STILL IN THE GROUND, IN THE TRANSMISSION LINE, AND FLARED OFF, PART DEUX: OIL AND GAS CASES PENDING BEFORE OR RECENTLY DECIDED BY THE SECOND COURT OF APPEALS.

By

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With Continuing Thanks to Russell Barton for Help With the Title.

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Presentations and Papers:

Still in the Ground, in the Transmission Line, and Flared Off: Oil and Gas Cases Pending

Before or Recently Decided by the Second Court of Appeals, Presented to the Texas Wesleyan School of Law Energy Symposium, 2010.

Preservation of Error Post-Trial. State Bar of Texas Appellate Boot Camp 2008 and Appellate Law 101, 2010, and to the Tarrant County Bar Brown Bag Seminar, 2010.

Enforcement of Arbitration Clauses. Presented to Tarrant County Bar Association and Appellate Section Brown Bag Seminar, January 30, 2009.

Taking a Bankruptcy Court Decision to the Fort Worth District Courts: Is The Trip Really Worth It? Presented to Tarrant County Bar Association Bankruptcy Section November 19, 2007.

What the Movies and Television Tell Us About Lawyers, PowerPoint Presentation in several versions, Copyright 2007-8. Presented through Tarrant County Brown Bag Seminar Series, and presented to Wichita County Bar Association, Tarrant County Criminal Defense Bar Association, Denton County Bar Association, Eldon B. Mahon Inn of Court, and Tarrant County Probate Bar Association.

A Growing Fondness–A Cooling Ardor? Trends in the Use of Federal Authority and Authority from Other States by the Supreme Court of Texas over a Quarter Century (9/1/1980-8/31/2006). By Steven K. Hayes. Copyright 2006. Presented to the State Bar of Texas Advanced Civil Appellate Practice Course 2006.

Oral Argument Before the Second District Court of Appeals: The Rules, and an Analysis of Fifty-Seven Cases. By Steven K. Hayes. Copyright 2005

Mandamus Before the Second District Court of Appeals: An Analysis of Mandamus Rulings in 2003 through 2006. By Steven K. Hayes. Copyright 2006.

Hints and Invitations: Enticements from the Supreme Court of Texas? by Steven K. Hayes Copyright 2006, compiled and updated monthly since January, 2006.

Current Compilations:

> "Issues Presented in Some Civil Cases Pending Before the Second Court of Appeals", a synopsis of issues set out in briefs in some civil cases pending before the Second Court of Appeals, updated on a monthly basis since 2003, at www.stevehayeslaw.com/IssuesPresented.pdf
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> "Summaries of Some Recent Opinions of the Second Court of Appeals" , a compilation of summaries of cases published by the Second Court of Appeals for some of their opinions, updated monthly since 2008, found at www.stevehayeslaw.com/RecentOpinions.pdf .

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STILL IN THE GROUND, IN THE TRANSMISSION LINE, AND FLARED OFF, PART DEUX: OIL AND GAS CASES PENDING BEFORE OR RECENTLY DECIDED BY THE SECOND COURT OF APPEALS.

Just like the version of this paper presented at this same seminar last year, I hope this paper gives you some food for thought about oil and gas matters you or your clients face, and gives you a starting point for keeping up with such cases now pending before the Second Court of Appeals, or which that Court has recently decided. I cannot promise you I have identified all oil and gas-related cases pending before the Court. If you know of one I have missed, please let me know about it. If you can provide me copies of the briefs, I will add that case to the compilation of issues pending before the Court which I publish every month on my website at www.stevehayeslaw.com/IssuesPresented.pdf. As to oil and gas cases which the Court has decided recently, I've done my best through word searches on Lexis® to identify those cases. Once again, if you know of one I've missed, I would really appreciate you letting me know so I can add it to the mix.

1. The Methodology

This overview involves the time frame beginning March 1, 2010 and ending on roughly February 12, 2011 ("the time frame"). February 12 is a highly significant date, since it's my daughter's birthday.

Compiling this overview involved searches on two separate databases:

- for cases in which the Second Court of Appeals had issued an opinion which related to oil and gas issues or the Barnett Shale, the search used Lexis®, and limited the population of cases to those issued by the Second Court during the time frame;

- for issues raised in such cases pending in the Second Court, the search used the compilation of issues presented in briefs filed in some civil cases in the Second Court which the author posts on his website, as that compilation existed on February 28, 2010. The current compilation can be found at www.stevehayeslaw.com/IssuesPresented.pdf .

Searches of the two foregoing databases involved looking for the following search phrase, or the individual words founds in it (as necessary): oil or gas or barnett or shale or chesapeake or gathering or pipe or division or royalty or devon or chesapeake or XTO or EOG or Quicksilver or Encana or Range or Williams or Carrizo or Burlington or Talon or J-W or Aruba or Burnett or Pioneer or DTE or Western.

2. What big picture information do the pending and decided cases give us?

Aside from the more traditional oil and gas issues, the cases pending before and recently decided by the Second Court give us these things to think about:

- similar to last year, the Court considers roughly half of its recent oil and gas-related decisions anything but mundane. As of the writing of this paper, parties have filed petitions for review with the Supreme Court in at least one of these cases, involving the interpretation of a divorce decree.

- the cases did not come from as wide a range of counties and courts as last year. This year Tarrant, Parker, Wise, and Cooke Counties accounted for all cases decided by the Court, and at least 70% of those cases came from Tarrant County. So the cases decided by the Court came from the far eastern edge of its District, and the far eastern edge of the Barnett Shale. Most cases emanated from district courts (including family law courts), with a couple coming from

county courts at law and one coming from probate court. Cases still pending before the Court came from the foregoing counties, as well as one case each from Cooke and Wichita County;

- the players and play in the Barnett Shale have some interstate and international aspects about them;

- the recently decided cases focused more on traditional oil and gas issues, at least to the extent you consider the interpretation of documents as traditional oil and gas issues. Last year, the cases involved a whole breadth of legal issues, from to condemnation, jurisdiction, interpretation of deeds, sanctions, the strip and gore doctrine, and turnover orders, DTPA and negligence claims, contract, fraud and recission claims, condemnation, pleas to the jurisdiction and special appearances, preferential rights (rights of first refusal), standing, summary judgments, and will construction.

A. The Court does not consider most these cases mundane.

Unlike the Supreme Court of Texas, the Second Court of Appeals is not a court of discretionary jurisdiction–it pretty much has to take whatever cases the parties bring its way. So reviewing the oil and gas-related cases pending before or recently decided by the Court tells us more about what the various parties throughout the Second District think is important enough to bring before the Court than what the Court thinks is important.

Having said that, of the eleven oil and gas-related cases in which the Court issued an opinion on the merits the last year, the Court has designated at least five of them as "Opinions" instead of "Memorandum Opinions." *See Vinson Minerals, Ltd., et al., v. XTO Energy, Inc.*, 2010 Tex. App. LEXIS 9970 (Tex. App.–Fort Worth December 16, 2010, pet. due 3/2/10); *Moncrief Oil International, Inc., v. OAO Gazprom, et al*, 2010 Tex. App. LEXIS 9382 (Tex. App.–Fort Worth November 24, 2010, mo. rehearing denied); *Pena v. Smith*, 321 S.W.3d 755, 756 (Tex. App.–Fort Worth 2010); *Poag v. Flories*, 317 S.W.3d 820, 822 (Tex. App.–Fort Worth 2010, pet. den.); and *In re Estate of Conard L. Florence*, 2010 Tex. App. LEXIS 1788 (Tex. App–Fort Worth 2010). A Memorandum Opinion is one which does not: (1) establish a new rule of law, alter or modify an existing rule, or apply an existing rule to likely recurring novel fact situation; (2) involve issues of constitutional law or legal issues of importance to the jurisdiction of Texas; (3) criticize existing law; or (4) resolve an apparent conflict of authority. TEX. R. APP. PRO. 47.4. So the Court considered almost 1/2 of its oil and gas-related decisions last year as something other than mundane. In at least two of the oil and gas-related decisions, parties have filed petitions for review with the Supreme Court of Texas. The Supreme Court has denied the petition in one such case (*see Poag*, supra), and has yet to rule on the petition in the other case (a case in which the Court issued a Memorandum Opinion, *Martin v. Martin*, 2010 Tex. App. LEXIS 4421, *2 (Tex. App.–Fort Worth June 10, 2010, pet. filed)).

B. The Court has affirmed the trial courts in virtually all its reported decisions. Plaintiffs and Defendants have fared about equally as well.

In the eleven cases in which it has issued opinions on the substantive issues, it has affirmed or mostly affirmed the trial court decision eight times–a little over 70% of the time. *See* Appendix Three. According to statistics reported to the Office of Court Administration by the Second Court, this is at least roughly comparable to the percentage of total civil cases it affirmed in whole or in part for the FYE 8/31/10. *See* http://www.courts.state.tx.us/pubs/AR2010/toc.htm, click on "Courts of Appeal Activity, Activity Detail." Like last year, Defendants came out slightly better than Plaintiffs in the Court's decisions this year, winning 60%+ of the time (Plaintiffs and Defendants fared about equally as well last year in the Court's decisions). But this apparent favoring of Defendants probably does not mean much, if anything at all, given that this

tendency is more readily explained by who won at the trial court, and the Second Court's proclivity toward affirmance this year. If anything, these outcomes emphasize the importance of winning at the trial court level. See Appendix 3

C. The cases come from a whole range of counties and trial courts.

Last year, the oil and gas cases pending before and recently decided by the Second Court come from a whole range of counties (Tarrant, Denton, Wichita, Cooke, Parker, Wise, Jack and Hood Counties), but this year, not so much. Cases decided by the Court came from Tarrant, Parker, Wise, and Cooke, with at least 70% of the cases coming from Tarrant County. These four contiguous counties lie on the eastern edge of the Second Court's district, and therefore from the far eastern edge of the Barnett Shale. These counties are collectively the most populous counties in the District, and have probably seen the most oil and gas activity in the last few years in the Second Court's district. As was true last year, the cases come from district, county and probate courts.

In terms of cases pending before the Court, in addition to cases emanating from the foregoing four counties, one case also came to the Court from each of Cooke and Wichita Counties

D. The Interstate and International Aspects of the Barnett Shale Play and Players.

Growing up in McGregor, and raised by parents born in Whitehall and on Slaughter's Branch, respectively, I didn't buy much from a store called Gazprom. But whether by fortuity or dynamic, that name did pop up in the a case before the Second Court of Appeals.

The case (02-09-00336-CV, *Moncrief Oil International, Inc., v. OAO Gazprom, OAO Gazprombank, Gazprom Export, LLC, and Gazprom Marketing and Trading, Ltd.*, from the 17th District Court of Tarrant County) does not involve a local oil or gas play, but does have to do with an international deal involving potentially bringing gas from Russia into Texas. And it involves the granting of a special appearance asserted by the Russian parties. So be aware that just because your local clients might think all their legal disputes will enjoy local resolution, that may or may not be the case.

And 02-09-00463-CV, *Dugas Limited Partnership, Dugas 1998 Irrevocable Trust, William Bruce Dugas Grandchild Trust and James Stephen Turner and Hurley Calister Turner, Jr., Co-Trustees of the Dugas 1998 Irrevocable Trust f/b/o William Bruce Dugas v. Donna Neal Goode Dugas and Laura Nicole Dugas,* from the Probate Court of Denton County, involves whether Texas Courts have jurisdiction over a suit involving the interpretation of a trust created by a Will probated in Kentucky, brought against Kentucky trustees and a limited partnership which allegedly had its principal place of business and general partner in Texas.

E. The Breadth of the Legal Issues

I. Cases Decided by the Court this Last Year.

The cases decided by the Court this year tended much more toward the kinds of things you envision as traditionally driving cases involving oil and gas. Seven of the Court's eleven opinions involved interpreting documents, including deeds, divorce decrees, judgments (it's not over until it's over), leases, settlement agreements and wills. What follows is my take on the holdings of the Court in the various cases it decided this last year, with this exception: where you see the style of the case in ***bold italicized*** type, that represents a synopsis of the case posted on the Court's website on the page called "Case Summaries." The Court's website provides summaries on some, but not all, of the opinions it hands down, with this disclaimer:

> Summaries are prepared by the court's staff attorneys and law clerks for public information only and reflect his or her interpretation alone of the facts and legal issues. The summaries are not part of the court's opinion in the case and should not be cited to, quoted, or relied upon as the opinion of the court.

A. Interpretation

Deed (Royalty Interests)

In *Hudspeth, et al, v. Berry, et al*, 2010 Tex. App. LEXIS 5641, *1, *4 (Tex. App.–Fort Worth July15, 2010, no pet.), the Court reversed and rendered in a case involving competing motions for summary judgment. The case involved the interpretation of the clause in a 1943 deed which reserved of non-participating royalty interest for the Appellees' predecessors in title out of the conveyance of land to the Appellants' predecessors. *Id.*, at *4-5. The Court held that because "the 1943 deed does not contain conflicting fractions, and because the plain language of the deed is unambiguous,. . . the reservation clause in the 1943 deed provides for a "fractional royalty" interest rather than a "fraction of royalty" interest." *Id.*, at *10-11. The Court specifically noted:

> The first part of the reservation clause in the 1943 deed expressly reserves an "undivided 1/40th royalty interest (being 1/5th of 1/8th)" for J.H. and for R.C. or for their successors-in-interest. The clause goes on to provide that "there shall be reserved the usual 1/8th royalty of which 1/8th J. H. Berry shall be entitled to and receive 1/5th, and R.C. Berry shall be entitled to and receive 1/5th." Based on the plain language--that is, "of which 1/8th . . . shall be entitled to receive 1/5th"--J.H. and R.C. were each entitled to receive 1/40th royalty interests (1/5th x 1/8th). Both portions of the 1943 deed's reservation clause refer to 1/40th royalty interests. Thus, there is nothing in the 1943 deed to harmonize.

Id., at *9-10. The reservation clause read, in toto, as follows:

> There is, however, expressly reserved and excepted from this conveyance, for the benefit of J. H. Berry, his heirs or assigns, and [sic] undivided 1/40th royalty interest (being 1/5th [*6] of 1/8th) and for the benefit of R. C. Berry, his heirs or assigns, an undivided 1/40th royalty interest (being 1/5th of 1/8th) . . . . But the grantee herein, his heirs or assigns, may, and they are hereby expressly authorized to lease the said land at will for oil, gas and other mineral privileges without our consent or ratification but in any such lease or leases, there shall be reserved the usual 1/8th royalty of which 1/8th J. H. Berry shall be entitled to and receive 1/5th, and R. C. Berry shall be entitled to and receive 1/5th.

Id., at *5-6.

Divorce Decree (Reservation of Mineral Interest)

Martin v. Martin, 2010 Tex. App. LEXIS 4421, *2 (Tex. App.–Fort Worth June 10, 2010, pet. filed). The agreed divorce decree awarded the wife "'[a] portion of the mineral interest, in the property known as 'The Ranch' . . . , more specifically [*2] described *as a 1/6 undivided mineral interest in the entire 107 acres in which the parties own an interest which mineral interest shall be reserved in the special warranty deed from wife to husband and his parents*.'" Emphasis in opinion. The Fort Worth court held the decree was ambiguous, but based on a finding by the trial court that the husband and wife owned no more than ½ of the minerals between them, the Court held the agreed decree meant that the deed from the wife should reserve a 1/12

undivided mineral interest. *Id.*, at *5, *7.

Judgment (Turnover Statute)

Anoco Marine Industrial, Inc., v. Patton Production Corporation, et al, 2010 Tex. App. LEXIS 2541 (Tex. App.–Fort Worth April 8, 2010, no pet.). The Court held that the conditions required by TEX. CIV. PRAC. & R. CODE §31.002 for a turnover were not met, and the trial court abused its discretion in ordering the turnover. A turnover requires an unsatisfied judgment. The judgment at hand required that all funds "held" by the production company or "interpleaded" in the registry of the court be paid to the plaintiff. In its petition for a turnover order, the plaintiff failed to prove that any funds "held" or "interpleaded" at the time of the prior judgment remained in the registry, or held in suspension. So plaintiff failed to prove an unsatisfied judgment–even though it proved that some perhaps subsequent funds remained in the registry or held in suspension.

Lease (Offer and Acceptance)

In *Lucas v. Coomer,* 2010 Tex. App. LEXIS 9956, *11, *15-6, *17 (Tex. App.–Fort Worth December 16, 2010) the majority opinion affirmed a summary judgment in favor of the lessors on a gas lease, which imposed liability on the lessee to pay a bonus to lessors and a commission to their attorney, holding that: (1) the lessee had accepted the lessors' offer, albeit in a different manner than that specified in the lease, agreeing to be bound by the terms of the lease, and that the lessees had assented to that alternative acceptance of the lease; (2) the language of the lease did not create a condition precedent to the formation of the lease; and (3) the lease was not ambiguous. In *Coomer*, a provision in the Addendum, drafted by the attorney for the lessors, provided that upon "acceptance of this agreement, a representative of the Lessee shall initial each page of the Lease and of this Addendum and file the original of record . . . and provide Lessor's Attorney, a certified copy of such lease." *Id.*, at *4. The provision also said that:

> Failure to so provide [sic] then this offer shall be rescinded and the lease offer shall be ipso facto withdrawn. Timely filing and delivery of the lease shall constitute acceptance by the Lessee. Failure to file and deliver the certified copy of the lease shall be prima facie proof that the lease was declined by the Lessee.

Id., at *4. The lessee had arranged for her land man to sign and deliver the lease and addendum to the offices of the lessors' attorney, but apparently never picked up or filed the lease after it was signed by the lessors. The dissent would have held that fact issues prevented summary judgment for the lessors, because "the evidence did not establish as a matter of law that this provision was intended to benefit the [lessors]" and for that reason "they could not waive its effectiveness by assenting to a different method of acceptance. Only [the lessor] could agree to waive its effect. . .". *Id.*, at *21.

Lease (Termination)

In *Vinson Minerals, Ltd., et al., v. XTO Energy, Inc.,* 2010 Tex. App. LEXIS 9970 (Tex. App.–Fort Worth December 16, 2010, pet. due 3/2/11), the Court dealt with battling summary judgment motions, and affirmed the judgment of the trial court in favor of the lessee. The lessors contended they were entitled to terminate the leases with the successor lessee, because the successor lessee failed to make "'undisputed payments' after demand." The Court held that the lessors presented no evidence that they provided the successor lessee with a proper written notice or demand for payment as required by the leases. *Id.*, at *1. The lease at issue contained a clause which allowed the lessor to terminate the lease if "[the lessee] wrongfully or unreasonably withholds any undisputed payment or payments due to [the lessors] for a period of sixty (60) days after written demand for payment is made by [the lessors]." *Id.*, at *10. The Court held that the letter which

the lessors contend made a demand to pay "undisputed amounts" due under the lease did not constitute such a demand because the "language and context of the letter negate any reasonable interpretation of the language buried in the middle of a sentence, buried in the middle of a paragraph, and buried in the middle of the three-page letter as a stand-alone "demand" for payment under Section 3(e) of the leases that can be considered separate and apart from the rest of the letter." *Id.*, at *20. The Court then said:

> Permitting a party to recharacterize, after the fact, what was clearly a settlement demand as a "Demand Letter," to use the Vinsons' label, based upon part of a sentence inserted in the middle of a letter otherwise ostensibly devoted from beginning to end to compromise and settlement, in order to invoke the harsh consequences of forfeiture, would reward obfuscation and "gotcha" tactics and would chill rather than encourage parties to negotiate in good faith toward a compromise and settlement of their claims.

Id., at *21. The Court then held that, by granting the lessee's motion to exclude the letter, the trial court would have properly exercised its discretion to find that the letter was a settlement demand inadmissible under Tex. R. Evid. 408, and not a demand letter. *Id.*, at *21. And because forfeiture requires literal compliance with the lease, and the lease at hand prohibited litigation for forfeiture for a set period of time after the lessors gave the lessee "written notice *fully describing the breach or default,"* there was insufficient evidence as a matter of law to invoke forfeiture as a remedy because: (1) none of their communications (including the excluded letter) fully described the breach or default, or called any amount undisputed; (2) the excluded letter did not set a deadline by which payments must be made; and (3) the excluded letter did not give notice that the lessors intended to invoke forfeiture as a remedy. *Id.*, * 30, 31, 32, 36, 38-9. The concurring opinion had additional comments about the Rule 408 and forfeiture analyses. *Id.*, at 42-5.

Vinson Minerals, Ltd. v. XTO Energy, Inc., No. 02-08-00453-CV (Dec. 16, 2010) (Gardner, J., joined by Walker, J.; Livingston, C.J., concurs with opinion).

Held: The trial court did not abuse its discretion by excluding from the summary judgment evidence a letter written as part of settlement negotiations. In addition, Appellants presented no evidence that they provided Appellee with a proper written notice or demand for payment as required by the oil and gas leases. Therefore, summary judgment for Appellee was proper.

Concurrence: The concurrence would hold that the demand portion of a letter was admissible under rule 408. Tex. R. Civ. P. 408. But the concurrence argues that the alleged notice of the possibility of forfeiture is insufficient.

Settlement Agreement

Pena v. Smith, 321 S.W.3d 755, 756 (Tex. App.–Fort Worth 2010, no pet.), the Court reversed and remanded a trial court's order summarily enforcing a disputed mediated settlement agreement. *Id.* In *Pena*, the owner of a piece of real estate signed an earnest money contract to sell the same to a potential buyer, but when presented with a separate document to confirm she was also selling the mineral rights, she refused, saying that had never been the deal. *Id.*, at *2-3. The buyer sued the seller for breach of the contract, the trial court ordered mediation, and at the mediation the parties signed an "Agreed Mediation Settlement Agreement" in which the seller agreed to convey the surface rights to the buyer but retain the mineral rights. *Id.*, at 757. The seller's lawyer had authority to sign any documents necessary to consummate the Settlement pursuant to a limited power of attorney if she could not or would not sign. *Id.* The seller refused to sign the documents, and the buyer filed a motion to enforce the Settlement. The comments posted by the Court on its website, below, appropriately summarize the Court's rulings, with the added note that the Court held that, once a party has withdrawn its consent to a settlement, a trial court cannot render an agreed judgment, and the court only

has the authority to enforce the settlement agreement only as it would in an action on a written contract, with the same burdens of pleading and proof that attend such an action. *Id.*, at 758.

> ***Pena v. Smith***, No. 02-09-00356-CV (Aug. 12, 2010) (Meier, J., joined by Walker and McCoy, JJ.).
>
> Held: Assuming that the allegations and arguments contained in Appellee's pleadings were sufficient to give Appellant fair notice of Appellee's contract claim for breach of the mediated settlement agreement, the trial court nonetheless erred by rendering a judgment enforcing the disputed settlement agreement because Appellee failed to support his action with legally sufficient evidence.

Will (Meaning of "Tangible Property")

In re Estate of Florence, Deceased, 307 S.W.3d 887 (Tex. App.–Fort Worth 2010, no pet.) dealt with the interlocutory appeal of the denial of a summary judgment and the granting of a cross-summary judgment in a probate case. The probate case involving the "construction of the language of a will and the treatment of certain estate property by the decedent's widow." *Id.* At 888. The husband's Will was admitted to probate, and his wife named executrix of his estate. *Id.* The Will gave the wife all of the husband's interest in certain specifically described property and all other "tangible property." It gave the rest of the husband's estate to the wife as Trustee to hold that rest and remainder in Trust. After the wife died, her Will was admitted to probate, and her executor was appointed. Thereafter, her executor took the position that the "tangible property" the wife had inherited under the Will of her husband included both real and personal property, but a set of heirs took the position that the "tangible property" the wife had inherited under the Will included only personal property (and did not include real property). *Id.*, at 889. The heirs urging the "personal property" definition filed a declaratory judgment action asking for the adoption of their interpretation of the Will. The wife's executor urged the "real and personal property" definition, and filed a motion for summary judgment, arguing that limitations on the heirs declaratory judgment action to construe the Will began to run when the Will was admitted to probate over twenty years earlier, and thus barred the dec action. *Id.*, at 889-90. The "personal property" heirs filed a no evidence motion for summary judgment, contending there was no evidence of any overt act occurring more than four years prior to the dec action that would have notified them that anyone was treating the phrase "tangible property" as though it should include real property; those heirs also filed a traditional motion for summary judgment. *Id.*, at 890. The trial court granted the motion of the "personal property" heirs, and denied the motion of the executor. The Fort Worth Court affirmed the judgment, holding that limitations on the heirs' dec action did not start to run on the date the husband's Will was admitted to probate, noting that the "only evidence presented showed that over the twenty plus years between Conard's death and Eleanor's death, Eleanor treated the term "tangible property" as if it meant 'tangible personal property'," including her handling of mineral leases, royalties, division orders, etc., in the name of her husband's Estate and the Trust *Id.*, at 892. The Court therefore held that limitations did not bar the heirs' declaratory judgment action. *Id.*, at 893-4.

> ***In re Estate of Conard L. Florence***, No. 02-08-00445-CV (Mar. 11, 2010) (McCoy, J., joined by Livingston and Meier, JJ.).
>
> Held: In a will construction case, the only evidence presented showed that for over twenty plus years the term "tangible property" was treated as if it meant "tangible personal property." Thus, as a matter of law, Appellees' declaratory judgment action did not begin to accrue until Appellant asserted a different interpretation of "tangible property," thereby demonstrating that he was not going to abide by Appellees' construction of the will.

B. Jurisdiction

In *Moncrief Oil International, Inc., v. OAO Gazprom, et al*, 2010 Tex. App. LEXIS 9382 (Tex. App.–Fort Worth November 24, 2010, mo. rehearing filed), the Court affirmed the trial court's order granting the special appearance over claims asserted against a foreign company. The Court held that extensive phone calls and e-mails to the Texas office of the plaintiff, and two meetings in Texas, concerning a proposed, but never consummated, transaction cannot constitute doing business in Texas for the purposes of general jurisdiction–i.e., did not constitute continuous, systematic contacts satisfying due process requirements, citing *PHC-Minden L.P.* at 170-1. For purposes of specific jurisdiction, the Court held that: (1) an alleged tortious interference by the Defendant with the Plaintiff's joint venture was not sufficient to confer specific jurisdiction just because the Plaintiff was a Texas resident or alleges it suffered damages in Texas (*Id.*, at *23); (2) the evidence was legally and factually sufficient to support the trial court's implied findings that the two meetings the defendant attended in Texas did not constitute purposeful availment for purposes of establishing specific jurisdiction as to the defendant concerning the plaintiff's claim for misappropriation of trade secrets; and (3) that the trial court did not err by refusing to impute the contacts of one company to another based on allegations of alter-ego relationship between the two companies, given the plaintiff did not rebut the presumption that the two companies were separate entities. *Id.*, at *48-50. Finally, the Court held that the trial court did not abuse its discretion by refusing to compel the deposition of two witnesses when the trial court could have concluded that their testimony would only be cumulative of the evidence already before the Court, and would not lead to the discovery of additional contacts with Texas. *Id.*, at 53-4.

> ***Moncrief Oil Int'l, Inc. v. OAO Gazprom, No.*** 02-09-00336-CV (Nov. 24, 2010) (Walker, J., joined by Gardner, J.; and William Brigham (Senior Justice, Retired, Sitting by Assignment)).
>
> Held: For the reasons detailed in the opinion, the trial court properly granted Appellees' special appearances.

C. Limitations (Filing of Deed)

In *Poag v. Flories*, 317 S.W.3d 820, 822 (Tex. App.–Fort Worth 2010, pet. den.), the Court affirmed a summary judgment dismissing the Appellant's declaratory judgment claims, and refusing to award attorney's fees to the Appellee.

> ***Poag v. Flories,*** No. 02-08-00170-CV (July 1, 2010) (McCoy, J., joined by Walker and Meier, JJ.).
>
> Held: The recording of the administrator's deed, conveying surface estate only in two tracts of land, charged Appellant with notice, thereby commencing the two- and four-year period of limitations to file an action to set the administrator's deed aside. Moreover, although Appellant/Cross-Appellee couched his declaratory action in terms of a request for a declaration, everything he requested of the court was necessary to, and a component of, the ultimate relief he sought, which was to clear title on the two tracts of land. Thus, as a matter of law, Appellee/Cross-Appellant was not entitled to an award of attorneys' fees under the Uniform Declaratory Judgments Act

D. Quantum Meruit

In *Rickett v. Lesikar*, 2010 Tex. App. LEXIS 8307, *1 (Tex. App.–Fort Worth October 14, 2010, no pet.), the Court affirmed the judgment of the trial court, after a bench trial, denying recovery to a plaintiff on a quantum meruit claim. The plaintiff had provided the defendant with seismographic data and maps, which the defendant said he was unable to interpret, but no oral or written report. The Court of Appeals held that there "was sufficient evidence in the record for the trial court to find that [the plaintiff's] testimony was less credible than [the defendant's] with regard to the services [the plaintiff] rendered, and for it to determine

whether the services were valuable to [the defendant] and whether [the defendant] accepted or used them," all of which the plaintiff had to prove to recover on quantum meruit. *Id.*, at *9.

E. Summary Judgment

Mancuso v. Cheaha Land Services, L.L.C., 2010 Tex. App. LEXIS 6567 (Tex. App.–Fort Worth August 12, 2010, no pet.), the Court affirmed a no-evidence summary judgment against a plaintiff who had brought a suit to recover unpaid commissions. The Court held that the trial court did not abuse its discretion in denying a continuance on the summary judgment hearing, because the Appellant had requested a trial at about the same time as the summary judgment hearing, and had failed to explain how he did not have time to conduct discovery before the hearing, and in fact he did nothing to conduct the discovery he said he needed prior to the hearing. *Id.*, at *7-8. Furthermore, since Appellant did not ask the trial court for leave to serve his responses to requests for disclosure after the deadline for serving the same, and therefore under Rule 193.6 Appellant was barred from presenting evidence in response to Appellee's no evidence motion for summary judgment. *Id.*, at *9, 10. The rules of civil procedure barred Appellee from responding to Appellant's no-evidence motion for summary judgment, so the trial court did not err in granting the same. *Id.*, at *11.

II. Cases Still Pending Before the Court as of February 12, 2011.

Lots of interesting cases still remain pending before the Court, and they seem to show a maturing of the litigation in the Barnett Shale. Last year, for lack of a better synopsis, many of the cases had to do with putting the deal together and bringing the deal online. This year, it seems like a lot of the cases decided by the Court involved folks fighting over whether they had a share of, or the size of the share they had in, oil and gas plays as determined by certain documents. Over the next year, the stuff pending before the Court indicates coming decisions that cover a much wider range of topics than the cases handed down by the Court the last two years.

A. Condemnation

Are Texas cities immune from suit in condemnation proceedings brought by utility and pipeline companies, either because the public policy of municipal land being held in trust for the public overrides the presumptive entitlement to immunity or because Section 181.004 of the Texas Utilities Code waives immunity from suit for Texas cities. 02-10-00069-CV, *Town of Flower Mound, Texas, v. Mockingbird Pipeline, L.P.*, from the Probate Court of Denton County.

Two amicus briefs: City of Haltom City and Centerpoint Energy Resources Corporation.

B. Deeds

The application of the statute of frauds, whether a deed severed and reserved a mineral estate, and whether a party is estopped to challenge a reservation of a mineral interest in a deed found in their chain of title. 02–09-00299, *XTO Energy Inc., et al, v. Leonard Nikolai and Sandra Nikolai*, from the 367th District Court of Denton County.

Whether a deed conveyed less than half the mineral rights despite the warranty in a prior deed. 02-10-00061-CV, *Bill Walker & Bobbye Walker v. Campuzano Enterprises, Ltd, Campuzano Investments, Inc., Fernando Campuzano, Francisco Campuzano, Carmen L. Campuzano and Carrizo Oil & Gas, Inc.*, from the 352nd District Court of Tarrant County.

Whether the reservation of mineral rights in the Deed had an ambiguity, and whether the Defendants established ownership of the Property, mineral rights or otherwise. 02-10-00061-CV, *Bill Walker & Bobbye*

Walker v. Campuzano Enterprises, Ltd, Campuzano Investments, Inc., Fernando Campuzano, Francisco Campuzano, Carmen L. Campuzano and Carrizo Oil & Gas, Inc., from the 352nd District Court of Tarrant County.

C. Engineering Negligence

Whether the trial court erred in denying Appellants' motion to dismiss, and whether the trial court erred in overruling Appellants' objections to evidence attached to Appellee's response to Appellants' motion to dismiss, and the statutory requirements of Section 150.002 of the Texas Civil Practices and Remedies Code regarding a certificate of merit. 02-10-00189-CV, *Carter & Burgess, Inc., and Carter & Burgess, Inc. d/b/a Jacobs Carter Burgess v. Crosstex North Texas Gathering, L..P.*, from the 43rd District Court of Parker County.

D. Jurisdiction

Whether a Texas probate court has jurisdiction over a suit brought by Texas beneficiaries of a trust created by a Will probated in Kentucky against Kentucky trustees and a limited partnership which allegedly had its principal place of business and general partner in Texas. 02-09-00463-CV, *Dugas Limited Partnership, Dugas 1998 Irrevocable Trust, William Bruce Dugas Grandchild Trust and James Stephen Turner and Hurley Calister Turner, Jr., Co-Trustees of the Dugas 1998 Irrevocable Trust f/b/o William Bruce Dugas v. Donna Neal Goode Dugas and Laura Nicole Dugas*, from the Probate Court of Denton County.

E. Limitations

Whether the trial court erred in granting Appellee's motion for partial summary judgment and motion for severance based on a finding that there was no genuine issue of material fact regarding Appellant's affirmative defense of limitations, and the diligence exercised in serving a defendant with process after filing suit. 02-10-00142-CV, *Jerry C. Hamilton v. Texas CES, Inc. d/b/a Mercer Well Services, et al, and XTO Energy, Inc.*, from the 235th District Court of Cooke County.

F. Oil and Gas

In addition to certain procedural issues, this case addresses whether, for purposes of the recording statute (Texas Property Code Section 11.001(a)) recording an instrument (an oil and gas lease) as to real property in one county where a part of the property is located constitute effective recording as to each county in which that property is located, and are subsequent purchasers of lots in a subdivision in the county where the lease is not recorded placed on constructive notice of the lease. 02-10-00370-CV, *Aston Meadows, Ltd., A Texas Limited Partnership, Montclaire Custom Homes, L.P., A Texas Limited Partnership, Peter Paulsen, Steve Paulsen, Mike Wells, Kathryn LeBlanc, Donald LeBlanc, Natalie J. Warnick, James S. Warnick, and Kathy Ivey v. Devon Energy Production Company, L.P. and Devon Energy Corporation*, from the 141st District Court of Tarrant County.

Addresses whether a force majeure (the obtaining of city permits) had occurred and timely notice given of the same, and whether permit applications were timely submitted. 02-10-00062-CV, *Allegiance Hillview, L.P., v. Range Texas Production, LLC, and Range Production Company*, from the 211th District Court of Denton County.

Whether the Appellee had liability for the services of subcontractors used to perform work Appellee was contractually bound to provide, and whether Appellee failed to perform in a good and workmanlike manner, as in failing to circulate the well clean at the conclusion of the third squeeze job. 02-10-00157-CV, *Lesikar Oil and Gas Co. v. Legend Swabbing, Inc.*, from the 43rd District Court of Parker County.

G. Registry of the Court

Who owns drilling equipment and funds in the court's registry from the sale of equipment. 02-09-00320-CV, *Terry McBryde v. John James*, from the 78th District Court of Wichita County.

H. Venue

Whether venue should be transferred to the county where the mineral properties are located, in a case involving ownership of a Joint Venture as opposed to title to the land, and whether an assignment was forged. 02-09-00442-CV, *Frances Jane Fuller Jackson Morris v. Margaret Ann Fuller*, from the 67th District Court of Tarrant County.

3. Details on the cases are in the Appendices to this paper.

As mentioned above, I post a compilation of the issues raised by the parties in cases pending before the court on my website at www.stevehayeslaw.com/IssuesPresented.pdf. Once the Court decides the case, I remove the issues from that case from the posted compilation. I have attached two appendices to this paper: the first is a synopsis from my compilation of the issues in oil and gas-related cases pending before the Court as of February 12, 2011. The second appendix contains a synopsis of the cases decided by the Court this last year.

4. Conclusion: I hope this helps, and gives you some food for thought.

Like I said earlier, I intend this paper to give you some food for thought, and to give you a starting point for examining oil and gas-related cases pending before or recently decided by the Second Court. If you have any thoughts or suggestions about the same, let me know. I do try to give credit where credit is due.

APPENDIX ONE. CASES STILL IN THE GROUND

(As of February 12, 2011)

Those summaries of issues raised by the parties in the Second Court are drafted solely by the author, and are neither sponsored, endorsed or approved by the Second Court of Appeals or the parties. You may find a current compilation of issues pending before the Court on the author's website at http://www.stevehayeslaw.com/IssuesPresented.pdf .

1. Cases Still Pending (as of February 12, 2011).

Condemnation

Appellant addresses whether Texas cities are entitled to immunity from suit in condemnation proceedings brought by utility and pipeline companies, whether the public policy of municipal land being held in trust for the public overrides the presumptive entitlement to immunity from suit historically given to Texas cities for over 150 years, and whether Section 181.004 of the Texas Utilities Code waives immunity from suit for Texas cities. 02-10-00069-CV, *Town of Flower Mound, Texas, v. Mockingbird Pipeline, L.P.*, from the Probate Court of Denton County, by Robert F. Brown, Edwin Voss, Jr., and Terrence S. Welch, Brown & Hofmeister, L.L.P., 740 East Campbell Road, Suite 800, Richardson, Texas 75081, for Appellant. 3/31/10.

Appellee addresses whether governmental immunity prevents condemnation of public lands and whether said immunity has been waived when the State has authorized the condemnation of public land, since the right of eminent domain is superior even to property rights in land already devoted to a public use. Appellee also addresses whether immunity should be found in this case, thus rendering portions of the Texas Utilities Code, meaningless, whether cities are immune from suit in condemnation actions related to their proprietary functions and rights, and whether the clear authority granted to gas corporations to condemn public property abrogated by the codification of the original enactment chartering gas corporations. Appellee also addresses whether the paramount use test be abandoned and replaced by an immunity analysis primarily designed to protect the government purse, and whether this court's holding in *Enbridge* is controlling of the issues in this case. 02-10-00069-CV, *Town of Flower Mound, Texas, v. Mockingbird Pipeline, L.P.*, from the Probate Court of Denton County, by Sam B. Burke, Wood, Thacker & Weatherly, P.C., 400 West Oak Street, Suite 310, Denton, Texas 76201, for Appellee. 4/22/10.

Amicus Curiae Haltom City contends that the Legislature has not waived governmental immunity from suit in Section 181.004 of the Texas Utilities Codes. 02-10-00069-CV, *Town of Flower Mound v. Mockingbird Pipeline, L.P.*, from the Probate Court of Denton County, Texas, by Tim G. Sralla, Fredrick "Fritz" Quast, Steven A. Wood, Taylor, Olson, Adkins, Sralla and Elam, L.L.P., 6000 Western Place, Suite 200, Fort Worth, Texas 76107. 6/8/10.

Amicus contends that the trial court correctly denied Appellant's plea to the jurisdiction because: (1) the Texas Utilities Code grants Mockingbird the right to condemn any person's property; (2) courts have historically allowed utilities to condemn public property; (3) the term "person" includes governmental units; and (4) the opposite decision would end in an absurd result that has significant consequences for the citizens of Texas and the gas industry. Amicus also contends that the court of appeals should affirm the trial court's denial of the plea to the jurisdiction because Appellant failed to challenge any implied finding in this case. 02-10-00069-CV, *Town of Flower Mound, Texas, v. Mockingbird Pipeline, L.P.*, from the Probate Court of Denton County, by Thomas J. Forestier, Winstead PC, 1100 JPMorgan Chase Tower, 600 Travis Street, Houston, Texas 77002, and David F. Johnson, Joe P. Regan, Winstead PC, 777 Main Street, Suite 1100, Fort Worth, Texas 76102, for Amicus Curiae Centerpoint Energy Resources Corporation. 10/4/10.

Engineering Negligence

Appellants address whether the trial court erred in denying Appellants' motion to dismiss, and whether the trial court erred in overruling Appellants' objections to evidence attached to Appellee's response to Appellants' motion to dismiss. 02-10-00189-CV, *Carter & Burgess, Inc., and Carter & Burgess, Inc. d/b/a Jacobs Carter Burgess v. Crosstex North Texas Gathering, L..P.*, from the 43rd District Court of Parker County, by Stephen L. Tatum, Andrew D. Keetch, Stephen D. Taylor, Cantey Hanger, LLP, Cantey Hanger Plaza, 600 West 6th Street, Suite 300, Fort Worth, Texas 76102-3685, for Appellants. 8/26/10.

Appellee addresses whether the trial court abused its discretion: (1) in denying Appellants' motion to dismiss, when Appellee's certificate of merit met the statutory requirements of Section 150.002 of the Texas Civil Practices and Remedies Code; (2) in overruling Appellants' objection based on the lack of authenticity of documents produced by Appellant and attached to Appellee's certificate of merit and bearing distinctive characteristics establishing their authenticity under Rule 901(b)(4) of the Texas Rules of Evidence, and Appellants' e-mails attached to the certificate were not hearing under Rule 801(e)(2). Appellee also addresses whether the trial court can look outside the four corners of the certificate of merit (i.e., look at documents attached to Appellants' motion to dismiss) in determining the motion to dismiss. . 02-10-00189-CV, *Carter & Burgess, Inc., and Carter & Burgess, Inc. d/b/a Jacobs Carter Burgess v. Crosstex North Texas Gathering, L..P.*, from the 43rd District Court of Parker County, by Lewis L. Isaacks, J. Brantley Sounders, M. Shannon Kackley, Gay, McCall, Isaacks, Gordon & Roberts, P.C., 777 E. 15th Street, Plano, Texas 75074, for Appellee. 9/30/10.

In reply, Appellant contends that Appellee's Certificate of Merit fails to meet the requirements under Section 150.002(a) of the Texas Civil Practices and Remedies Code, and that Appellee's evidence is mostly inadmissible and that Appellee misrepresents the nature of its evidence. 02-10-00189-CV, *Carter & Burgess, Inc., and Carter & Burgess, Inc. d/b/a Jacobs Carter Burgess v. Crosstex North Texas Gathering, L..P.*, from the 43rd District Court of Parker County, by Stephen L. Tatum, Andrew D. Keetch, Stephen D. Taylor, Cantey Hanger, LLP, Cantey Hanger Plaza, 600 West 6th Street, Suite 300, Fort Worth, Texas 76102-3685, for Appellants. 11/19/20.

Jurisdiction

Appellants contend that: (1) general jurisdiction does not exist over Dugas, LP, based solely on a phrase in the formation document calling for the principal office to be in Texas, when such office was never created; (2) specific jurisdiction does not exist over these foreign trusts and trustee simply because beneficiaries live in Texas; and (3) the trial court lacked jurisdiction because the Kentucky Court where the Will was admitted to probate has dominant jurisdiction. 02-09-00463-CV, *Dugas Limited Partnership, Dugas 1998 Irrevocable Trust, William Bruce Dugas Grandchild Trust and James Stephen Turner and Hurley Calister Turner, Jr., Co-Trustees of the Dugas 1998 Irrevocable Trust f/b/o William Bruce Dugas v. Donna Neal Goode Dugas and Laura Nicole Dugas*, from the Probate Court of Denton Texas, by R. William Wood, Grace Weatherly, Wood, Thacker & Weatherly, P.C., 400 West Oak Street, Suite 310, Denton, Texas 76201, for Appellants. 2/23/10 and 2/17/10.

Appellee addresses whether the Denton County Probate Court has specific jurisdiction over trust claims, including tort claims, by a lifelong Texas beneficiary against two nonresident trustees, when all of the trust beneficiaries at the trust's creation were Texas residents, and the trustees had other Texas contacts, and whether

Appellee's claims should be abates because the Will was probated in Kentucky, thus forcing all Appellee's trust claims to be pursued in Kentucky, even though the 1998 had no connection with Kentucky. 02-09-00463-CV, *Dugas Limited Partnership, Dugas 1998 Irrevocable Trust, William Bruce Dugas Grandchild Trust and James Stephen Turner and Hurley Calister Turner, Jr., Co-Trustees of the Dugas 1998 Irrevocable Trust f/b/o William Bruce Dugas v. Donna Neal Goode Dugas and Laura Nicole Dugas*, from the Probate Court of Denton Texas, by Fred Hartnett, Jim Hartnett, Jr., and Will Ford Hartnett, The Hartnett Law Firm, 2920 N. Pearl Street, Dallas, Texas 75201, for Appellee Laura Nicole Dugas. ca. 3/15/10.

Appellee addresses whether the trial court's denial of Dugas LP's special appearance on grounds of general personam jurisdiction was supported by a record which showed said LP's formation documents selected its principal place of business in Texas, the address for its general partner was an Aubrey, Texas, address, the decedent operated his business interests from his ranch in Denton County, and the primary asset of the LP is a Texas General Partnership. Appellee also addresses whether the trial court's denial of the Trusts' and the Trustees' special appearance on grounds of specific personal jurisdiction was supported by a record which showed that the trust beneficiaries reside in Texas, the Trustees' duties require them to inquire into the needs and interests of said beneficiaries, the trusts made distributions to the beneficiaries in Texas and the main asset of the Trust is stock ownership in a partnership having a principal place of business in Texas and whose primary asset is stock in a Texas general partnership. Appellee also addresses whether dominant jurisdiction can deprive a Texas court of jurisdiction when the case in the other state was not filed first and the claims pending in that case are not the same claims as those pending in the Texas court. 02-09-00463-CV, *Dugas Limited Partnership, Dugas 1998 Irrevocable Trust, William Bruce Dugas Grandchild Trust and James Stephen Turner and Hurley Calister Turner, Jr., Co-Trustees of the Dugas 1998 Irrevocable Trust f/b/o William Bruce Dugas v. Donna Neal Goode Dugas and Laura Nicole Dugas*, from the Probate Court of Denton Texas, by John T. Palter, W. Craig Stokley, Riney Palter PLLC, 5949 Sherry Lane, Suite 1616, Dallas, Texas 75225, for Appellee Donna Neal Dugas. ca. 3/12/10.

Appellant replies that the Trustees did not purposefully avail themselves of the forum by failing to act. 02-09-00463-CV, *Dugas Limited Partnership, Dugas 1998 Irrevocable Trust, William Bruce Dugas Grandchild Trust and James Stephen Turner and Hurley Calister Turner, Jr., Co-Trustees of the Dugas 1998 Irrevocable Trust f/b/o William Bruce Dugas v. Donna Neal Goode Dugas and Laura Nicole Dugas,* from the Probate Court of Denton Texas, by R. William Wood, Grace Weatherly, Wood, Thacker & Weatherly, P.C., 400 West Oak Street, Suite 310, Denton, Texas 76201, for Appellants. 4/5/10.

Limitations

Appellant addresses whether the trial court erred in granting Appellee's motion for partial summary judgment and motion for severance based on a finding that there was no genuine issue of material fact regarding Appellant's affirmative defense of limitations. 02-10-00142-CV, *Jerry C. Hamilton v. Texas CES, Inc. d/b/a Mercer Well Services, et al, and XTO Energy, Inc.*, from the 235th District Court of Cooke County, by Ralph Ray Gregory, Jr., 12225 North Loop West,
Suite 1108, Houston, Texas 77008, for Appellant. 7/8/10.

Appellee contends the trial court's grant of summary judgment was proper because Appellant could not establish there was a genuine issue of material fact that he was diligent in serving Texas CES with process after the limitations period had run to defeat the affirmative defense of the statute of limitations. 02-10-00142-CV,

Jerry C. Hamilton v. Texas CES, Inc. d/b/a Mercer Well Services, et al, and XTO Energy, Inc., from the 235th District Court of Cooke County, by Ian P. Faria, Daniel F. Shank, Coats | Rose, 3 East Greenway Plaza, Suite 2000, Houston, Texas 77046, for Appellee. 8/9/10.

Oil and Gas

Appellants address whether the trial court erred: (1) when it rendered summary judgment for Appellee and did not grant summary judgment for Appellants; (2) when it excluded the affidavit and exhibits of a witness in connection with considering Appellant's motion for summary judgment and her response to Appellee's motion for summary judgment; and (3) when it excluded portions of Appellant's affidavit. Appellants also address whether, for purposes of the recording statute (Texas Property Code Section 11.001(a)) recording an instrument as to real property in one county where a part of the property is located constitute effective recording as to each county in which that property is located, especially where the property consists of two parcels, one of which is located only in Tarrant County and attached to the other parcel only at a terminus point and that other parcel is located in both Wise and Tarrant County, is recording an oil and gas lease in Wise County effective as to the parcel in Tarrant County, and are subsequent purchasers of lots in a subdivision in the county where the lease is not recorded placed on constructive notice of the lease. 02-10-00370-CV, *Aston Meadows, Ltd., A Texas Limited Partnership, Montclaire Custom Homes, L.P., A Texas Limited Partnership, Peter Paulsen, Steve Paulsen, Mike Wells, Kathryn LeBlanc, Donald LeBlanc, Natalie J. Warnick, James S. Warnick, and Kathy Ivey v. Devon Energy Production Company, L.P. and Devon Energy Corporation*, from the 141st District Court of Tarrant County, by Hunter T. McLean, William Brent Shellhorse, Whitaker, Chalk, Swindle & Sawyer, LLP, 301 Commerce Street, Suite 3500, Fort Worth, Texas 76102, for Appellants.

Appellees address whether the trial court erred: (1) in finding and concluding that (a) one or more events of force majeure had occurred as that term is defined in the parties' Surface Use Agreement; (b) Appellees timely submitted its permit applications; or (c) Appellee timely provided written notice of one or more events of force majeure; and (2) in awarding attorney's fees to Appellee and issuing a permanent injunction. 02-10-00062-CV, *Allegiance Hillview, L.P., v. Range Texas Production, LLC, and Range Production Company*, from the 211th District Court of Denton County, by Andrew D. Sims, Russell R. Barton, Harris, Finley & Bogle, P.C., 777 Main Street, Suite 3600, Fort Worth, Texas 76102, and John H. Cayce, Jr., Matthew D. Stayton, Kelly Hart & Hallman LLP, 201 Main Street, Suite 2500, Fort Worth, Texas 76102, for Appellees. 9/10/10.

Appellant replies that the City's failure to issue permits was not an event of force majeure, Appellant did not waive its argument that Appellee failed to satisfy the condition precedent of timely notice, and Appellee's SUP permit application was not timely. 02-10-00062-CV, *Allegiance Hillview, L.P., v. Range Texas Production, LLC, and Range Production Company*, from the 211th District Court of Denton County, by Richard A. Ilmer, John C. Pegram, Brown McCarroll, L.L.P., 2001 Ross Avenue, Suite 2000, Dallas, Texas 75201, and Elizabeth G. Bloch, Brown McCarroll, L.L.P., 111 Congress, Suite 1400, Austin, Texas 78701, for Appellant. 10/4/10.

Appellants address whether the trial court erred by: (1) granting final summary judgment disposing of all parties and claims; (2) failing to find ambiguity in the reservation of mineral rights in the Deed; (3) granting Defendants' motions for final summary judgment; (4) sustaining objections to Appellants' evidence in support of denial of the summary judgment motions because ambiguity permits introduction of parol evidence. Appellants also address whether the C Defendants established ownership of the Property, mineral rights or

otherwise. 02-10-00061-CV, *Bill Walker & Bobbye Walker v. Campuzano Enterprises, Ltd, Campuzano Investments, Inc., Fernando Campuzano, Francisco Campuzano, Carmen L. Campuzano and Carrizo Oil & Gas, Inc.*, from the 352nd District Court of Tarrant County, by Eric D. Fein, Vickie S. Brandt, Eric D. Fein, P.C. & Associates, 3500 Oak Lawn Avenue, Suite 510, Dallas, Texas 75219, for Appellants. 7/19/20.

Appellees respond that: (1) the trial court did not err: (a) in finding the deed unambiguous; (b) in granting summary judgment to quiet title, but it did err in granting a final summary judgment on Appellant's conversion, unjust enrichment, trespass and fraud/fraud in the inducement/statutory fraud claims; (c) in sustaining objections to evidence in support of the denial of summary judgment; and (2) Appellant improperly attempts to create a fact issue by challenging subsequent ownership and chain of title of property conveyed in the Walker to AAQH Deed. 02-10-00061-CV, *Bill Walker & Bobbye Walker v. Campuzano Enterprises, Ltd, Campuzano Investments, Inc., Fernando Campuzano, Francisco Campuzano, Carmen L. Campuzano and Carrizo Oil & Gas, Inc.*, from the 352nd District Court of Tarrant County, by Andrew W. Seibert, Gregory J. Barbaree, Landrith & Kulesz, L.L.P., 601 W. Abrams St., Arlington, Texas 76010, for Appellees. 8/18/10.

Appellant addresses whether the trial court erred: (1) in holding that Appellee had no liability for the services of subcontractors used to perform work Appellee was contractually bound to provide to Appellant; (2) in deciding that Appellee fully performed its contractual obligations to Appellant (i.e., refusing to hold Appellee failed to perform in a good and workmanlike manner, as in failing to circulate the well clean at the conclusion of the third squeeze job, and in failing to find that Appellant incurred $26,475.64 in expenses as a result of Appellee's failure); and (3) in making Finding of Fact Nos. 22 and 17. 02-10-00157-CV, *Lesikar Oil and Gas Co. v. Legend Swabbing, Inc.*, from the 43rd District Court of Parker County, by Russell R. Barton, James E. Key, Theresa L. Berend, Harris, Finely & Bogle, P.C., 777 Main Street, Suite 3600, Fort Worth, Texas 76102, for Appellant. 7/15/10.

Appellees addresses whether, given the totality of the evidence and the trial court's role as the sole judge of the witnesses' credibility, the trial court erred: (1) in failing to find that Appellee was liable for work performed by other contractors where such contractor were working for Appellant and where Appellant or its representative was overseeing and monitoring all work on the project; (2) in holding that Appellee fulfilled its contractual obligations to Appellant and performed in a good and workmanlike manner, where Appellee successfully repaired the casing leak; and (3) that Appellant take nothing on its counterclaim. Appellee also addresses whether the evidence supported certain of the trial court's findings of fact. 02-10-00157-CV, *Lesikar Oil and Gas Co. v. Legend Swabbing, Inc.*, from the 43rd District Court of Parker County, by Jason L. Wren, 900 Jackson Street, Founders Square, Suite 600, Dallas, Texas 75202 for Appellee. 9/16/10.

Appellant replies that Appellee ignores the trial court's express findings and conclusions, in which the trial court found and concluded that Appellee was obligated to perform the entire repair of the casing leak, that Appellee's reliance on other findings is misplaced and does not result in a deemed finding that Appellant contracted with Basic. 02-10-00157-CV, *Lesikar Oil and Gas Co. v. Legend Swabbing, Inc.*, from the 43rd District Court of Parker County, by Russell R. Barton, James E. Key, Theresa L. Berend, Harris, Finely & Bogle, P.C., 777 Main Street, Suite 3600, Fort Worth, Texas 76102, for Appellant. 10/5/10.

Appellant contends: (1) that venue should be transferred to Hemphill County, where the mineral properties are located, because no probative evidence overcomes the mandatory venue provision; (2) the assignment through which Appellee claims title to the mineral properties is invalid because it was forged when recorded in Lubbock County and forged again four years later when recorded in Hemphill County; (3) if the

assignment is upheld, the trial court's judgment should be modified for a commencement date of September 11, 2009 for payment of Appellant's "40% net profit interest" as the assignment provides instead of the 20% ordered in the judgment; and (4) the trial court improperly awarded Appellee relief not requested in her pleadings, and a portion of the judgment is vague and unenforceable and should be stricken. 02-09-00442-CV, *Frances Jane Fuller Jackson Morris v. Margaret Ann Fuller*, from the 67th District Court of Tarrant County, by George Whittenburg, David Gamez, Jr., Whittenburg Whittenburg Stein & Strange, P.C., 1010 S. Harrison Street, Amarillo, Texas 79101, for Appellant. 4/14/10.

Appellee contends: (1) the trial court properly denied the motion to transfer venue because the case concerns ownership of the Joint Venture rather than the title to property located in Hemphill County; (2) sufficient evidence supports the trial court's finding that the Assignment was not forged; (3) the trial court properly found that Appellee was entitled to twenty percent of the total net profit of the Joint Venture; and (4) the trial court properly entered a judgment that addressed all issues raised by the pleadings or tried by consent of the parties, including an order for an accounting as pled by Appellee. 02-09-00442-CV, *Frances Jane Fuller Jackson Morris v. Margaret Ann Fuller*, from the 67th District Court of Tarrant County, by Daniel G. Altman, Roswald E. Shrull, Shrull & Associates, 1701 River Run, Suite 1116, Fort Worth, Texas 76107, for Appellee. 7/6/10.

In reply, Appellants reassert the issues raised in their opening brief: (1) that venue should be transferred to Hemphill County, where the mineral properties are located, because no probative evidence overcomes the mandatory venue provision; (2) the assignment through which Appellee claims title to the mineral properties is invalid because it was forged when recorded in Lubbock County and forged again four years later when recorded in Hemphill County; (3) if the assignment is upheld, the trial court's judgment should be modified for a commencement date of September 11, 2009 for payment of Appellant's "40% net profit interest" as the assignment provides instead of the 20% ordered in the judgment; and (4) the trial court improperly awarded Appellee relief not requested in her pleadings, and a portion of the judgment is vague and unenforceable and should be stricken 02-09-00442-CV, *Frances Jane Fuller Jackson Morris v. Margaret Ann Fuller*, from the 67th District Court of Tarrant County, by George Whittenburg, David Gamez, Jr., Whittenburg Whittenburg Stein & Strange, P.C., 1010 S. Harrison Street, Amarillo, Texas 79101, for Appellant. 8/16/10.

Appellant contends that the Deeds satisfy the Statute of Frauds, the Appellees are estopped to deny the validity of the reservation in one of the Deeds because a subsequent deed in the Appellees' chain of titles recites the validity of the reservation, and the trial court erred in rendering judgment vesting record title in the Appellees. 02-09-00299-CV, *XTO Energy Inc., et al, v. Leonard Nikolai and Sandra Nikolai*, from the 367th District Court of Denton County, by Brandy R. Manning, Murphy, Mahon, Keffler and Farrier, L.L.P., Tindall Square–Building No. 2, 505 Pecan Street, Suite 101, Fort Worth, Texas 76102, for Appellant. 2/16/10.

Appellants McCurrin, et al., contend the trial court erred in denying summary judgment to Appellants and granting summary judgment in favor of Appellees, because: (1) the property descriptions in the Deeds satisfy the statute of frauds, validly severing the mineral estate from the surface estate of the subject property and reserving ownership of the mineral in Appellant via their predecessor in title; and (2) because Appellees are estopped from denying the validity of the mineral reservation in the 1904 Deed because instruments in the Appellees' chain of title recite the validity of that reservation. Appellants also contend the trial court erred in denying them summary judgment because Appellees failed to establish as a matter of law that title to either the mineral or surface estates at issued vested in them. 02–09-00299, *XTO Energy Inc., et al, v. Leonard Nikolai and Sandra Nikolai*, from the 367th District Court of Denton County, by R. Scott Alagood, Alagood &

Cartwright, P.C., 1710 Westminster Driver, Denton, Texas 76205, for Appellants McCurrin, et al. 3/3/10.

Appellees/Cross Appellants contend the trial court erred in not granting or failing to consider the Nikolai's summary judgment ground of title by adverse possession and prior possession, as well as contending that the Nikolais were entitled to seek and recover attorneys' fees under the Declaratory Judgment Act. Appellees/Cross Appellants contend the trial court also contend the trial court made several erroneous rulings in its Order on Plaintiffs' Objections. 02–09-00299, *Leonard Nikolai and Sandra Nikolai v. XTO Energy Inc., et al*, from the 367th District Court of Denton County, by Michael K. Hurst, Vaness J. Rush, Gruber Hurst Johansen & Hail, LLP, 1445 Ross Avenue, 25th Floor, Dallas, Texas 75202, for the Nikolais. 4/28/10.

In reply, Appellant addresses whether the Appellees are estopped to deny the validity of the reservation in one of the Deeds because a subsequent deed in the Appellees' chain of titles recites the validity of the reservation, whether the Appellees failed to establish title to the mineral or surface estates and in fact negated record title, and whether the property descriptions in the Deeds satisfy the statute of frauds as a matter of law. Appellant also addresses whether the trial court properly denied Appellee's adverse possession claim and claim for attorneys' fees, and whether the court of appeals should reverse the judgment as to all defendants. 02-09-00299-CV, *XTO Energy Inc., et al, v. Leonard Nikolai and Sandra Nikolai*, from the 367th District Court of Denton County, by Brandy R. Manning, Murphy, Mahon, Keffler and Farrier, L.L.P., Tindall Square–Building No. 2, 505 Pecan Street, Suite 101, Fort Worth, Texas 76102, for Appellant. 6/16/10.

Appellees/Cross-Appellants reply that the trial court erred in not granting or in failing to consider their summary judgment grounds of title by adverse possession and prior possession, that it made several erroneous rulings in its Order on Plaintiffs' Objections, and that they were entitled to seek and recover attorneys' fees under the Declaratory Judgments Act. 02–09-00299, *Leonard Nikolai and Sandra Nikolai v. XTO Energy Inc., et al*, from the 367th District Court of Denton County, by Michael K. Hurst, Vaness J. Rush, Gruber Hurst Johansen & Hail, LLP, 1445 Ross Avenue, 25th Floor, Dallas, Texas 75202, for the Nikolais. 8/4/10.

Appellants McCurrin, et al., contend the trial court erred in denying summary judgment to Appellants and granting summary judgment in favor of Appellees, because: (1) the property descriptions in the Deeds satisfy the statute of frauds, validly severing the mineral estate from the surface estate of the subject property and reserving ownership of the mineral in Appellant via their predecessor in title; and (2) because Appellees are estopped from denying the validity of the mineral reservation in the 1904 Deed because instruments in the Appellees' chain of title recite the validity of that reservation. Appellants also contend the trial court erred in denying them summary judgment because Appellees failed to establish as a matter of law that title to either the mineral or surface estates at issued vested in them. 02–09-00299, *XTO Energy Inc., et al, v. Leonard Nikolai and Sandra Nikolai*, from the 367th District Court of Denton County, by R. Scott Alagood, Alagood & Cartwright, P.C., 1710 Westminster Driver, Denton, Texas 76205, for Appellants McCurrin, et al. 8/26/10.

Appellants/Cross-Appellees McCurrin, et al., reply that Appellant's counsel is entitled to recover his reasonable and necessary ad litem fees and expense incurred in representing Appellants on this appeal and/or for collecting such fees and expenses, because to rule otherwise would violate the Texas and U.S. Constitutions and Texas policy relating to the compensation of attorney ad litems forced to represent parties they have never met. 02–09-00299, *XTO Energy Inc., et al, v. Leonard Nikolai and Sandra Nikolai*, from the 367th District Court of Denton County, by R. Scott Alagood, Alagood & Cartwright, P.C., 1710 Westminster Driver, Denton, Texas 76205, for Appellants McCurrin, et al. 9/29/10.

Appellee COG addresses whether: (1) Appellants can claim, despite the warranty in a prior deed, that they actually intended to convey less than half of the mineral rights and that they still retain some legal claim to the minerals; (2) the trial court was correct in deciding, as a matter of law, that the Walkers had no legal rights to the minerals on the property; (3) the trial court properly declined to consider testimonial evidence containing legal opinions about the meaning of the language in the deed; and (4) the trial court properly granted summary judgment in favor of Appellee on the conversion, trespass, and unjust enrichment claims based on its ruling that the Appellants retained no legal rights in the property at issue. 02-10-00061-CV, *Bill Walker & Bobbye Walker v. Campuzano Enterprises, Ltd, Campuzano Investments, Inc., Fernando Campuzano, Francisco Campuzano, Carmen L. Campuzano and Carrizo Oil & Gas, Inc.*, from the 352nd District Court of Tarrant County, by Charles W. Sartain, Brent E. Dyer, Looper Reed & McGraw, P.C., 1601 Elm Street, Suite 4600, Dallas, Texas 75201, for Appellee COG. 9/17/10.

In reply, Appellants address whether the trial court erred by granting final summary judgment "disposing of all parties and claims", whether the trial court committed error by failing to find ambiguity in the reservation of mineral rights in the deed, whether the trial court erred in granting the defendants' motions for summary judgment, whether the C defendants established ownership of the property, mineral rights or otherwise, and whether the trial court erred by sustaining objections to plaintiffs' evidence in support of denial of the summary judgment motions because ambiguity permits introduction of parol evidence. 02-10-00061-CV, *Bill Walker & Bobbye Walker v. Campuzano Enterprises, Ltd, Campuzano Investments, Inc., Fernando Campuzano, Francisco Campuzano, Carmen L. Campuzano and Carrizo Oil & Gas, Inc.*, from the 352nd District Court of Tarrant County, by Eric D. Fein, Vickie S. Brandt, Eric D. Fein, P.C. & Associates, 3500 Oak Lawn Avenue, Suite 510, Dallas, Texas 75219, for Appellants. 9/7/10.

Appellant contends the trial court erred in granting Appellee's motion for summary judgment and in granting declaratory judgment declaring ownership of funds in the court's registry because no affirmative pleadings were required for Appellant to assert, no prior judicial admissions nor the judgment in the Parker County suit barred Appellant from asserting, ownership rights in the drilling equipment or funds in the court's registry from the sale of the equipment. 02-09-00320-CV, *Terry McBryde v. John James*, from the 78th District Court of Wichita County, by D. Nicholas Acuff, Acuff & Gamboa, LLP, 2501 Parkview Drive, Ste. 405, Fort Worth, Texas 76102, for Appellant. 2/8/10.

APPENDIX TWO. SPREADSHEET OF DECIDED CASES

Case No.	Case	County	Court	Opinion	Issues	Ruling	Winner
02-09-00152-CV	*Lucas v. Coomer*, 2010 Tex. App. LEXIS 9956 (Tex. App.–Fort Worth December 16, 2010).	Parker	43rd	Memorandum Opinion	Lease was not ambiguous, did not create a condition precedent, and lessee accepted lessor's offer, albeit in a different manner than specified in the lease	Affirmed	Plaintiff
02-08-00453-CV	*Vinson Minerals, Ltd., et al., v. XTO Energy, Inc.*, 2010 Tex. App. LEXIS 9970 (Tex. App.–Fort Worth December 16, 2010)	Wise	271st	Opinion	Trial court properly excluded settlement demand from evidence, and Lessors were therefore not entitled to terminate the lease, because Lessors presented no evidence that they provided successor lessee with proper written notice or demand for payment as required by the lease.	Affirmed	Defenda
02-09-00336-CV	*Moncrief Oil International, Inc., v. OAO Gazprom, et al*, 2010 Tex. App. LEXIS 9382 (Tex. App.–Fort Worth November 24, 2010, mo. rehearing den.)	Tarrant	17th	Opinion	Trial court properly granted special appearance of foreign companies, in that plaintiff did not establish that the court had either general or specific jurisdiction over them.	Affirmed	Defenda
02-10-00026-CV	*Rickett v. Lesikar*, 2010 Tex. App. LEXIS 8307, *1 (Tex. App.–Fort Worth October 14, 2010)	Tarrant	48th	Memorandum Opinion	Trial court properly denied recovery to plaintiff on quantum meruit claim because of what evidence showed as to services rendered, and whether those services were useful to, or accepted by, defendant.	Affirmed	Defenda
02-09-00356-CV	*Pena v. Smith*, 321 S.W.3d 755, 756 (Tex. App.–Fort Worth 2010)	Wise	271st	Opinion	Trial court erred in summarily enforcing mediate settlement agreement, because defendant had withdrawn consent to such agreement.	Reversed and remanded	Defenda

Case No.	Case	County	Court	Opinion	Issues	Ruling	Winner
02-09-00241-CV	*Mancuso v. Cheaha Land Services, L.L.C.*, 2010 Tex. App. LEXIS 6567 (Tex. App.–Fort Worth August 12, 2010)			Memorandum Opinion	Trial court appropriately granted no-evidence motion for summary judgment against a plaintiff who sued to recover commissions. Trial court did not abuse discretion in denying continuance related to claim of lack of discovery, or in barring plaintiff from presenting summary judgment evidence for failure to timely respond to disclosure requests.	Affirmed	Defenda
02-09-00225-CV	*Hudspeth, et al, v. Berry, et al*, 2010 Tex. App. LEXIS 5641, *1, *4 (Tex. App.–Fort Worth July15, 2010)	Cooke	235th	Memorandum Opinion	Reservation clause in a 1943 deed does not contain conflicting fractions and is unambiguous, and thus provides for a "fractional royalty."	Reversed and rendered	Plaintiff
02-08-00170-CV	*Poag v. Flories*, 317 s.W.3d 820 (Tex. App.–Fort Worth, 2010, pet. den.)	Tarrant	342nd	Opinion	Trial court properly granted summary judgment dismissing declaratory judgment action, as limitations on suit to clear title began to run on recording of administrator's deed; defendant was not entitled to attorney's fees on the dec action.	Affirmed	Defenda
02-08-00490-CV	*Martin v. Martin*, 2010 Tex. App. LEXIS 4421 (Tex. App.–Fort Worth June 10, 2010)	Tarrant	322nd	Memorandum Opinion	A divorce decree was ambiguous as to what mineral interest wife could reserve from her conveyance of land to husband, but since evidence showed they owned no more than ½ minerals, wife should reserve a 1/12th interest from deed.	Affirmed	Movant
02-09-210-CV	*Anoco Marine Industrial, Inc., a/d/a Anoco Marine Industries, Inc., v. Patton Production Corporation and J.L. Patton, Jr.*, 02-09-210-CV (Fort Worth April 6, 2010)	Tarrant	48th	Memorandum Opinion	When the judgment creditor does not prove that some part of the judgment remains unsatisfied, it cannot obtain a turnover order.	Reversed and Rendered	Defenda
02-08-00445-CV	*In re Estate of Conard L.*	Tarrant	Probate	Opinion	In construing will, the	Affirmed	Plaintiff

Case No.	Case	County	Court	Opinion	Issues	Ruling	Winner
	Florence, 2010 Tex. App. LEXIS 1788 (Tex. App–Fort Worth 2010)		Court No. 1		only evidence presented showed that the term "tangible property" was treated as if it meant "tangible personal property."		