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

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

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ORAL ARGUMENT REQUESTED

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ARGUMENT

I.

The majority misapprehended the law and Defendant's argument on appeal and reached the wrong conclusion on the merits.

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II.

There is no genuine dispute as to any material fact. The Assignment is not ambiguous. It included all of Plaintiff's interest in the lease. It did not except the override. The Defendant is entitled to judgement in her favor as a matter of law.

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III.

The Plaintiff's construction of a subsequent "intentions clause" which equates it with an "exception" is both unreasonable and illogical. Moreover, even if it were reasonable, it would be repugnant to the grant and thus void and unenforceable as a matter of law.

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

INTRODUCTION

The instant case involves the construction of an Assignment of working interest in an oil and gas lease which Plaintiff attached to its Complaint. Defendant moved to dismiss, with prejudice, pursuant to **735 ILCS 5/2-615**. The Trial court granted Defendant's motion and dismissed the case as a matter of law, based on the pleadings. The Plaintiff Appealed.

ISSUE PRESENTED

The question presented is whether the Plaintiff excepted an "overriding royalty interest" from its Assignment of all interest in the lease to the Defendant.

JURISDICTION

This Court has jurisdiction pursuant to **Supreme Court Rule 315**. The Appellate Court initially reversed the trial court and remanded the case for further proceedings in a Rule 23 Order dated July 15, 2016 **(A52-63)**. The Defendant timely sought rehearing. The Appellate Court denied the Petition for Rehearing, but issued a modified Rule 23 Order dated November 2, 2016, with one justice dissenting **(A1-29)**. On December 6, 2016, Defendant timely filed a Petition for Leave to appeal.

STATEMENT OF FACTS

The facts and instruments involved are not in dispute. On April 1, 2007, Plaintiff entered into a "**PAID UP OIL AND GAS LEASE**" with Norman and Eleanor Jordan, covering 220 acres located in Macon County, Illinois **(See Plaintiff's Exhibit #1, C10-13, A30-33)**

The lease granted Plaintiff the exclusive right to come on to the property to prospect for oil and gas for a definite "primary term" of three (3) years and if successful within that time period, to thereafter continue to produce, store and market the crude oil produced therefrom. The "secondary term" of the lease is of indefinite duration. According to the

Habendum clause, the lease continues for as long as oil and gas are being produced in "paying quantities from the Leased Premises or from lands pooled or unitized therewith" **(See Paragraph 3 of Plaintiff's Exhibit # 1, C10, A30)**

The lease reserved a "royalty" unto the Lessors, being the rights to $1/8^{th}$ (12.5%) of any crude oil produced from the leasehold premises, free and clear of all expenses. Conversely, the lease granted the Plaintiff, Lessee the rights to the remaining 7/8ths (87.5%), of any crude oil produced. The Lessee's share is known as "working interest". It bears all of the cost of development (i.e. drilling, completion and subsequent operations). **(See Paragraph 6 of Plaintiff's Exhibit #1, C11, A31).**

On October 31, 2007, Plaintiff executed a "**PARTIAL ASSIGNMENT OF OIL & GAS LEASES**" wherein Plaintiff sold and assigned 75% of its working interest to certain third parties. More specifically, 60% of said 75% working interest was assigned to Headington Oil, Limited Partnership. 20% of it was assigned to Focus Energy, LLC and 20% of it was assigned to Bayswater Exploration and Production, LLC. The Plaintiff retained the remaining 25% of the working interest **(See First and Second Paragraphs, of Plaintiff's Exhibit #2, C14, A34)**.

In so doing, the Plaintiff carved out and reserved unto itself an "overriding royalty", in the amount of 6.5% being a non-cost bearing share of the working interest **(See Third Paragraph, of Plaintiff's Exhibit #2, C14, A34).**

The "**PARTIAL ASSIGNMENT OF OIL AND GAS LEASES**" from Plaintiff in pertinent part provides:

> "Assignor *excepts* from this Assignment and *reserves* to Assignor an overriding royalty interest that share of production from the lands covered by the leases assigned equal to the greater of (i) the difference between nineteen percent (19%) and existing leasehold burdens or (ii) one percent (1%)" **(Pl. Ex. 2, p. 1; C14, A34). (Emphasis Supplied)**

The "existing leasehold burdens" then consisted of the Lessor's royalty in the amount of 12.5%. Hence, the 1% alternative minimum did not apply. Instead, the overriding royalty which Plaintiff expressly reserved and excepted from the grant amounted to 6.5% (i.e. 19% - 12.5%) **(See Third Paragraph, of Plaintiff's Exhibit #2, C14, A34)**.

The override "comes off the top" so to speak. It is borne by and deducted proportionately from all four working interest owners' above referenced ownership percentages. According to the Assignment, Headington Oil, Limited Partnership was to receive 60% of 75% of 81% (i.e. 87.5% - 6.5%), the same being 36.45% of the oil produced **(See Third Paragraph, of Plaintiff's Exhibit #2, C14, A34)**.

Co-Defendant John Basnett was likewise given an overriding royalty in the lease in the amount of 1/32 of 7/8^{ths} through a separate Assignment **(C53-55)**.

In May of 2008, a well, known as the Jordan #1, was drilled on the leased premises, during the primary term of said oil and gas lease. The well was completed, equipped and began producing oil. About a year and a half later, the Plaintiff and other three working interest owners sold their interest in the well to Defendant **(See Plaintiff's Complaint; C23)**.

On October 30, 2009, the Plaintiff, Ramsey Herndon LLC, Headington Oil Limited Partnership, Focus Energy, LLC, and Bayswater, LLC sold and assigned all of their collective interest in the oil and gas lease, the related equipment and future production to Defendant Lisa Luchtefield, DBA Beam Oil Company. The Plaintiff executed an **"ASSIGNMENT OF LEASES and BILL OF SALE" (See Plaintiff's Exhibit #3, and Paragraph 5 of Plaintiff's Complaint; C23, A43)**.

The construction and meaning of that conveyance **(i.e. Plaintiff's Exhibit #3)** is the focus of the instant appeal. The Assignment from Plaintiff to Defendant, in pertinent part provides:

"ASSIGNMENT OF LEASES AND BILL OF SALE

STATE OF ILLINOIS)
KNOW ALL MEN BY THESE PRESENTS, THAT:
COUNTY OF MACON)

> For the sum of Ten and No/100 Dollars ($10.00) and other good and valuable consideration paid to it the receipt and sufficiency of which are hereby (sic acknowledged) RAMSEY HERDON LLC, HEADINGTON OIL COMPANY LLC, FOCUS ENERGY LLC and BAYSWATER EXPLORATION AND PRODUCTION, LLC (hereinafter called "ASSIGNORS"), has GRANTED, BARGAINED, SOLD, TRANSFERRED, ASSIGNED and CONVEYED and by these premises does hereby GRANT, BARGAIN, SELL TRANSFER, ASSIGN and CONVEY UNTO;
>
> Lisa E. Luchtefield DBA Beam Oil Company
> 1349 East Wantland Drive
> Taylorville, Illinois 62568
>
> (hereinafter called "ASSIGNEE") *all* of ASSIGNOR'S (sic) right, title and interest in and to the oil and gas and mineral leases described on Exhibit "A" attached hereto together with like interest in and to *all* personal property located therein or thereon or used or obtained in connection therewith" **(C23, A43). (Emphasis Supplied)**
>
> ***
>
> "All oil, including oil in tanks as of the Effective Time, and gas production attributable to times prior to the Effective Time, shall be owned by ASSIGNOR and the expenses related thereto shall be borne by ASSIGNOR or their predecessors in interest. *All* production after the Effective Time shall be owned by the ASSIGNEE and the expenses related thereto shall be borne by ASSIGNEE" **(C24, A44). (Emphasis Supplied)**
>
> ***
>
> "ASSIGNEE does hereby agree to assume, be bound by and subject to each ASSIGNOR's express and implied covenants, rights, obligations and liabilities with respect to the Oil and Gas Properties and ASSIGNEES interest in the Oil and Gas Properties shall bear its proportionate share of royalty interest, overriding royalty interest and other payments out of or measured by production from and after the Effective Time" **(C24, A44). (Emphasis Supplied)**

NOTE: Plaintiff's Exhibit #3, C23-26; A43-45, Capitalization in original, but underlined and italicized emphasis supplied.

The Defendant subsequently reworked the well, greatly increased the production and sold the crude oil produced to a third party, known in the industry as the "first purchaser". It is undisputed that the Defendant did not receive any of the oil proceeds for production after the Effective Time of the Assignment **(C8)**.

PROCEEDURAL HISTORY

Approximately six and one half years afterwards, the Plaintiff, Ramsey Herndon, LLC, brought suit against the Defendant, Lisa Whiteside for "Breach of Contract" (Count I) and "Conversion" (Count II) claiming that it had not been paid the revenue attributable to an "overriding royalty interest" it had allegedly reserved in the oil and gas lease.

Plaintiff's claims turn entirely upon the construction afforded to the subject Assignment. In essence, this case is a declaratory action to quiet title, with a request for further relief dependent upon the outcome.

The Plaintiff claimed that the Sixth paragraph of the Assignment operated to reduce the scope of the grant so as to exclude the overriding royalty from the conveyance and demanded payment. The Defendant disagreed and rejected Plaintiff's demand. She maintained that there was no "exception" or "reservation" of the "overriding royalty" in the Assignment, but rather Plaintiff conveyed all interest it owned, including the override to her.

Attached to the Plaintiff's Complaint as Exhibits were the following instruments:

1. **PAID UP OIL AND GAS LEASE** dated April 1, 2007, from Norman Jordan and Eleanor M. Jordan to Ramsey Herndon, LLC **(Plaintiff's Exhibit #1)**.
2. **ASSIGNMENT OF LEASE AND BILL OF SALE** dated October 31, 2007, from

Ramsey Herndon, LLC to Headington Oil, Limited Partnership, Focus Energy, LLC and Bayswater Exploration and Production, LLC, reserving an overriding royalty **(Plaintiff's Exhibit #2)**.

3. **ASSIGNMENT OF LEASE AND BILL OF SALE** dated October 30, 2009 from Ramsey Herndon LLC, Headington Oil Company, LLC, Focus Energy, LLC and Bayswater Exploration and Production, LLC to Lisa E. Luchtefeld (Whiteside) dba Beam Oil Company **(Plaintiff's Exhibit #3)**.

There was and is no dispute as to the authenticity of these three documents, nor is there any dispute as to the legal effect of the first two instruments. The **PAID UP OIL AND GAS LEASE, (Plaintiff's Exhibit #1)** granted the Plaintiff the exclusive oil and gas development rights to the leasehold premises. The **ASSIGNMENT OF LEASE AND BILL OF SALE (Plaintiff's Exhibit #2)** conveyed an undivided fractional portion of those right to certain third parties. More importantly it also included a provision whereby the Plaintiff, Ramsey Herndon LLC, as Assignor, created, "excepted" and "reserved" an "overriding royalty interest" from the conveyance.

The present dispute involves the operation and legal effect of the third instrument, being the Assignment from the Plaintiff to the Defendant **(Plaintiff's Exhibit #3, C23-31, A43-51)**.The authenticity of this instrument is not in doubt. It is admitted by Plaintiff and must be taken as true for purposes of Defendant's Motion.

The **ASSIGNMENT OF LEASE AND BILL OF SALE** conveyed, "all of Assignor's, right, title and interest in and to the oil, gas and mineral leases described on Exhibit "A" to Defendant. It also conveyed all of the related personal property and equipment as well as all future production to Defendant. Said grant did not include an "exception" of the overriding royalty interest which Plaintiff had previously reserved

(Plaintiff's Exhibit #3, C23-31, A43-51).

The Assignment did however include a clause towards the end, in the Sixth paragraph, which indicated that the Assigned interest was to bear its proportionate share of "royalty interest, overriding royalty interest and other payments out of or measured by production" **(Plaintiff's Exhibit #3, C23-31, A43-51).**

The Defendant, Lisa Whiteside, filed a Motion to Dismiss pursuant to **735 ILCS 5/2-615**, *with prejudice*, on the basis that the **ASSIGNMENT OF LEASE AND BILL OF SALE** being the conveyance from Plaintiff to Defendant on which the Plaintiff's claim is based, did not include any "exception" for the Plaintiff's overriding royalty, but rather conveyed all interest of Plaintiff in and to the described Oil and Gas Leases, including its overriding royalty, to Defendant **(Plaintiff's Exhibit #3, C23-31, A43-51)**.

Defendant argued that the subsequent provision upon which Plaintiff relies is not an exception to the grant, but rather is a limitation, qualification or condition of it. It is reference to the fact that other outstanding interest in the lease exist, some of which are owned by third persons or entities who are not party to the instrument and are thus not included in the conveyance.

Defendant posited that the provision in issue notified her that she was taking all of the Assignors' interest in the lease, including the override "subject to" the royalties and other overriding royalties owned by third parties, such as the Lessors, Norman and Eleanor Jordan and Co-Defendant, John Basnett, who were not party to the instrument.

The 6.5% override continued to exist as a separate non-cost bearing interest following the assignment, however it passed in the conveyance to Defendant. Consequently, Defendant argued, the Plaintiff could not sustain a cause of action for conversion or breach of contract.

Defendant's Motion was filed pursuant to **735 ILCS 5/2-615** because the defect in Plaintiff's claim was apparent from the face of the pleadings. Unlike a motion pursuant to **735 ILCS 5/2-619**, which pierces the pleadings and relies upon extrinsic facts outside the pleadings, the instant Motion is confined to the pleadings, including the Exhibits ***Worley v Barger*, 347 Ill. App. 3d 492 (5th Dist. 2004).**

When pleading a duty based on a specific document, that document must be attached to the Complaint as an Exhibit. Exhibits attached to a Complaint are part of the pleadings "for all purposes" **735 ILCS 5/2-606**.

Therefore, the facts stated in the Exhibits are considered the same as having been alleged in the Complaint itself. Factual matters in Exhibits which conflict with the allegations in the Complaint, negate such allegations ***Outboard Marine v. Chisholm and Son*, 133 Ill. App. 3rd 238 (2d Dist. 1985).**

When an Exhibit conflicts with the facts alleged in the body of the Complaint, the Exhibit controls ***Perkaus v Chicago Catholic H.S. Athletic League*, 140 Ill. App. 3rd 127 (1st Dist. 1986).** Facts disclosed by an exhibit prevail over contrary facts alleged in the text of a Complaint ***Garrison v Choch*, 308 Ill. App.3d 48, 53 (1999).**

Although a Motion to Dismiss admits all well-pleaded facts as well as the reasonable inferences therefrom, such Motion does <u>not</u> admit allegations in the Complaint which conflict with the facts disclosed by an Exhibit. In such case, the pleading is self-defeating ***Outboard Marine v. Chisholm and Son*, 133 Ill. App. 3rd 238 (2d Dist. 1985).**

In the instant case, the **ASSIGNMENT OF LEASE AND BILL OF SALE** which Plaintiff attached to its Complaint pursuant to **735 ILCS 5/2-606**, did <u>not</u> include any reservation of or exception for the Plaintiff's override. Rather it included <u>all</u> interest which the Plaintiff/Assignor had in the subject oil and gas lease, the personal property and

equipment and future production. The Assignment itself thus expressly negates the very causes of action which the Plaintiff attempted to plead, as a matter of law **(Plaintiff's Exhibit #3, C23-31, A43-51).**

The Plaintiff cannot be deprived of an overriding royalty interest which, according to its own Assignment, it did not reserve or except from the conveyance to the Defendant in the first place and therefore did not own at the time the oil alleged to have been converted was produced or the contract was allegedly breached. Hence, the trial Court granted the Defendant's Motion pursuant to **735 ILCS 5/2-615** and dismissed Plaintiff's claims with prejudice.

STANDARD OF REVIEW

A Motion to dismiss with prejudice under **735 ILCS 5/2-615** attacks the legal sufficiency of the Complaint. The standard of review which applies to motions to dismiss with prejudice is whether the Plaintiff has stated or can state a cause of action; whether Plaintiff can plead any facts that could entitle them to relief or conversely whether no set of facts can be pled that would give rise to a cognizable claim for relief under State law ***Worley v Barger*, 347 Ill. App. 3d 492 (5th Dist. 2004).**

In reviewing dismissal under **735 ILCS 5/2-615** the reviewing court must decide whether the allegations, when viewed in the light most favorable to the Plaintiff are sufficient to establish a cause of action upon which relief may be granted. A cause should not be dismissed with prejudice unless it appears from the pleadings that no set of facts can be proven which will entitle the Plaintiff to recovery ***Worley v Barger*, 347 Ill. App. 3d 492 (5th Dist. 2004) and *Oliveira v Amaco Oil Co.*, 201 Ill. 2d 134,147 (2002)** .

The facts in this case are not disputed. Likewise, the authenticity of the instruments involved are not in question. The instruments are attached to the Plaintiff's Complaint and

are incorporated therein. They control. They are admitted by both parties. The Plaintiff alleged them and they must be assumed for purposes of Defendant's motion.

The pleadings in this matter thus present a pure question of law concerning the construction of the Assignment, namely, does it except the override or not? This Court's review of that legal issue is *de novo* ***Milder v Van Alstine*, 230 Il. App. 3d 869 (3rd Dist. 1992).**

APPEAL AND DECISION UNDER REVIEW

The trial court, Judge Little presiding, agreed with Defendant Whiteside and granted her Motion to Dismiss with prejudice. The trial Court ruled in favor of Defendant, finding that the Assignment in question did not include any exception for the overriding royalty, but rather conveyed or quitclaimed all interest which Plaintiff owned at the time, including the overriding royalty, to the Defendant **(C86, C91-92)**.

The Plaintiff timely appealed. The Appellate Court reviewed the briefs and heard oral argument. The Appellate Court reversed the Trial Court, ruled in favor of the Defendant and remanded the case for further proceedings **(A52-63).**

First, the Appellate Court issued a Rule 23 Order dated July 15, 2016, finding *inter alia*, that an overriding royalty was not an interest in real estate and therefore was not governed by the rules of construction of deeds and other instruments affecting real estate upon which Defendant relied (i.e. that the Assignment is clear and must be enforced as written; that even if it were not, it must be construed strictly against the Plaintiff/Assignor and liberally in favor of the Defendant/Assignee; that all doubts or ambiguities must be resolved in favor of Defendant and that the subsequent "subject to" and "shall bear" clause towards the end of the instrument should not be construed in a manner which is repugnant to the grant which appears at the beginning of it.)

The Appellate Court's original opinion at page 11 stated:

> "This whole argument by Whiteside depends on the supposition that an overriding royalty is indeed an interest in real estate" **(A62)**...
>
> "Plaintiff's reservation of an overriding royalty is finite or limited in time and thus under Illinois law Whiteside is mistaken in her crucial supposition that Plaintiff's overriding royalty is an interest in the leased real estate and when that prop is kicked out, her argument collapses by its own terms". **(Emphasis Supplied) (A63)**.

The argument that an overriding royalty was not real estate was not made by Plaintiff at the trial court level or in the Plaintiff's initial brief. Rather it was raised for the first time on appeal, in the Plaintiff's reply brief. A reply brief is normally limited to responding to the Appellee's brief. New arguments and theories are general not allowed. In this case the argument was not only allowed, it was accepted. The Appellate Court's opinion turned entirely on that perceived legal proposition **(A61 - 63)**.

Defendant filed a Petition for Rehearing on August 8, 2016, within the time permitted by law, complaining not only of this procedural anomaly, but also the substantive error underlying it. Defendant's Petition for Rehearing demonstrated the fallacy and discussed the implications of holding that an overriding royalty is not real estate. Defendant pointed out that all ownership interest in active wells, including overriding royalties, are taxed as real estate under the Real Property Tax Code **35 ILCS 200/9-145 and *Updike vs. Smith*, 378 Ill. 600 (1942)**. The Assignment in question was recorded **(C23, A43).**

Perhaps more importantly, Defendant noted that the entire oil industry would be in upheaval if such interest are held not to be real estate, as in such event, conveyances of interest in oil and gas leases would not be subject to the Statute of Frauds. They would not be required to be in writing or be recorded.

The right to payment for oil purchases is determined by an examination of the real estate records in the County where the well is located. All conveyances are required to be in writing and recorded in order to be binding on the first purchaser. The entire oil industry depends upon the record notice provided by local real estate records to function.

If the Appellate Court's decision were allowed to stand, there would be no conceivable way for crude oil purchasers to determine who was entitled to payment for the oil produced. Unrecorded contracts and even verbal contracts would suffice to pass ownership.

The practical difficulty this would place on crude oil buyers would in effect cripple the market for oil and gas in this State. Purchasers of crude oil could no longer rely upon an examination of the real estate records in the county where the well is located to determine title and the right to payment, but would be required to continually monitor every owner of every interest in every leasehold regardless of where they may be located before they purchase oil each month from a particular well. Obviously, this was an untenable position.

Defendant also pointed out that even if you accepted the Appellate Court's incorrect premise and thus concluded that an overriding royalty were personal property rather than real estate, the "**ASSIGNMENT OF LEASES AND BILL OF SALE**" nevertheless conveyed "all personal property" associated with the leasehold to Defendant. Furthermore, it expressly stated that "All production after the Effective Time shall be owned by ASSIGNEE".

The Assignment expressly included all of Plaintiff's interest in the lease, all of its interest in the related personal property and equipment and all of its right to future production. Defendant argued that even if an overriding royalty were personal property,

according to the unambiguous language of the Assignment, the Defendant should nonetheless prevail as a matter of law.

In response, the majority completely changed its analysis, admitting that such interest are in fact real estate, but nevertheless arriving at the same conclusion by another means, finding that the sixth (6^{th}) paragraph of the Assignment containing the "shall bear" language was a clear unambiguous exception to the grant, not repugnant to it **(See Rule 23 Order dated November 2, 2016, A1-24)**.

The Appellate Court denied Defendant's Petition for Rehearing and also denied her Motion to Publish the opinion. In so doing, the majority of the Appellate Court, Justice Appleton and Justice Steigmann concurring, found that the subsequent provision in the Sixth paragraph of the Assignment, that the Assignee's interest "shall bear" its proportionate share of the "royalty and overriding royalty" was an exception to the grant of "all of Assignor's right, title and interest", rather than notice to Defendant that all of Plaintiff's interest in the lease was being conveyed, subject to the rights of third parties, namely the Lessors and Co Defendant John Basnett. **(A1- 24)**.

The majority's reasoning created an internal inconsistency within the previous sentence in the same paragraph, which provided that the Assignee assumed all of the Assignor's *rights* and *duties* under the lease.

The override cannot be treated as both a right and a duty at the same time. The majority resolved that conflict in favor of the Assignor instead of the Assignee. The majority held that Defendant "assumed" the *obligation* of Plaintiff/Assignor's override, but not the *right* to it, despite the fact that both terms appear next to one another, in the same sentence, in precisely the same grammatical position. The clause in issue expressly and unequivocally refers to the Assignee's assumption of both Assignor's rights and duties.

The reference to Assignor's rights was simply ignored and dismissed by the majority, while the reference to duties was given precedence, contrary to any recognized rule of construction **(A21- 24)**.

The majority concluded, without reference to any legal authority, that the use of the word "assumes" dictated the preference because the term is more commonly used only in reference to duties, not rights. The majority affirmed the dismissal of Count II, but reversed the trial court's decision as to Count I and remanded the case for further proceedings **(A21-24)**.

Justice Pope on the other hand, agreed with the Defendant that the case should be dismissed with prejudice as a matter of law and issued a dissenting opinion **(A25-29)**.

Defendant suggests, there is no ambiguity or internal inconsistency to resolve. Secondly, even if there were, the law requires those ambiguities and inconsistencies be resolved in her favor. In either case, Plaintiff's claim fails.

On December 6, 2016, the Defendant timely filed her Petition for Leave to Appeal to this Court pursuant to Supreme Court Rule 305. The Petition was granted on March 29, 2017.

INTRODUCTION TO OIL AND GAS

In order to answer the question presented, it is helpful to first understand some of the basic principles of oil and gas, including mineral ownership and conveyancing, focusing particularly on the various interests that may be created from or carved out of an oil and gas lease. In the process of doing so, we shall also become familiar with the oil and gas terminology employed in the subject Assignment.

Historically, the ownership of real estate has been likened to a bundle of twigs. The right to prospect for, mine and remove minerals, such as oil and gas, is but one of the twigs or rights which are included in the landowner's bundle. Those rights may be removed from the bundle by "grant" or "reservation". Alternatively, they may remain with the bundle.

In either event, oil and gas share a unique physical attribute that distinguishes them in the eyes of the law from all other interest in real estate. Unlike hard minerals, such as coal or limestone, oil and gas are fugacious. They do not always remain static or in place.

Oil and gas are the renderings of ancient plant and animal life that were deposited on the sea floor where they then overlain and overburdened again and again over vast geological periods of time. This organic matter was cooked by the extreme heat and pressure of the earth. Being fugacious and light, they migrate upwards from the shale or source rock, over time, to a place where they become trapped, most typically in a semi-porous rock formation which is overlain by an impervious "cap rock" which causes the formation to act as a reservoir or trap. Saltwater is often also present. Being heavier than oil, it serves to buoy the oil within the formation and provides pressure to drive it to a point of less resistance such as a well bore **See Kuntz, *Oil and Gas*, Section 1.12 and 1.13 (3rd edition 1987)**.

Oil and gas move, migrate or "flow" within a reservoir in response to changes in geological pressures. Such changes may be naturally occurring, such as in the event of an earthquake, or the result of manmade exploration activities.

Oil is oftentimes found in and produced from a "common" reservoir, which underlies multiple tracts of land. Although oil does not drain evenly from an underground reservoir composed of rock, like water from a lake, oil produced from a particular well

bore may have been drained from beneath adjoining property. Currently, there is no way to know for sure where any specific quantity of oil produced may have originated or what oil may have been displaced across boundary lines in the production process. This unique characteristic is reflected in oil and gas law.

Due to their fugacious nature, oil and gas in place are not capable of ownership separate and distinct from the land. Although considered a part of the land, the owner of oil and gas rights does not own the oil and gas in place underground in the traditional sense, but merely owns the "exclusive right" to prospect for or to attempt to produce it ***Miller v. Ridgley,* 2 Ill. 2d 223 (1954), *Triger v. Carter Oil Co.,* 372 Ill. 182 (1939) and See Williams & Meyers, Oil and Gas Law, Sections 203 and 203.1.**

If the owner of the oil and gas rights in certain lands, makes a grant of them to another, it is a grant only of the rights to remove as much oil as may be found and taken from the land ***Pickens v. Adams*, 7 Ill.2d 283 (1956).**

As long as oil or gas remains in the reservoir, it remains part of the land subject to the correlative rights of others to drill wells upon their lands in an attempt to produce or capture it ***Continental Resources of Illinois, Inc. v. Illinois Methane, LLC*, 364 Ill. App. 3d 691, (5th Dist. 2006).**

Oil and gas are considered part of the real estate and are not subject to absolute ownership until they are severed from the land and captured (i.e. reduced to physical possession). Capture occurs when the oil enters the well bore. At that moment in time oil becomes personal property, owned by the parties in the proportions established by the various instruments and agreements. Oil is captured, pumped to the surface (i.e. produced), where it is stored and sold. The sale proceeds are distributed accordingly.

The "rule of capture" has evolved as a rule of necessity and convenience. It avoids the difficulty of attempting to trace where any specific quantity of oil originated and also balances the correlative rights of the parties to a common source or supply. According to the rule, the owners of the oil and gas rights where the well is located also own the oil and gas produced therefrom. Reduced to its essentials to rule of capture may be simply stated as "Finders Keepers. Losers Weepers".

An oil and gas "lease" is an agreement whereby the owner of the oil and gas rights, (i.e. the Lessor), grants another party, (i.e. the Lessee), the exclusive right to prospect for oil and gas on certain described property for a definite period of time, known as the "primary term", provided that if production is achieved during that period, the lease shall continue indefinitely, as long thereafter as production continues. This indefinite extension under the "habendum clause" is referred to as the "secondary term". The Lessee's exclusive right to prospect for oil and gas on certain property is an interest in real estate. It is a "freehold estate" ***Deverick v. Bline*, 404 Ill. 302 (1949).**

Like all conveyances of interest in real estate, an oil and gas lease must be in writing to be enforceable and be recorded to provide constructive notice. The lease defines the relationship and sets forth the term and conditions of the grant. More importantly for our purposes, it divides the oil and gas rights into two distinct components, namely, "royalty" and "working interest".

The lease reserves unto Lessor the right to a certain portion (e.g. $1/8^{th}$) of all the oil and gas produced from the leasehold premises, free and clear of all expenses. The portion reserved by the Lessor is referred to as "royalty" **3 *Summers Oil and Gas*, Section 29:15 (3rd Edition 2014).**

Conversely, the Lease grants the Lessee the rights to the remaining portion (e.g. 7/8th) of the oil and gas produced. The Lessee must bear all of the risk and expenses associated with the drilling, completing, equipping and operating of the well, whereas the Lessor bears none. The Lessee's share is thus referred to as the "working interest" ***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).**

"Working interest" in an oil and gas lease may be further divided into separate, distinct, individually owned, but indivisible fractional shares, with each owner being entitled to a portion of the oil and the resulting proceeds, but also responsible for an *aliquot* share of the expenses incurred.

Overriding royalties or overrides may be created out of the working interest. "Overriding royalty" has some similarities with, but differs from and is not to be confused with, the mineral owner's "royalty". An "overriding royalty" or "override" is a fractional portion of the working interest, which has been singled out for certain preferential cost treatment.

The term "overriding royalty" refers to a non-cost bearing fractional interest in post-production oil and gas that is carved out of the working interest created by the oil and gas lease. An overriding royalty is free and clear of expenses, but it is a charge on the "working interest", not the mineral owner's "royalty" interest. An overriding royalty interest is a non-operating interest, meaning the owner has a right to share in the production, but has no right to direct or control the operations. It is a non-operating, non-cost bearing deduction or charge on the working interest ***Summers Oil and Gas*, Section 29:15 (3rd Edition 2014).**

An overriding royalty interest, having been carved out of the working interest created pursuant to an oil and gas lease, expires or terminates when the underlying oil and gas lease expires, at which time ownership of the all oil and gas rights reverts back to the mineral owner(s) ***Deverick v. Bline*, 404 Ill. 302 (1949).**

Working interest and overrides in oil and gas leases are conveyed or reserved by written Assignment, in much the same fashion as the mineral rights themselves may be conveyed or reserved by Deed. The same legal principles apply **3 *Summers Oil and Gas* Section 29:15 (3rd Edition 2014).**

Ownership of the underlying mineral rights is conveyed or reserved by "Deed", whereas "working interest" and "overrides" in a lease are conveyed or reserved by an "Assignment". It is well settled that an overriding royalty in an oil and gas lease is an interest in real property ***Deverick v. Bline*, 404 Ill. 302 (1949).**

It is created by express, written conveyance or reservation. Consequently, assignments conveying or reserving an "overriding royalty" are governed by the same rules and formalities as are deeds and other instruments involving real estate, such as the statute of frauds, etc. **3 *Summers Oil and Gas* Section 29:15 (3rd Edition 2014).**

For purposes of this analysis it is important to understand and distinguish between each of the above referenced interest which arise, directly or indirectly, out of an oil and gas lease, namely: 1.) "royalty", 2.) "working interest" and 3.) "overriding royalty".

In addition, it is also helpful to understand the meaning of the terms "reservation" and an "exception". Technically a "reservation" differs from an "exception". A reservation creates or carves out a new interest that did not exist before. It is something that is withheld

from the grant, whereas an exception refers to a previously created interest that is not included in the conveyance. However, because these terms have been so frequently used interchangeably, albeit mistakenly, the courts no longer require absolute precision. The two terms are now considered to be virtually synonymous with one another ***Cali v DeMattei*, 121 Ill. App. 3d 623 (5th Dist. 1984)**.

Where Grantor's obvious intent was to retain interest in oil, gas, and other minerals underlying property conveyed, his statement in deed "excepting" mineral interest from conveyance served to retain interest in his favor of underlying minerals, notwithstanding that, in highly technical analysis, "reserving" may have been the more appropriate term ***Cali v DeMattei*, 121 Ill.App. 3d 623 (1984)**.

ARGUMENT

I.

The majority misapprehended the law and Defendant's argument on appeal and reached the wrong conclusion on the merits.

The court mischaracterized the Defendant's argument as follows:

> "By assigning to Whiteside all of its interest in the paid-up lease, Plaintiff assigned to her all of its working interest, leaving no working interest out of which to carve the overriding royalty interest, according to Whiteside's reasoning." **(Emphasis Supplied) (A9).**

That was not the Defendants argument. Defendant never claimed the override disappeared, expired or ceased to exist following the conveyance. To the contrary, the Defendant maintains that subject override remains intact. It survives the conveyance, but pursuant to the Assignment, it belongs to the Assignee, not the Assignor.

The overriding royalty in question was created, excepted, reserved and carved out of the working interest by the Plaintiff when the Plaintiff assigned working interest to the other three investors **(Plaintiff's Exhibit #2, C14; A34)**.

Having been so previously created, contrary to the majority's opinion, it need not be carved out or created again, when the Plaintiff assigned all of its interest to the Defendant **(Plaintiff's Exhibit #3, C23, A43)**.

More accurately stated, Defendant's argument is that the overriding royalty, being an interest then owned by Plaintiff in the described oil and gas lease, was assigned to Defendant along with all other interest Plaintiff owned at the time. The override does not need to be recreated. It continues to exist, just like before, but it now belongs to the Defendant; Not the Plaintiff.

If Plaintiff intended to withhold the override from the conveyance it could and should have "excepted" and/or "reserved" it, like it did before, in its previous Assignment. Clearly Plaintiff knew how to do so **(Plaintiff's Exhibit #2, C14; A34)**.

The issue here is not the technical distinction between a reservation and an exception for either or both will suffice. The question here is whether the Sixth paragraph, which uses the terms "assume", "subject to" and or "shall bear" is an exception from the grant. Are these terms clear, apt words of reservation or exception? Do they mean the same thing as "except or "reserve"?

The word "except" is unambiguous. It means "to leave out or take out; exclude or omit". The word "reserve" means "to keep or retain". Those terms are straight forward. They are clear **See *Black's Law Dictionary* (10th ed. 2014)**

The word "shall" is self-explanatory. It means something is mandatory. The word "bear" means "to carry, transport...to support or sustain, undergo or withstand." The words

"subject to" mean "conditional or dependent on something". The word "assume" means "to take up or undertake" **See *Black's Law Dictionary* (10th ed. 2014).**

It is submitted that although the courts no longer require precision in the use of the terms "reserve" and "except", those two terms are not synonymous with the terms "subject to", "assume" or "shall bear". Such clear "words of reservation or exception" are conspicuously absent from the Assignment in question.

Moreover, they appear in the Sixth paragraph, in the context of a clause that has nothing to do with the grant. That clause, which appears near the end of the instrument, deals with pre-existing rights of third parties, such as the Lessors and other owners of overrides. The provision serves as notice to the Assignee that she stands in the shoes of the Assignor, with respect to both its rights and its duties. Assignee thereby assumes all of the obligations of her predecessor, including the duties owed to third parties.

For example, that the Assignee is bound by the terms and conditions of the lease, including the royalty. However, the provision relied upon does not apply to retrieve or exclude the overriding royalty interest owned by the Assignor which was conveyed to the Assignee, pursuant to the preceding absolute grant.

Reference to such third party rights operates as a limitation, condition or qualification of the warranty, not a reservation or exception from the grant **See *Miller v Lowery*, 468 So. 2d 865, 86 Oil and Gas Reporter 78 (Miss. Sup. Ct. 1985) and *Texas Incorporated v Newton and Rosa Smith Charitable Trust*, 471 So. 2d 877, 86 Oil and Gas Reporter 313 (La. App. Ct. 2nd Cir. 1985).**

Contrary to the majority's opinion, the words "except" and or "reserve" do not mean the same thing as the terms "subject to", "assume" or "shall bear". Furthermore the

terms appear in an entirely different context from the grant. The two provisions under consideration do not interact. They deal with different issues. The majority's finding that the Defendant assumed only duties, but not any rights is pure sophistry **(A21-24)**.

When one limits the operation of the Sixth paragraph to its above stated intended purpose, the majority's alleged internal inconsistency between use of the terms "rights" and "duties" disappears **(A9)**. All *rights* of the Assignors may be assumed along with all *duties* owed to third parties under separate instruments, such as the rights of the Lessors to the royalty under the lease and the rights of Co-Defendant John Basnett to an override under his Assignment. The subject override remains a charge on the working interest, but it is owned by Defendant.

Having reviewed the facts and the substantive law of oil and gas ownership as well as the reservation, grant, division and conveyancing of those rights and the Appellate Court's misapprehensions, we now turn our attention to the allegations set forth in Plaintiff's Complaint, the Defendant's Motion to Dismiss and the application of the applicable Standard of Review to those facts. We begin our analysis with a brief re-examination of the Assignment, which Plaintiff attached to its Complaint.

II.

There is no genuine dispute as to any material fact. The Assignment is not ambiguous. It included all of Plaintiff's interest in the lease. It did not except the override. The Defendant is entitled to judgement in her favor as a matter of law.

The Assignment which Plaintiff prepared, executed, delivered and attached to its Complaint expressly conveyed "all" of the Plaintiff's interest in the subject oil and gas lease to Defendant, Lisa Whiteside. It assigned all of Plaintiff's interest in the personal

property and equipment used or obtained in connection with the lease to the Defendant. It also stated that "All production after the Effective Time shall be owned by ASSIGNEE".

The word "all" is not ambiguous. It is a plain, simple, commonly understood term. By definition, it includes everything, all interest overrides, working interest or claims to future production which the Plaintiff owned in the demised leasehold. The grant is clear, distinct, concise and absolute. It is not equivocal or ambiguous. It does not include any "reservation" or "exception" in contrast to Plaintiff's previous Assignment.

The Sixth paragraph does not create any ambiguity with regards to the scope of the grant. It is not addressed to the grant or the interest conveyed. As stated above, it addresses another issue entirely, being interest of third parties which are not conveyed. It is notice that the interest conveyed by the grant is subject to the rights of certain third parties.

The following three relevant points are beyond dispute. First, an override is an interest in an oil and gas lease. Second, oil becomes personal property once it is produced and severed from the land. Third, the Plaintiff's Complaint is making a claim to production subsequent to the effective date of Assignment. The Plaintiff is making a claim to the subsequently produced oil (i.e. personalty), despite the fact that Plaintiff assigned all interest it owned in the lease, all personal property and all future production to Defendant.

It is submitted that this instrument is not in any way ambiguous in regards to the scope of the grant, but the larger point for our purposes here is that, even if it were, the rules of construction require the instrument be construed in favor of the Defendant, not the Plaintiff. Any and all ambiguity must be resolved in Defendant's favor, against the Plaintiff. Not the other way around.

The scope of a grant of an interest in an oil and gas lease may be enlarged by a subsequent intentions clause, but it may not be reduced by one ***Weaver v. Ellis,* 127 Ill. App 3d 725, 732 (5th Dist. 1984) and *Gelfius v Chapman,* 118 Ill. App. 3d 290, 454 N.E.2d 1047, 73 Ill. Dec. 798 (1983).**

The Appellate Court's decision reverses the operation of the rules and the party in whose favor the instrument is construed. It turns the rule on its head. It construes the instrument in favor of the Assignor/Grantor rather than the Assignee/Grantee. For example, it seizes upon the word *duties* while ignoring the word *rights*.

The majority claims the Assignment unambiguously excepts the override from the grant, when in fact the strongest claim that could possibly be asserted in these circumstances is that the Assignment is ambiguous. The grant is simple and absolute, whereas the alleged exception is doubtful at best. Nowhere do the words "except" or "reserve" appear in the Assignment.

Had the Plaintiff used such clear, apt words of exception or reservation, like it did in its previous Assignment, then this argument would have merit. There would be no dispute. We would not be here. Plaintiff, for whatever reason did not do so. It is simply too far of a legal stretch to say that the terms "assumes", "subject to" or "shall bear" as used in the Sixth paragraph are unambiguous words of reservation or exception. They do not clearly express an intent to exclude something from the grant.

The general rule of real estate law conveyancing is that all of the Grantor's interest in the demised premises are conveyed unless they are clearly and expressly reserved ***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).**

It is well settled that instruments such as deeds, which convey interest in real estate, must be construed strictly against the Grantor and liberally in favor of the Grantee. The burden of clearly defining the scope of the grant is on the Grantor, not the Grantee ***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)**.

Applying the four corners rule and the other rules of construction which apply to conveyances of interest in real estate, the scope of the grant must be construed in favor of the Grantee/Assignee and against the Grantor/Assignor. Any doubt must be resolved in favor of the Grantee/Assignee **See *Jones v. Johnson*, 16 Ill. App. 3d 997 (5th Dist. 1974).**

The scope of an express grant is not reduced by ambiguity or implication. In fact, the opposite is true. The rule of law regarding the construction of instruments favors Defendant; not Plaintiff. It requires the Assignment be enforced as written, according to its plain meaning. It also mandates the Court resolve any doubt in favor of Defendant **See *Jones v. Johnson*, 16 Ill. App. 3d 997 (5th Dist. 1974).**

An instrument such as a deed or assignment speaks for itself. Its construction is dependent on the language used. If the grant is clear, then it should be enforced as written. No construction will be adopted, which is repugnant to the grant. No ambiguity is resolved against the Grantee ***Law v Kane*, 384 Ill. 591 (1943)**.

The cardinal rule of construction is to determine the parties' intent. This is best evidenced by the words chosen. The Court must first and foremost consider the plain and clear meaning of the terms the parties used. Second, the Court must consider the entire document as a whole. If the language is clear, it is to be enforced as written. No words

should be found meaningless, unless to do so would violate some rule or cannon of construction **See *Jones v. Johnson*, 16 Ill. App. 3d 997 (5th Dist. 1974).**

When there is doubt or ambiguity as to the scope of the grant, resort may be had to other explanatory provisions to resolve the doubt. However, it is only when the granting clause does not definitely describe the estate granted, that reference may be had to other provisions ***Nave v Bailey*, 329 Ill.235 (1928).**

If the Plaintiff had truly intended to reserve an overriding royalty, it should have expressed that intention more clearly, preferable in or near the granting clause. All it had to do was "except" or "reserve" its override, like it did before, in its previous Assignment **(Plaintiff's Exhibit #2, C14; A34).**

Alternatively, instead of conveying "*all interest*" in the subject oil and gas leases and then excepting the override, the Plaintiff could have accomplished the same thing by only conveying "*all* of its *working interest*" in said leases. Although an override is created out of the working interest, once created it is no longer remains part of it. It is a separate non-cost bearing interest, distinct from the working interest. Again, for whatever reason, the Plaintiff did not exercise either of these two simple options.

The Plaintiff is bound by the language it used and the court cannot insert additional language into the Assignment to change its legal effect or choose to ignore certain terms it finds legally inconvenient. Likewise, the Court may not resolve ambiguities in favor of the Assignor or give effect to an alleged "intention clause" which appears somewhere else in the document, contrary to the terms of the granting clause **See *Jones v. Johnson*, 16 Ill. App. 3d 997 (5th Dist. 1974).**

The "shall bear" provision on which Plaintiff relies has nothing to do with the grant. It is not in close proximity to the grant. It appears in the Sixth paragraph near the end of the instrument in a clause dealing with the assumption of Assignor's rights and liabilities to third parties.

The Sixth paragraph's purpose is not to remove or exclude something from the scope of the grant. Rather its purpose is to limit the liability of the Assignor by disclosing and acknowledging the existence of 3rd parties' rights, such as the royalty owners, who also have interest in and to the same oil and gas lease which must be taken into account when dividing up the oil sales proceeds.

Said provision has no application to a party who joined in executing the instrument as an Assignor. To do so would equate a "condition" of the conveyance with an "exception" to it. It would allow a subsequent "intentions clause" in the instrument to be construed in a manner which is repugnant to the grant.

To illustrate, if the Sixth paragraph of the Assignment is treated as an exception to the grant then said paragraph likewise excepts the mineral owners' royalty from the grant, since the two terms (i.e. royalty and overriding royalties) appear next to each other in the same sentence. Such construction is illogical however, inasmuch as the Lessee never owned the royalty in the first place. Under the majority's analysis, the term "royalty" in the second sentence of the Sixth paragraph is rendered meaningless. It is a nullity. It is nothing, but pure surplusage.

The majority similarly chose to ignore the word "rights" in the first sentence of that same paragraph, which referred to the Assignee's assumption all of the Assignor's rights,

which naturally would include the override. The majority's sole justification for that conclusion is that:

"assume *typically* is used in the sense of taking on responsibilities, obligations, or powers, not gaining rights... It would be an unnatural usage to say that someone agrees to assume rights" **(Emphasis Supplied) (A22)**.

The majority opinion ignores some terms, renders others meaningless and resolves all ambiguity in favor of the Assignor, contrary to the rules of construction, not in keeping with them.

On the other hand, if the Sixth paragraph of the Assignment is construed and interpreted as Defendant suggest, then the terms "royalty" and "rights" are not superfluous. They are both given full meaning and effect. The Sixth paragraph is informing the Assignee that she is standing in the shoes of the Assignor. She is taking all of the Plaintiff's rights in the lease, including the override, but she is taking them "subject to" the obligations owed to certain third parties such as the Lessors' royalty and the Co-Defendant's overriding royalties, both of which are measured out of production.

Making a conveyance "subject to" a particular pre-existing agreement or rights of third parties appearing in the chain of title, is not the same thing as "excepting" them from the immediate grant between the parties to the instrument. The two are vastly different.

If the Plaintiff had actually intended to "except" the 6.5% override it previously created, excepted and reserved for itself from the conveyance of "all its right title and interest" in the subject lease to the Defendant, then it should have said so. The burden is on the Plaintiff to clearly define the interest being excepted from the grant.

The granting clause of the subject Assignment concludes with a period, without any words of reservation or exception. "All" means "all". "All" is a common, plain, ordinary

term. It is absolute. There is no room for ambiguity. It includes anything and everything which the Assignor owned. It includes the override. This particular grant includes not only all interest in the lease, but also the personal property and equipment as well as all future production. It is difficult to conceive how the instrument could be any clearer with regards to the scope of the grant.

The Defendant is not the Grantor. Defendant is the Grantee. The Defendant did not prepare the Assignment. The Plaintiff did. If it does not say what the Plaintiff meant, then Plaintiff has no one to blame for this result, but itself. The Plaintiff certainly knew or should have known how to properly "reserve" or "except" an overriding royalty from an assignment of working interest as evidenced by its earlier Assignment **(See "Plaintiff's Exhibit #2", "PARTIAL ASSIGNMENT OF OIL AND GAS LEASES", C14-15).**

Had Plaintiff intended to include an exception or reservation of overriding royalties from the "**ASSIGNMENT OF LEASES AND BILL OF SALE**" "**Exhibit #3**", it should have said so, like it did in the prior Assignment. The Plaintiff could easily have stated that it was excepting its override, in plain and clear language somewhere in the document **See *Jones v. Johnson*, 16 Ill. App. 3d 997 (5th Dist. 1974).**

For whatever reason, Plaintiff did not. Regardless of the motive, the language used in the instrument is what counts. The Assignment in question is not ambiguous. It conveyed all of Plaintiffs interest in the lease, the personal property and equipment associated therewith and all rights to future production to the Defendant.

Moreover, even if it were ambiguous, all ambiguities must be resolved in favor of the Defendant as a matter of law. The Court must not adopt a construction that ignores the term "rights" in the Sixth paragraph or renders the words "overriding royalties" meaningless.

III.

The Plaintiff's construction of a subsequent "intentions clause" which equates it with an "exception" is both unreasonable and illogical. Moreover, even if it were reasonable, it would be repugnant to the grant and thus void and unenforceable as a matter of law.

The scope of a grant of an interest in an oil and gas lease may be enlarged by a subsequent intentions clause, but it may not be reduced by one ***Weaver v. Ellis*, 127 Ill. App 3d 725, 732 (5th Dist. 1984) and *Gelfius v Chapman*, 118 Ill. App. 3d 290, 454 N.E.2d 1047, 73 Ill. Dec. 798 (1983).**

A provision which is repugnant to the grant is void and unenforceable, regardless of the parties' intent. A provision is "repugnant to the grant" when both provisions cannot be given full effect at the same time. If two provisions are inconsistent and cannot be fully reconciled, then one must yield to the other. The common law rule is that in such event the grant must obtain and the other provision must be disregarded, regardless of the actual intentions of the Grantor ***Nave v Bailey*, 329 Ill.235 (1928)**.

Even if the "shall bear" provision upon which Plaintiff relies could reasonably be construed as an attempt to reduce the grant, it would be unenforceable as a matter of law as being inconsistent with and repugnant to the grant. It is impossible to give both provisions full effect. It is one way or the other. Defendant cannot legally or logically be said to have received "all" of Assignor's right, title and interest in and to the lease, if the Plaintiff is allowed to keep an override.

It is submitted that the provision on which Plaintiff relies is not actually repugnant to the grant, because it does not address that issue, but instead addresses another issue entirely. However, the point remains, even if the rule of law allowed the court to construe the "shall bear" provision in favor of the Plaintiff as an attempt to reduce the grant, it would be void as being repugnant to the grant **See *Nave v Bailey*, 329 Ill.235 (1928).**

Admittedly, the historically rigid rules of construction which depend on exactly where in the instrument a provision appears have lost legal traction in favor of a more modern approach which places more emphasis on the parties' intentions **Kuntz, *A Treatise on The Law of Oil and Gas*, Section 14.2 and 14.3 (1987).**

Nowadays, a *clear* expression of intention will be given effect regardless of its location in the instrument. Where however the intention is not clear, the words used must be read in context. Even clear words appearing in provisions other than the grant, must be given meaning consistent with their location. They should be limited the operation of the particular covenant in which they appear, rather than the grant **Kuntz, *A Treatise on The Law of Oil and Gas*, Section 14.3 (1987).**

Under modern rules of construction, the intentions of the parties is derived from the whole instrument. Exceptions may be held valid though they appear in other parts of the instrument, but only if the intention is clearly expressed. If the intentions are not clear and/or no clear or apt words of reservation or exception are used, then the qualification or condition is limited to the clause or provision in which it appears **Kuntz, *A Treatise on The Law of Oil and Gas*, Section 14.2 and 14.3 (1987).**

Although the physical location of the clause purporting to retain some interest in the Grantor is no longer the deciding factor, if such terms appear within a particular

provision, they should be construed to operate only as an exception to that covenant **Kuntz, *A Treatise on The Law of Oil and Gas*, Section 14.2 and 14.3 (1987).**

In deciding this case, it is important to keep in mind that none of these rules of construction would come into play had the Plaintiff simply used clear words of exception, such as "except" or "reserve" in the Assignment. The scope of a grant of an interest in an oil and gas lease may be enlarged by a subsequent intentions clause, but it may not be reduced by one ***Weaver v. Ellis*, 127 Ill. App 3d 725, 732 (5th Dist. 1984) and *Gelfius v Chapman*, 118 Ill. App. 3d 290, 454 N.E.2d 1047, 73 Ill. Dec. 798 (1983).**

A situation similar to the present one was addressed by the Appellate Court in ***Gelfius v Chapman*, 118 Ill. App. 3d 290, 454 N.E.2d 1047, 73 Ill. Dec. 798 (1983).** In that case, Grantors brought action against Grantee, to obtain title to coal and coal rights underlying a tract. The deed in question "reserved" to Grantors:

> "an undivided one-fourth (1/4th) interest in the gas and oil, together with right of ingress and egress at all times for purposes of mining drilling, exploring, operating and developing said land for oil and gas *and other minerals*." **(Emphasis Supplied).**

The Plaintiff/Grantor argued that the scope of the grant should be reduced and conversely the reservation expanded by judicial construction so as to exclude 1/4th of the "other minerals" including the coal from the conveyance. Otherwise, the Plaintiff argued that the words "and other minerals" appearing at the end of the access clause, would be rendered meaningless and superfluous, contrary to the rule of construction, which require every term and phrase be given meaning.

The issue presented in that case was whether the phrase "and other minerals" which was contained in a provision concerning access, following the Grantor's reservation of one-fourth ($1/4^{th}$) interest in only the "gas and oil", enlarged that reservation so as to also include a one-fourth ($1/4^{th}$) interest in other minerals including coal.

The ambiguity allegedly arose because the granting clause did not directly refer to "coal". It only referred to "gas and oil". The reference to "other minerals" was in a subsequent clause dealing with access rights which directly followed a specific reservation of only the "oil and gas" ***Gelfius v Chapman,* 118 Ill. App. 3d 290, 454 N.E.2d 1047, 73 Ill. Dec. 798 (1983).**

The Appellate Court held that the deed did not reserve 1/4th interest in "coal and coal rights", but rather only reserved a $1/4^{th}$ interest in the "oil and gas" ***Gelfius v Chapman,* 118 Ill. App. 3d 290, 454 N.E.2d 1047, 73 Ill. Dec. 798 (1983)**

In that case, like the present one, Plaintiffs were attempting to enlarge the reservation and reduce the scope of the grant in reliance upon a subsequent "intentions clause", being a clause which allegedly expresses an intention to retain certain rights, contrary to the broader language of the grant.

The Plaintiffs argued that the phrase "and other minerals" would be rendered meaningless if the grant were construed in the Grantee's favor, and that the four corners rule of construction required the court to give meaning to every word included in the instrument. Defendant countered that The Plaintiff's construction was repugnant to the grant and thus erroneous as a matter of law.

The court reconciled the allegedly inconsistent propositions of law and found for the Defendant. The court resolved the alleged ambiguity in the deed by applying the fundamental rule of instrument construction, that a deed must be construed with the primary purpose of determining the intention of the parties. To determine the parties' intention, the court found it necessary to consider "the instrument as a whole, giving effect to every word and rejecting none as meaningless or repugnant, if but only if, it can be done without violating any positive rule of law ***Gelfius v Chapman,* 118 Ill. App. 3d 290, 454 N.E.2d 1047, 73 Ill. Dec. 798 (1983).**

The Court acknowledged that there was a rule of law requiring ambiguities to be resolved in favor of the Grantee; not the Grantor. This rule would be violated if the Grantor's construction were adopted. The Appellate Court instead followed the long-standing rule that a Grantor may reserve any and all mineral rights when he or she conveys land, but what is not expressly reserved is conveyed ***Gelfius v Chapman,* 118 Ill. App. 3d 290, 454 N.E.2d 1047, 73 Ill. Dec. 798 (1983); See also *Jones v. Johnson,* 16 Ill. App. 3d 997 (5th Dist. 1974).**

In the present case the construction of the Sixth paragraph of the Assignment to exclude the Assignor's overriding royalty would be repugnant to the grant of all interest in the subject lease and contrary to the rules of construction which apply to such instruments.

IV.

The alleged exception is not in close proximity to the grant. No clear words of exemption are used. The terms relied on by Plaintiff appear in the context of a provision which is not related to the grant and should be limited to that purpose. The

override survives the conveyance and remains as a charge on the working interest, but it belongs to the Defendant, not the Plaintiff.

In this case, the granting clause appears in the First paragraph of the Assignment. It is clear, plain and simple. It conveys "all" interest of Plaintiff in the lease and the personal property and equipment to Defendant. It does not include any exception or reservation. It ends with a period **(See Plaintiff's Exhibit #3, C23, 24; A43, 44)**.

The Second paragraph is all capitalized. It includes a lengthy disclaimer of various warranties to the property and/or equipment. It also includes a hold harmless and indemnification agreement **(See Plaintiff's Exhibit #3, C23, 24; A43, 44)**.

The Third paragraph, deals with the assumption of all plugging liability and surface restoration work by the Assignee. The Fourth paragraph includes additional indemnity and hold harmless provisions which are extremely broad **(See Plaintiff's Exhibit #3, C24, A44)**.

The Fifth paragraph designates ownership of oil in inventory at the time of sale, and allocates both revenue and expenses before and after the Effective Date of the transfer. It provides that "All production after the Effective Time shall be owned by ASSIGNEE" **(See Plaintiff's Exhibit #3, C24, A44)**.

Only then do we reach the Sixth paragraph on page 2, **(See Plaintiff's Exhibit #3, C24; A44)**. The first sentence of that paragraph is merely an expression of the law, namely that the Assignee is stepping into the shoes of the assignor and thus assuming all of the Assignor's *rights*, obligations and *duties* under the lease **(See Plaintiff's Exhibit #3, C24; A44)**.

The second sentence of that paragraph includes the provision upon which Plaintiff relies. It states as follows:

> "ASSIGNEE'S interest in the Oil and Gas Properties *shall bear its proportionate share of royalty interest, overriding royalty interest and other payments out of or measured by production*" **ASSIGNMENT OF LEASES AND BILL OF SALE" "Plaintiff's Exhibit 3" C24; A44.**

Notwithstanding the lack of proximity of the subject provision in relation to the granting clause, the term "shall bear" is simply not the same thing as the term "except".

Although the location of a provision in an instrument is no longer the controlling factor, it is relevant in this case. Where a *clear* expression of intent to exempt some interest from the grant appears, it will be given effect, regardless of its location. The point of emphasis being that the expression of intent to exclude must be *clear*. Had the Plaintiff used apt words of exemption such as "except" or "reserve", the location of the provision would not be important. However that is not the case.

An exception from the grant is a point worthy of emphasis. It is pretty important. It is an exception to the general rule governing conveyances. The burden is on the Grantor to clearly set forth any interest excepted therefrom. All interest is conveyed unless clearly excluded. Reduction of the grant by ambiguity or implication is contrary to all of the above referenced general rules of construction.

In ruling on this case, this Court must ask itself - Is it fair and or does it make good legal sense to allow a Grantor to say one thing (i.e. I am conveying all of my interest to you) at the beginning of the instrument in the grant, then bury an exception from the grant in a provision near the end of the document that does not use either of the terms "except" or "reserve"?

It is submitted that the result reached by the Appellate Court here is not only contrary to the rule of law, it defies logic, common sense, equity and fundamental fairness, which ironically, were the same underlying considerations that gave rise to those rules of law.

The moral of this case should be, if you want to "except" something from the grant then you ought to say so, in clear unambiguous language, preferably in or near the grant so the Grantee is put on notice. Otherwise, the Court is sanctioning legal sleight of hand.

The oil and gas industry depends on the clarity of title and the resulting marketability of the commodity produced in order to function. The provision upon which Plaintiff relies is not that unusual, even if the Plaintiff's construction of it is. Similar language appears in many recorded instruments throughout the State which are routinely reviewed by title examiners when rendering Division Order Title Opinions for pipeline companies and crude oil purchasers as to the division of proceeds from a particular well.

As a matter of public policy, if this Court were to rule against Defendant based on this provision, title to oil in many other cases would be placed in doubt and any past payments based thereon would be erroneous.

Moreover, similar language has been commonplace in Deeds and other conveyances for many years, perhaps more than a century. Deeds are customarily made subject to various interest such as easements, unpaid taxes, prior recorded rights of way etc. Research has not revealed a single instance in which such a "subject to" or similar provision was construed to be an exception to the grant, rather than a condition of it. If the Appellate Court's decision is allowed to stand, it will constitute a fundamental change in

the law of real estate as we know it. It will inject uncertainty into almost every real estate conveyance which has ever occurred in this State.

If the Plaintiff actually intended to except its override from the conveyance it should have clearly said so in the Assignment. Plaintiff prepared the Assignment. If it did not say what Plaintiff intended, then that is Plaintiff's fault. There is no legal remedy to protect Plaintiff from its own alleged mistake in draftsmanship.

The language could not be any clearer. There is no rule of construction that allows a party to alter or change the clear meaning and import of the words it used. The Court cannot rewrite the Assignment as Plaintiff in hindsight wishes it had been written.

In short, "all" means "all". The language in the grant is clear and unequivocal. The grant is absolute in every respect. The Assignment conveyed all of the Assignor's right, title and interest in the oil and gas leases including the override, to the Defendant. It also included all personal property and equipment and all future production.

In short, the Plaintiff is asserting a claim to an interest in the lease and to subsequent production, contrary to the plain and clear terms of the Assignment.

The Plaintiff in this case, cannot claim to have been deprived of an overriding royalty interest which it did not reserve or except, and therefore did not own at the time the oil allegedly converted was produced from the subject leasehold premises.

Plaintiff's claims must fail as a matter of law, for the simple reason that, according to the Assignment, the Plaintiff did not retain any rights in the oil and gas lease assigned to Defendant. Rather, Plaintiff conveyed all of its right, title and interest in the subject oil and gas leasehold premises including the override to the Defendant.

CONCLUSION

In summary, the Plaintiff cannot state a cause of action against the Defendant in the circumstances. The instrument which Plaintiff attached to its Complaint negates the facts alleged therein and defeats its causes of action as a matter of law.

WHEREFORE, the Defendant, Lisa Whiteside, respectfully requests this honorable court enter an order reversing the Appellate Court and affirming the decision of the trial court dismissing Counts I and II of the Plaintiff's Complaint with prejudice.

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No. 121668

IN THE SUPREME COURT OF ILLINOIS

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

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this 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 brief under Rule 342(a), is 40 pages.

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of:

Brief of the Defendant/Appellant and Separate Appendix

Has been mailed to:

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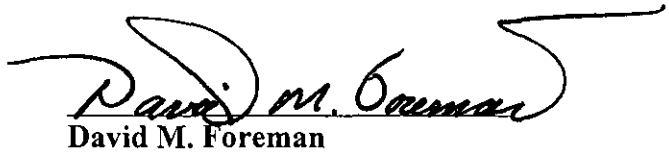
in compliance with Rule 12 of the Rules of Practice of the Illinois Supreme Court, by placing said copy in an envelope, legibly addressed, securely sealed and sufficiently stamped and depositing same in the United States Mail at Salem, Illinois on the 1st day of May, 2017, all in compliance with said Rule.



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