

President
Michael C. Savas, CTIP



FILED
19-0334
6/9/2020 2:18 PM
tex-43594035
SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK
Executive Vice President & CEO
Leslie Midgley, CAE

June 9, 2020

Supreme Court of Texas
Supreme Court Building
201 W 14th Street
Suite 104
Austin, TX 78711

REF: No. 19-0334; *Broadway National Bank, Trustee of the Mary Francis Evers Trust, et al., v. Yates Energy Corporation, et al.*

TO THE SUPREME COURT OF TEXAS:

Founded in 1908, the Texas Land Title Association (TLTA) is a statewide trade association representing the Texas title insurance industry and currently serving over 15,000 professionals involved in the safe and efficient transfer of real estate. In the course of their daily work, our membership serves over a million consumers each year. With active members in every Texas county, TLTA membership comprises approximately 90 percent of the title insurance agents and underwriters licensed to do business in Texas. From time to time, cases come before the Court that have significant impact on real estate commerce in Texas and which impact the ability of TLTA's members to safely insure title to real property. On those occasions, we will endeavor to share with the Court our support of those parties who advocate the sanctity of the Texas real property laws and doctrines. The TLTA has received no compensation for the preparation of this letter.

This case is of substantial importance to the everyday practice of real estate law in Texas because it questions how parties may effectively correct an error in the documentation of a conveyance under the Texas Property Code correction provisions. The trial court and appellate court reached different conclusions, and the appellate court was not unanimous in its approach. TLTA does not advocate for a specific interpretation of these statutes, but respectfully requests that the Court provide clear instruction for practitioners working with these statutes on a daily basis.

Enacted in 2011 and amended in 2013, Property Code Sections 5.027 – 5.031 create a statutory framework to correct an instrument by agreement. This framework eliminates the need for court intervention, saves the parties time and money, cures clouds on the property's title, and avoids disruptions to subsequent transactions. At the same time, the correction instrument was never intended to replace the court system if there is a disagreement. The correction instrument statutory scheme is available when the "parties" agree to move quickly and efficiently to protect

recorded title and not unnecessarily clog the courts. But where there is disagreement, more appropriate remedies exist such as reformation, rescission, or declaratory judgment.

Here, there is no question that the original parties and the subsequent grantees eventually disagreed as to the extent of the conveyance and the scope of correction. Initially, Petitioner Broadway Bank as Trustee attempted to correct its 2005 Mineral Deed by executing a Correction Mineral Deed in 2006 that revised the mineral conveyance to only a life estate, as opposed to fee simple. In 2013, Respondent EOG claimed the 2006 deed was invalid because it was only signed by the grantor, and Broadway Bank prepared and executed an Amended Correction Mineral Deed signed by all the grantees of the 2005 Mineral Deed. When the Respondents claimed the 2013 Amended Correction Mineral Deed was invalid because it was not signed by all the subsequent grantees of the mineral interests, this lawsuit ensued. While the trial court held that the 2013 Amended Correction Mineral Deed was effective and limited Respondents' mineral rights to the original grantee's life estate, the court of appeals reversed and rendered judgment that the Amended Correction was invalid without the subsequent purchasers' signatures. That decision raises two questions that must be analyzed by this Court:

1. May subsequent grantees rely on a recorded mistake when they are aware of it or otherwise not bona fide purchasers?

The Texas Property Code correction provisions have always respected and been subject to the recording statute. *See* Tex. Prop. Code § 13.001.¹ The conveyancing instrument may be corrected, but not to the detriment of a subsequent creditor or subsequent purchaser for valuable consideration without notice. *See* Tex. Prop. Code § 5.030(c).² Thus, the integrity of recorded documents is protected, and the rights of bona fide creditors or purchasers for valuable consideration without notice cannot be undermined by a subsequent correction instrument.

However, the recording statute and Texas law have never given rights to others with notice, or lacking consideration, to take advantage of an error or an unrecorded interest. The appellate court failed to consider this long-standing principle of real property and public recording law. Should this principle be changed by a construction of the correction statutes that simply focuses on the form of the correction or other technicality?

For the same reason, the standing of the parties in this particular case to challenge the correction is suspect. The 2012 Royalty Deed from the original grantee to Respondent Yates only conveyed the grantor's "right, title and interest in" the mineral interests. Under long-

¹ Section 13.001(a) reads: "A conveyance of real property or an interest in real property or a mortgage or deed of trust is void as to a creditor or to a subsequent purchaser for a valuable consideration without notice unless the instrument has been acknowledged, sworn to, or proved and filed for record as required by law."

² Section 5.030(c) reads: "A correction instrument is subject to the property interest of a creditor or a subsequent purchaser for valuable consideration without notice acquired on or after the date the original instrument was acknowledged, sworn to, or proved and filed for record as required by law and before the correction instrument has been acknowledged, sworn to, or proved and filed for record as required by law."



established law established by the Court, this is in the nature of a quit claim and the knowledge of the parties and rights of others are impressed upon the grantees to the conveyance. *See Rogers v. Ricane Enterprises, Inc.*, 884 S.W.2d 763, 769 (Tex. 1994); *Woodward v. Ortiz*, 150 Tex. 75, 83, 237 S.W.2d 286, 291 (1951); *Cook v. Smith*, 107 Tex. 119, 122, 174 S.W. 1094, 1095 (1915). Yates and the subsequent grantees under the quit claim chain of title are not bona fide purchasers as a matter of law, and therefore they cannot rely on the recorded error and challenge the correction. Their rights were subject to the equitable rights of others to have the conveyance corrected. Tex. Prop. Code § 5.030(c).

2. Who must execute a material correction instrument when there have been subsequent conveyances?

Property Code Section 5.029 specifies the signatories as: “the parties to the original transaction or the parties’ heirs, successors, or assigns, as applicable.” If the grantor and grantee are still alive or in existence, this is simple. If not, it provides for an heir if an individual is deceased; a successor if an entity no longer exists; or an assign if the rights and obligations of a party have been assigned. However, the statute says nothing about requiring a subsequent grantee, whose rights could not be affected if it is a bona fide purchaser for value without knowledge.

It is accepted law that a grantee is not an assign,³ but the appellate court suggested that all parties in the chain of title, including the subsequent grantees, must execute the correction instrument. If this requirement is to be imposed upon the statute, this Court is respectfully requested to make that clear.⁴ However, in doing so, the Court should consider whether the subsequent grantee has any knowledge of the error sought to be corrected. If the grantee does not, is that grantee competent to execute a correction instrument, and does requiring the grantee’s execution vitiate the bona fide purchaser protection in Section 5.030(c)? But if the grantee does have knowledge of the error, then it likely cannot be a bona fide purchaser and thus takes title subject to any correction instrument, regardless of whether it executes the correction instrument.

Ultimately, the importance of the correction provisions to the real estate industry cannot be understated. Buyers, sellers, lenders, borrowers, attorneys and title companies prepare and rely on correction instruments to rectify errors in conveyances and provide a true statement of the intended transaction. Moreover, correction instruments preserve the reliability of our recording system in this State. A valid correction should not be thwarted by a non-bona fide

³ *See, e.g., West v. Brenntag Southwest*, 168 S.W.3d 327, 333 (Tex. App.—Texarkana 2005, pet. denied) (precluding real property grantee from suing for injury to real property where injury occurred prior to grantee’s acquisition of the property and there was no assignment of the prior landowner’s cause of action to the grantee).

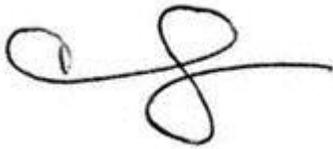
⁴ Legislation is likely needed to add a requirement that notice be given to subsequent parties in the chain of title. This is already partly in place for a non-material correction instrument. *See* TEX. PROP. CODE § 5.028(d)(2). While recording provides constructive notice, it would be desirable for actual notice to be provided to subsequent parties in the chain of title. This court has previously addressed this in other contexts by providing that limitations does not run until actual notice exists. *See, e.g., Cosgrove v. Cade*, 468 S.W.3d 32 (Tex. 2015).



purchaser, just as adherence to the form of a correction instrument should not come at the expense of a bona fide lender or purchaser.

Accordingly, TLTA respectfully requests guidance from this Court as to the requirements for parties to an effective material correction when there has been a subsequent conveyance. The real estate and title industries rely heavily on the ability to correct material errors in recorded instruments, and the varying interpretations of Property Code Sections 5.029 and 5.030, highlighted by the history of this case, demonstrate the urgent need for clear instruction on how to do so.

Sincerely,

A handwritten signature in black ink, consisting of a series of loops and a horizontal line extending to the right.

Aaron Day
Director of Government Affairs & Counsel
Texas Land Title Association
aaron@tlta.com
State Bar No. 24037899

CERTIFICATE OF COMPLIANCE

I certify that this document contains 1354 words in the portions of the document are subject to the word limits of the Texas Rule of Appellate Procedure 9.4(i), as measured by the undersigned's word-processing software.

/s/ Aaron Day

Aaron Day

CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2020, a true and correct copy of the foregoing amicus letter has been served by electronic mail to all attorneys of record.

/s/ Aaron Day

Aaron Day

Counsel for Petitioner:

Joseph R. Knight
Alithea Z. Sullivan
EWELL, BROWN, BLANKE & KNIGHT LLP
111 Congress Avenue, 28th Floor
Austin, TX 78701

David Jed Williams
Stephanie L. Curette
HORNBERGER FULLER & GARZA,
INCORPORATED
7373 Broadway, Suite 300
San Antonio, TX 78209

Gregory A. Richards
PATILLO RICHARDS, P.C.
280 Thompson Drive
Kerrville, Texas 78028

Counsel for Respondent:

Michael J. Byrd
Murry B. Cohen
AKIN, GUMP, STRAUSS, HAUER FELD, LLP
1111 Louisiana Street, 44th Floor
Houston, Texas 7002

R. Laurence Macon
THE MACON LAW FIRM, PLLC
750 Rittiman Road
San Antonio, Texas 78209

Corey F. Wehmeyer
Benjamin Robertson
SANTOYO MOORE WEHMEYER P.C.
12400 San Pedro Ave., Suite 300
San Antonio, Texas 78216

Thad T. Dameris
Hannah Sibiski
ARNOLD & PORTER KAYE SCHOLER LLP
700 Louisiana Street, Suite 4000
Houston, Texas 77002

/s/ Aaron Day

Aaron Day



Automated Certificate of eService

This automated certificate of service was created by the e filing system. The filer served this document via email generated by the e filing system on the date and to the persons listed below:

Aaron Day on behalf of Aaron Daniel Day
Bar No. 24037899
aaron@tita.com
Envelope ID: 43594035
Status as of 06/09/2020 14:25:00 PM -05:00

Associated Case Party: Broadway National Bank, Trustee of the Mary Frances Evers Trust

Name	BarNumber	Email	TimestampSubmitted	Status
Joseph R.Knight		jknight@ebbklaw.com	6/9/2020 2:18:42 PM	SENT
Alithea Z.Sullivan		asullivan@ebbklaw.com	6/9/2020 2:18:42 PM	SENT

Associated Case Party: EOG Resources, Inc.

Name	BarNumber	Email	TimestampSubmitted	Status
Corey F.Wehmeyer		cwehmeyer@smwenergylaw.com	6/9/2020 2:18:42 PM	SENT
Benjamin Robertson		brobertson@smwenergylaw.com	6/9/2020 2:18:42 PM	SENT
Henri Inocencio		hinocencio@swenergylaw.com	6/9/2020 2:18:42 PM	SENT

Associated Case Party: Yates Energy Corporation

Name	BarNumber	Email	TimestampSubmitted	Status
Heather Peckham		hpeckham@akingump.com	6/9/2020 2:18:42 PM	SENT
Michael JByrd		mbyrd@akingump.com	6/9/2020 2:18:42 PM	SENT
Murry B.Cohen		mcohen@akingump.com	6/9/2020 2:18:42 PM	SENT
Murry BCohen		judge@judgemurrycohen.com	6/9/2020 2:18:42 PM	SENT

Case Contacts

Name
Susie Reeves
Stephanie L.Curette
David Jed Williams
Hannah Demarco Sibiski
Gregory A. Richards

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below:

Aaron Day on behalf of Aaron Daniel Day
Bar No. 24037899
aaron@tita.com
Envelope ID: 43594035
Status as of 06/09/2020 14:25:00 PM -05:00

Case Contacts

Stephanie Curette	24076780	scurette@hfgtx.com	6/9/2020 2:18:42 PM	SENT
Andrew Bender	24084290	abender@thebenderfirm.com	6/9/2020 2:18:42 PM	SENT
Thad T. Dameris	5345700	thad.dameris@arnoldporter.com	6/9/2020 2:18:42 PM	SENT
Michael J. Byrd	3561445	mbyrd@akingump.com	6/9/2020 2:18:42 PM	SENT
Marcy Castanon		mcastanon@hfgtx.com	6/9/2020 2:18:42 PM	SENT
Deborah SmithMcClure		debmcclure@mac.com	6/9/2020 2:18:42 PM	SENT
Grace Ojionuka		Grace.Ojionuka@arnoldporter.com	6/9/2020 2:18:42 PM	SENT
Catherine Hodges		catherine.hodges@arnoldporter.com	6/9/2020 2:18:42 PM	SENT

Associated Case Party: Glassell Non-Operated Interests, Ltd.

Name	BarNumber	Email	TimestampSubmitted	Status
David J.Weiner		David.Weiner@arnoldporter.com	6/9/2020 2:18:42 PM	SENT