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July 7, 2021

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

REF: No. 19-0233; *Concho Resources, Inc. et al. v. Marsha Ellison, d/b/a Ellison Lease Operating*

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.

TLTA appreciates the Court's contractual approach to the Boundary Stipulation and the application of estoppel based on Mr. Ellison's execution of the unrecorded October 2008 letter. However, the Association respectfully requests that the Court limit its opinion to the parties executing the Boundary Stipulation and October 2008 letter and make clear that freedom of contract, estoppel, and avoidance of court proceedings are the only bases of the Court's determination – not real property principles or land title records.

Under the Court's freedom of contract analysis, the parties were free to agree to establish a new boundary line, even one based on a subjective uncertainty. It accomplished the goal of parties reaching an agreement and not burdening the court system. However, the fiction of the Boundary Stipulation is that an agreement/contract settled a subjective question as to the location of the boundary between the Northwest and Southeast tracts at issue. In reality, it sought to retroactively change a boundary line objectively established by long standing legal principles almost 80 years earlier. That change resulted in the transfer of approximately 154 acres to a new

owner, but without actual grant language or the acceptance of all vested owners, including the mineral lessees.[1], [2]

A deed has always required a conveyance signed by the owner(s), with a legal description, and delivery to the grantee. TEX. PROP. CODE § 5.021. It follows from the delivery requirement that a deed can never be retroactive. *See Tuttle v. Turner, Wilson & Co.*, 28 Tex. 759, 773 (1866) ("A deed takes effect only from the date of its delivery, which may be either actual or constructive."). Even boundary agreements containing proper grant and convey language and a legal description are prospective only. A correction instrument can be utilized to correct a mistake based on the original transaction, but as held by this Court in *Myrad Properties Inc. v. LaSalle Bank National Association GMAC*, it cannot be utilized to add or subtract tracts of land. 300 S.W.3d 746, 750 (Tex. 2009).

The Texas Legislature subsequently enacted the Correction Instrument statutes at Property Code §§ 5.027 – 5.030 to allow retroactive application under certain circumstances and avoid litigation something this Court has lauded as a worthy goal. But in the Opinion, this Court explicitly rejected the appellate court's finding that the Boundary Stipulation was "close in nature to 'correction deed'" and found that "[u]nlike correction deeds . . . the boundary stipulation does not purport to 'replace[]' either the 1927 deed or the 1930 deed". It is an agreement between owners of adjacent property regarding the location of the boundary between their tracts, and nothing in the statutory provisions governing correction deeds affects the validity of such an agreement." Opinion n. 11.

So if the Boundary Stipulation cannot be construed as a material correction deed, it should be governed by *Myard's* prohibition against giving retroactive effect to agreements – however they may be characterized – that convey an additional, separate parcel of land. *See* 300 S.W.3d at 750. Allowing the Boundary Stipulation to have retroactive effect back to 1987 raises the same concerns and risks the same harms this Court sought to prevent in *Myrad*, namely the "introduc[tion of] unwarranted and unnecessary confusion, distrust, and expense into the Texas real property records system. For example, it could require those who must rely on such records to look beyond the deed and research the circumstances of ownership to make sure that no

[1] *See e.g., Kirby Lumber Corp. v. Southern Lumber Co.*, 196 S.W.2d 387, 389 (1946) (finding that judgment concerning real property is not binding on parties with a vested interest in the property that were not joined as parties or in privity with the parties).

[2] Notably, the cases cited by the Court in support of contractual resolutions of boundary disputes are inapposite to the facts before the Court. In *Houston Oil Co. of Tex. v Singleton*, 44 S.W.2d 479, 479 (Tex. Civ. App.—Beaumont 1931, writ ref'd), the boundary line agreement between two neighboring landowners in Orange County included express conveyance language, wherein the western tract owner "**quitclaim[ed]** to any and all improvements lying S.E. of aforesaid line and on Sec. 8 of the lands of the International Railroad grant in the said County of Orange, Texas, and now belonging to the New York and Texas Land Co., Ltd." (emphasis added). In *Levy v. Maddux*, 16 S.W 877, 877-78 (Tex. 1891), the disputed strip of land between two residential tracts measured only 22 inches by 70 feet, nowhere near the 154 acres at issue in this suit. And both cases involved admitted and objective controversies between adjacent landowners as to the true location of the boundaries. The heirs of Singleton argued their father signed the boundary line instrument under duress in order to avoid a threatened lawsuit by the adjacent owner. 44 S.W.2d at 479-80. The neighbors in Levy each hired their own surveyor, both of whom identified the agreed upon boundary as the true boundary between the tracts. 16 S.W. at 877.

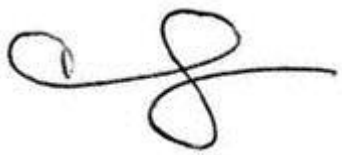
conveyance mistake such as that before us in this case was made, undermining the entire purpose of record notice." *Id*. at 750-51.

The harm is amplified in this case by the fact that Mr. Ellison's accession to the Boundary Stipulation via the October 2008 letter was never recorded. Without evidence that all parties in title agreed to the change in boundaries, a title examiner reviewing the mineral estate could never know whether the agreement was valid without a search beyond the recorded documents. While the Court held that the Boundary Stipulation was a valid agreement based on Mr. Ellison subsequent ratification, the Court did not state the impact of the recorded Boundary Stipulation on the real property records. Enforcing the agreement among the parties according to contract and equitable defenses may make sense in the right circumstances, but allowing it to change the state of clear recorded title which may be relied upon by many, including unknown interests, does not. Confusion and uncertainty are injected into the record system, undermining the purpose of record notice.

The question now arising from the Court's holding is what credence or validity – if any – should be accorded to the Boundary Stipulation by a stranger to the document? Are subsequent mineral owners bound by the agreement, when there is no record evidence that all vested title owners executed it? And if it is truly retroactive, what about the affected unrecorded and equitable rights that may exist – the lien claimant, fraudulent transfer claim, bankruptcy trustee, or judgment holder about to file its claim?

Accordingly, TLTA respectively requests the Court to limit its opinion to the parties and the issues before it and expressly state that the Boundary Stipulation does not affect a real property conveyance that is binding on third parties. The Boundary Stipulation clearly transfers real property and without joinder of other interest holders does not include their interests. The Court's opinion as currently worded leaves substantial confusion as to whether a contractual agreement, such as the Boundary Stipulation, with an off-record binding joinder, is sufficient as a real property transfer. Such confusion will do immense harm to the functionality and reliability of Texas' recording system for real property records, which is not what the Court or the parties intended. Therefore, a clarification by the Court is warranted, limiting this opinion to the Court's contractual analysis and precluding any reading that allows parties to utilize an agreement and estoppel to transfer real property, whether retroactive or prospective.

Sincerely,



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I certify that this document contains 1674 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
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CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2021, a true and correct copy of the foregoing amicus letter has been served by electronic mail to all attorneys of record.

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