[Cite as *Mineral Dev., Inc. v. SWN Production (Ohio), L.L.C.*, 2023-Ohio-4749.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MONROE COUNTY

MINERAL DEVELOPMENT INC.,

Plaintiff-Appellant,

v.

SWN PRODUCTION (OHIO), LLC, et al.,

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case Nos. 23 MO 0004; 23 MO 0005

Civil Appeal from the
Court of Common Pleas of Monroe County, Ohio
Case No. 2022-043

BEFORE:
Cheryl L. Waite, David A. D'Apolito, Mark A. Hanni, Judges.

JUDGMENT:
Reversed and Remanded.
Declaratory Judgment Issued in Favor of Appellants.

Atty. Daniel P. Corcoran, Theisen Brock, L.P.A., 424 Second Street, Marietta, Ohio 45750, for Plaintiff-Appellant Mineral Development, Inc.

Atty. Nils Peter Johnson, Johnson & Johnson, 12 West Main Street, Canfield, Ohio 44406, for Plaintiffs-Appellants Mackey, et al.

Atty. Paul N. Garinger, and *Atty. David J. Dirisamer*, Barnes & Thornburg, LLP, 41 South High Street, Suite 3300, Columbus, Ohio 43215, for Defendants-Appellees SWN, et al.

Atty. Todd M. Kildow, Emens Wolper Jacobs & Jasin Law Firm Co., LPA, 250 West Main Street, Suite A, Saint Clairsville, Ohio 43950, for Defendants-Appellees Schilling, et al.

Dated: December 21, 2023

WAITE, J.

{¶1} This is an appeal of the trial court's interpretation of a deed containing two royalty reservations on two parcels conveyed in a 1936 deed. Appellant Mineral Development, Inc.'s ("Mineral Development") complaint asked that the trial court determine the 1936 deed in question contained a floating 1/2 of oil and gas royalties on the first parcel, and a floating 1/4 of royalties on the second parcel. Appellant argued in the alternative that the royalty reservation provided a fixed 1/16 and 1/32 royalty on the two parcels. Appellants Dianne R. Mackey, James Martin, and Janet Clark ("Mackey Appellants" or "Mackey Defendants"), although listed as defendants in the complaint, have an interest in the royalty reservations that aligns with Appellant Mineral Development's interest.

{¶2} Appellee SWN Production (Ohio), LLC, ("SWN Production") argued that the royalty reservations did not need interpretation and simply meant what they said. In SWN Production's view, this meant the royalty on the first parcel was 1/16, to be multiplied by an unspecified royalty, and on the second parcel was 1/32, to be multiplied by an unspecified royalty. Using a typical 1/8 royalty as an example, SWN Production contends amounts to 1/16 times 1/8, or a 1/128 royalty on the first parcel. These are three dramatically different possible interpretations of the deed reservations here, giving rise to the complaint for declaratory judgment.

{¶3} The trial court dismissed Appellant Mineral Development's complaint and granted summary judgment to SWN Production on all counts. It determined that the 1936 Deed under review was clear on its face and did not need interpretation, and certainly not the one advanced by Appellants. The trial court is incorrect. The 1936 deed reservations are ambiguous, and thus require some degree of interpretation. Based on a reading of the entire deed, we hold that the royalty reserved is a fixed fractional royalty: 1/16 royalty on parcel one; and 1/32 royalty on parcel two. However, this amount is not to be further reduced by any further multipliers. We also hold that the fractions given in the royalty reservations are specific, and do not represent unspecified floating values. The judgment of the trial court is reversed and declaratory judgment is issued in favor of Appellants on the first claim in the complaint. The case is remanded for determination on the remaining claims and counterclaims, as well as to determine royalty distributions.

Facts and Procedural History

{¶4} On February 3, 2022, Mineral Development filed a complaint for declaratory judgment and quiet title against 17 defendants including SWN Production and the Mackey Defendants (Appellants here). The real property that is the subject of this appeal consists of 80 acres in sections 16 and 22 of Green Township, Monroe County. There are two 40-acre tracts: the southwest quarter of section 16 (the "Eastern Forty Acres"); and the southeast quarter of section 22 (the "Western Forty Acres). The complaint also included claims regarding quiet title, breach of lease, unjust enrichment, and a demand for an accounting.

{¶5} In 1903, C.B. Clegg acquired the Eastern Forty Acres from James Clegg and Susan Clegg through a warranty deed. Monroe County Deed Vol. 61, Page 624.

{¶6} In 1911, Sarah J. and Isaac H. Fox, and M. Alice and George W. Gray deeded the Western Forty Acres to C.B. Clegg (the "1911 Deed"). It was recorded on April 12, 1912. Monroe County Deed Vol. 78, Page 122. The deed contained the following reservation (the "Fox/Gray Reservation"):

> The grantors, their heirs and assigns reserve and except from this deed one half of the royalty of all oil produced and saved therefrom, that is to say: 1/16 of all the oil produced and saved from said premises, and one half of all monies received for rentals for gas wells that may be drilled on said premises. The above reservation as to oil and gas royalty is to extend for the period of sixty years from the date of this deed, at the expiration of which time, said reservation is to cease.

{¶7} On March 28, 1936, C.B. Clegg and Elizabeth G. Clegg conveyed both parcels by deed to John and Missouri C. Schilling (the "1936 Deed"). Monroe County Deed Vol. 105, Page 522.

{¶8} As to the Western Forty Acres, the 1936 Deed recited the 1911 Fox/Gray Reservation for reference purposes, and then added a new reservation (the "Clegg Western Reservation"):

> The grantors, their heirs and assigns, hereby reserve and except from this deed the 1/2 of the 1/16, being the 1/32 of the royalty of all oil and gas underlying the above described tract of land.

{¶9} As to the Eastern Forty Acres, the 1936 Deed added a new reservation (the "Clegg Easter Reservation"):

> The grantors, their heirs and assigns, hereby reserve and except from this deed the 1/2 of the 1/8, being the 1/16 of the royalty of all the oil & gas underlying the above described 40 acres.

{¶10} Through a series of conveyances, the Western Forty Acres is now owned as follows: Ronald L. and Kathy Jo Schilling, 29.216 acres; Donald C. and Christina L. Schilling, .676 acres; Donald J. and Sandra K. Ady, .108 acres. The parties do not appear to dispute that these six persons also own the oil and gas rights reserved in the 1911 Fox/Gray Reservation that expired in 1971. These five persons further own the oil and gas rights not reserved by the Clegg Western Reservation.

{¶11} Through a series of conveyances, the Eastern Forty Acres is now owned as follows: Donald J. and Sandra K. Ady, 1.412 acres; James Schilling, 34.631 acres; James R. Schilling, 2.14 acres; Judy L. Robison, 1.817 acres. These six persons also own the oil and gas rights not reserved by the Clegg Eastern Reservation. Once again, the parties do not appear to dispute this.

{¶12} The Clegg royalty interests, including both the Eastern and Western Reservations, are now proportionately owned as follows: Mineral Development, Inc., 7/10ths; Charles R. Clegg, 1/20th; the heirs, successors, and assigns of Leslie G. Brantingham, 1/20th; the heirs, successors, and assigns of Wanda W. Martin, 1/5th. The heirs and assigns of Wanda W. Martin (Appellants Dianne R. Mackey, Janet E. Clark,

and James E. Martin) each own one-third of Wanda W. Martin's share of the Clegg interests, being 1/15th for each.

{¶13} In 2013, the surface owners began entering into oil and gas leases. It is alleged that some of these leases contain royalty provisions greater than the typical 1/8th royalty. The royalties are alleged to be 15%-20% rather than the typical 12.5%. The surface owners have entered into leases with Eclipse Resources I, LP, a predecessor in interest of SWN Production. SWN Production has drilled wells on the two parcels and has an interest in the leases. It is alleged that SWN Production has underpaid royalties to Appellants or has held royalties in suspense.

{¶14} Appellant Mineral Development's complaint raised two main issues it sought to have resolved by declaratory judgment. The first was that any time the phrase "1/2 of the 1/8" was mentioned, it represented a placeholder signifying 1/2 of the actual royalty fraction used in any specific lease. This assertion was significant because the active leases on the property are alleged to have royalties greater than the standard 1/8th royalty, and under Appellant's theory, it would receive the benefit of the larger royalty fraction. Thus, it sought to have the royalty amount be declared a “floating” royalty interest. The second alternative assertion was that the oil and gas interest reserved by the Cleggs was a fixed 1/16 royalty in the Clegg Eastern Reservation, and a fixed 1/32 royalty in the Clegg Western Reservation. Appellant alleged that SWN Production was utilizing a third interpretation of the Clegg Reservations that provided for a much smaller royalty fraction; 1/16 times a 1/8 royalty, which amounted to a 1/128th royalty in the Clegg Eastern Reservation, and 1/32 times 1/8, amounting to a 1/256th royalty in the Clegg Western Reservation. The essence of the declaratory judgment complaint asked the

court to determine which of these three options was the proper interpretation of the Clegg Reservations.

{¶15} Mineral Development filed a motion for partial summary judgment on August 30, 2022, arguing its two alternative interpretations. SWN Production filed a motion for summary judgment on August 31, 2022. SWN Production contended that the Clegg reservations were unambiguous and reserved 1/16 (or 1/32) “of the royalty.” The Mackey Defendants, each one being an owner of 1/15th of the Clegg Reservation interest, filed a motion for partial summary judgment on September 1, 2022.

{¶16} The trial court issued its judgment on January 18, 2023, granting SWN Production's motion for summary judgment and overruling the other motions, and the complaint was dismissed. Appellant Mineral Development filed an appeal on February 17, 2023, in Appeal No. 23 MO 0004, and has filed merit and reply briefs. The Mackey Appellants filed their appeal on February 21, 2023, in Appeal No. 23 MO 0005, and have filed merit briefs under both appeal numbers. Appellee SWN Production filed a single response brief applicable to both appeals. Defendants-Appellees Ronald Schilling, Kathy Schilling, and James R. Schilling (the "Schilling Appellees") filed merit briefs in both appeals.

{¶17} Each Appellant raises one assignment of error. Appellant Mineral Development mistakenly placed its assignment of error in its reply brief rather than its merit brief. Although this is a violation of the Rules of Appellate Procedure, there is no question about the issue being raised by Mineral Development, and there are other Appellants in this appeal raising the same arguments. We will treat Appellant Mineral Development's assignment of error as if it were included in the merit brief.

MINERAL DEVELOPMENT, INC., ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED WHEN IT GRANTED APPELLEES' MOTIONS FOR SUMMARY JUDGMENT CONCERNING TITLE AND DENIED MINERAL DEVELOPMENT'S MOTION FOR SUMMARY JUDGMENT CONCERNING TITLE.

MACKEY APPELLANTS ASSIGNMENT OF ERROR

THE TRIAL COURT'S CHARACTERIZATION OF THE CLEGG INTEREST AS " '1/16 OF THE ROYALTY OF ALL THE OIL AND GAS FOR THE EASTERN FORTY ACRES' AND '1/32 OF THE ROYALTY OF ALL THE OIL AND GAS' FOR THE WESTERN FORTY ACRES," IS PLAINLY CONTRARY TO THE INTENT OF THE PARTIES.

Summary Judgment Standard

{¶18} An appellate court conducts a de novo review of a trial court's decision to grant summary judgment, using the same standards as the trial court set forth in Civ.R. 56(C). *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Before summary judgment can be granted, the trial court must determine that: (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most favorably in favor of the party against whom the motion for summary judgment is made, the conclusion is adverse to that party. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d

267 (1977). Whether a fact is "material" depends on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc.*, Inc., 104 Ohio App.3d 598, 603, 662 N.E.2d 1088 (8th Dist.1995).

{¶19} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." (Emphasis deleted.) *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 662 N.E.2d 264 (1996). If the moving party carries its burden, the nonmoving party has a reciprocal burden of setting forth specific facts showing that there is a genuine issue for trial. *Id.* at 293, 662 N.E.2d 264. In other words, when presented with a properly supported motion for summary judgment, the nonmoving party must produce some evidence to suggest that a reasonable factfinder could rule in that party's favor. *Brewer v. Cleveland Bd. of Edn.*, 122 Ohio App.3d 378, 386, 701 N.E.2d 1023 (8th Dist.1997).

{¶20} The evidentiary materials to support a motion for summary judgment are listed in Civ.R. 56(C) and include the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact that have been filed in the case. In resolving the motion, the court views the evidence in a light most favorable to the nonmoving party. *Temple*, 50 Ohio St.2d at 327, 364 N.E.2d 267.

Arguments

{¶21} This appeal involves the interpretation of two oil and gas reservations in a 1936 deed. The Appellants' arguments and interpretations substantially overlap and will

be treated together. Appellees and the trial court have settled on a third interpretation. We will examine each one in turn.

{¶22} Appellant Mineral Development's complaint, and its motion for summary judgment, argued that two small phrases in the Clegg Reservations (which we will refer to a sub-clauses) created an ambiguity as to exactly how much of the oil and gas royalties were being reserved. The Clegg Eastern Reservation states: "The grantors, their heirs and assigns, hereby reserve and except from this deed the 1/2 of the 1/8, being the 1/16 of the royalty of all the oil & gas" were reserved. The two sub-clauses in question are "the 1/2 of the 1/8" and "being the 1/16 of the royalty of all the oil & gas." Appellants contend that the words "the 1/2 of the 1/8" are the operative and most significant words in the royalty reservation.

{¶23} Appellants believe that the use of the fraction "1/2" combined with the definite article "the" in front of "1/8" indicates that the Cleggs were reserving 1/2 of their entire royalty interest in the property. They posit that the fraction "the 1/8" was shorthand for "our royalty interest." It is true, as Appellants point out, that the word "the" often limits or particularizes the noun that follows it, unlike the indefinite article "a" or "an." *Black v. Ryan*, 11th Dist. Lake No. 2011-L-030, 2012-Ohio-866, ¶ 37. According to Appellants, the phrase "1/2 of the 1/8" does not refer to the fraction 1/16. They argue that it should be understood as a floating or flexible calculation that takes into account any royalty percentage in a lease, whether or not it was the usual 1/8 royalty. Under this interpretation, Appellants are entitled to one half of any royalty contained in an oil and gas lease on the property, even if that royalty is greater than 1/8 (such as a 1/6 or 1/5 royalty). This is apparently the situation in some of the leases at issue in this appeal.

{¶24} Appellants' alternative argument is that the two sub-clauses, when read together, indicate at minimum a fixed fraction of 1/16 of the entire royalty interest in the property. Appellants contend that Appellees and the trial court rely on a third, strained interpretation of the two sub-clauses in which the Cleggs reserved only 1/16 which was to be multiplied by a fractional royalty, i.e., 1/16 times a 1/8 royalty, or a total of 1/128 royalty. The remaining 127/128ths royalty flows to the other owners.

{¶25} It has been difficult to fully understand Appellees' argument because nowhere in the record do they plainly state they are actually using the fraction 1/128 (or in the case of the Clegg Western Reservation, 1/256 royalty). At oral argument in this matter it became very clear that in granting declaratory judgment to Appellant the trial court actually determined that the Clegg reservation is 1/16 (or 1/32) multiplied by yet another royalty fraction: the royalty amount set forth in any current leases.

{¶26} Before delving deeper into the substance of Appellants' argument, we must determine if the language in question can be clearly, consistently, and unambiguously interpreted on its face, as the trial court seems to conclude. The basic law governing the interpretation of leases is not in dispute in this appeal. Deeds are a type of contract, and the construction and interpretation of contracts is a matter of law, which is reviewed de novo. *Long Beach Assn., Inc. v. Jones*, 82 Ohio St.3d 574, 576, 697 N.E.2d 208 (1998). Under a de novo review of a contract, an appellate court may interpret the language of the contract and substitute its interpretation for that of the trial court. *Washington v. Covelli*, 2015-Ohio-2928, 35 N.E.3d 578, ¶ 115 (7th Dist.).

{¶27} Written instruments "are to be interpreted so as to carry out the intent of the parties, as that intent is evidenced by the contractual language." *Skivolocki v. East Ohio*

Gas Co., 38 Ohio St.2d 244, 313 N.E.2d 374 (1974), paragraph one of the syllabus. "When construing a deed, a court must examine the language contained within the deed, the question being not what the parties meant to say, but the meaning of what they did say, as courts cannot put words into an instrument which the parties themselves failed to do." *Johnson v. Consol. Coal Co.*, 7th Dist. No. 13 BE 3, 2015-Ohio-2246, ¶ 15. "If the terms of the written instrument are clear and unambiguous, courts must give the words their plain and ordinary meaning * * *." *Alexander v. Buckeye Pipe Line*, 53 Ohio St.2d 241, 246, 374 N.E.2d 146 (1978); *Olmstead v. Lumbermens Mutl. Ins. Co.*, 22 Ohio St.2d 212, 216, 259 N.E.2d 123 (1970).

{¶28} When the plain language of the written instruments is ambiguous, then a court may look to parol evidence to resolve the ambiguity and ascertain the parties' intent. *Illinois Controls, Inc. v. Langham*, 70 Ohio St.3d 512, 521, 639 N.E.2d 771 (1994); *City of Steubenville v. Jefferson Cty.*, 7th Dist. No. 07JE51, 2008-Ohio-5053, ¶ 22. "Parol evidence, such as a map, plat or other deed, may be incorporated by reference within a deed, or may be utilized to explain any ambiguities in the deed description." *Scarberry v. Lawless*, 4th Dist. Lawrence No. 08CA7, 2009-Ohio-2212, ¶ 13.

{¶29} "Individual terms in a contract should not be defined in isolation, but rather as a whole within the context of an entire agreement." *Wildcat Drilling, LLC v. Discovery Oil & Gas*, LLC, 7th Dist. Mahoning No. 17 MA 0018, 2018-Ohio-5392, ¶ 6; see also *Tera, LLC v. Rice Drilling D, LLC*, 2023-Ohio-273, 205 N.E.3d 1168 (7th Dist.). "In the construction of a contract courts should give effect, if possible, to every provision therein contained, and if one construction of a doubtful condition written in a contract would make that condition meaningless, and it is possible to give it another construction that would

give it meaning and purpose, then the latter construction must obtain." *Shops at Boardman Park, L.L.C. v. Target Corp.*, 7th Dist. Mahoning No. 13 MA 0188, 2016-Ohio-7283, ¶ 12, quoting *Farmers' Nat. Bank v. Delaware Ins. Co.*, 83 Ohio St. 309, 94 N.E. 834 (1911), paragraph six of the syllabus.

{¶30} "[W]hen possible, a court's construction of a contract should attempt to harmonize all the provisions of the document rather than to produce conflict in them." *Summitcrest, Inc. v. Eric Petroleum Corp.*, 7th Dist. No. 12 CO 0055, 2016-Ohio-888, 60 N.E.3d 807, ¶ 35.

{¶31} Turning first to the Clegg Eastern Acres, once again, the two sub-clauses provide: "1/2 of the 1/8"; and "being the 1/16 of the royalty of all the oil & gas." These two sub-clauses are separated by a comma. We agree with Appellants that "the 1/8" appears to refer to something specific. The question is: 1/8 of what? As we noted in our recent case of *Moore Family Tr. v. Jeffers*, 7th Dist. Monroe No. 22 MO 0013, 2023-Ohio-3653, the reference to a 1/8 royalty interest in older deeds was fairly "ubiquitous" and was the expected and usual royalty fraction in an oil and gas reservation. *Id.* at ¶ 39; see also *Rochus v. Thompson*, 7th Dist. Noble No. 16 NO 0430, 2017-Ohio-4138, ¶ 6 (referring to the "standard" 1/8 royalty). Because the Cleggs owned the entirety of the 40 Eastern Acres, they owned all royalty rights in those acres. Based on historical reference, presumably the royalty interest the Cleggs, themselves, held in the Eastern Acres was a 1/8 interest.

{¶32} As we observed in *Moore*: "A royalty has been defined as an agreed return paid for oil or gas reduced to possession and taken from the leased premises, and as a share of the profits or proceeds from gas and oil operations. An oil and gas 'royalty' has

been described as that fractional interest in the production of oil or gas that was created by the owner of land, either by reservation when the mineral lease was entered into, or by direct grant to a third person." *Id.* at ¶ 25, citing *Buegel v. Amos*, 7th Dist. Monroe No. 577, 1984 WL 7725. A royalty right is not a right to remove oil and gas, but rather, "a right to be compensated for a fractional part of any oil and gas that has been removed from the ground or may be removed in the future[.]" *Id.* at ¶ 27. A right to royalties, when contained in a deed, is generally a perpetual right unless otherwise limited within the deed. *Id.* at ¶ 25.

{¶33} When the word "royalty" is used in a deed or lease, it is not always clear on a cursory review whether it is being used to describe the entire royalty interest in a property (100% of the profits taken from oil and gas from which a fraction will be kept by the landowner), or if it refers to the surface owner's fractional interest, often expressed as a 1/8 royalty. This confusion arose in some very significant recent oil and gas cases in Ohio, such as *West v. Bode*, 162 Ohio St.3d 293, 2020-Ohio-5473, 165 N.E.3d 298. Throughout the *West* case the same royalty interest is expressed as: "one-half of the royalty"; "the one half royalty"; "1/16 royalty interest"; and "1/16 of the royalty." All of these phrases refer to the same interest, even though it was described both as "royalty" and "of the royalty." In other words, the terms "royalty" and "of the royalty" are often used synonymously. Since the size of the royalty interest was not the matter under review in the *West* appeal, the exact meaning of the seemingly conflicting terms was not further explored.

{¶34} In determining the first sub-clause of the Eastern Reservation, we must initially conclude the Cleggs were reserving one half of what they owned, which was a 1/8

royalty interest in the Eastern Acres. As earlier discussed, it was also fairly common in older deeds for grantors to reserve one-half of their royalty interest in the deed, expressed as both 1/2 of 1/8, or as 1/16. *Moore* at ¶ 39. To this point, there is nothing particularly unusual in the Eastern Reservation regarding the reserved royalty interest.

{¶35} Turning our review to the Western Acres, we are confronted with a slightly different provision. The Western Reservation states: "The grantors, their heirs and assigns, hereby reserve and except from this deed the 1/2 of the 1/16, being the 1/32 of the royalty of all oil and gas underlying the above described tract of land." The two sub-clauses on review are "1/2 of the 1/16" and "being the 1/32 of the royalty of all oil and gas." This language immediately raises a question: why has 1/8 from the Eastern Reservation been changed to 1/16 in the Western Reservation? There is no need to rely on parol evidence to answer this question because the answer is contained within the 1936 deed itself. Immediately preceding the Clegg Western Reservation is a recitation of a reservation from the 1911 deed from Sarah J. Fox, Isaac H. Fox, M. Alice Gray, and George W. Gray, to C.B. Clegg. In this quote to the 1911 reservation the grantors reserved "one half of the royalty of all oil produced and saved therefrom, that is to say: 1/16 of all the oil produced and saved from said premises, and one half of all monies received for rentals for gas wells that may be drilled on said premises." Therefore, it is apparent the Cleggs did not own all the royalties from the Western Acres. They owned half, and the Foxes/Grays reserved the other half of the royalties. The Cleggs' half of the royalties amounted to a 1/16 royalty. When the Cleggs transferred the Western Acres to John and Missouri C. Schilling in 1936, they held back half of what they owned, namely

"1/2 of the 1/16." In all other respects the prior interpretation of the first sub-clause of the Eastern Reservation applies to the first sub-clause of the Western Reservation.

{¶36} If the second sub-clauses of these two reservations simply mirrored the first sub-clause, the matter would end there, but they do not. Looking again to the Eastern Reservation, the second sub-clause states: "being the 1/16 *of the* royalty of all the oil & gas." (Emphasis added.) If the second sub-clause were to mirror the first, it undoubtedly would read "being the 1/16 royalty of all the oil & gas." The inclusion of the words "of the" appears to indicate a further reduction of the 1/16 royalty by another, as yet, undefined royalty fraction. Again, a royalty is a right to be compensated for a fractional part of any oil and gas removed from the ground or that may be removed in the future. Appellees and the trial court have interpreted this to mean the Cleggs were only reserving 1/16 of a presumed 1/8 royalty, which actually calculates to a 1/128 royalty.

{¶37} As noted in the *West* case, *supra*, the words "of the royalty" in a deed do not necessarily mean a fraction of the royalty, but may also signify the entire royalty interest. *West* at ¶ 7, 9 (where "royalty interest" and "of the royalty interest" are used synonymously). "[T]he word 'royalty' has been used 'loosely,' including in the broad sense of referring to the mineral interest itself. 1 Kuntz, A Treatise on the Law of Oil and Gas, Section 15.4." *Peppertree Farms, L.L.C. v. Thonen*, 167 Ohio St.3d 52, 2022-Ohio-395, 188 N.E.3d 1061, ¶ 25.

{¶38} Since the words "of the royalty" by themselves create confusion as to whether they mean "the entire royalty interest" or "of the 1/8 royalty," we must look to all the words in the document to decipher their meaning. There is nothing in the 1936 lease that would lead us to believe that the Cleggs intended anything other than the reservation

of 1/2 of the entire royalty interest owned in each of the two parcels, described as the fraction 1/16 (1/2 of 1/8) royalty in the Eastern Reservation, and 1/32 (1/2 of 1/16) royalty in the Western Reservation. In light of the entire deed, including the additional information provided by the language from the 1911 deed, the Cleggs' intent in the 1936 deed is clear.

{¶39} Appellees would have us rely entirely, or at least primarily, on the second sub-clauses of the Clegg Reservations to justify their payment of royalties, here. The second sub-clause reads "being the 1/16 of the royalty of all the oil & gas." Appellees contend that "the royalty" refers to a fraction of the entire royalty, such as 1/8. Thus, the royalty reserved by the Cleggs would be 1/16 times 1/8, i.e., 1/128. There is no basis for Appellees' interpretation or the trial court's approval of that interpretation. The phrase used was "of the royalty of *all* the oil and gas." (Emphasis added.) If there is a presumption to be made from the language in the deed, it would be that the Cleggs were reserving 1/16 of all the royalties received. There is no need to presume, here, because the first sub-clause, especially in light of the 1911 deed language, is clear in and of itself. Thus, the trial court's determination, which supports Appellees' contentions, is erroneous.

{¶40} Appellants argue alternatively that the Clegg Reservations reserved a floating 1/2 of the entire royalty interest in the Eastern Acres, and a floating 1/4 interest in the Western Acres. Appellants base this argument on the *Moore* decision, which recognized that 1/8 was the standard royalty in most older leases. Appellants seek to extend our reasoning in *Moore* so that the mention of a 1/8 fraction in a royalty reservation essentially amounts to a term of art; simply a shorthand method to denote "whatever royalty amount might appear in a future lease." This alternative argument is an overreach.

{¶41} Appellants argue that the 1911 Fox/Gray reservation referred to a 1/2 royalty twice: once regarding the oil royalty, which was also expressed as "1/16 of all the oil produced"; and once as "one half of all monies received for rentals for gas wells." Appellants contend that the second reference is clearly a floating amount based on real production. The dollar amount would "float" because it was intended to be based on the actual rentals agreed to in any future specific lease. Appellants contend that this "floating" concept should be applied to the Clegg Reservations as well for the sake of consistency, and the consistent interpretation is that the fraction 1/16 actually means "one half of the entire royalty."

{¶42} In this regard, Appellants' alternative interpretation is inconsistent, unnecessary, and a misreading of both the 1911 and 1936 reservation language. First, the rental clause in the Fox/Gray reservation may indeed refer to a floating rental income source, but the Clegg Reservations did not use this language. The Clegg Reservations do not mention rentals for gas. The Clegg Reservations refer to royalties for all oil *and* gas. Appellants have not indicated how rentals and royalties relate to one another, what a typical rental for gas would have been in 1911 or 1936, or why these different terms would be used. It would be pure speculation to assume that the Clegg Reservations also referred to gas rentals when they specifically provide "the royalty of all oil and gas."

{¶43} Appellants rely on our recent *Moore* case for the notion that a reference to a 1/2 royalty interest can refer to a floating interest even when the specific fraction 1/16 also appears in a royalty assignment. In *Moore*, though, the royalty assignment clearly contemplated and referred to two different situations: the fixed royalty in an existing 1894 lease, and the possible royalties in future leases. *Moore Family Tr. v. Jeffers*, 2023-Ohio-

3653, at ¶ 40. The royalty assignment under review took into account both situations and assigned one half of an existing 1/8 lease royalty (being a 1/16 royalty), as well as one half of any royalties from future leases. Our holding in *Moore* focused on the exact terms of the 1896 royalty assignment under review. *Moore* does not apply here, because this case does not contain the same language or have the same problem of interpretation that existed in *Moore*. Appellants ask us to set a bright-line rule not considered in *Moore*, namely, that the phrase "1/2 of the 1/8" is always interchangeable with the phrase "1/2 of a floating royalty interest" because it was the convention of landowners in some period of Ohio history to make this assumption.

{¶44} As Appellee points out, just because a 1/8 royalty was common in Ohio, it was not so absolute that it may serve as shorthand for all royalty agreements. For example, in *Nonamaker v. Amos*, 73 Ohio St. 163, 76 N.E. 949 (1905), the 1902 lease under review called for a 1/6th royalty. In *Griner v. Ohio Oil Co.*, 1904 WL 1155 (Apr. 1904), a lease from 1891 called for a 1/6 royalty. Royalties also were occasionally stated as actual dollar amounts rather than fractions or percentages. In *Titus v. Winn*, 19 Ohio Dec. 279 (Ohio Com.Pl.1908), the royalty was $200 per year. As we approach more modern times, oil leases tend to have less standard royalty amounts. In *Black Diamond Coal Co. v. Buckeye Petroleum Co.*, 4th Dist. Athens No. CA-1271, 1986 WL 12952, the royalty in a 1978 lease was 13.28%. While there are a plethora of examples to be found, it is clear that at all stages of oil leasing in Ohio, parties could and did insist on royalties that suited their purposes rather than being locked into a 1/8 royalty.

{¶45} One of the difficulties with Appellants' argument that "1/8" should be treated as interchangeable with "future royalty" or "standard royalty" instead of being viewed as

a set fraction, is that when this amount is further broken down in the Clegg Reservations, the "1/8" supposed term of art is not consistently used by the drafter and other fractions are relied upon to express the royalty reservation. We have already noted there is a wealth of caselaw where the drafter intended through all the language employed that a 1/8 reservation is just that.

{¶46} Appellants rely on two Texas cases in support of their interpretation. The first is *U.S. Shale Energy II, LLC v. Laborde Properties, L.P.*, 551 S.W.3d 148 (Tex. 2018). We did rely on some of the reasoning in *U.S. Shale Energy* in our recent *Moore* opinion. In *U.S. Shale Energy*, the Texas Supreme Court was faced with a lengthy royalty clause that first reserved "an undivided one-half (1/2) interest in and to the Oil Royalty, Gas Royalty and Royalty in other Minerals" and then went on to a second clause that said, "the same being equal to one-sixteenth (1/16) of the production." *Id.* at 150. The court held that a royalty interest may be conveyed or reserved " 'as a fixed fraction of total production' (fractional royalty interest) or 'as a fraction of the total royalty interest' (fraction of royalty interest)." *Id.* at 152; Williams & Meyers, Oil and Gas Law § 327.1 (2016); see also *Ogren v. Sandaker*, 2017 ND 105, 893 N.W.2d 750 (N.D.2017), ¶ 10 (for a detailed description of fixed versus floating royalty interests). The court held that the second clause "qualifies, modifies, or clarifies" the first clause, and therefore, the reservation was a floating fractional interest of 1/2 of the royalty that would be determined by each separate lease.

{¶47} Appellants ask us to apply the same reasoning to the instant appeal. In this matter, however, *U.S. Shale Energy* is wholly inapplicable. The holding of *U.S. Shale Energy* was based on two seemingly conflicting clauses, the first describing "an undivided

one-half (1/2) interest," and the second "being equal to one-sixteenth (1/16) of the production." The court interpreted the first clause as clearly a floating 1/2 of any future royalty, and the second clause as consistent with that language, rather than modifying it into a fixed 1/16 royalty.

{¶48} Obviously, a Texas case is not binding in Ohio. More importantly, though, is that the reservation language in the Texas case is very different from the Clegg Reservations. The Clegg Eastern Reservation contains two specific fractions: "1/2 of the 1/8" and "1/16." The Clegg Western Reservation contains two specific fractions: "1/2 of 1/16" and "1/32." These fractions are not inconsistent with one another, so there is no need for further interpretation. The problem in this appeal is not the specificity of the fractions used or that they give rise to some conflict. The relevant issue here is the meaning of the words "*of the* royalty" and "*the* 1/8."

{¶49} Appellants also cite to *Hysaw v. Dawkins*, 483 S.W.3d 1 (Tex.2016). In *Hysaw*, the Texas Supreme Court faced the question of whether a royalty provision in a will referred to a fixed fractional royalty or a floating amount. The will left the mother's property to her three children. She left different sized parcels of land to each child, but equally divided the oil and gas rights. The will contained a variety of double fractions explaining the interests the mother left to her three children. These fractions included “an undivided one-third (1/3) of an undivided one-eighth (1/8) of all oil, gas or other minerals" and “one-third of one-eighth royalty.” The issue before the court was whether to interpret the royalty provisions as providing a fixed 1/8th percentage (and thus allowing the child who negotiated a lease for better than 1/8 royalty to reap the benefits of that extra royalty),

or whether the mother's intent was that the three children share equally in all future royalties regardless of the specific provisions of each lease.

{¶50} One of the most important conclusions in *Hysaw* was that "[t]he proper construction of instruments containing double-fraction language is a dilemma of increasing concern in the oil and gas industry, as uncertainty abounds, disputes proliferate, and courts have seemingly varied in their approaches to this complicated issue." *Id.* at 4. *Hysaw* reasoned that: "In fractional-royalty cases, courts generally take the straight-forward mathematical approach of multiplying double fractions to establish the fractional royalty interest." *Id.* *Hysaw* also reasoned that "[i]n this line of cases, phrases such as 'the usual 1/8 royalty' or 'the 1/8 royalty' are not accorded any particular significance. Also present in many fractional royalty cases is a restatement of the double-fraction language expressed as a single fraction. Sometimes, the absence of language creating an inconsistency has been expressly noted." *Id.* at 12.

{¶51} One of the key factors in *Hysaw* was that even though double fractions were used, there was a clear, overriding purpose by the testator to equally divide the royalties between her three children. *Id.* at 23. The court noted other factors at play, such as the use of identical language describing each child's inheritance; that the royalty rights were non-participatory and were simply rights to receive royalties; and a provision for re-equalization if an inter vivos event diminished the available royalty.

{¶52} Appellants rely on *Hysaw* to support the notion that "1/8" does not necessarily mean "1/8" but is shorthand for "the usual lease royalty." *Hysaw* does not stand for such a broad general principle. The holdings in *Hysaw* are very modest and, to some degree, contradict Appellants' argument. Even if we could apply *Hysaw* to the facts

of this case, it would not lead to the outcome argued by Appellants. To summarize the holding in *Hysaw*, a testator's intent should be taken from the entire instrument, and the use of a specific fraction or double-fraction to describe a property interest may not be the only factor in determining the grantor/testator's intent. Those are not particularly novel holdings, and they certainly do not conflict with the approach we must take in this matter.

{¶53} If the Cleggs desired to reserve a floating one-half royalty on oil and gas production, they certainly could have done so, as it was a fairly common practice in the early 1900s in Ohio. *Hill v. Hanlon*, 15 Ohio Law Abs. 738 (7th Dist.1933) (reserving one half the oil royalties and one half the gas rentals); *Covert v. Koontz*, 7th Dist. Monroe No. 13 MO 8, 2015-Ohio-228, ¶ 3 (reserving one half part of the royalty in a 1903 conveyance); *Kilburn v. Graham*, 7th Dist. Monroe No. 18 MO 0022, 2019-Ohio-2695, ¶ 3 (conveying one half of their share of oil and gas royalties in a 1919 deed); *Duvall v. Hibbs*, 5th Dist. Guernsey No. CA-709, 1983 WL 6483, *1 (conveying one-half of the oil and gas under the premises and one-half of the royalty in the oil already in tanks in a 1908 deed); *West v. Bode*, 2019-Ohio-4092, 145 N.E.3d 1190, ¶ 9 (7th Dist.), aff'd, 162 Ohio St.3d 293, 2020-Ohio-5473, 165 N.E.3d 298, ¶ 9 (conveying a one-half royalty in a 1916 deed); *Peppertree Farms, L.L.C. v. Thonen*, 167 Ohio St.3d 52, 2022-Ohio-395, 188 N.E.3d 1061, ¶ 7 (reserving one half of the royalty of the oil and gas under the described real estate in a 1916 deed); *Blackstone v. Moore*, 2017-Ohio-5704, 94 N.E.3d 108, ¶ 2 (7th Dist.) (reserving a one half interest in oil and gas royalty in a 1915 deed).

{¶54} As earlier discussed, the sole, sensible, and consistent interpretation of the Clegg Reservation is that the Cleggs reserved specific fractional amounts of 1/16 and 1/32 royalty in the two parcels. Appellants' assumption that all Ohio landowners at some

point in time simply used the fraction "1/8" to mean "any future lease royalty" is not borne out by the deed language, by Ohio case law, or by this record on appeal. Appellants have not cited language in any document in the record that supports this interpretation.

{¶55} The trial court's final judgment in this case did not interpret the first and second sub-clauses of the Clegg Reservations as being in conflict, ambiguous, or unclear. Since the trial court did not find ambiguity with these, it simply quoted the reservations in the judgment entry. We find no error in how the court analyzed the 1936 deed, and in fact, the court conducted a thorough review using many of the same cases we have cited. However, the trial court did overlook the erroneous interpretation Appellees gave to the phrase “of the royalty of all oil and gas” when applying “the 1/16” and “the 1/32.” By failing to address Appellees’ erroneous interpretation that Appellants’ 1/16 or 1/32 interests were intended to be further fractionalized, the trial court erroneously upheld Appellees’ convoluted calculation of the royalties.

{¶56} Appellants' first argument is correct and is sustained in part. The trial court should have granted Appellant Mineral Development's partial motion for summary judgment regarding declaratory judgment. The Clegg Eastern Reservation conveys a fixed 1/16th (or 6.25%) royalty, and the Clegg Western Reservation conveys a fixed 1/32nd (or 3.125%) royalty. These royalties are not to be further fractionalized. Appellants' alternative argument that the Clegg Reservations conveyed a floating 1/2 or 1/4 royalty is without merit.

Conclusion

{¶57} Appellant Mineral Development filed a complaint for declaratory judgment and other causes of action to resolve a dispute about two oil and gas royalty reservations in a 1936 deed. The deed reserved royalties of "one half of the 1/8" and "1/2 of the 1/16," respectively. Mineral Development argued that this meant either a floating one half royalty or a fixed 1/16 royalty. Appellees argued that the reservation language was not ambiguous and needed no interpretation, resulting in further fractionalizing the royalty payments made. The trial court agreed with Appellees and dismissed Appellant's complaint in its entirety. The trial court erred, because the royalty reservations do contain ambiguous and unclear provisions that can only be reconciled by viewing the entire deed. It is clear that the grantor of the 1936 Deed reserved a 1/16 royalty in the Clegg Eastern Acres and a 1/32 royalty in the Clegg Western Acres, and that these royalty amounts were not to be further reduced by Appellees using another royalty fraction. Appellants' alternative argument that the royalty amount should be deemed as a floating royalty of 1/2 or 1/4 of the entire royalty proceeds is also not supported by the record or by case law. The judgment of the trial court is reversed, declaratory judgment is issued in favor of Appellant as set forth in this opinion, and the matter is remanded to adjudicate the remaining claims and counterclaims, as well as to determine royalty distributions.

D’Apolito, P.J. concurs.

Hanni, J. concurs.

For the reasons stated in the Opinion rendered herein, Appellants' assignments of error are sustained and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Monroe County, Ohio, is reversed. Declaratory judgment is issued in favor of Appellants. We hereby remand this matter to the trial court for further proceedings according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellees.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.