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Supreme Court of Texas.
Betty Yvon Lesley, et al.
v.
Veterans Land Board of the State of Texas (VLB), et al.
No. 09-0306.

September 15, 2010.

Appearances:

Charles Christopher Aycock and Charles Tighe, Cotton, Bledsoe, Tighe & Dawson, Midland, TX, for the petitioner.
Laura H. Burney, Law Offices of Laura H. Burney, San Antonio, TX, for the respondent.

Before:

Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices. Chief Justice Wallace B. Jefferson did not participate.

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JUSTICE NATHAN L. HECHT: The Court is ready to hear arguments in 09-0306 Lesley v. Veterans Land Board.

MARSHAL: May it please the Court, Mr. Aycock and Mr. Tighe will present argument for the petitioners. Petitioners have reserved six minutes for rebuttle. Mr. Aycock will open with the first 14 minutes and Mr. Tighe will present the rebuttal.

ORAL ARGUMENT OF CHARLES CHRISTOPHER AYCOCK ON BEHALF OF THE PETITIONER

ATTORNEY CHARLES CHRISTOPHER AYCOCK: May it please the Court and good morning. Ignoring the relevant holdings of Manges v. Guerra and this applying In Re Bass, the Court of Appeals erred one, in holding that the executive owes no duty to the non-executive co-tenant to lease minerals and two, that the executive, in order to enhance the value of his surface estate can ensure that the dominant mineral estate is never developed for leasing purposes. In Manges v. Guerra, both the Court of Appeals below and the respondents like to focus on the sensational act of Manges leasing his co-tenant's minerals to himself and this Court's holding that when a lease is executed, the executive must obtain every benefit for the non-executive that the executive obtains for himself, but the Court's view of Manges is limited there. Eastland does not go on to understand that Manges

says much more than applying what the duties with regard to actually having executed a lease. Manges v. Guerra tells us, and we know from Manges v. Guerra, that preleasing activities, including the failure to execute an oil and gas lease when there's a reasonable opportunity to do so is also a breech of the executive duty.

JUSTICE EVA M. GUZMAN: Does the fact that you can have like horizontal drilling, does that impact your argument at all on the breechness?

ATTORNEY CHARLES CHRISTOPHER AYCOCK: No, Justice Guzman, it does not for two reasons. First of all, there is no evidence in this record that all of the minerals that exist within the subject property can be reached by horizontal drilling and the other problem with horizontal drilling is that that assumes that these mineral owners have the right to use neighboring surface. There is no obligation at law for a neighboring surface owner to allow his neighbors access to their minerals through his surface and so that was not an issue that was addressed in Manges v. Guerra and is not something that is available for the co-tenant owners here.

JUSTICE NATHAN L. HECHT: Why would you buy the executive rights if you have to do whatever is in the best interest of the mineral interest owner?

ATTORNEY CHARLES CHRISTOPHER AYCOCK: The reason that you buy the executive rights is so that you can have some control over how the surface is used is the first reason.

JUSTICE NATHAN L. HECHT: How would you maintain that if you've got to lease the property?

ATTORNEY CHARLES CHRISTOPHER AYCOCK: Well, that's the beauty of the Manges duty. The Manges duty says that you have to lease the property if an average landowner looking out for his own interest would do so. It's a reasonable standard and so the idea that the executive duty and oil and gas development and the surface cannot all coexist is a false premise that has been argued by the respondents and articulated by the Court of Appeals. Throughout the State of Texas, oil and gas development and surface use coexist. They coexist rurally and they coexist urbanly. There are only gas developments that exist within subdivisions, even within large cities. The beauty of the Manges charge is that it allows the executive right's holder to have some control over how the surface is used so long as that control does not reach to the level of unreasonableness and self-dealing.

JUSTICE NATHAN L. HECHT: So you say that the, someone cannot buy the executive rights to preclude development of the property?

ATTORNEY CHARLES CHRISTOPHER AYCOCK: That's correct, Your Honor. You cannot.

JUSTICE NATHAN L. HECHT: He just, for whatever reason and sentimental value or where he grew up or crazy or something, he doesn't want the money. He doesn't want to drill the property so he says sell me the executive rights. You say that can't be done.

ATTORNEY CHARLES CHRISTOPHER AYCOCK: That's correct. The, in fact, this very issue was addressed by Lee Jones in his 1948 Texas Law Review Article that is cited by this Court in its footnote in In Re Bass to explain the difference between a nonparticipating royalty interest and a mineral interest and it's very interesting that even back in 1948, Lee Jones says it is believed that the Courts will not tolerate an arbitrary refusal to exercise the exclusive leasing privileges and one of, I'm sorry.

JUSTICE NATHAN L. HECHT: But it's not arbitrary. I mean he's got a reason. He wants to preserve the surface free of drilling.

ATTORNEY CHARLES CHRISTOPHER AYCOCK: If the reason though is putting the subservient surface state over the rights of the dominant mineral estate then the executive has breeched his duty. The--

JUSTICE EVA M. GUZMAN: Does it become a breech or arbitrary when there is a, now a value when it's known now that they're very valuable versus when they were first [inaudible] or is that what prevents it or is it, couldn't there be a situation where it wasn't arbitrary where you just decided to preserve them because you wanted to?

ATTORNEY CHARLES CHRISTOPHER AYCOCK: Well, the decision where it would become arbitrary would be if there is, like the record in this case, where we know that the executive takes a sign and sticks it in the ground and says lessees need not apply. That is the result of the restrictive covenants. So the case before the Court now is not one of dealing with the nuances of what is reasonable or not reasonable under the circumstances because on this undisputed record, we know that but for the restrictive covenants, the minerals could have been leased. The Manges charge allows a fact-finder, if there are fact questions, to deal with these issues of what are reasonable under the circumstances and is the surface owner in fact trying to enhance the value of the surface estate to the complete detriment of the mineral owner so that's self-dealing so that the surface owner obtains a value through the use of the executive right that the mineral owner does not hold.

JUSTICE PAUL W. GREEN: Who owns the executive rights in this case or does that matter to you?

ATTORNEY CHARLES CHRISTOPHER AYCOCK: Who owns the executive rights in this case?

JUSTICE PAUL W. GREEN: Bluegreen and the lot owners.

ATTORNEY CHARLES CHRISTOPHER AYCOCK: Bluegreen owned the executive rights. It did not convey the executive rights to the lot owners, but it has subsequently conveyed all of its executive rights to the property owner's association. Our position is that the various deeds to the lot owners did not convey the executive rights because those deeds accepted from the grant all rights to develop minerals, explore for minerals, which the Court has said, the Eastland Court said the executive right and the development right go together. So if you have accepted from the grant as if all those words were stuck in the deed, it's not subject to, it's accepted from, if you have accepted from the grant all of the ability to use the property for oil and gas development, then Bluegreen reserved the executive rights.

JUSTICE PAUL W. GREEN: But without explicitly saying so, they, as a practical matter, they reserved executive rights.

ATTORNEY CHARLES CHRISTOPHER AYCOCK: And well I understand that the Court of Appeals held and the respondent's argument that what really happened here is that this was an exception by implication and that that is frowned on at law, but really this is no different than the prior cases where the courts have said when you have accepted leasing rights, we are going to interpret that to mean the same thing as executive rights because you have defined what the term is. That's exactly what happened here. They didn't use the word executive right, but they defined it. So there's no exception by implication. It was done expressly and to further answer your question, Justice Green, as far as whether the duty exists or who, and whether the duty was breeched, it makes not difference who actually owns the executive rights because the executive owes those duties to his mineral co-tenants.

JUSTICE DALE WAINWRIGHT: Let me ask you further about that, the point Justice Green raises because the CA, as you mentioned, held that Bluegreen conveyed that interest and it was not specifically accepted out. Further explain your argument that Bluegreen somehow retained it and it was not a retention by implication, it was otherwise.

ATTORNEY CHARLES CHRISTOPHER AYCOCK: Right. Two points. First, Justice Wainwright, I would like to say that there is no question that on this record that Bluegreen did own the executive rights at the time that the restrictive covenants were put in place. So at the time that we said there will never be leasing of the property, there is no question that Bluegreen did that while it was the executive. Now, when Bluegreen did

these various deeds to the lot owners, what those deeds say is that we are accepting from the grant, the terms of the restrictive covenants. It's not subject to the restrictive covenants. We are accepting from the grant. So if you take all of the words that exist in the restrictive covenants, it's as if they are typed into the deed. So we are accepting from the grant, in other words we are not giving to you the right to develop the minerals by any form or fashion whether through leasing or self-development. So since we have not given you that right, that right was retained. It's not by implication. It's by definition.

JUSTICE NATHAN L. HECHT: Why should the executive rights be severable from the mineral interest if they really, if there's not much to them?

ATTORNEY CHARLES CHRISTOPHER AYCOCK: Well, there's actually a whole lot to the executive right, Your Honor, and let's not--

JUSTICE NATHAN L. HECHT: I'm not following that because it seems to me under your theory that the, if you've got fiduciary duty to look after the best interests of the mineral interest owner, that's pretty well ties your hands.

ATTORNEY CHARLES CHRISTOPHER AYCOCK: Well, let's not forget though that the fiduciary duty that this Court has articulated with regard to the executive rights is not the full fiduciary duty. It doesn't entitle all, the full panoply of fiduciary obligations. The fiduciary duty is, it's really a small "f" fiduciary duty instead of a big "F" because the executive right owner does not have to subordinate his interest for the interest of the non-executive as if it was a full fiduciary duty, but the executive can't self-deal and the executive has to acquire the same benefits for the non-executive that it gets for itself. So here, for example in this case, the Court of Appeals has articulated that the restrictive covenants would not be enforceable, but for the fact that Bluegreen held the executive rights. So the restrictive covenants don't work unless Bluegreen held the executive right, but implementing the restrictive covenants is not an exercise of that right. The two don't go together. If the restrictive covenants are only enforceable because Bluegreen owned the executive right, then that must have been an exercise of the executive right and Bluegreen did obtain the benefits by using the executive right that its non-executive mineral owners did not get and--

JUSTICE NATHAN L. HECHT: What is the law of other states? Do you know?

ATTORNEY CHARLES CHRISTOPHER AYCOCK: The law of the other states is, I believe, somewhat divided and I'm happy to do post-submission briefing with more detail, but it's my understanding that, for example, Louisiana has a statute in place that says the executive does not owe a duty to lease. However, it is my understanding that other courts have articulate, have adopted the standard, other states have adopted the standard as articulated by--

JUSTICE NATHAN L. HECHT: Manges.

ATTORNEY CHARLES CHRISTOPHER AYCOCK: Well, Professor from Texas Tech, I'm sorry, Professor Kramer and Amicus from Williams & Myers where he has said that the executive duty, at the very least, has a standard of do no harm and so other states have adopted that standard and we would be happy, if with post-submission briefing, to answer that question in more detail.

JUSTICE NATHAN L. HECHT: Okay.

JUSTICE EVA M. GUZMAN: The scope of the duty is?

ATTORNEY CHARLES CHRISTOPHER AYCOCK: The scope of the duty is exactly what is articulated in the jury charge of Manges v. Guerra and that is exactly what the trial court here found and it is that the owner of the leasing rights owes to the non-executive mineral owners the same degree of diligence and discretion in ex-

ercising the rights and powers granted under leasing rights as would be expected of an average landowner who, because of self-interest, is normally willing to take the steps to lease. One of the arguments that has been articulated by the respondents and I've started referring to it as the widows-and-orphans arguments is, my goodness, this is going to be a horrible standard to place on unsophisticated strangers that don't know how to do leasing. Well, first of all, there's no evidence in this record that we're dealing with unsophisticated strangers. We know that we are dealing with mineral co-tenants and the law has always said that co-tenants cannot commit waste of their other co-tenants interest. So this duty that was articulated and adopted by this Court back in Manges v. Guerra provides a very workable framework to deal with all of the various exigencies and circumstances that exist whether you have a sophisticated executive or an unsophisticated executive.

JUSTICE DEBRA H. LEHRMANN: Can you explain, if we do impose this affirmative obligation to lease, how the traditional right of the executive owner to exercise substantial discretion in dealing with the mineral state would be affected?

ATTORNEY CHARLES CHRISTOPHER AYCOCK: Well, I would take slight issue with the description of having substantial discretion because the substantial discretion is limited to, the executive does have discretion, but the executive must do no harm.

JUSTICE DEBRA H. LEHRMANN: Right.

ATTORNEY CHARLES CHRISTOPHER AYCOCK: And so I think the duty that the Court has already adopted has worked well since 1984. There have been various Courts of Appeals' cases that have articulated this very duty; Hlayinka, Mims, and Pickens v. Hope and it's worked fine and the sky has not crumbled in oil and gas.

JUSTICE NATHAN L. HECHT: Are there any other questions? Thank you, Counsel.

ATTORNEY CHARLES CHRISTOPHER AYCOCK: Thank you.

JUSTICE NATHAN L. HECHT: The Court is ready to hear argument from the respondents.

MARSHAL: May it please the Court, Ms. Burney in this case will present argument for the respondents. Ms. Burney will open with the first 13 minutes.

ORAL ARGUMENT OF LAURA H. BURNEY ON BEHALF OF THE RESPONDENT

ATTORNEY LAURA H. BURNEY: May it please the Court. My name is Laura Burney and I'm here on behalf of the respondent, the developer in this case, Bluegreen. I must begin by correcting some of the mischaracterizations of the law. You notice in petitioner's argument you did not hear about the case that answers the question. That case is your decision in In Re Bass. In Re Bass expressly says that there is no affirmative duty to lease on the executive. As Justice Hecht has pointed out, the whole point of the executive right is to allow those with that right to control leasing. There has never been a case that has interpreted Manges as an opposing an affirmative duty to lease. And--

JUSTICE NATHAN L. HECHT: But Manges itself awards damages for pay of the lease.

ATTORNEY LAURA H. BURNEY: Yes. That did end up being part of the damages, that's true, Your Honor, but there is nothing in that decision as this Court said in Bass, we would ask this Court just to stick by your decision in Bass. That decision very clearly says that the difference between this case and Manges in the Bass case was not a difference in the type of interest. The difference was in Manges and in all of the cases since Manges, there had been leases and that is what triggers the duties of utmost good faith and fair dealing. I would like to

answer--yes Your Honor?

JUSTICE NATHAN L. HECHT: I understand your position on Bass, but what is the answer to, besides Bass, to why or how damages could be awarded in the Manges case for the part, not the self-dealing part, but for just the non-lease?

ATTORNEY LAURA H. BURNEY: Well, in the Manges case, which, of course, is an example of a very notorious case, creating some difficult law, it was so egregious there that the Court used the fiduciary standard and they were looking for a way to figure out what damages would have been if, since he had leased to himself, how could they come up with damages. I would like to also point out that counsel for the petitioner relies on the jury charge in Manges, which this Court has never expressly adopted and even if it did, if you read that jury charge, it expressly refers to the exercise of the affirmative duty of a duty to lease. It does not impose an affirmative duty to lease and that is something that this Court expressly recognized in Bass. We would have to go back to Danciger v. Powell. Danciger Oil Company v. Powell in 1941. That is the case that this Court cites in Bass to clearly state that an executive owes no affirmative duty. In Danciger, there was a deed from the Powell's to an oil company. In our case, we have a deed from some individuals to a real estate developer. It was known that it was a real estate developer. The mineral owners kept a small fraction of the minerals and they expressly conveyed in the deed the executive right to this real estate developer for $2 million. The reason we are really here today, Your Honors, is that these petitioners seek to rewrite the deed. They do not have the executive right and they are sorry that that's the case.

JUSTICE NATHAN L. HECHT: But it wouldn't make any difference to your case as I understand it if they had retained all of the minerals.

ATTORNEY LAURA H. BURNEY: No, it would not. What is key is the executive right. The executive right has always been the stick in the bundle that completely controls leasing. This Court and all commentators have consistently made that point. That's evidenced by the majority rule that this state follows, which is this: No matter how small a fractional interest in the minerals I own, I could own a 1/1000 of the minerals in Black Acre. If I keep the executive right, I have an absolute right to lease those minerals. The executive right is the key. You don't keep them, you cannot lease.

JUSTICE DON R. WILLETT: Can a current executive rights owner be permitted or should they permitted from prohibiting a future executive rights owner from forever developing the property?

ATTORNEY LAURA H. BURNEY: An executive rights owner has the executive right, Your Honor. They have the full duty to lease and it is their decision. It would be a shock to a lot of ranchers, farmers and residential developers out there who reserve the executive right for the purpose of facilitating and protecting their surface estates to learn that they suddenly have an affirmative duty to lease. And to answer this--oh I'm sorry.

JUSTICE DON R. WILLETT: Would they have the authority to prevent future executive rights' owners from developing the property?

ATTORNEY LAURA H. BURNEY: No, Your Honor. If the executive right passes, an executive rights owner can exercise the lease and I would also like to address, Your Honor, there's a lot of skies falling, you know rhetoric here. Producers are used to encountering very difficult mineral titles. Difficult mineral titles is the rule, not the exception in this state and all states. What do they do? They have to negotiate rather than litigate and that will occur if this Court does what it has always done in Bass, in Moser v. United States Steel, in Danciger, in HECI v. Neel. In all these cases this Court has refused to rewrite these to change the parties' bargain.

JUSTICE DON R. WILLETT: Does anything in the record estimate the value of the surface estate?

ATTORNEY LAURA H. BURNEY: No, Your Honor, and also we need to correct some of the record about

what the record says about the value of these minerals. We're making a lot of speculation here. This is not a case where there's been a lot of leases to these lot owners who are now the executive right owners and they've turned them down. There's not even any evidence that this is really worth producing at $7.00 gas. That is all pure speculation. We are here today to ask whether or not these lot owners have an affirmative duty to lease. This Court answered that question in Bass.

JUSTICE PAUL W. GREEN: What if a neighboring tract is draining the reservoir? Everybody sees it happening. Is there still no duty to lease?

ATTORNEY LAURA H. BURNEY: There's no duty to lease. There is no affirmative duty to lease, no.

JUSTICE PAUL W. GREEN: They just?

ATTORNEY LAURA H. BURNEY: What would happen there is this is where if you keep the property rights clear, these lot owners have the mineral rights. A typical example of a problem in a [inaudible]

JUSTICE NATHAN L. HECHT: Their hands are tied.

ATTORNEY LAURA H. BURNEY: Pardon?

JUSTICE NATHAN L. HECHT: Their hands are tied by the restrictions.

ATTORNEY LAURA H. BURNEY: There are deed restrictions in place, but as always these are typical deed restrictions and deed restrictions that prohibit mineral drilling that is very common. That is not against public policy.

JUSTICE DON R. WILLETT: So they can overcome that with a sufficient vote?

ATTORNEY LAURA H. BURNEY: Pardon?

JUSTICE DON R. WILLETT: They could invalidate that restriction if they all banded together.

ATTORNEY LAURA H. BURNEY: Absolutely. That was going to my point, Your Honor, that these are completely amendable, only two-thirds. It is hyperbole to say that these minerals had been "condemned" and then that leads me to another case and another mischaracterization, this Court set forth the mineral estate dominance rule in Getty Oil v. Jones in 1971. The rule is not that the mineral estate in the State of Texas can be developed at all cost to all surface use. This is what the Court said in Getty Oil v. Jones: Oil and gas estate is dominant over surface estate in the sense that the use of as much of the premises as is reasonably necessary to produce the minerals is impliedly authorized by the lease, but rights implied in favor of the mineral estate are to be exercised with due regards for the surface. In Getty Oil, you had what we don't have here, a mineral estate owner with the executive right who had leased and what this Court said is, yes, you've got an implied easement to produce mineral owner because you have the executive right, but you must also show due regard for the surface, so it all comes back, Your Honors, to the fact that this is a case where they do not have the executive right. They cannot change that. I would like to answer--

JUSTICE NATHAN L. HECHT: Even if executive right owner has no duty anymore than no self-dealing, why should he be permitted to restrict the future use of the executive right by means of these deed restrictions?

ATTORNEY LAURA H. BURNEY: First of all, Your Honor, I don't think it's exactly clear to say that they have restrictive future rights. We have--

JUSTICE NATHAN L. HECHT: There are some restrictions though.

ATTORNEY LAURA H. BURNEY: Absolutely. It is not against public policy for a residential developer to buy property and develop it for residential use. They have exercised their property rights. Unlike Manges, we don't have anyone here who has abused their rights. This was an above-board deal. If in Danciger Oil in 1941 where this Court absolutely refused to imply any type of duty for an oil company grantee to develop the property, it certainly makes no sense that this Court would imply an affirmative duty when a real estate developer bought the property for $2 million. If the Court is going to impose such a duty, to answer your question about other jurisdictions, we address it in our brief. We would be the only jurisdiction to do so. Our neighbor to the east, Louisiana, with which we share a huge prolific producing shale, the Hansville has an affirmative code provision that says an executive has no affirmative duty to lease, but if the executive undertakes to lease, it must do so in good faith. That appears in a Louisiana code because that represented stated law. That's also the law of Texas, Your Honors.

JUSTICE NATHAN L. HECHT: Why would you convey the executive rights and retain the mineral interest if you have no control over developing it?

ATTORNEY LAURA H. BURNEY: There is no downside to it, Your Honor. For these mineral owners and for the developer, since they got the executive right, they may be motivated by self-interest someday too. That is always the case when property rights are clear. In the event that they do choose to amend their property restrictions, which when they have three-eighths of the minerals as they do here, that could very well be if we ever get into some facts about what these minerals are worth, which we do not have in the record and then these people benefit. They got their $2 million upfront. They'll share down the road with their cost bearing mineral interests:

JUSTICE DON R. WILLETT: Has there ever been an attempt by petitioners to persuade or cajole or buy out the executive interest of all the lot owners?

ATTORNEY LAURA H. BURNEY: I don't know.

JUSTICE DON R. WILLETT: Or to persuade a sufficient number of them to invalidate their restrictions?

ATTORNEY LAURA H. BURNEY: I don't know of any, I don't believe that's the case, Your Honor, but you do raise a point that negotiation has always served producers well. They have run into worse burdens in a chain of title. An example that's frequently written about is when a producer goes out in the chain of title. They know they cannot change the deeds in the chain of title and they find in there a very large interest, either mineral or royalty that entitles that outstanding owner to say one-half of all the production coming out of the ground. In that instance, no producer can afford to produce. What can they do? They can't rewrite the deed. They know that. They must go to that interest owner and negotiate for the benefit of both parties. So we urge this Court to stand by your decision in Bass, which very clearly said whether or not the executive interest, the non-executive interest is a non-participating royalty or a non-participating mineral, there is no affirmative duty to lease in this state. Alternatively, Your Honor, there has never been a case in this state that has imposed an affirmative duty to lease and contrary to Mr. Aycock's representation, none of the commentators have viewed this state as imposing an affirmative duty to lease, including the Williams & Meyers Treatise he quoted. If you were to do so, it would be such a sea change in the law that you could only do so perspectively. Property owners have relied on the use of the executive right to protect their property. In that instance, you would have to follow what you did in Moser v. United States Steel where this overruled the surface destruction test and adopted the ordinary and natural meaning test, but felt like they could only do so perspectively.

JUSTICE NATHAN L. HECHT: Well, you say a sea change, but what did people do between Manges and Bass when--

ATTORNEY LAURA H. BURNEY: In between-- Manges has never been interpreted as imposing a very strong affirmative duty to lease. When Manges came out in 1985, the confusion about Manges was why did the Court

use the fiduciary label when, since Schlitter v. Smith in 1937, the Court had always used an utmost good faith. Hancock in Hlavinka v. Hancock, which is a post Bass decision, one of several out of the Court of Appeals that have relied on this Court's decision in Bass and one in which this Court denied review, the Court did a very good job of reviewing the law since Manges and said that all the post-Manges cases had dealt with instances when an executive had abused the leasing power and had gotten leasing benefits that were unfair to the non-executive. For example, there are cases where an executive negotiated a "surface damage payment" in a trade-off for a lower royalty--

JUSTICE DON R. WILLETT: Real quick, if we were to find there is a duty and there was breech here, what would be the remedy we ought to fashion?

ATTORNEY LAURA H. BURNEY: Well first of all, Your Honor, if you were to find a duty as I said that would be a new law, I don't think, there isn't any evidence in this record about, that there were, they had turned down leases or that's there's a, that's, there's nothing like that in the record. There's supposedly a letter of interest. There's nothing like that. You couldn't even do that here, Your Honor.

JUSTICE NATHAN L. HECHT: Any other questions? Thank you, counsel.

ATTORNEY LAURA H. BURNEY: Thank you.

ATTORNEY STEPHEN E. HAYNES: May it please the Court. Good morning. I'm Steven Haynes and I represent a good number of the individual lot owners that have filed a, originally the appeal and now are respondents in this particular matter.

JUSTICE NATHAN L. HECHT: Did you get a deed like the Court of Appeals said, there were 1700 deeds. It's the one the Court of Appeals quoted?

ATTORNEY STEPHEN E. HAYNES: Your Honor, I would presume that many of my clients did receive deeds that were similar to that in form. They were thinking the affidavit that's in the record, there were five or six different deed forms that were used, but the one that is referenced in the Court of Appeals' decision is one of the most common.

JUSTICE NATHAN L. HECHT: Why, when you read the exception number three, that referred to a one-fourth mineral interest that had been reserved, why doesn't that at least inject some confusion as to what was reserved back in the Bluffdale deeds that the Court of Appeals seemed to think was clear from the beginning and therefore limitations [inaudible]?

ATTORNEY STEPHEN E. HAYNES: Your Honor, I think when you look at that, the fact that Bluegreen may have mischaracterized the deed it also has a deed reference in there to the actual deed itself.

JUSTICE NATHAN L. HECHT: Right, but I mean it shows, looks to me like that Bluegreen at least thought a fourth had been reserved.

ATTORNEY STEPHEN E. HAYNES: Certainly, but the fact that Bluegreen may have mischaracterized the prior reservation shouldn't affect my client's rights. I mean the prior deeds say what they say in regards to specificity.

JUSTICE NATHAN L. HECHT: Right, but the Court of Appeals said well this is clear as a bell and that's why limitations is not told and the discovery rule doesn't apply, but it was not clear as a bell to Bluegreen that was deeding all this all these lots to people and since none of the lot owners ever popped up and said wait a minute it's not a fourth, it must not have been clear to them either.

ATTORNEY STEPHEN E. HAYNES: And the reason I'd like to point that out, the Court is raising a good point in this sense, but one of the important things to understand about, and one of the reasons I raise an alternative argument in regard to the reformation issue is this, in order to reform the deed against my clients, you have to show that all of my clients had constructive or actual knowledge of the mistake in reformation so you can't allege on one hand that the deed itself is ambiguous and therefore I didn't find the mistake and then turn around and say, but every subsequent purchaser had constructive knowledge of it. It's either inherently undiscoverable or it's not. If it's inherently undiscoverable, there's no way I had constructive knowledge of the prior defect and therefore the deed cannot be reformed and the Court of Appeals [inaudible] no reversible error. I would point out, Your Honor, that from the beginning, my clients did nothing but buy a lot on which they thought they were going to build their home and having done nothing more than buy a residential lot to build a home they find themselves being sued for millions of dollars.

JUSTICE NATHAN L. HECHT: Do some want to lease?

ATTORNEY STEPHEN E. HAYNES: Your Honor, I suspect and I think it's a good question, I suspect there are probably some developments, maybe even some of my own clients who would lease under the right terms and that's really the whole point of this.

JUSTICE NATHAN L. HECHT: But they're not going to be able to under the respondents theory--

ATTORNEY STEPHEN E. HAYNES: Well they could execute non-surface leases today.

JUSTICE NATHAN L. HECHT: Sorry now?

ATTORNEY STEPHEN E. HAYNES: They could execute a non-surface lease today and not be in violation of the restrictive covenant to any regard. So I suspect under the right terms, certainly there are many lot owners who would be willing to lease and that's really the whole point of the case is that under the current law they have the discretion to decide when those terms were right. If the law were to change they would not have that discretion.

JUSTICE PAUL W. GREEN: Do you think the lot owners have the executive rights or does Bluegreen?

ATTORNEY STEPHEN E. HAYNES: I do believe the lot owners had the executive right Your Honor and I want to point out, I think there's a real fundamental problem with the plaintiff's argument and this is and they go to say well you reserved the executive rights by filing the restrictive covenants. They misunderstand the nature of a reservation. If I'm reserving something and it means I'm reserving it onto myself so that I can execute a lease. Well, if the restrictive covenants prevent leasing, how is that a reservation? Bluegreen can't execute a, if my clients can't execute a lease, Bluegreen can't execute a lease. I fail to see how they're calling that a reservation because it doesn't retain anything under Bluegreen to do something that my clients could not also do. So and I would point out that there's a [inaudible] case that the Court of Appeals held unless the executive right is specifically reserved it then passes on to the grantee. I think as-- go ahead.

JUSTICE DON R. WILLETT: Have there been efforts at all to, as I asked the other respondent, have there been efforts to persuade lot owners to either band together in sufficient numbers to invalidate their restriction or to cajole them into--

ATTORNEY STEPHEN E. HAYNES: The efforts were, if you don't give me your executive rights, I'm going to sue you for millions of dollars. And there were many of my clients who got a letter from the appellants in this case that said something, I'm sorry the petitioners in this case that said something to the effect of you owe us millions of dollars for failing to lease your home, but if you'll simply execute this deed giving me your executive leasing rights then we'll let you out of the lawsuit, but to the extent there was any effort to obtain the execu-

tive leasing rights, that was it. And I would point out that if this Court were to create a duty to lease we're going to see a lot more of that.

JUSTICE DON R. WILLETT: Do you have any idea what the combined value of the surface estate is across the lots?

ATTORNEY STEPHEN E. HAYNES: Your Honor, I really don't. I can tell you at one point I did a quick MAC on the appraised value of my client's interest, which was well in excess of $12 to $15 million on just my [inaudible]lot.

JUSTICE DALE WAINWRIGHT: The petitioners apparently indicate something about $610 million worth of minerals.

ATTORNEY STEPHEN E. HAYNES: Your Honor, I think that's pure speculation. First of all, assume that there's even minerals there. Everyone in this courtroom knows that there are oil and gas promoters that go around and do seismic data and tell you there are millions of dollars of gas beneath the soil only to subsequently drill a dry hole. I would also point out if you read that affidavit closely, you'll find that it's based upon gas traded at MCF of about $7 and the last time I looked, gas was traded at MCF of about $2 so there's definitely some fluff in that number that was there.

JUSTICE DALE WAINWRIGHT: You represent about 460 landowners, is that right?

ATTORNEY STEPHEN E. HAYNES: There are about 460 who have appealed and I represent the largest portion of those, Your Honor. I don't represent them all, but we did jointly brief it for the benefit of the Court not having to have multiple briefs.

JUSTICE NATHAN L. HECHT: Is there a public interest here in preventing waste and encouraging development that cuts against your position?

ATTORNEY STEPHEN E. HAYNES: Well, I think the public interest is to ensure the people that bargain for a certain benefit get the benefit that they bargained for. And in this case, the benefit was we purchased the discretion to decide when and on what terms to lease. I'd also point out if the Court were to create a duty to lease, my personal opinion is that would decrease the value of minerals in this state because as the Court has pointed out, what's going to happen is a land developer is going to come to a land owner and say you own the executive leasing rights for your co-tenant or for this other individual and you know what, if you don't execute this lease then you're going to get sued by your co-tenant. Now is there going to be any negotiation for oil and gas lease under those circumstances? And the answer obviously is no. People are going to be forced to lease their mineral interest at substantially less rates than what they could bargain for because they have no negotiating power. It becomes purely an administrative function with no discretion to negotiate for the value of the minerals.

JUSTICE NATHAN L. HECHT: Any other questions? Thank you, counselor.

ATTORNEY STEPHEN E. HAYNES: Thank you.

REBUTTAL ARGUMENT OF CHARLES TIGHE ON BEHALF OF PETITIONER

ATTORNEY CHARLES TIGHE: May it please the Court. I'd like first to talk about several different items that have been mentioned that I think call for further discussion. In this record there is, and not that this is determinative in, but that it is a fact. We have expert testimony in an affidavit that the value of the minerals under this property could be as much as $600 million. That's not just speculation. There was a prior well drilled on this property to the Marble Falls formation that was productive of gas, but there wasn't an infrastructure pipeline

so they abandoned it.

JUSTICE EVA M. GUZMAN: Was that at the $7 or the $2 trading?

ATTORNEY CHARLES TIGHE: Well it depends, of course, upon the value of the dollar.

JUSTICE EVA M. GUZMAN: Okay. So at that time--

ATTORNEY CHARLES TIGHE: Back at that time it was about $7.

JUSTICE EVA M. GUZMAN: Okay.

ATTORNEY CHARLES TIGHE: I think now, you know $5, whatever, but many millions of dollars, but in that well they did a log and there's 160 feet of Barnett shale under this acreage. We have expert testimony in the form of an affidavit. They did no contrary evidence at all. We have expert testimony that the formation is such that you would expect it to be generally over the whole property. There was a study done of wells on an adjoining county to support that view, but that's what the evidence is. The surface, a question was asked about the surface, the surface was over $500 an acre, surface and minerals and whatever went with it. The second thing, a question was asked about if you reserve a royalty don't you really anticipate that that might be a beneficial to you someday? As in Schlittler, which in 1937 the Court didn't have any problem with that. It says a reservation of royalty on all oil gas and minerals which may be produced necessarily implies that the grantor contemplated the leasing of the land for production. One of the fascinating things about the oil and gas business is that you can sit here with a piece of property today with minerals that you don't think much about and tomorrow because of advanced techniques, formations that were earlier unproducible have suddenly become producible in the Barnett shale, in the Eagle Ford and so to reserve minerals does mean something. It does raise, mean that you have an expectation that if the opportunity arises the value of your minerals will be realized.

JUSTICE NATHAN L. HECHT: But what if you don't. What if the purchaser of the executive rights says I'm going to buy this and I am never going to lease this property, that's my firm intent, so you don't have that expectation?

ATTORNEY CHARLES TIGHE: That would be the result of affirming the Court of Appeals' opinion in this case and there are several things that would be consequential that would follow that. The first is I own minerals that today are worth to the [inaudible] on the order of $450 million. You are my co-tenant. We are co-tenants. You have a duty not to harm my minerals, but if you have the executive rights, you can make my minerals valueless. You can determine that I'm at your mercy. The other thing that I would say about that, it's interesting, if all you say is that an executive who, and executive's rights are acquired in different ways; through inheritance, through partition, a family gets together they've inherited minerals and they say you know how are we going to deal with these things? Well, they try to find one person that knows something about executive rights, about leasing, about oil and gas and they say you be the one so we'll give you the executive right. Tomorrow that guy says you know I don't think I'm going to follow through on this. I think I'm going to not exercise the executive rights.

JUSTICE NATHAN L. HECHT: And I can see that that's where it comes up a lot of times. Is there much, are there many commercial transactions that involve just the executive rights?

ATTORNEY CHARLES TIGHE: I'm not aware of any. Ordinarily though, there's nothing improper. One, you want to keep the executive rights unified in some source to make it easier to lease. One of the reasons that you give the executive rights or would sell the executive rights to the surface owner aside from the fact that through the courts you have some confidence that if you give him executive rights he's not going to do harm to your interest because he's going to protect it if he has an opportunity to do so. The surface owner, within the framework of Manges' duty and within the framework of Getty that provides the way that you measure these conflicts

and deal with them to make an accomodation theory, because of that there's nothing wrong with the guy giving somebody the executive rights to, so that he can obtain further protection that he otherwise would be entitled to.

JUSTICE EVA M. GUZMAN: Sir, can you discuss their last argument, of sort of a policy argument, that if we create a duty to lease that it's going to restrict the value of land and that's the end of negotiations, you know because it's purely administrative I'm going to force you to lease that. Can you discuss [inaudible]--

ATTORNEY CHARLES TIGHE: I'm sorry. Would you say it once more please?

JUSTICE EVA M. GUZMAN: I can. The last argument that they made was that if the court creates a duty to lease that that will restrict the value of the land and that it really sort of turns years and years of the way things are normally negotiated on its head if you will. Can you respond to that, why we should create a duty to lease if you will to the extent it's not already there?

ATTORNEY CHARLES TIGHE: To say that a duty to lease imposed on an exec right holder would decrease the value of the property?

JUSTICE EVA M. GUZMAN: Restrict, yeah because--

ATTORNEY CHARLES TIGHE: I don't quite know how to respond to that because I don't think that, that's pure speculation as to whether it would. The--

JUSTICE PHIL JOHNSON: Tighe? If I could ask one brief question along that line, if you can be sued for your neighbor or your co-tenant's belief that you should have leased at $3 and you think it's going to $7 and that could generate a lawsuit claiming you did not act reasonably, why would anyone ever want the executive rights when you could just sit and second-guess them and backseat drive them so-to-speak and it would threaten them with lawsuits?

ATTORNEY CHARLES TIGHE: You would want the executive rights so that you could add additional protection for the surface; bury the pipelines no more than 300 feet from a residents, but--

JUSTICE PHIL JOHNSON: But aren't you subject, if your theory is there, but aren't you subjecting every executive right's owner to blackmail so-to-speak by their co-tenant, threatening them with lawsuits?

ATTORNEY CHARLES TIGHE: Well, I think that the situation would be that there may be a disagreement as to whether or not a reasonable person would lease or not, but that's the very question that courts are set up to deal with. That could well be, but the reverse of that is if you enter into a lease and you didn't get enough money or enough bonus, I, as a non-executive mineral owner, [recording cuts out]. I can sue you. However, if you follow what the Court of Appeals has said, if you instead of entering a lease that is unfair where I'd get something, say I'm not going to enter a lease then I get nothing and my value is destroyed.

JUSTICE NATHAN L. HECHT: Any other questions? Thank you, Mr. Tighe. The Chief Justice is recused in this case. The case is submitted and the Court will take a brief recess.

MARSHAL: All rise.

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