2016 IL App (4th) 150853-U

NO. 4-15-0853

Order filed July 15, 2016

Modified upon denial of rehearing November 2, 2016

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

RAMSEY HERNDON LLC, Plaintiff-Appellant, v. LISA WHITESIDE (f/k/a Lisa Luchtefeld), d/b/a BEAM OIL COMPANY, and JOHN R. BASNETT, Defendants-Appellees.	)	Appeal from Circuit Court of Macon County No. 15L27 Honorable Thomas E. Little, Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justice Steigmann concurred in the judgment.
Justice Pope dissented.

ORDER

¶ 1 *Held*: Because count I of the complaint states a cause of action for breach of contract, the dismissal of that count is reversed, but the dismissal of count II, the count alleging conversion, is affirmed because plaintiff fails to make a reasoned legal argument regarding that count.

¶ 2 Plaintiff, Ramsey Herndon LLC, seeks damages from two defendants: Lisa Whiteside (formerly known as Lisa Luchtefeld), doing business as Beam Oil Company, and John R. Basnett. The complaint has two counts. Count I is directed against Whiteside, and it alleges that she breached a contract by failing to pay overriding royalties to plaintiff (we will explain what they are below). Count II is directed against both Whiteside and Basnett, and it alleges they "unlawfully converted Plaintiff's overriding royalty interest." The trial court granted defendants' motions to dismiss these counts with prejudice. Plaintiff appeals.

¶ 3 In our *de novo* review, we conclude that count I states a cause of action but that plaintiff has forfeited any issue as to count II because plaintiff's argument regarding that count is undeveloped and is unsupported by citation to authorities. Therefore, we affirm the dismissal of count II, but we reverse the dismissal of count I, and we remand this case for further proceedings. We deny Whiteside's petition for rehearing.

¶ 4 I. BACKGROUND

¶ 5 A. The Allegations in the Complaint

¶ 6 The complaint alleges that plaintiff entered into an oil and gas lease and then made fractional assignments of its interest in the lease: first an assignment of 75% and afterward an assignment of the remaining 25%. In count I, the claim is that Whiteside, the assignee of the 25%, breached a promise she made, in that assignment, to continue the payment of overriding royalties to plaintiff out of oil extracted from the leased land.

¶ 7 The relevant transactional documents are attached to the complaint as exhibits. In chronological order, the transactions were as follows.

¶ 8 1. *"Paid Up Oil and Gas Lease"*

¶ 9 On April 1, 2007, plaintiff entered into a "Paid Up Oil and Gas Lease" with J. Norman Jordan and Eleanor M. Jordan. (A "paid-up lease" is "[a] mineral lease that does not provide for delay-rental payments and does not subject the [lessee] to any covenant to drill." Black's Law Dictionary 1218 (9th ed. 2009). A "delay rental" is "[a] periodic payment made by an oil-and-gas lessee to postpone exploration during the primary lease term." *Id.* at 1411. Thus, "[a] paid-up lease is one under which the lessee has paid a *bonus* for the privilege of holding the

lease during its primary term—a lease with 'no rentals.' " (Emphasis in original.) *EnerQuest Oil & Gas, LLC v. Plains Exploration & Production Co.,* 981 F. Supp. 2d 575, 607–08 (W.D. Tex. 2013).) The Jordans were the lessors, and plaintiff was the lessee. In return for a cash bonus paid to them up front by plaintiff, the Jordans agreed to allow plaintiff to explore and develop the oil and gas reserves on 220 acres in Macon County. Plaintiff promised to pay the Jordans a royalty of 12.5% of all gas and oil substances physically produced from the leased premises.

¶ 10 The lease was to remain in force for a primary term of three years "and for as long thereafter as oil or gas or other substances covered hereby [were] produced in paying quantities from the Leased Premises." The lease further provided, in a paragraph with the heading "Operations":

> "If[,] after the primary term[,] this lease is not otherwise being maintained in force, but Lessee is then engaged in Operations, *** this lease shall remain in force so long as any one or more of such Operations are prosecuted with no interruption of more than 90 consecutive days, and if any such Operations result in the production of Oil and Gas Substances, as long thereafter as there is production in paying quantities from the Leased Premises or lands pooled or utilized therewith."

¶ 11 2. *"Partial Assignment of Oil and Gas Leases"*

¶ 12 On October 31, 2007, "[f]or adequate consideration," plaintiff assigned 75% "of its rights, titles[,] and interests" in the paid-up lease to three assignees: Headington Oil, Limited Partnership (Headington); Focus Energy, LLC (Focus); and Bayswater Exploration & Production, LLC (Bayswater).

¶ 13 Part of the consideration for plaintiff was the assignees' promise to pay plaintiff an "overriding royalty interest." ("An 'overriding royalty interest' is a fractional interest in the production of oil and gas and is over and above any royalty interest payable to the lessor of an oil and gas lease. It is an interest retained by the lessee of an oil and gas lease *** when the lessee assigns all or part of its lease or allows another party to drill on a site covered by its lease." 58 C.J.S. *Mines & Minerals* § 352, at 357 (2009).) Specifically, the assignment provided as follows:

> "Assignor excepts from this Assignment and reserves to Assignor, as an overriding royalty interest, that share of the production from the lands covered by the leases assigned, equal to the greater of (i) the difference between nineteen percent (19%) and existing leasehold burdens or (ii) one percent (1%), with the provision that if such lease covers less than the entire mineral fee estate in any of the land covered thereby[,] such overriding royalty, as to such land, shall be reduced to the proportion thereof which is equal to the undivided mineral fee estate covered by such lease."

¶ 14 3. *"Assignment of Leases and Bill of Sale"*

¶ 15 On October 30, 2009, for $10 "and other good and valuable consideration," the " 'ASSIGNORS,' " defined as plaintiff, Headington, Focus, and Bayswater, assigned to the " 'ASSIGNEE,' " defined as Lisa E. Luchtefeld, doing business as Beam Oil Company, "all of [their] right, title[,] and interest in and to the oil, gas[,] and mineral leases described on Exhibit 'A' attached hereto together with a like interest in and to all personal property located therein or thereon or used or obtained in connection therewith (hereinafter called the 'Oil and Gas Properties')." Exhibit A in turn referenced the paid-up lease of April 1, 2007, between the

Jordans and plaintiff, and it gave the legal description of the 220 acres, on which an oil well was located. The oil well was called "Jordan [No.] 1." "All production after the Effective Time" would be "owned by the ASSIGNEE."

¶ 16 Later on in this assignment, the assignee (Luchtefeld, now known as Whiteside) agreed to assume the following obligations and be subject to the following rights of the assignors (plaintiff, Headington, Focus, and Bayswater):

> "ASSIGNEE does hereby agree to assume; be bound by and subject to each ASSIGNOR'S express and implied covenants, rights, obligations[,] and liabilities with respect to the Oil and Gas Properties, and ASSIGNEE'S interest in the Oil and Gas Properties shall bear its proportionate share of royalty interests, *overriding royalty interests*[,] and other payments out of or measured by production from and after the Effective Time." (Emphasis added.)

¶ 17 4. *The Alleged Breach of Contract*

¶ 18 Plaintiff alleges, on information and belief, that Whiteside engaged Basnett to be the operator of Jordan No. 1 and that sometime prior to April 1, 2010, Whiteside, Basnett, or both of them "engaged in activities designed to restore or obtain production from Jordan [No.] 1." Plaintiff further alleges that, from April 2010 or earlier and continuing to the present, Jordan No. 1 has been producing oil in paying quantities and that Whiteside, Basnett, or both of them "assume[d] unauthorized control over the [6.5%] of oil production from Jordan [No.] 1 that was immediately due to Plaintiff under its overriding royalty and sold such portion of the production to third parties," without "offer[ing] or tender[ing]" it to plaintiff.

¶ 19 5. *The Alleged Conversion*

¶ 20 Count II incorporated by reference the allegations in count I and further stated as follows:

> "12. Defendants Whiteside and/or Basnett willfully and with intent to defraud Plaintiff of its rights to the overriding royalty interest due it, delayed production from Jordan [No.] 1 until April, 2010 in an attempt to allow the 2007 Lease to expire, along with Plaintiff's right to overriding royalties.
>
> WHEREFORE, Plaintiff requests that the Court find that Defendants have unlawfully converted Plaintiff's overriding royalty interest and award it damages based on the market value of the oil which should have been tendered to Plaintiff's account and further award it punitive damages in the amount of $100,000 based on Defendants' willful and fraudulent attempt to circumvent Plaintiff's right to overriding royalties."

¶ 21 B. Defendants' Motions Against the Complaint

¶ 22 1. *Whiteside's Motion To Dismiss the Complaint and Her Separate Motion To Strike Count II*

¶ 23 Pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2014)), Whiteside moved to dismiss the complaint with prejudice, arguing that, in the "Assignment of Leases and Bill of Sale," attached to the complaint as exhibit No. 3, plaintiff had assigned to her all its interest in the lease and that the subsequent provision in the assignment, pertaining to overriding royalties, could not reduce the scope of the earlier provision. In other words, Whiteside argued that the preservation of plaintiff's overriding royalty would be inconsistent with plaintiff's assignment to her of all its remaining interest in the lease.

¶ 24 In addition to her motion to dismiss the complaint as a whole, Whiteside filed a separate motion to strike count II, likewise pursuant to section 2-615, on the grounds that an overriding royalty was an interest in real property and only personal property could be converted.

¶ 25 2. *Basnett's Motion To Strike Count II*

¶ 26 Under both section 2-619(a)(9) (735 ILCS 5/2-619(a)(9) (West 2014)) and section 2-615, Basnett moved to strike the count directed against him, count II. Under the heading of section 2-619(a)(9), he presented evidence that he had entered into a separate contract with Whiteside, under which *she* was obligated to pay *him* an overriding royalty. He argued that by accepting overriding royalties from Whiteside pursuant to his separate contract with her, he could not be said to have converted any personal property of plaintiff.

¶ 27 Under the heading of section 2-615, he argued that count II was both conclusory and lacking in some of the essential elements of conversion, namely, that plaintiff had tendered to Basnett a demand for the allegedly converted personal property and that Basnett had assumed control, dominion, or ownership over plaintiff's personal property.

¶ 28 3. *The Trial Court's Ruling*

¶ 29 On September 25, 2015, the trial court granted defendants' motions. The court reasoned:

> "6. In the ['']Assignment of Leases and Bill of Sale,['] the Plaintiff and the aforementioned three entities, as Assignors, plainly conveyed *all* of assignor's right[,] title[,] and interest in and to the oil, gas[,] and mineral leases described in the 2007 lease. The court is unable to discern any reservation on the part of the

> Plaintiff of the overriding royalty interest[,] and the court specifically finds that the said interest was included in the conveyance to Whiteside.
>
> 7. As to Count II of the Complaint relating to Basnett, the court finds that Plaintiff has failed to state a cause of action for conversion. Basnett's override interest and the funds received therefrom arise from his contract with Whiteside[,] and the Plaintiff has no right upon which a claim for conversion could be based." (Emphasis in original.)

Therefore, the court dismissed the complaint with prejudice.

¶ 30 This appeal followed.

¶ 31 II. ANALYSIS

¶ 32 A. Does Count I State a Cause of Action For Breach of Contract?

¶ 33 Plaintiff argues that, in count I, it pleaded a legally sufficient cause of action for breach of contract, because in the "Assignment of Leases and Bill of Sale," attached to the complaint as exhibit No. 3, Whiteside agreed to assume each of the assignors' covenants, and to be subject to each of their rights, regarding the 220 acres and specifically agreed that her interest in the 220 acres should "bear its proportionate share of *** overriding royalty interests."

¶ 34 Whiteside has a different interpretation. She points out that, earlier in exhibit No. 3, plaintiff assigned to her "*all* of [plaintiff's] right, title, and interest in and to" the paid-up lease and also "to *all* personal property *** obtained in connection therewith." (Emphases added.) Not only that, but exhibit No. 3 provides: "*All* production after the Effective Time" would be "owned by the ASSIGNEE." (Emphasis added.) She reasons as follows. The paid-up lease created two interests in the mineral estate: the Jordans' royalty interest and plaintiff's working interest. See

People ex rel. Harris v. Parrish Oil Production, Inc., 249 Ill. App. 3d 664, 666 (1993) (a working interest is "that portion of the oil and gas that may be produced from the premises after the royalty is paid to the lessor"). An overriding royalty interest (not to be confused with the royalty interest) is "carved out of the working interest created by an oil and gas lease"; it is carved out of plaintiff's working interest. (Internal quotation marks omitted.) *Reynolds-Rexwinkle Oil, Inc. v. Petex, Inc.*, 1 P.3d 909, 914 (Kan. 2000). By assigning to Whiteside *all* of its interest in the paid-up lease, plaintiff assigned to her all of its working interest, leaving no working interest out of which to carve the overriding royalty interest, according to Whiteside's reasoning. Alternatively, she argues in her petition for rehearing, if the overriding royalty interest were regarded as personal property (she maintains, however, that it is real property), plaintiff assigned to her "all personal property *** obtained in connection" with the oil and gas lease—and, as if to banish any doubt, exhibit No. 3 says that "[a]ll production" shall be hers. Whiteside admits she assumed the obligation to pay overriding royalties, but to avoid a repugnancy with the granting clause, she argues exhibit No. 3 should be construed as meaning she shall assume only the overriding royalties "owned by others who are *not* party to the instrument," to quote her brief. (Emphasis in original.) She cites cases holding that a provision repugnant to the grant must yield to the grant (*Law v. Kane*, 384 Ill. 591, 597 (1944); *Nave v. Bailey*, 329 Ill. 235, 242 (1928)) and that ambiguities in deeds should be resolved in favor of the grantee (*Gelfius v. Chapman*, 118 Ill. App. 3d 290, 292 (1983); *Jones v. Johnson*, 16 Ill. App. 3d 996, 999-1000 (1974)).

¶ 35 Before evaluating those opposing arguments, we should be clear as to the standard of review and rules of construction that we bring to this appeal.

¶ 36 When a party appeals a dismissal that was pursuant to section 2-615, we review the dismissal *de novo*, deciding whether the complaint states a cause of action, that is, a cause for

relief under the law. *Oliveira v. Amoco Oil Co.*, 201 Ill. 2d 134, 147 (2002). (We need not discuss section 2-619(a)(9), since, as we will explain, plaintiff has forfeited any issue as to count II.) In assessing the legal sufficiency of the complaint, we take the well-pleaded factual allegations of the complaint to be true, and if more than one reasonable inference could be drawn from those factual allegations, we draw the inference that would be favorable to the plaintiff. *Id.* In the event of a contradiction between the text of the complaint and an attached exhibit upon which the action is founded, the facts disclosed by the exhibit prevail over the contrary facts alleged in the text of the complaint. *Garrison v. Choh*, 308 Ill. App. 3d 48, 53 (1999).

¶ 37 Count I is founded upon the "Assignment of Leases and Bill of Sale," exhibit No. 3. Therefore, Whiteside's contractual liability depends on the correct construction of that exhibit. As its title says, exhibit No. 3 is an assignment, a "transfer of some identifiable property, claim[,] or right from the assignor to the assignee." (Internal quotation marks omitted.) *A.J. Maggio Co. v. Willis*, 316 Ill. App. 3d 1043, 1047 (2000). Because an assignment is a contract, we should construe an assignment as we would construe any other contract. *CNA International, Inc. v. Baer*, 2012 IL App (1st) 112174, ¶ 48; *Amalgamated Transit Worker's Union, Local 241 v. Pace Suburban Bus Division of the Regional Transportation Authority*, 407 Ill. App. 3d 55, 60 (2011); 3 Walter H.E. Jaeger, Williston on Contracts § 431, at 175 (3d ed. 1960).

¶ 38 In her brief and in her petition for rehearing, Whiteside takes a different view. She argues that only a formalistic distinction can be made between an assignment conveying an interest in an oil estate and a deed doing so and that such an assignment therefore should be construed as a deed would be construed. In support of that argument, she cites *Updike v. Smith*, 378 Ill. 600 (1942), and *Williams v. Sohio Petroleum Co.*, 18 Ill. App. 2d 194 (1958), as well as a treatise (3 Nancy Saint-Paul, Summers on Oil and Gas § 29:15 (3d ed. 2014)).

¶ 39 If we did construe the assignment as we would construe a deed, the cases on which Whiteside chiefly relies—*Nave*, *Law*, *Jones*, and *Gelfius*—would provide no justification for qualifying or nullifying the clear language in which she agreed to assume the obligation of paying overriding royalty interests held by any of the assignors. Let us take a look at those cases one at a time.

¶ 40 1. *Nave v. Bailey*

¶ 41 The deed in *Nave* began with "the premises," and "the habendum" followed. *Nave*, 329 Ill. at 237. These terms referred, respectively, to the granting clause of a deed and to an optional subsequent clause (*id.* at 246), beginning with the infinitive verbs "to have and to hold" (*habendum et tenendum*), which "lessen[ed], enlarge[d], explain[ed], or qualif[ied], but [did] not totally contradict or be repugnant to, the estate granted in the premises." *Id.* at 240.

¶ 42 The premises of the deed in *Nave* conveyed a fee simple estate to the grantees, whereas the *habendum* conveyed a life estate to them. *Id.* at 242. Applying the common-law doctrine of repugnancy, the supreme court held the *habendum* to be void because it totally contradicted, and thus was "repugnant" to, the estate granted in the premises: the grant could not be an estate for life and at the same time an estate in fee simple. *Id.*

¶ 43 *Nave* is distinguishable from the present case for two reasons. First, the doctrine of repugnancy is applicable only if the premises use words of inheritance. *Smith v. Grubb*, 402 Ill. 451, 460 (1949). "Where, however, words of inheritance are not used, the rule is that every word in the conveyance, irrespective of where it may be found, shall be given weight in construing the instrument[,] and the doctrine of repugnancy, *** that subsequent words in a grant which apparently reduce the estate conveyed by the words of the grant shall be disregarded as

repugnant to the grant, has no application ***." *Id.* In *Nave*, the premises used words of inheritance: the grant was to the named grantees " 'and to their heirs.' " *Nave*, 329 Ill. at 237. The assignment to Whiteside, by contrast, uses no words of inheritance, and consequently, instead of applying the doctrine of repugnancy, we should construe the assignment as a whole, giving weight to its every word (see *Smith*, 402 Ill. at 460), as we would do in the construction of a contract (see *Bundy*, 384 Ill. at 144; *S & H Realty & Investment Co. v. Consumers Budget Loan Co.*, 8 Ill. App. 3d 206, 208 (1972))—which the assignment happens to be (see *CNA*, 2012 IL App (1st) 112174, ¶ 48).

¶ 44 Second, the *habendum* in *Nave* contradicted the nature of the estate conveyed in the granting clause. In the present case, by contrast, Whiteside would not contradict the nature of the estate granted to her by agreeing to assume the obligation to pay overriding royalties. That obligation would affect only the quantity of the estate, not its nature or quality.

¶ 45 2. *Law v. Kane*

¶ 46 In *Law*, Janie Law signed a warranty deed and delivered it to William Mead. *Law*, 384 Ill. at 592-93. In the warranty deed, which used no words of inheritance, she conveyed to him 35 acres " 'for and during the natural life of the grantor, she reserving the use and occupation of the land during her the grantor's life.' " *Id.* at 593. The deed continued, in the next sentence: " 'A part of the consideration of this deed is that the grantee, shall if and when requested by the grantor furnish her support, and pay her funeral expenses, if she leaves no estate.' " *Id.*

¶ 47 Mead predeceased Law and devised his entire estate to James P. Kane, who, by virtue of Mead's will and in turn the warranty deed from Law to Mead, claimed fee-simple

ownership of the 35 acres, subject to an obligation to provide any support that Law genuinely needed—he asserted she was rich and needed none. *Id.* at 593-94. Law, who demanded support and an accounting (*id.* at 593-94), disagreed with Kane's construction of the warranty deed. She maintained that, by the warranty deed, she had reserved a fee-simple title in herself and had conveyed to Mead merely an estate for her life—known at common law as an estate *per autre vie*—subject to her right to receive support from Mead and his successors for the rest of her life whenever she requested such support. *Id.*

¶ 48 Did Law convey a fee title to Mead while reserving a life estate for herself, or did she instead reserve the fee title for herself while conveying to Mead an estate for her life? That was the issue in *Law*. *Id.* at 595-96.

¶ 49 The supreme court said:

> "Where words of inheritance are wanting, as here, the entire context of an instrument may be considered, and every word used, wherever found, should be given weight in determining the estate granted. In particular, if a less estate is limited by express words or appears to have been granted by construction or operation of law, the deed does not convey a fee-simple estate. [Citations.] Repugnant provisions in a deed are to be construed together and reconciled, if possible, but no construction of a provision will be adopted which holds it repugnant to the grant, and therefore void, so as to defeat the manifest intent of the parties." [Citation.] *Id.* at 597.

¶ 50 "In the light of [those] established principles [of] construction," the supreme court decided:

> "[Law] intended to convey the property to [Mead] for and during her lifetime, only, reserving to herself merely the right to request support if she so elected. The first words of limitation in the granting clause 'for and during the natural life of the grantor' are words conveying and creating an estate *pur autre vie*, namely, for the life of Janie Law. The language immediately following 'she reserving the use and occupation of the land during her the grantor's life' cannot be isolated and separated from the next sentence which reads, 'A part of the consideration of this deed is that the grantee, shall if and when requested by the grantor furnish her support, and pay her funeral expenses, if she leaves no other estate.' " *Id.*

¶ 51 Arguably, by this construction, the supreme court reduced the phrase " 'she reserving the use and occupation of the land during her the grantor's life' " to surplusage, or reduced the next sentence of the deed to surplusage, by treating them as having the same meaning, *i.e.*, the right to support as requested. And the construction seems to go against the plain meaning of the phrase—what is " 'the use and occupation of the land' " if not a life estate? But construing the deed as granting an estate to Mead for Law's life while, at the same time, reserving to Law a life estate would have made the deed pointless—an absurd, self-negating exercise. It would have completely wiped out the grant to Mead. Thus, the supreme court added, in conclusion:

> "On the other hand, if the words, standing alone, 'she reserving the use and occupation of the land during her the grantor's life,' be construed as irreconcilably inconsistent with the language immediately preceding, which grants to Mead a life estate for and during the life of plaintiff, the subsequent

language may be disregarded. The repugnant words would simply yield to the clause conveying the life estate to Mead." *Id.* at 598.

¶ 52 At first, this might seem an invocation of the inapplicable doctrine of repugnancy, but in context it is nothing more than the invocation of a canon of construction. "Repugnant provisions in a deed are to be construed together and reconciled, *if possible* ***." (Emphasis added.) *Id.* at 597. "An exception must be part of the thing granted, and must not be as extensive as such a thing, so as to be repugnant thereto." 4 Herbert Thorndike Tiffany, The Law of Real Property § 975, at 82 (3d ed. 1975). An exception, to be a true exception, must leave something of the grant; the grantor surely meant to convey *something*. Even in the construction of contracts, a court may legitimately disregard unambiguous language if it is clear, from the context, that the parties meant something different from what they said. *United Airlines, Inc. v. City of Chicago*, 116 Ill. 2d 311, 318-19 (1987).

¶ 53 The contradiction—or "repugnancy" if one wants to call it such—in the assignment to Whiteside is not nearly of the same magnitude as that in the warranty deed in *Law*. If we gave full effect to the "ASSIGNEE hereby agrees" provision, we would not make the assignment a pointless, self-negating document. Again, the "repugnancy" in the assignment is not to the nature of the estate; it is merely to the precise quantity of the estate. In other words, it is an exception and is "repugnant" to the grant only to the extent that any exception is "repugnant" to the grant. Therefore, *Law* is distinguishable.

¶ 54 3. *Jones v. Johnson*

¶ 55 In *Jones*, the granting clause and the description clause conveyed to the grantees some land, without limitation (in those clauses). *Jones*, 16 Ill. App. 3d at 997-98. Then a

reservation clause " '[reserved] unto the Grantors the undivided One[-]Half Interest in and to all of the Oil, Gas, in and under that may be produced from the above described lands.' " *Id.* at 998. (Strictly speaking, this was an exception, not a reservation, since, before the conveyance, the grantors already owned the oil and gas rights. "An exception in a deed withholds from its operation some part or parcel of the thing which but for the exception would pass by the general description to the grantee. A reservation is the creation of some new right issuing out of the thing granted, and which did not exist before as an independent right, in behalf of the grantor and not of a stranger." *Dickman v. Madison County Light & Power Co.*, 304 Ill. 470, 479 (1922).). Finally, there was an intent clause, and it was the intent clause that gave rise to the dispute in *Jones* (16 Ill. App. 3d at 999) ("The crucial question then becomes what effect is to be given this final clause when reading the instrument as a whole."). The intent clause said: " 'It is the intention of the Grantors to convey the Undivided One[-]Half Interest in and to all of the Oil, and Gas, that may be produced from the above described lands, also the Surface of the above described lands.' " *Id.* at 998.

¶ 56 According to the grantors and their mineral-rights lessee, the intent clause was significant for what it left *unsaid*: it said nothing about conveying "the mineral estate" to the grantees. *Id.* at 999. Consequently, the grantors and their lessee claimed not only a one-half interest in the oil and gas but also "a fee interest in all other minerals located on, in[,] or beneath the surface estate." *Id.* at 997.

¶ 57 In addressing this claim by the grantors and their lessee, the appellate court began with the observation that when a landowner made a deed containing no reservation and no limitation of the estate conveyed, the landowner "convey[ed] everything under the surface as well as on the surface." *Id.* at 998-99. But a landowner did not have to make a total, unlimited

conveyance. A landowner could "sever his land into estates," such as by "dispos[ing] of the mineral estate and retain[ing] the surface" or by "dispos[ing] of the surface and retain[ing] the mineral estate." *Id.* at 999. "[P]lainly," by operation of the granting, description, and reservation clauses, if they were considered alone, the grantors in *Jones* conveyed to the grantees "the surface estate, the mineral estate[,] and an undivided one-half interest in the oil and gas." *Id.* The question was whether, despite those proceeding clauses, the intent clause ended up "reserving" to the grantors all of the mineral estate except for an undivided one-half interest in oil and gas. *Id.*

¶ 58 For two reasons, the appellate court concluded the intent clause did not have that effect. First, giving effect to the intent clause "would [have] require[d] [the appellate court] to ignore and disregard the legal import of the granting and reservation clauses." *Id.* Second, "it [was] an established rule of construction that where there [was] ambiguity or a question in construing a deed, the deed should be construed most favorably to the grantee as against the grantor." *Id.* at 999-1000.

¶ 59 Whiteside sees such an ambiguity in the assignment to her. On the one hand, the assignors assigned to her "*all* of [their] right, title[,] and interest in and to the oil, gas[,] and mineral leases ***[,] together with a like interest in and to *all* personal property located therein or thereon or used or obtained in connection therewith," and agreed that "[*a*]*ll* production after the Effective Time" would be "owned by [her]." (Emphases added.) On the other hand, she agreed to "to assume; be bound by and subject to each ASSIGNOR'S express and implied covenants, rights, obligations[,] and liabilities with respect to the Oil and Gas Properties" and that "[her] interest in the Oil and Gas Properties [should] bear its proportionate share of *** overriding royalty interests and other payments out of or measured by production from and after the Effective Time." She argues that her assumption of the covenant and obligation of

Headington, Focus, and Bayswater to pay overriding royalties to plaintiff would contradict the preceding clauses, including the granting clause, in which "all" was conveyed to her. "All" means all, she argues, and contradicting the initial conveyance to her of "all" creates an ambiguity, which "should be construed most favorably to the grantee" (herself) "as against the grantor" (plaintiff). *Id.*

¶ 60 By this reasoning, however, the grantors in *Jones* would not even have been entitled to a one-half interest in the oil and gas, considering that, in the granting clause and the description clause, read in isolation, they conveyed *all* to the grantees: "everything under the surface as well as on the surface." *Id.* at 998-99. And yet, the appellate court concluded, the grantors "plainly" were entitled to keep a one-half interest in the oil and gas (*id.* at 999)—even though the granting clause and the description clause, in themselves, contained no excepting or qualifying language (*id.* at 997-98). To use an illustration, there is no effective difference between the general wording "I convey Blackacre to John Doe" and the more emphatic wording "I convey *all* of Blackacre to John Doe." The general description is already all-encompassing. "I convey Blackacre to John Doe" does not mean "I convey *some* of Blackacre to John Doe." If an exception clause follows a granting clause, then, necessarily, the granting clause purports to convey all; otherwise, there would be no need for an exception clause. To quote *Dickman* again,"[a]n exception in a deed withholds from its operation some part of the thing[,] *which*[,] *but for the exception*[,] *would pass by the general description to the grantee*." (Emphasis added.) *Dickman*, 304 Ill. at 479. By Whiteside's logic, a separate exception clause in a deed would be a nullity, or it would have to be limited or qualified to the point at which it is no longer an exception, because the contradiction between it and the preceding "general description" of what is being conveyed would create an ambiguity, which would have to be construed against the

grantor. That logic is incompatible with the very nature of an exception clause, a long-familiar convention in deeds. See *id.*

¶ 61 In the assignment to Whiteside, the clause beginning with the words "ASSIGNOR agrees to assume" is actually comparable not to the intent clause in *Jones* but to the "reservation" clause in that case (as we have explained, the "reservation" clause was really an exception clause). An exception has to be clear: that, basically, is the teaching of *Jones*. It does not have to use the word "except"; the "reservation" clause in *Jones* did not do so. It merely has to express the intent to make an exception, and it has to describe the excepted property "with such certainty that it may be identified." 4 Herbert Thorndike Tiffany, The Law of Real Property § 975, at 82 (3d ed. 1975).

¶ 62 The exception in the assignment to Whiteside is certain and clear. In simple, straightforward, unambiguous language, the assignee, Whiteside, agrees to assume and be bound by each assignor's covenants and rights with respect to the oil and gas properties, including, specifically, overriding royalties. Our duty is to effectuate that clearly expressed intent—which is no less clear for being expressed in the format of a generally descriptive granting clause followed by an exception clause. See *Dickman*, 304 Ill. at 479; *Jones*, 16 Ill. App. 3d at 998 ("[T]he primary purpose of construction of a deed is to ascertain the intention of the parties, which is to be determined and gathered from the instrument as a *whole*, giving effect to every word and rejecting none as meaningless or repugnant, if it can be done without violating any positive rule of law." (Emphasis in original.)).

¶ 63 4. *Gelfius v. Chapman*

¶ 64 In *Gelfius*, Kenneth Chapman and Pauline Chapman conveyed 80 acres, by warranty deed, to Edna Ferguson and Mark Ferguson. *Gelfius*, 118 Ill. App. 3d at 291. The deed "reserved" to the Chapmans an undivided one-fourth interest in *oil and gas* " 'together with the right of ingress and egress at all times for the purposes of mining, drilling, exploring, operating[,] and developing said land for oil and gas *and other minerals*.' " (Emphasis added.) *Id.*

¶ 65 Notice that, in this deed, the Chapmans first excepted a one-fourth interest in oil and gas (but not in any other mineral) and then, immediately afterward, when "reserving" their right of ingress and egress, they spoke of mining and drilling not only for oil and gas but also for " 'other minerals.' " *Id.* Coal fell into the category of " 'other minerals.' " Therefore, the Chapmans and their successors in title argued that the phrase " 'and other minerals' " succeeded in "reserving" coal rights, too. They argued that the phrase "enlarged [the] reservation," beyond a one-fourth interest in oil and gas, "to include a one-fourth interest in coal and coal rights." *Id.*

¶ 66 The appellate court was unconvinced. Finding the analysis in *Jones* to be apposite, the appellate court gave essentially two reasons for rejecting the claimed additional exception of coal rights. First, "[t]he general phrase 'and other minerals' appearing only as part of a subsequent description of access rights has no power to modify the precedent grant of land and enlarge the specific reservation of one-fourth interest in the gas and oil rights." *Id.* at 292. As Tiffany puts it, "[t]he part or thing excepted *** must be described with such certainty that it may be identified," and "an exception [may be] held to be void for lack of such certainty." 4 Herbert Thorndike Tiffany, The Law of Real Property § 975, at 82 (3d ed. 1975). The ingress and egress clause did not except coal rights with certainty. That clause did not specify coal, let alone a percentage of coal. Really, it did not directly except any mineral rights at all. The purported exception of other mineral rights could be perceived, if at all, only by implication from

the right to enter the property to mine not only for oil and gas but also for " 'other minerals.' " An argument could have been made that the grantors retained a right of egress and ingress to mine for other minerals in case, afterward, they acquired the right to mine for other minerals—a right they did not have as of yet. An exception has to be clear and straightforward; it cannot be hinted at. The exception in the present case, by contrast, is far from subtle or coy. The "ASSIGNOR agrees to assume" clause is certain, specific, and direct; it plainly and explicitly imposes an obligation on Whiteside to pay overriding royalties to which any of the assignors had a right. In that respect, it is significantly different from the ingress and egress clause in *Gelfius*, which did not specifically except or even mention coal rights.

¶ 67 Second, *Gelfius*, like *Jones*, applied "the rule that ambiguities in deeds must be construed in favor of the grantee." *Gelfius*, 118 Ill. App. 3d at 292. As we have already discussed, if a clear and specific exception clause creates an ambiguity by "withhold[ing] *** some part *** of the thing[,] which[,] but for the exception[,] would pass by general description to the grantee," there would be no such thing as an exception clause. *Dickman*, 304 Ill. at 479. Undeniably, there is such a thing as an exception clause.

¶ 68 In the words of exhibit No. 3, Whiteside, as the assignee, "agree[d] to assume; be bound by and subject to each ASSIGNOR'S express *** covenants, rights, obligations[,] and liabilities with respect to the [220 acres]," and she specifically agreed that her "interest in the [220 acres should] bear its proportionate share of *** overriding royalty interests." That provision is written in plain English, and its application is straightforward. Three of the assignors—Headington, Focus, and Bayswater—had made a *covenant*, and had assumed an *obligation*, with respect to the 220 acres, namely, to pay an overriding royalty to the fourth assignor, plaintiff. Plaintiff had a corresponding *right* to that overriding royalty. Therefore, under

the plain and unambiguous terms of exhibit No. 3, Whiteside agreed to assume the obligation of Headwater, Focus, and Bayswater to pay plaintiff an overriding royalty out of the oil extracted from the 220 acres; Whiteside's newly acquired interest in the 220 acres was subject to a clearly worded exception: plaintiff's right to an overriding royalty.

¶ 69 The dissent observes, however, that, in the same sentence in which Whiteside agreed her "interest in the Oil and Gas Properties [should] bear its proportionate share of *** overriding royalty interests," she "assume[d]" plaintiff's "rights *** with respect to the Oil and Gas Properties." Thus, the dissent argues, any right plaintiff had to collect payment from the property in question now belongs to Whiteside.

¶ 70 From a strictly grammatical point of view, the dissent is correct. The object "rights" receives the action of the verbal phrase "does hereby agree to assume," just as the other objects—"covenants," "obligations," and "liabilities"—do so ("ASSIGNEE does hereby agree to assume; be bound by and subject to each ASSIGNOR'S express and implied covenants, rights, obligations[,] and liabilities with respect to the Oil and Gas Properties"). But "assume" typically is used in the sense of taking on responsibilities, obligations, or power, not gaining rights. See Black's Law Dictionary 120 (7th ed. 1999) (defining "assumption" as "[t]he act of taking (esp[ecially] someone else's debt or other obligation) for or on oneself"); The New Oxford American Dictionary 97 (2001) (defining "assume" as "take or begin to have (power or responsibility)"). It would be an unnatural usage to say that someone "agrees to assume rights."

¶ 71 Not only would we read the word "assume" in an unusual way, but we would end up with an implausible, paradoxical interpretation by holding that Whiteside first "agree[d] to assume" the rights to overriding royalties and then, in the same sentence, agreed that her interest in the oil and gas properties would bear its proportionate share of these overriding royalties.

"[T]echnical or grammatical construction must give way to the intention of the parties ***." *Lehmann v. Revell*, 354 Ill. 262, 284 (1933). Reasonableness obliges us to look beyond the clumsiness in the draftsmanship and interpret the contract as meaning that Whiteside "agrees to assume" the assignors' "obligations" "with respect to the Oil and Gas Properties" and, by the same token, agrees to "be subject to" their "rights" "with respect to the Oil and Gas Properties."

¶ 72 Not only does this interpretation reasonably give effect to all the provisions of the contract, rendering none of them meaningless (see *Wolfensberger v. Eastwood*, 382 Ill. App. 3d 924, 934 (2008)), but it honors an additional black-letter canon of construction. "[W]here one intention is expressed in one clause of an instrument and a different, conflicting intention appears in another clause of the same instrument, effect should be given to the clause which is more specific, and the general clause should be subjected to such modification or qualification as the specific clause makes necessary." *Lima Lake Drainage District of Adams County v. Hunt Drainage District of Hancock County*, 204 Ill. App. 3d 521, 526 (1990). In the assignment to Whiteside, we first have a general provision, in which plaintiff assigns to her all its interest in the oil lease and all its interest in any personal property obtained in connection with the oil lease. By that general provision, *considered in isolation*, plaintiff would have assigned to Whiteside its overriding royalty interest, because the overriding royalty interest was either an interest in the oil lease or an interest in personal property obtained in connection with the oil lease. Further down, though, the assignment has a clause specifically addressing overriding royalties, and in that clause, Whiteside agrees to "assume, be bound by, and [be] subject to each ASSIGNOR'S *** covenants *** with respect to the Oil and Gas Properties" and that "[her] interest in the Oil and Gas Properties shall bear its proportionate share of *** overriding royalty interests." The

"assumption" provision, which specifically addresses overriding royalties, modifies or qualifies the earlier, general grant. See *id.*

¶ 73 B. Forfeiture of the Theory of Conversion

¶ 74 Plaintiff's argument regarding count II consists of only two sentences: "Under plaintiff's [overriding royalty interest], it has a right to a share of the oil and proceeds therefrom. Defendants have converted this share to their own purpose and must be held accountable." This undeveloped argument, unsupported by citation to any legal authority, is forfeited. See *In re Detention of Lieberman*, 379 Ill. App. 3d 585, 610 (2007).

¶ 75 III. CONCLUSION

¶ 76 For the foregoing reasons, we deny Whiteside's petition for rehearing. We affirm the dismissal of count II with prejudice, but we reverse the dismissal of count I, and we remand this case for further proceedings.

¶ 78 Affirmed in part and reversed in part; cause remanded.

¶ 79 JUSTICE POPE, dissenting upon denial of petition for rehearing:

¶ 80 I respectfully dissent upon the denial of Whiteside's petition for rehearing in this case. Although I concurred in the original order, after reviewing Whiteside's petition for rehearing and reexamining the original briefs, it appears this court's original reasoning and decision were wrong. It also appears the majority agrees our original reasoning was not correct as a large portion of the original analysis no longer appears in the majority opinion. However, the majority still believes the trial court erred in dismissing Ramsey Herndon's claim against Whiteside. I disagree.

¶ 81 We can affirm a trial court's judgment based on any reason found in the record. *Tummelson v. White*, 2015 IL App (4th) 150151, ¶ 25. This court reviews the result the trial court reached, not the trial court's reasoning. *Id.* ¶ 26. However, in this case, the trial court's reasoning for dismissing Ramsey Herndon's claim against Whiteside was correct. In its September 25, 2015, order dismissing Ramsey Herndon's claim against Whiteside, the court noted:

> "In the Assignment of Leases and Bill of Sale, [Ramsey Herndon] and the aforementioned three entities, as Assignors, plainly conveyed *all* of assignor's right title and interest in and to the oil, gas and mineral leases described in the 2007 lease. The court is unable to discern any reservation on the part of [Ramsey Herndon] of the overriding royalty interest and the court specifically finds that the interest was included in the conveyance to Whiteside." (Emphasis in original.)

I agree with the trial court.

¶ 82 Under the plain language of the October 2009 assignment, Ramsey Herndon assigned "all of [its] right, title and interest in and to the oil, gas and mineral leases described on Exhibit 'A' attached hereto together with a like interest in and to all personal property located therein or thereon or used or obtained in connection therewith." Ramsey Herndon's overriding royalty interest was an interest in the lease. The continued existence of the overriding royalty interest depended on the continued existence of the lease.

¶ 83 As is evident from Ramsey Herndon's October 2007 partial assignment of the lease, Ramsey Herndon knew how to except or exclude an overriding royalty interest from an assignment. The partial assignment specifically stated:

> "Assignor excepts from this Assignment and reserves to Assignor, as an overriding royalty interest, that share of the production of the lands covered by the leases assigned, equal to the greater of (i) the difference between nineteen percent (19%) and existing leasehold burdens or (ii) one percent (1%) with the provision that if such lease covers less than the entire mineral fee estate in any of the land covered thereby such overriding royalty, as to such land shall be reduced to the proportion thereof which is equal to the undivided mineral fee estate covered by such lease."

However, in assigning all its interest in the lease to Whiteside, Ramsey Herndon made no exception or exclusion for the overriding royalty interest. As a result, pursuant to the plain language of the assignment, Ramsey Herndon assigned its overriding royalty interest to Whiteside. Because it no longer owns the overriding royalty interest, Ramsey Herndon has no legal right to the benefits of the same.

¶ 84 The majority offers no analysis on this point. The majority's omission can be explained—but not justified—by its belief Whiteside conceded the plain language of the assignment required her to continue making payments to Ramsey Herndon on the overriding royalty interest. According to the majority, "Whiteside admits she assumed the obligation to pay overriding royalties, but to avoid a repugnancy with the granting clause, she argues exhibit No. 3 should be construed as meaning she shall assume only the overriding royalties 'owned by others who are *not* party to the instrument.' " (Emphasis in original.) *Supra* ¶ 34 (quoting appellee Whiteside's brief).

¶ 85 However, Whiteside made no such concession. In fact, the first heading of the argument portion of Whiteside's brief to this court states:

> "There is no genuine dispute as to any material fact. The Assignment which Plaintiff prepared, executed, delivered and attached to its Complaint expressly conveyed '*all*' of the Plaintiff's interest in the subject oil and gas lease to Defendant, Lisa Whiteside. The word 'all' by definition, includes any overrides which the Plaintiff owned at the time. The grant is clear, concise and absolute. It does not include any 'reservation' or 'exception'. The Defendant is entitled to judgment in her favor as a matter of law." (Emphasis in original.)

In addition, the majority's quote from Whiteside's brief is taken out of context. Whiteside's brief states:

> "An overriding royalty in an oil and gas lease is an interest in real estate and a conveyance of *all* interest which the Assignor

> has in an oil and gas lease, without any reservation or exception, includes any overriding royalty, which the Assignor may own. Obviously it would not include overrides owned by others who are *not* party to the instrument. That issue is dealt with in a later provision in the Assignment, known for our purpose here as the 'shall bear' provision, which coincidentally is discussed in more detail below as it is the very same provision upon which plaintiff relies." (Emphases in original.)

This statement is correct.

¶ 86 Had Ramsey Herndon not been a party to this assignment, then Whiteside would have been obligated to pay Ramsey Herndon its overriding royalty. Further, had Ramsey Herndon specifically excepted, excluded, or reserved its overriding royalty interest from the assignment, Whiteside again would have been obligated to pay Ramsey Herndon its overriding royalty. However, Ramsey Herndon was a party to the assignment and assigned "all" of its interests in the lease without reserving, excepting, or excluding its overriding royalty interest. As a result, Ramsey Herndon no longer owns an overriding royalty interest; Whiteside does.

¶ 87 The majority points out this assignment should be construed just like any other contract. *Supra* ¶ 37. A court's primary objective in construing a contract is to give effect to the intent of the parties. *Dowling v. Chicago Options Associates, Inc.*, 226 Ill. 2d 277, 295-96 (2007). "A contract should be given a fair and reasonable construction based upon all of its provisions, read as a whole." *Id.* at 296.

¶ 77 When this assignment is read as a whole, it is clear Whiteside has no obligation to make payments to Ramsey Herndon on an overriding royalty now owned by Whiteside. The

majority's construction of this contract is neither fair nor reasonable. While it is true the "shall bear" clause required Whiteside to "bear its proportionate share of royalty interests, overriding royalty interest, and other payments out of or measured by production from and after the Effective Time," the same clause also provided Whiteside would "assume" Ramsey Herndon's "rights *** with respect to the Oil and Gas properties." As a result, any right Ramsey Herndon had to collect payment from the property in question now belongs to Whiteside. When this contract is read as a whole, the "shall bear" clause was not intended by the parties to require Whiteside to continue making overriding royalty payments to Ramsey Herndon. As such, I disagree with the majority's interpretation of this assignment, which requires Whiteside to make overriding royalty payments to Ramsey Herndon on an overriding royalty Ramsey Herndon no longer owns.