

A FRESH LOOK AT AN OLD TORT: LITIGATING SLANDER OF TITLE IN MINERAL DISPUTES

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I. INTRODUCTION

Many decades have passed since courts in several western states first began to deal with the explosion of litigation resulting from equally frenzied oil and gas development in the region. Now, states in the Appalachian region of

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the eastern United States are rumbling with the sounds of new natural gas development triggered by the discovery of vast natural gas fields heretofore unknown or thought impossible to capture. Named for the geological stratum in which the prized gas is found, the Marcellus and Utica shale discoveries have triggered a modern-day “gold rush” involving modest landowners and large corporations alike. The literature is already bustling with scholarly activity focused on the implications of this newfound resource.¹

One aspect of mineral development to which the literature has paid surprisingly little attention is a cause of action called slander of title.² In West Virginia, slander of title is defined as the (1) publication of (2) a false statement (3) derogatory to plaintiff’s title (4) with malice (5) causing special damages (6) as a result of diminished value in the eyes of third parties.³ While the elements of the cause of action are not always expressed in a like way, the functional ingredients are nearly always the same. In most cases involving slander of title, a plaintiff’s injury is alleged to have been caused by the wrongful assertion by another of an interest in the plaintiff’s property. Often central to the suit, the wrongful assertion frequently comes in the form of a recorded quitclaim deed or other instrument signifying the disputed interest. In the context of a property-based energy law practice where the value of mineral interests can easily climb into the millions of dollars, particular care must be taken that clouded titles do not deprive an individual of his economic stake in the property, whether that stake arises from a fee simple, leasehold, or other interest. To be sure, slander of title is a peculiar and not often litigated tort. But in the rush to purchase potentially valuable mineral interests throughout greater

¹ Much of the literature has focused on the environmental and regulatory aspects of natural gas exploration. *See, e.g.*, Kristen Allen, *The Big Fracking Deal: Marcellus Shale—Pennsylvania’s Untapped Resource*, 23 VILL. ENVTL. L.J. 51 (2012); Jeffrey C. King et al., *Factual Causation: The Missing Link in Hydraulic Fracture—Groundwater Contamination Litigation*, 22 DUKE ENVTL. L. & POL’Y F. 341 (2012); Bruce M. Kramer, *Federal Legislative and Administrative Regulation of Hydraulic Fracturing Operations*, 44 TEX. TECH L. REV. 837 (2012); Ross H. Pifer, *What A Short, Strange Trip It’s Been: Moving Forward After Five Years of Marcellus Shale Development*, 72 U. PITT. L. REV. 615 (2011); Laura C. Reeder, *Creating A Legal Framework for Regulation of Natural Gas Extraction from the Marcellus Shale Formation*, 34 WM. & MARY ENVTL. L. & POL’Y REV. 999 (2010); Symposium, “Shale” We Drill? *The Legal and Environmental Impacts of Extracting Natural Gas from Marcellus Shale*, 22 VILL. ENVTL. L.J. 189 (2011); Hannah Wiseman, *Fracturing Regulation Applied*, 22 DUKE ENVTL. L. & POL’Y F. 361 (2012); Hannah Wiseman, *Regulatory Adaptation in Fractured Appalachia*, 21 VILL. ENVTL. L.J. 229 (2010).

² A suit for slander of title can relate not only to interests in real property, but also to personal property. *See, e.g.*, *Maragos v. Union Oil Co. of Cal.*, 584 N.W.2d 850, 851 (N.D. 1998). Because this Article is concerned with the cause of action relevant to claims of ownership in real property, I do not address cases involving personal property claims.

³ *See TXO Prod. Corp. v. Alliance Res. Corp.*, 419 S.E.2d 870, 873 (W. Va. 1992), *aff’d on other grounds*, 509 U.S. 443 (1993).

Appalachia, it is probable that some aggressive actors have and will slander the title of rightful interest owners. Such cases are likely now only beginning to percolate in the trial courts. Accordingly, this Article intends to act as a practitioner's guide to slander of title in the special context of mineral title litigation, with particular emphasis on West Virginia law.

The purpose of this Article is severalfold. Part II briefly reviews the origins of slander of title, with particular focus on underlying policy considerations. In Part III, the action itself is dissected, and each element receives some commentary. With the *Second Restatement of Torts* as a guide, the Article notes differing treatment by the courts of various states, with special focus on the decades-long experience of several western states in the context of oil and gas litigation. Part IV addresses selected defenses that frequently arise in the real property context. Finally, Part V surveys common factual scenarios that could give rise to slander of title suits involving mineral interests.

II. BRIEF BACKGROUND

The ownership of real property has long played a fundamental role in all aspects of life—economic and political principal among them. Indeed, the purpose of government has been traditionally understood to be for the protection of private property ownership.⁴ An action for slander of title is but one method by which an owner of real property can employ the power of the law to protect his rights—particularly the right to market.⁵ In the seminal West Virginia decision recognizing slander of title as a cause of action, *TXO Production Corp. v. Alliance Resources Corp.*, the court traced the origin of the common law tort back to 16th Century England. The Supreme Court of Appeals observed:

Slander of title long has been recognized as a common law cause of action. Indeed, the slander of title cause of action was especially important 400 years ago when many transfers of land were oral transfers (i.e., feoffment with livery of seisin), and when, the Domesday Book notwithstanding, land records were much less complete than they are today.⁶

We need not spend much time on the action's historical lineage. It is enough that we recognize the justifications for the continued viability of the

⁴ JOHN LOCKE, *SECOND TREATISE ON GOVERNMENT* § 85 (Simon & Brown ed. 2012).

⁵ The influential work on the fundamental underpinnings of slander of title is by the estimable Professor William L. Prosser. See William L. Prosser, *Injurious Falsehood: The Basis of Liability*, 59 COLUM. L. REV. 425 (1959).

⁶ *TXO Prod. Corp.*, 419 S.E.2d at 878.

tort, the principal of which, as noted, is the defense of real property ownership and all of its attendant rights.⁷

As its name suggests and the *Second Restatement of Torts* [hereinafter “*Second Restatement*”] explains, slander of title—also called “injurious falsehood” or simply “disparagement” in early literature—was developed by courts that analogized to the tort of oral defamation.⁸ These cases frequently involved oral accusations aimed at a plaintiff’s title that caused him to lose a lease or sale of the besieged property.⁹ Despite the apparent similarities, important differences exist between slander of title and personal defamation. First, proof of special damages is an element of slander of title not always required to prove defamation.¹⁰ Moreover, a plaintiff claiming slander of title must establish that the defendant’s act of false publication was malicious; mere negligence will not suffice.¹¹ The *Second Restatement* explains as follows:

The action for injurious falsehood is obviously similar in many respects to the action for defamation. Both involve the imposition of liability for injuries sustained through publication to third parties of a false statement affecting the plaintiff. Despite their similarities, however, the two torts protect different interests and have entirely different origins in history. The action for defamation is to protect the personal reputation of the injured party; it arose out of the old actions for libel and slander. The action for injurious falsehood is to protect economic interests of the injured party against pecuniary loss; it arose as an action on the case for the special damage resulting from the publication.¹²

Because of the need to prove special damages with particularity, one commentator has noted that the tort is more akin to “intentional interference with economic relations than with the general damage to one’s reputation involved in the personal libel or slander actions.”¹³ The *Second Restatement*

⁷ See *Forman v. Cheltenham Nat’l Bank*, 502 A.2d 686, 689 (Pa. Super. Ct. 1985) (“An action for slander of title safeguards an owner’s marketable interest in property against another person’s false and malicious representation of the owner’s title to the property.”).

⁸ See RESTATEMENT (SECOND) OF TORTS § 624 cmt. a (1977).

⁹ See *id.*; see also W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 128, at 967 (5th ed. 1984).

¹⁰ Mark S. Dennison, *Proof of Slander or Disparagement of Title to Real Property*, in 55 AM. JUR. PROOF OF FACTS 3d 509 (2000).

¹¹ Karen McConnell, Comment, *Slander of Title: Onward Through the Fog*, 24 S. TEX. L.J. 171, 173 (1983).

¹² See RESTATEMENT (SECOND) OF TORTS § 623A cmt. g (1977).

¹³ See McConnell, *supra* note 11.

and *Prosser and Keeton on the Law of Torts*¹⁴ are excellent resources for those interested in further exploration of the origins of slander of title, including its similarities to other causes of action.

III. THE ELEMENTS OF SLANDER OF TITLE

The elements of slander of title are straightforward, and while often set forth by various courts in slightly different terms, its essential ingredients are nearly always the same. Grounded in the *Second Restatement*, most courts, including the Supreme Court of Appeals of West Virginia, have defined slander of title as when a person maliciously publishes false statements derogatory to another's property interest causing special damages.¹⁵

A. *Plaintiff's Property Interest*

Of course, only a plaintiff with an interest in the affected property has standing to bring a slander of title suit. The *Second Restatement* defines the required interest rather broadly:

Any kind of legally protected interest in land, chattels or intangible things may be disparaged if the interest is transferable and therefore salable or otherwise capable of profitable disposal. It may be real or personal, corporeal or incorporeal, in possession or reversion. It may be protected either by legal or equitable proceedings and may be vested or inchoate. It may be a mortgage, lease, easement, reversion or remainder, whether vested or contingent, in land or chattels, a trust or other equitable interest.¹⁶

In a very fundamental way, the requisite property interest must be a legally enforceable interest—whether in ownership, possession, or both.¹⁷ In the context of mineral estates, for instance, the interest held by an oil and gas lessee (often the operator) is sufficient to permit him to maintain an action for slander of title.¹⁸ Indeed, the affected property interest can range from fee

¹⁴ See KEETON ET AL., *supra* note 9, § 128, at 967.

¹⁵ See RESTATEMENT (SECOND) OF TORTS §§ 623A, 624 (1977); see also *TXO Prod. Corp. v. Alliance Res. Corp.*, 419 S.E.2d 870, 879 (W. Va. 1992), *aff'd on other grounds*, 509 U.S. 443 (1993).

¹⁶ RESTATEMENT (SECOND) OF TORTS § 624 cmt. c (1977).

¹⁷ For a more in-depth treatment of this element, see Jeffrey F. Ghent, Annotation, *Slander of Title: Sufficiency of Plaintiff's Interest in Real Property to Maintain Action*, 86 A.L.R. 4TH 738 (1991).

¹⁸ See, e.g., *TXO Prod. Corp.*, 419 S.E.2d at 870.

simple ownership in the entire tract, including the surface and all mineral interests, to only the leasehold interest in a tiny percentage of the oil. Some courts have also found that a purchaser's interest in real property may be sufficient.¹⁹ On the other hand, several courts have concluded that where the disputed property had already been sold or contracted to be sold *before* the alleged disparagement occurred, the seller did not have a sufficient interest to bring a suit for slander of title.²⁰

Consider a recent case from California concerning property interest in an easement. In *Sumner Hill Homeowners' Association, Inc. v. Rio Mesa Holdings, LLC*,²¹ a homeowners' association sued a developer of surrounding land, claiming that the defendant slandered members' easement rights to access a nearby river. The defendant argued that the property rights they slandered were inadequate to constitute "title" to support a claim for slander of title.²² The court did not agree, reasoning that

no action was necessary to perfect or establish plaintiffs' easement rights. Rather, plaintiffs' rights accrued and vested when they purchased their lots because (1) their deeds referenced a subdivision map with a system of roads, including [the disputed river access road] and (2) [defendants] and their sales agents made promises of river access to plaintiffs or their predecessors during the marketing of the residential lots.²³

Thus, an interest as small (or large) as a simple right-of-way easement can serve as a basis for a slander of title suit.

An interesting split of authority has developed on the question of whether title acquired by adverse possession but *not* established by a judicial decision can support a slander of title action.²⁴ The courts following the view that an action for slander of title cannot be maintained by a plaintiff—whose title to the disputed property was acquired by adverse possession though *not* confirmed by judicial decree—emphasize that "protection from injury to the

¹⁹ See, e.g., *Williams v. Jennings*, 755 S.W.2d 874, 880 (Tex. Crim. App. 1988).

²⁰ See, e.g., *Kirchoff v. Moulder Bros., Inc.*, 391 So. 2d 347 (Fla. Dist. Ct. App. 1980); *Bynum v. Bynum*, 531 P.2d 618 (N.M. Ct. App. 1975); *White & Baxter, Inc. v. Jade Square & Tower, Ltd.*, 404 N.Y.S.2d 105 (App. Div. 1978); *Bennett v. Pace*, 731 P.2d 33 (Wyo. 1987).

²¹ 141 Cal. Rptr. 3d 109 (Ct. App. 2012)

²² *Id.* at 134.

²³ *Id.*

²⁴ Compare *Howard v. Schaniel*, 169 Cal. Rptr. 678 (Ct. App. 1980) (stating that an action for slander of title is not available), with *Colquhoun v. Webber*, 684 A.2d 405 (Me. 1996) (acquiring title by adverse possession, even though it had not been established by judicial decree, was sufficient ownership interest to maintain action for slander of title).

salability of property is the thrust of the tort.”²⁵ Title acquired by adverse possession is not a marketable title until it is established by judicial proceedings; before such time, the law presumes the record titleholder is the rightful owner. Therefore, adversely possessed property, absent a judicial decree, cannot support a slander suit.²⁶

On the other hand, the expansive description of legally protected interests found in the *Second Restatement* would seem to include an interest held by the adverse possessor—with or without a judicial decree in-hand.²⁷ At least one court following the *Second Restatement* adopted this view.²⁸ Another emphasized that once a person meets the requirements for adverse possession, “title vests in that person by operation of law” regardless of judicial action.²⁹ In this way, no judicial action is necessary to effectuate the transfer to the adverse possessor because the latter’s interest in the subject property is sufficient to maintain a slander of title claim. Under the *Second Restatement*’s broad definition, and other fundamental tenets supporting the free alienation and protection of real property interests, this is the better view.

Ultimately, it is crucial for attorneys concerned with potential slander of title to identify and define the ownership interest at issue and place it in the proper context. Such a determination will also help ensure that the amount of special damages, among other related concerns, is accurate. This is especially true in light of the complicated and frequently incomplete title history of many disputed mineral interests. While the property interest element of slander of title is always necessary and not often disputed, it is important to recognize that such property interests may be broadly defined, thus making the hurdle of standing easy to overcome.

B. Publication

A slander of title plaintiff must also establish that the defendant’s statement derogatory to plaintiff’s property interest was published.³⁰ As part of this requirement, the plaintiff must allege and prove that the defendant communicated the defamatory statement to a third party.³¹

²⁵ *Howard*, 169 Cal. Rptr. at 682.

²⁶ *Id.*

²⁷ See RESTATEMENT (SECOND) OF TORTS § 624 cmt. c (1977).

²⁸ See, e.g., *Colquhoun v. Webber*, 684 A.2d 405 (Me. 1996).

²⁹ *Davis v. Sponhauer*, 574 N.E.2d 292, 300 (Ind. Ct. App. 1991).

³⁰ See *TXO Prod. Corp. v. Alliance Res. Corp.*, 419 S.E.2d 870 (W. Va. 1992).

³¹ See, e.g., *Tishman-Speyer Equitable S. Fla. Venture v. Knight Invs., Inc.*, 591 So. 2d 213 (Fla. Dist. Ct. App. 1991); *TXO Prod. Corp.*, 419 S.E.2d at 870.

Publication means the act of making the defamatory statement known to any person or persons other than the plaintiff himself. It is not necessary that there should be any publication in the popular sense of making the statement public. A private and confidential communication to a single individual is sufficient. Nor need it be published in the sense of being written or printed. . . .³²

Indeed, “[t]he slander may consist of a statement in writing, printing, or by word of mouth, and may relate to personal as well as real property.”³³ Of course, communicating the defamatory statement to the plaintiff alone would not constitute actionable publication.³⁴ Methods of publication often vary.³⁵

In Mississippi, for instance, slander of title may consist of “conduct” that raises a question as to another’s right to particular property,³⁶ and it was found in one case that the act of burying a dead body on the subject property “constitutes the statement slandering [plaintiff’s] title.”³⁷ Despite the unique circumstances of that case, authority illustrates that the most common method of publication is the filing or recording of a false instrument or notice purporting to affect the title to property.³⁸ More such examples are set forth below.³⁹

C. *False Statement*

Without exception, the statement published by defendant respecting the plaintiff’s property interest must be false.⁴⁰ In the context of real property, a false statement may be as simple as an assertion that the plaintiff does not own

³² BLACK’S LAW DICTIONARY 1348 (9th ed. 2009) (quoting R.F.V. HEUSTON, SALMOND ON THE LAW OF TORTS 154 (17th ed. 1977)).

³³ *Walley v. Hunt*, 54 So. 2d 393, 396 (Miss. 1951).

³⁴ *See, e.g., Bonded Inv. & Realty Co. v. Waksman*, 437 So. 2d 162, 164 (Fla. Dist. Ct. App. 1983).

³⁵ *See* BLACK’S LAW DICTIONARY 1348 (9th ed. 2009). (“The publication of a libel might be in the form of a book, pamphlet or newspaper, but nothing of that nature is required. A letter sent to a single individual is sufficient.” (quoting ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 489 (3d ed. 1982))).

³⁶ *Walley*, 54 So.2d at 396.

³⁷ *Welford v. Dickerson*, 524 So. 2d 331, 334 (Miss. 1988).

³⁸ *See, e.g., Reaugh v. McCollum Exploration Co.*, 163 S.W.2d 620 (Tex. 1942) (concerning a wrongful refusal to release oil and gas lease); *Jarrett v. Ross*, 164 S.W.2d 550 (Tex. Comm’n App. 1942) (concerning a wrongful recordation of deed); *Commercial Sec. Co. v. Thompson*, 239 S.W.2d. 911 (Tex. App. 1951) (concerning a wrongful filing of judgment lien).

³⁹ *See infra* Part V.

⁴⁰ *See* RESTATEMENT (SECOND) OF TORTS § 623A (1977).

the subject property of which he is the apparent owner or that the title is somehow defective.⁴¹ Other common falsehoods found in the case law include an assertion by a defendant that he has an interest in or lien on the subject property.⁴²

While not often the subject of dispute, the question of falsity sometimes requires a more nuanced approach. Consider a recent Georgia decision, *Executive Excellence, LLC v. Martin Brothers Investments, LLC*.⁴³ In that case, an ongoing dispute over the terms of a contract for the purchase of real property eventually led the seller to file a slander of title claim against the purported purchaser on the basis of statements made at a public meeting by the purchaser's attorney.⁴⁴ The central inquiry was whether the attorney's statements, which indicated there was active litigation involving the property, were false. The party asserting slander of title argued that the statements were plainly false at the time made because the litigation referenced was not commenced until a week *after* the statement was made.⁴⁵ The court disagreed, reasoning that while technically false, the statement was substantially true in context of the acrimonious dispute between the parties:

The lawsuits were filed on May 30, 2007 and May 31, 2007 respectively, approximately one week after the alleged statement was made. Nevertheless, “[d]efamation law overlooks minor inaccuracies and concentrates upon substantial truth. A statement is not considered false unless it would have a different effect on the mind of the listener from that which the pleaded truth would have produced.” It is undisputed that the parties were then embroiled in a contract dispute over the purchase and sale of the properties when the alleged statement was made. The lawsuits were filed shortly thereafter, presenting active litigation. Under these circumstances, the attorney's statement presented a minor factual error which did not go to the substance of the statement and did not render the communication false for defamation purposes.⁴⁶

Irrespective of the particular analysis employed by the Georgia court in the case just discussed, the issue of falsity typically goes unchallenged or, in

⁴¹ See, e.g., *Rorvig v. Douglas*, 873 P.2d 492, 496 (Wash. 1994).

⁴² See, e.g., *Cawrse v. Signal Oil Co.*, 103 P.2d 729 (Or. 1940); *McClure v. Fischer Attached Homes*, 145 Ohio Misc. 2d 38 (2007).

⁴³ 710 S.E.2d 169 (Ga. Ct. App. 2011).

⁴⁴ *Id.* at 173.

⁴⁵ *Id.* at 174.

⁴⁶ *Id.* at 175 (internal citation omitted).

most cases, is bound up with the question of malice. Courts and litigants frequently focus their attention on the latter instance.

D. Malice

A slander of title case will often rise or fall on whether the plaintiff can establish that the defendant's publication of a false statement was malicious.⁴⁷ Malice has been defined as an intent to deceive or injure,⁴⁸ and has been used to characterize a defendant who "raises his own claim without any reasonable grounds" and otherwise lacks good faith.⁴⁹ While "[courts] want to discourage people from slandering the title of others, [they] do not want to discourage people from making legitimate (though possibly weak) claims of their own."⁵⁰ One court explained that

malice is a necessary ingredient to entitle plaintiff to recover; *that it is the gist of the action*; that it cannot be maintained if the claim was asserted by defendant in good faith, and if the act complained of was founded upon probable cause or was prompted by a reasonable belief, although the statement may have been false.⁵¹

"As a general rule, the defense with the greatest chance of success is a contention that the defendant acted in good faith."⁵² For this reason, malice has been called "the principal element of the cause of action . . . and the one most difficult to prove."⁵³

Some courts have held that actual malice need not be proved, but rather may be implied from the language used or from the nature of the defendant's actions.⁵⁴ Thus, malice can often be inferred in the absence of evidence indicating the defendant's good faith. Put another way, malice may be implied

⁴⁷ See, e.g., *Noble v. Johnson*, 68 P.2d 838, 841 (Okla. 1937) ("[M]alice is a necessary ingredient of an action for slander of title.").

⁴⁸ See, e.g., *Bright v. Gass*, 831 S.W.2d 149 (Ark. Ct. App. 1992); *Maragos v. Union Oil Co. of Cal.*, 584 N.W.2d 850 (N.D. 1998); *Montecalvo v. Mandarelli*, 682 A.2d 918, 923 (R.I. 1996).

⁴⁹ *TXO Prod. Corp. v. Alliance Res. Corp.*, 419 S.E.2d 870, 879 (W. Va. 1992)

⁵⁰ *Id.*

⁵¹ *Henderson v. Millis*, 373 N.W.2d 497, 506 (Iowa 1985) (quoting *Miller v. First Nat'l Bank*, 264 N.W. 272, 274 (Iowa 1935)) (emphasis added).

⁵² Richard E. Kaye, *Cause of Action for Slander of Title to Real Property*, in 40 CAUSES OF ACTION § 31, at 381 (2d ed. 2013).

⁵³ *Misco Leasing, Inc. v. Keller*, 490 F.2d 545, 548 (10th Cir. 1974).

⁵⁴ See, e.g., *Montecalvo v. Mandarelli*, 682 A.2d 918, 924 (R.I. 1996); *Peckham v. Hirschfeld*, 570 A.2d 663, 667 (R.I. 1990); *Huff v. Jennings*, S.E.2d 886, 891–92 (S.C. Ct. App. 1995).

from “the publication of an untrue statement disparaging another’s title under such circumstances as would lead a reasonable man to foresee that a sale or lease of the property would thereby be prevented, regardless of the publisher’s motive, intent, or good faith.”⁵⁵ Therefore, questions of good faith can be particularly fact-intensive and often not susceptible to summary judgment.⁵⁶ Even so, evidence of negligence⁵⁷ or a “mere technical defect in the execution of a document affecting title” will not alone suffice.⁵⁸

West Virginia, like many jurisdictions, allows a slander of title plaintiff to present evidence implying malice on the part of the defendant where no actual malice can be shown. Indeed, the *TXO* decision amply illustrates how other courts may treat the issue of establishing the element of malice by implication. In *TXO*, West Virginia’s highest court affirmed a judgment of \$19,000 in compensatory damages and ten million dollars in punitive damages against TXO Production Company for slander of title.⁵⁹ At issue were oil and gas development rights to a 1000-acre tract of property known as the Blevins Tract.⁶⁰ Alliance Resources held a lease of the oil and gas rights to the Blevins Tract from Tug Fork Land Company. TXO sought to acquire the oil and gas rights to the tract and approached Alliance Resources, seeking an outright sale.⁶¹ Alliance Resources declined and instead proposed a joint venture where TXO and Alliance Resources would share both costs and royalties resulting from development of the mineral interest.⁶²

TXO commissioned a title search on the tract and learned that there was a conveyance in 1958 of certain coal rights underlying it from Tug Fork Land to Leo Signaigo, Jr., interests that were later transferred to Virginia Crews Coal Company.⁶³ That 1958 conveyance reserved the oil and gas rights in the tract to Tug Fork Land. However, TXO attempted to persuade Signaigo to sign

⁵⁵ *Gates v. Utsey*, 177 So. 2d 486, 489 (Fla. Dist. App. 1965) (citation omitted).

⁵⁶ *See, e.g., Montecalvo*, 682 A.2d at 924–25. For example, evidence that the defendant consulted with his attorney may tend to negate a finding of malice, but such questions are often left to the jury. *See Duncan Land & Exploration, Inc. v. Littlepage*, 984 S.W.2d 318, 332–33 (Tex. Crim. App. 1998). *But see Humble Oil & Ref. Co. v. Luckel*, 171 S.W.2d 902, 906 (Tex. Civ. App. 1943) (“[A] claim of title does not constitute malice where such claim is made under color of title upon the advice of attorneys . . .”).

⁵⁷ *See, e.g., Dabbs v. Four Tees, Inc.*, 36 So. 3d 542 (Ala. Civ. App. 2008).

⁵⁸ *Brodie v. Nw. Tr. Services, Inc.*, 12-CV-0469-TOR, 2012 WL 4468491, at *7 (E.D. Wash. Sept. 27, 2012).

⁵⁹ *TXO Prod. Corp. v. Alliance Res. Corp.*, 419 S.E.2d 870 (W. Va. 1992).

⁶⁰ *Id.* at 875.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 876.

an affidavit stating that he did not know whether or not the oil and gas rights to the tract were included in the 1958 conveyance; he refused.

Despite the reservation in the 1958 deed, and despite Signaigo's representation that the oil and gas rights had not been included in his conveyance from Tug Fork Land, TXO paid Virginia Crews Coal Company a nominal amount for a quitclaim deed to the mineral rights it ultimately obtained from Signaigo.⁶⁴ TXO then argued that Tug Fork Land's lease to Alliance Resources was invalid and threatened to file a lawsuit unless Alliance Resources gave TXO concessions on the royalty split proposed for their joint venture. Shortly thereafter, TXO filed a suit against Alliance Resources to quiet title to the oil and gas rights underlying the Blevins Tract.⁶⁵ The evidence demonstrated, and the jury agreed, that TXO had embarked on a fraudulent scheme to create a false cloud on title with the intent to reduce the royalties it was to pay Alliance Resources under the terms of its joint venture.

At trial, TXO advanced a vigorous defense of good faith to rebut the inference of malice. The plaintiff proffered evidence of prior bad acts by TXO in order to satisfy the malice element, which included testimony by four lawyers demonstrating that the case was "but part of a pattern and practice of deception and chiseling by TXO."⁶⁶ The jury found that TXO had slandered Alliance Resource's title and awarded compensatory and punitive damages. As the case demonstrates, evidence of implied malice, therefore, is sufficient under West Virginia law.

Alternatively, some courts require a showing of actual malice.⁶⁷ Under this view, the plaintiff must present evidence not only that no reasonable belief or good faith supports the allegedly slanderous statement,⁶⁸ but that the defendant either knew the disparaging statement was false or that it was made with reckless disregard for its truth.⁶⁹ "Reckless disregard" has been defined as

⁶⁴ *Id.* at 877.

⁶⁵ *Id.*

⁶⁶ *Id.* at 883. The Supreme Court of Appeals later determined that the evidence was properly admitted as prior bad acts under Rule 404(b) of the West Virginia Rules of Evidence. *Id.* at 884.

⁶⁷ *See, e.g., Pecora v. Szabo*, 418 N.E.2d 431, 438 (Ill. App. Ct. 1981) (observing that "more recent cases appear to have rejected [a] liberal reading" of the malice requirement and concluding that "the weight of authority holds that a showing of malice requires knowledge by defendant that the disparaging statements were false or reckless disregard of this falsity").

⁶⁸ *See, e.g., Rorvig v. Douglas*, 873 P.2d 492, 496 (Wash. 1994) (en banc); *Brown v. Safeway Stores, Inc.*, 617 P.2d 704 (Wash. 1980) (en banc).

⁶⁹ *See, e.g., Pecora*, 418 N.E.2d at 439; *Hossler v. Hammel*, 587 N.E.2d 133 (Ind. Ct. App. 1992); *Davis v. Sponhauer*, 574 N.E.2d 292 (Ind. Ct. App. 1991).

publishing the defamatory statement “despite a high degree of awareness of probable falsity or entertain[ing] serious doubts as to [its] truth.”⁷⁰

Notably, the malice element of slander of title requiring a showing of lack of good faith and absence of probable cause (often called “legal” malice) is not the same as the showing of malice necessary to obtain a punitive damages jury instruction.⁷¹ The latter (called “actual malice”) requires an “actual evil intent, ill will or hatred”⁷² West Virginia law holds that a jury may assess punitive damages where there is proof of “gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others”⁷³ Thus, it is important for courts to understand that evidence of lack of good faith or absence of reasonable grounds to believe the allegedly slanderous statement alone does not merit a punitive damages instruction.⁷⁴

At bottom, if the party who publishes a false statement has reasonable grounds to believe it, that party has not acted with legal malice and the cause of action cannot succeed.⁷⁵

E. Causing Special Damages

The law does not presume damages as a consequence of slander of title; rather, the plaintiff must specifically plead and present evidence that he

⁷⁰ See, e.g., *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989) (citation omitted); see also *Kuwik v. Starmark Star Mktg. & Admin., Inc.*, 619 N.E.2d 129, 133 (Ill. 1993).

⁷¹ See, e.g., *Hamilton v. Amwar Petroleum Co., Inc.*, 769 P.2d 146, 149 (Okla. 1989) (“Malice, as the term is used in an action to recover punitive damages, signifies a standard of conduct more culpable than that necessary to recover in a slander of title action. Therefore, instances such as that now considered may arise where recovery of actual damages in a slander of title action is warranted by the evidence and the proof will not support an award of punitive damages.”).

⁷² *Id.*

⁷³ *TXO Prod. Corp. v. Alliance Res. Corp.*, 419 S.E.2d 870, 895–96 (W. Va. 1992) (McHugh, J., concurring) (quoting *Syl. pt. 1, Goodwin v. Thomas*, 403 S.E.2d 13 (W. Va. 1991)).

⁷⁴ See *Hamilton*, 769 P.2d at 149 (“[T]he showing of malice required to prevail in a slander of title action and that needed to submit a punitive damage question to the jury differ enough that a prima facie showing in a slander of title action, without more, is not determinative of an adequate showing for submission of a punitive damage issue to the jury.”); see also *Duncan Land & Exploration, Inc. v. Littlepage*, 984 S.W.2d 318, 332 (Tex. Crim. App. 1998) (“In the context of a slander of title action, the type of malice required is ‘legal malice’, which means ‘merely that the act must have been deliberate conduct without reasonable cause.’ However, the charge submitted to the jury, which was not objected to, asked whether [defendant] acted with ‘reckless disregard.’ This is a form of ‘actual malice,’ which is required for exemplary damages.” (citation and footnote omitted)).

⁷⁵ See, e.g., *Hogg v. Wolske*, 130 P.3d 1087 (Idaho 2006); *Gambino v. Boulevard Mortg. Corp.*, 922 N.E.2d 380 (Ill. App. Ct. 2009).

suffered special damages resulting from a published statement that was derogatory to his property interest.⁷⁶ In establishing the pecuniary loss, the slander of title plaintiff will frequently present evidence of a loss of a sale.⁷⁷ Indeed, “[t]he chief characteristic of special damages is a realized loss.”⁷⁸ Special damages must be specifically pled and subsequently “proved to a reasonable degree of certainty” and “are not recoverable if deemed to be too remote.”⁷⁹ In such cases, “the trier of fact must be furnished data sufficient to determine damages without resort to mere speculation or conjecture.”⁸⁰

Section 633 of the *Second Restatement* sets forth the general view:

(1) The pecuniary loss for which a publisher of injurious falsehood is subject to liability is restricted to

(a) the pecuniary loss that results directly and immediately from the effect of the conduct of third persons, including impairment of vendibility or value caused by disparagement, and

(b) the expense of measures reasonably necessary to counteract the publication, including litigation to remove the doubt cast upon vendibility or value by disparagement.

(2) This pecuniary loss may be established by

(a) proof of the conduct of specific persons, or

⁷⁶ Allowing a plaintiff to proceed without pleading special damages is tantamount to awarding damages “under the rubric ‘cloud on title.’ A suit to remove a cloud from title is a suit for a specific, equitable remedy.” *Ellis v. Waldrop*, 656 S.W.2d 902, 905 (Tex. 1983); *see also* *Humble Oil & Ref. Co. v. Sun Oil Co.*, 191 F.2d 705, 718 (5th Cir. 1951) (“A suit to quiet title is a purely equitable proceeding . . . The title to minerals in place may be freed from adverse claims by a suit to quiet title thereto or remove clouds therefrom.” (citation omitted)). *See generally* *Gardner v. Buckeye Sav. & Loan Co.*, 152 S.E. 530, 531 (W. Va. 1930) (“To quiet title to realty, or to remove an existing cloud, or to prevent a threatened cloud, is an ancient and well-established head of equity jurisprudence. The broad grounds on which equity interferes to remove a cloud on title are the prevention of litigation, the protection of the true title and possession, and because it is the real interest of both parties, and promotive [sic] of right and justice, that the precise state of the title be known, if all are acting bona fide.”).

⁷⁷ *See, e.g.*, *Prudential Ins. Co. v. Bonney*, 299 F. Supp. 790 (W.D. Okla. 1969) (concerning the loss of appreciation by implication); *Shell Oil Co. v. Howth*, 159 S.W.2d 483 (Tex. 1942) (concerning the loss of sale); *Am. Nat’l. Bank & Trust Co. v. First Wis. Mortg. Trust*, 577 S.W.2d 312 (Tex. Crim. App. 1979) (concerning the loss of value).

⁷⁸ KEETON ET AL., *supra* note 9, § 128, at 971 n.3.

⁷⁹ *Johnson v. Monsanto Co.*, 303 N.W.2d 86, 93 (N.D. 1981).

⁸⁰ *Id.* at 95.

(b) proof that the loss has resulted from the conduct of a number of persons whom it is impossible to identify.⁸¹

1. Loss of Specific Sale or Lease

Courts are divided as to whether the plaintiff must identify a specific, prospective buyer who was prevented by the slander from purchasing the disparaged property—that is, whether plaintiff must present proof of a specific lost sale. On one side, some courts require evidence showing that a pending sale was frustrated by the alleged slander:

In order to show that the words uttered have caused injury to the plaintiff, it is generally necessary to aver and show that they were uttered pending some treaty or public action for the sale of the property, and that thereby some intending purchaser was prevented from bidding or competing[.] If the plaintiff has merely a general intention to sell, [] the plaintiff does not suffer any damage from their utterance.⁸²

An early North Dakota decision similarly held that

[w]ords spoken or written in relation to property or title are not actionable per se, and so special damages must be shown, generally loss of sale or lease. Plaintiff must show “loss of sale to some particular person” or that she was “about to sell or make an advantageous disposition of his land, and another impertinently interfered, and falsely and maliciously represented that his title was not good, and thereby prevented the sale, or [] getting for it as fair a price as he otherwise would have done”⁸³

Many Texas courts have found that a plaintiff must demonstrate the loss of a sale or a lease to a particular prospective purchaser in order to establish special damages, though that state’s courts have not been uniform in this regard.⁸⁴ At least one Texas appellate decision concluded that proof of

⁸¹ RESTATEMENT (SECOND) OF TORTS § 633 (1977).

⁸² *McNichols v. Conejos-K Corp.*, 482 P.2d 432, 435 (Colo. App. 1971) (quoting *Zimmerman v. Hinderlider*, 97 P.2d 443, 447 (Colo. 1939)) (internal quotation marks omitted). As noted below, at least one more recent Colorado decision has relaxed the rule. See *infra* note 91 and accompanying text.

⁸³ *Briggs v. Coykendall*, 224 N.W. 202, 206 (N.D. 1929) (internal citations omitted).

⁸⁴ Compare *Shell Oil Co. v. Howth*, 159 S.W.2d 483, 490 (Tex. 1942) (requiring specific sale), and *Humble Oil & Ref. Co. v. Luckel*, 171 S.W.2d 902, 907 (Tex. Civ. App. 1943) (same),

specific pending sale was not required, reasoning that “the trend in the law is away from an overly rigid circumspection of special damages in actions such as slander of title,” citing to the *Second Restatement* § 633 and related comments.⁸⁵ Needless to say, the Supreme Court of Texas later overruled the decision, once again reaffirming the stringent specific sale requirement in that state.⁸⁶ A recent Texas appellate decision has recognized the requirement’s continued vitality.⁸⁷ The specific sale requirement still retains a strong following.⁸⁸

Some courts that have required proof of a loss of a specific sale have also recognized an exception for cases where the lost sale is impossible to identify.⁸⁹ A Wisconsin appellate decision, clearly uncomfortable with the rigidity of the specific sale requirement, though unwilling to completely discard it, adopted a more relaxed approach:

We hold that, when determining the necessary proof for special damages, the trial court must consider whether it is reasonable under the factual circumstances to expect the plaintiff to show that a slander of title prevented a particular sale. And, if such a requirement is not reasonable under the circumstances, the trial court must then determine the degree of particularity required.⁹⁰

The Wisconsin court cited approvingly to a Colorado appeals court decision, which cast the rule as follows:

Currently, the plaintiff is required to be particular only if it is reasonable to expect him to be so. If it is not a practical possibility to show specific losses, damages may then be proved by evidence similar to that used to prove lost profits resulting from a breach of contract. Consequently, if a plaintiff can present sufficient evidence, using detailed statistical and

with *Walker v. Ruggles*, 540 S.W.2d 470, 474 (Tex. Civ. App. 1976) (not requiring proof of specific sale).

⁸⁵ *Walker*, 540 S.W.2d at 474–75.

⁸⁶ See *A. H. Belo Corp. v. Sanders*, 632 S.W.2d 145, 145–46 (Tex. 1982).

⁸⁷ See *Smith v. Hennington*, 249 S.W.3d 600, 604–05 (Tex. App. 2008).

⁸⁸ See, e.g., *Sussex Real Estate Corp. v. Sbrocca*, 634 P.2d 999, 1002 (Colo. App. 1981); *Whyburn v. Norwood*, 267 S.E.2d 374, 377 (N.C. Ct. App. 1980); *Smith v. Hennington*, 249 S.W.3d 600, 604 (Tex. App. 2008); *Wharton v. Tri-State Drilling & Boring*, 824 A.2d 531, 538 (Vt. 2003); *Brown v. Safeway Stores Inc.*, 617 P.2d 704, 713 (Wash. 1980).

⁸⁹ See, e.g., *Barkhorn v. Adlib Assocs., Inc.*, 203 F. Supp. 121, 122 (D. Haw. 1962).

⁹⁰ *Tym v. Ludwig*, 538 N.W.2d 600, 603 (Wis. Ct. App. 1995).

expert proof, to exclude the possibility that other factors caused the loss of general business, recovery is allowed.⁹¹

Going further, California decisions have indicated that it is not necessary to show the loss of a particular sale in order to prove special damage flowing from the alleged slander.⁹² For example, in *Davis v. Wood*,⁹³ a California appeals court concluded that because the plaintiff's leasehold mineral interest was "greatly depreciated" in value and "rendered unmarketable," his complaint could survive dismissal.⁹⁴ In saving the claim from dismissal, the *Davis* court observed that once remanded, the trial court would be justified in requiring the plaintiff to set forth his damages with "greater particularity."⁹⁵ At least one later California decision has affirmed the principle that special damages "may be established by other than showing a loss of a particular potential sale."⁹⁶ This more liberal view is properly framed and set forth as follows:

The thrust of defendants' argument is aimed at the fact that plaintiffs did not establish that any particular prospective purchaser or lessee was deterred from negotiating or contracting with plaintiffs because he was the recipient of the false information disseminated by the defendants. It is recognized, however, that the property owner may recover for the impairment of the vendibility of his property without showing that the loss was caused by prevention of a particular sale. The most usual manner in which a third person's reliance upon disparaging matter causes pecuniary loss is by preventing a sale to a particular purchaser. The disparaging matter may, if widely disseminated, cause pecuniary loss by depriving its possessor of a market in which, but for the disparagement, his land or other thing *might with reasonable certainty have found a purchaser*.⁹⁷

Going beyond the *Second Restatement*, this view holds that evidence—such as that gained through expert testimony—regarding the value of the subject property before and after the disparagement can establish proof of

⁹¹ *Teilhafer Mfg. Co. v. Unarco Materials Storage, Inc.*, 791 P.2d 1164, 1168 (Colo. App. 1989) (internal citations omitted).

⁹² *See, e.g., Hill v. Allan*, 66 Cal. Rptr. 676, 689 (Ct. App. 1968).

⁹³ 143 P.2d 740 (Cal. Ct. App. 1943).

⁹⁴ *Id.* at 745.

⁹⁵ *Id.*

⁹⁶ *Glass v. Gulf Oil Corp.*, 96 Cal. Rptr. 902, 910 (Ct. App. 1970).

⁹⁷ *Id.* at 909 (citations and internal quotation marks omitted) (emphasis added).

special damages.⁹⁸ Thus, the question of “reasonable certainty,” like in the California case cited here, is often left for jury determination. This view does not maintain a wide following.

Other states, like West Virginia, have not had occasion to explicitly decide whether a specific sale is required, though it is likely these states would look to § 633 of the *Second Restatement* to ascertain their preferred policy.⁹⁹ Recent decisions, such as the Wisconsin and Colorado decisions described above, suggest a trend away from a strict specific sale requirement, though they have clearly not abandoned it. Nor should they. The loss of a specific sale has long been the cornerstone of the special damages requirement,¹⁰⁰ a rule justified by the unique problems associated with establishing damages absent speculation.¹⁰¹ Accordingly, attorneys prosecuting a slander of title claim must be prepared to specifically allege and present evidence of the loss of a specific sale in connection with the slander, or, alternatively, indicate how ascertaining such information is impossible. Despite the view of California, most courts are unlikely to sustain a pleading or claim that only generally alleges that the slander impaired vendibility in the ordinary course.

2. Attorney’s Fees

Most courts recognize that the attorney’s fees incurred in removing a cloud from the plaintiff’s title are recoverable as special damages in a slander of title suit.¹⁰² Indeed, as in the *TXO* case, it has been found that “expenses incurred by plaintiffs in the form of attorney fees and costs to clear title and remove the doubt cast upon their property rights by the recorded falsehood are sufficient special damages to support a cause of action for slander of title; no other pecuniary damages need be shown.”¹⁰³ It is important to note, however,

⁹⁸ *Id.* at 910–11.

⁹⁹ *See TXO Prod. Corp. v. Alliance Res. Corp.*, 419 S.E.2d 870, 881 n.7 (W. Va. 1992) (citing RESTATEMENT (SECOND) OF TORTS § 633 (1977)).

¹⁰⁰ *See Swan v. Tappan*, 59 Mass. 104, 104 (1849); *Wilson v. Dubois*, 29 N.W. 68, 69 (Minn. 1886).

¹⁰¹ It is axiomatic that the principal goal of most rules of damages is to place the injured party, to the extent possible, in the position he would have been in but for the defendant’s wrongful conduct. The speculative nature of damages for slander of title, in particular, has properly chastened most courts to hold fast to the specific sale requirement.

¹⁰² *See TXO Prod. Corp.*, 419 S.E.2d at 881 (“We follow the clear majority rule in holding that attorneys’ fees incurred in removing spurious clouds from a title qualify as special damages in an action for slander of title.” (citations omitted)).

¹⁰³ *Sumner Hill Homeowners’ Ass’n, v. Rio Mesa Holdings, LLC*, 141 Cal. Rptr. 3d 109, 139 (Ct. App. 2012); *see also Skyland Metro. Dist. v. Mountain W. Enter., LLC*, 184 P.3d 106, 131–32 (Colo. App. 2007); RESTATEMENT (SECOND) OF TORTS § 633(1)(b) (1977) (pecuniary loss in

that the attorney's fees and costs associated with bringing the slander of title action itself are *not recoverable*, per the traditional "American Rule" regarding the recovery of attorney's fees in the United States.¹⁰⁴

Thus, in combination with a well-supported demand for punitive damages, it is easy to see how in many slander cases, proof of special damages relating to a loss of a specific sale or lease may not be needed to recover substantial money damages.

IV. SELECTED DEFENSES

Among the defenses asserted by parties faced with a slander of title claim, two in particular are notable among the case law and thus deserve attention here. Both statute of limitations and privilege defenses are commonly asserted in a variety of civil actions, and this is no less true in actions for slander of title.

A. *Statute of Limitations*

The traditional view is that the statute of limitations governing actions for libel and slander applies to actions for slander of title.¹⁰⁵ However, a court adopting the contrary position has observed that "the real nature of the action and the better reasoned cases from other jurisdictions lead us to the conclusion that the one-year statute of limitation for personal slander and libel has no application" for the "thrust of the tort action of slander of title is the interference with a prospect of sale of real property or interference with a *proprietary right*."¹⁰⁶ These cases have concluded that the more sensible approach is to look to the limitations period governing actions for trespass or injury to *real property*, rather than to the limitation provision dealing with

slander of title action restricted to, in part, "the expense of measures reasonably necessary to counteract the publication, including litigation").

¹⁰⁴ See, e.g., *Montgomery Props. Corp. v. Econ. Forms Corp.*, 305 N.W.2d 470, 478–79 (Iowa 1981); *Colquhoun v. Webber*, 684 A.2d 405, 413 (Me. 1996).

¹⁰⁵ See, e.g., *Hosey v. Cent. Bank of Birmingham*, 528 So. 2d 843, 844 (Ala. 1988); *Old Plantation Corp. v. Maule Indus.*, 68 So. 2d 180, 182 (Fla. 1953); *Walley v. Hunt*, 54 So. 2d 393, 398 (Miss. 1951); *Buehrer v. Provident Mut. Life Ins. Co.*, 175 N.E. 25, 27 (Ohio 1931); *Woodard v. Pac. Fruit & Produce Co.*, 106 P.2d 1043, 1046 (Or. 1940); *Pro Golf Mfg. v. Tribune Review Newspaper Co.*, 809 A.2d 243, 246 (Pa. 2002) ("We therefore hold that the statute of limitations for slander is the same whether the slander involves property or the person.").

¹⁰⁶ *Selby v. Taylor*, 290 S.E.2d 767, 769 (N.C. Ct. App. 1982) (emphasis added).

personal injuries such as libel and slander.¹⁰⁷ This view is the better one, as the cases explain.

The practitioner should be aware that the statute of limitations may vary from state to state, with some states having not yet addressed the issue. West Virginia, for example, has a particularly opaque general or catch-all limitations period statute that in the absence of a judicial decision leaves the question open.¹⁰⁸ The language of section § 55-2-12(a) of the West Virginia Code appears to indicate that actions “for damage to property” must be brought within two years.¹⁰⁹

The problem of accrual presents another interesting question that many states, including West Virginia, have not yet had occasion to resolve. Some courts hold the view that the right of action accrues at the time of publication,¹¹⁰ though more reasoned authority indicates a contrary stance, as illustrated by the view taken by at least one Texas court.¹¹¹ In the context of a mineral law suit, the Supreme Court of Mississippi explained the former view:

The execution and filing for record of the mineral deeds purporting to convey title to an undivided one-half interest in the minerals on complainant’s land was in effect an assertion of claim of ownership by the defendants of an undivided one-half interest in said minerals and a denial of the complainant’s ownership of such interest. The assertion by the defendants of such interest in the manner alleged, if falsely and maliciously made, constituted a disparagement of the complainant’s title. That is the tort which gave rise to complainant’s cause of action for damages for slander of title and the complainant’s right to sue therefor accrued at the time of the execution and filing for record of said mineral deeds. The full measure of damages that might ultimately result from the defendants’ wrongful acts may not have been immediately foreseeable, but

¹⁰⁷ See, e.g., *Howard v. Hudson*, 259 F.2d 29, 32 (9th Cir. 1958) (applying California law); *Lase Co. v. Wein Prods., Inc.*, 357 F. Supp. 210, 212 (N.D. Ill. 1973) (applying Illinois law); *King v. Miller*, 133 S.E. 302, 303 (Ga. Ct. App. 1926).

¹⁰⁸ See W. VA. CODE ANN. § 55-2-12 (LexisNexis Supp. 2012); see also *Duffy v. Ogden Newspapers, Inc.*, 294 S.E.2d 121, 122 (W. Va. 1982) (“Our general statute of limitations for personal actions, W. Va. Code, 55-2-12, is difficult to interpret.”). In West Virginia, an action for defamation, whether libel or slander, is governed by a statute of limitations period of one year. See Syl. pt. 1, *Cavendish v. Moffitt*, 253 S.E.2d 558, 558 (W. Va. 1979).

¹⁰⁹ See W. VA. CODE ANN. § 55-2-12(a).

¹¹⁰ See *Hosey*, 528 So. 2d at 844–45; *Old Plantation Corp.*, 68 So. 2d at 182.

¹¹¹ See *Kidd v. Hoggett*, 331 S.W.2d 515, 520 (Tex. Civ. App. 1959); see also *Lacroix v. Villio*, 49 So. 20, 21 (La. 1909); *Green v. Chamberlain*, 60 So. 2d 120, 124 (La. Ct. App. 1952); *Chesebro v. Powers*, 44 N.W. 290, 291 (Mich. 1889); *New England Oil & Pipe Line Co. v. Rogers*, 7 P.2d 638, 642 (Okla. 1931).

complainant's cause of action accrued when the instruments were filed for public record, and the statute of limitations began to run at that time.¹¹²

Expressing the contrary view, a Texas court has observed that if one element, such as "frustration of a specific sale," constituting special damages is necessary to prove the claim, "the cause of action did not mature until the frustration occurred."¹¹³ This makes sense, for "[a]ny other rule would mean that limitation was running against a plaintiff before he had a cause of action."¹¹⁴ Thus, the limitations period accrues not from the date of publication, but from the time a prospective sale is lost because of the purported cloud on the plaintiff's title. This is the better view.

B. *Privileged Communications*

Another important defense to a slander of title claim is an assertion that the allegedly false publication is privileged. "Privileged communications are either absolute or qualified."¹¹⁵ In general, statements made in judicial proceedings, including in pleadings, are absolutely privileged.¹¹⁶ Depending on the nature and timing of the statements, among other things, the issue of privilege can raise interesting questions in slander of title suits,¹¹⁷ especially when one considers that even a malicious statement can be privileged.¹¹⁸ Litigants seeking to advance the affirmative defense of privilege, whether absolute or qualified, should look to the many cases addressing the issue in the context of personal defamation actions. More specific assertions of privilege

¹¹² *Walley v. Hunt*, 54 So. 2d 393, 398 (Miss. 1986).

¹¹³ *Kidd*, 331 S.W.2d at 520; *see also* *Shell Oil Co. v. Howth*, 159 S.W.2d 483, 490 (Tex. 1942).

¹¹⁴ *Kidd*, 331 S.W.2d at 520.

¹¹⁵ *Pond Place Partners, Inc. v. Poole*, 567 S.E.2d 881, 892 (S.C. Ct. App. 2002). The *Pond Place* decision sets forth a helpful explanation of common law privileges in the context of a slander of title action. *See id.* at 892–94.

¹¹⁶ RESTATEMENT (SECOND) OF TORTS § 635 (1977) ("The rules on absolute privilege to publish defamatory matter stated in §§ 583 to 592A apply to the publication of an injurious falsehood."); *see, e.g.,* *Sailboat Key, Inc. v. Gardner*, 378 So. 2d 47, 48–49 (Fla. Dist. Ct. App. 1979); *Bennett v. McKibben*, 915 P.2d 400, 404 (Okla. Civ. App. 1996).

¹¹⁷ *See* *Conservative Club of Wash. v. Finkelstein*, 738 F. Supp. 6, 13 (D.D.C. 1990) (alleging slanderous statements made by attorney in contemplation of litigation found privileged).

¹¹⁸ *See* *Collins v. Red Roof Inns, Inc.*, 566 S.E.2d 595, 598 (W. Va. 2002) ("Because an absolute privilege removes all possibility of remedy for a wrong that may even be committed with malice, such a privilege is permitted only in limited circumstances."). *Collins* provides an excellent discussion, including references to case law from other jurisdictions, of the principles supporting the conferral of absolute privilege to statements made before and during judicial proceedings. *See id.* at 598–600.

relevant to slander of title claims, such as whether the filing of a notice of lis pendens and mechanic's liens are is privileged, are addressed below.¹¹⁹

V. ISSUES IN MINERAL LITIGATION

Many practices common in energy development relating to mineral interests in real property can give rise to a slander of title lawsuit. While this Article is not intended to be an exhaustive treatment of all potential circumstances that could support the cause of action, this section will explore the more common factual scenarios addressed by courts.

A. *Top Leasing*

The concept of top leasing, a practice that has recently become more common since shale gas has become increasingly recoverable, also raises the specter of slander of title. Properly defined, a top lease is “a lease granted by a landowner, during the existence of a recorded mineral lease, which is to become effective if and when the existing lease expires or is terminated.”¹²⁰ The lease in effect at the time the top lease is executed is typically called the “bottom” lease.¹²¹ Early courts to address the practice more derisively characterized it as “claim jumping.”¹²² Even so, the practice is now (and has been for some time) a well-settled and legally acceptable method of ensuring uninterrupted development of energy resources, and is thus a practice that advances important economic goals.¹²³

The basic function of the top lease is to put the top lessee “next-in-line” in the event the existing lease terminates, or is ultimately held to have

¹¹⁹ See *infra* Part V.

¹²⁰ *Sohio Petroleum Co. v. Grynberg*, 757 P.2d 1125, 1126 (Colo. App. 1988); see also J. Hovey Kemp, *Top Leasing For Oil and Gas: The Legal Perspective*, 59 DENV. L.J. 641, 641 (1982) (defining a top lease as “an oil and gas lease covering a mineral estate that is currently under a valid, existing oil and gas lease”).

¹²¹ See, e.g., *Nantt v. Puckett Energy Co.*, 382 N.W.2d 655, 657 (N.D. 1986).

¹²² See *Frankfort Oil Co. v. Snakard*, 279 F.2d 436, 445 n.23 (10th Cir. 1960) (“In the oil and gas vernacular to toplease [sic] is to secure a lease on land covered by an existing lease to the end that the toplease [sic] will be effective after the expiration of the existing lease and the interest of one or more lessees thereby eliminated. Topleasing [sic] has the same invidious characteristics as claim jumping.”).

¹²³ See *Voiles v. Santa Fe Minerals, Inc.*, 911 P.2d 1205, 1209 (Okla. 1996); see also *Nantt*, 382 N.W.2d at 659 (“top leasing has become a useful and widespread business practice in the oil and gas industry in North Dakota, as well as in other regions” (footnote omitted)); David E. Pierce, *Effective Top Leasing and Mysteries of the Habendum Clause*, 26 OKLA. BAR ASS'N MIN. L. SEC. NEWSL. No. 2, Apr. 2005, at 2, available at <http://washburnlaw.edu/faculty/pierce-david-fulltext/2005-26oklahomabarassociationminerallawnewsletter2.pdf>.

terminated. The goal is to tie-up the mineral interest owner's development rights before other competitors, including the existing lessee.¹²⁴

Based on the small number of cases to address the intersection of top leasing and slander of title, there are only a few definitive principles arising from such scenarios. First, it is plain enough that the existence of a top lease does not constitute slander of title per se, as the element of malice must still be proven.¹²⁵ At least one commentator has concluded that “[i]f the top lease is carefully drafted not to express any view on the validity of the existing lease, it would not appear to be any sort of ‘slandrous words.’”¹²⁶ A similar explanation comes from a recent work published in the *Oklahoma Law Review*:

When a top lessee joins a mineral lessor in a suit to cancel the bottom lease, the bottom lessee might defend against the suit by asserting that his title has been slandered. To buttress this argument, the bottom lessee might assert that the execution of an oil and gas lease, despite the continued validity of his prior lease, constitutes slander of his title. However, the largest hurdle the bottom lessee faces in proving that his title has been slandered is showing that the top lessee acted with malice. If the top lessee has a valid interest, the fact that the lessor executed the top lease does not show that either party has acted in bad faith or with lack of probable cause.¹²⁷

The author goes on to suggest that “the top lessee should make sure that the top lease states that it is ‘subject to’ the bottom lease in order to avoid a slander of title suit.”¹²⁸ This is sound advice.

¹²⁴ See Nelson Roach, *The Rule Against Perpetuities: The Validity of Oil and Gas Top Leases and Top Deeds in Texas After Peveto v. Starkey*, 35 BAYLOR L. REV. 399, 409 (1983) (“Top leases are an accepted business practice because they increase actual drilling and competitiveness. Oil companies whose leases have been topped have greater incentive to drill on leased lands because they cannot keep a claim on large blocks for successive primary terms by waiting until the end of the primary term to take a renewal. The owner of the bottom lease must either drill or lose his lease. Furthermore, in addition to increasing drilling and production, top leasing helps small independent oil companies get leases in thickly leased lands controlled by the major oil companies.”).

¹²⁵ See, e.g., *Voiles*, 911 P.2d at 1209.

¹²⁶ Pierce, *supra* note 123, at 12.

¹²⁷ Marichiel Lewis, *Oil and Gas: Top Leasing After Voiles v. Santa Fe Minerals—Unethical Claim-jumping or Prudent Business Practice?*, 52 OKLA. L. REV. 127, 138 (1999) (footnotes omitted).

¹²⁸ *Id.* at 141.

B. Releases

“Whenever a lien against real estate has been discharged, a release of the lien should be recorded . . . so that the records will reflect the discharge of the obligation.”¹²⁹ The legal obligations concerning releases vary from state to state, and with those variations come potential consequences, sometimes including a slander of title lawsuit. The obligation to release may arise by statute, contract, or the common law. The statutory obligation to release, for instance, may result in penalties as expressed in the statute, including an allowance for recovery of the decrease in market value or for specific statutory damages.¹³⁰ Of course, the leaseholder may have a contractual obligation to release the mineral lease, such that any failure to do so would result in damages sounding in contract.¹³¹

One Oklahoma case is particularly instructive. In *Zehner v. Post Oak Oil Co.*,¹³² the refusal of a holder of invalid oil and gas leases to release served as the principal basis for a slander of title action, as the evidence indicated that the defendants had attempted to force the plaintiff-lessor to renegotiate leases favoring the defendants.¹³³ Notably, though, the right to require terminated oil and gas leases to be released of record is “so important in Oklahoma that the legislature has made it a misdemeanor to wrongfully refuse to release.”¹³⁴ The question then becomes whether, in the absence of a statutory or contractual obligation to release, there is an independent common law duty to do so. And does breach of the common law duty constitute slander of title? The majority view appears to be that there is no common law duty to release.¹³⁵

¹²⁹ John W. Fisher, II, *The Scope of Title Examination in West Virginia: Can Reasonable Minds Differ?*, 98 W. VA. L. REV. 449, 529 (1996) (citing W. VA. CODE § 38-12-1 (LexisNexis Supp. 1995)).

¹³⁰ See, e.g., NEB. REV. STAT. ANN. § 57-205 (LexisNexis 2012); see also *Erne v. Broiles*, 252 P.2d 612, 616 (Kan. 1953); *Mollohan v. Patton*, 202 P. 616, 618 (Kan. 1921).

¹³¹ See, e.g., *Solberg v. Sunburst Oil & Gas Co.*, 246 P. 168, 171 (Mont. 1926).

¹³² 640 P.2d 991, 994 (Okla. 1981).

¹³³ See *id.* at 994–95.

¹³⁴ *Id.* at 994. (citing OKLA. STAT. ANN. tit. 41, § 40 (West 1915); see also *Dixon v. McCann*, 206 P. 597, 599 (Okla. 1922) (The “statute was passed to remedy just this evil. It was to prevent a lessee who has recorded an oil and gas lease and although it has expired, been abandoned, or subject to forfeiture, still if not released is a cloud upon the landlord’s title, from using this as a weapon to extort from the landowner money, and use this cloud on his title . . . to prevent the landowner from executing a new lease.”).

¹³⁵ See, e.g., *Draper v. J.B. & R.E. Walker, Inc.*, 204 P.2d 826, 830 (Utah 1949).

Texas is the principal exception. In that state, courts have found a common law duty to release an oil and gas lease after it has terminated.¹³⁶ In the seminal case, *Kidd v. Hoggett*,¹³⁷ a mineral lessee attempted to retain the lease by paying shut-in royalty payments for a well that was not producing paying quantities.¹³⁸ Assuring the plaintiff that the well was producing, the lessee refused to release the lease.¹³⁹ Unable to lease the property to a third party because of the lessee-defendant's refusal to release his lease, plaintiffs sued and received special damages for the frustrated sale.¹⁴⁰ Therefore, at least in Texas, a breach of the common law duty to release an expired lease, even when the lessee is not required to do so under the provisions of the lease, can give rise to a cause of action for slander of title.¹⁴¹

But absent a statutory, contractual, or common law obligation to release a terminated lease, such an act may not give rise to a slander of title claim. No case has recognized a common law duty to release a terminated or otherwise invalid leasehold interest in West Virginia, and no statute creates the duty. There is little indication in West Virginia authority to suggest that a future decision would (or should) recognize such a duty.

C. *Lis Pendens*

“Lis pendens provides a mechanism for putting the public on notice of certain categories of litigation involving real property.”¹⁴² Most states require the filing a notice of pending litigation, commonly referred to as lis pendens, when such a lawsuit is filed. For example, a notice of lis pendens is properly filed in West Virginia only when a person seeks “to enforce any lien upon, right to, or interest in designated real estate.”¹⁴³ Indeed, “[t]he recordation of a

¹³⁶ See *Witherspoon v. Green*, 274 S.W. 170, 171 (Tex. Civ. App. 1925) (“The law charged appellee with the duty of removing this cloud from appellant’s title by the execution of a release of his apparent, though not actual, interest in the land.”).

¹³⁷ 331 S.W.2d 515 (Tex. Civ. App. 1959).

¹³⁸ See *id.* at 517. The court noted that under then-Texas law, “[s]hut-in royalty payments excuse production only if the well is actually capable of producing gas in paying quantities.” *Id.* at 519. The court concluded that the lease terminated because the leasehold mineral estate was not capable of producing in paying quantities regardless of the defendants’ continued payment of shut-in royalties. *Id.*

¹³⁹ *Id.* at 517.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*; see also *Ellis v. Waldrop*, 656 S.W.2d 902, 905 (Tex. 1983) (“[A] cause of action to recover damages for the failure to release a purported, though not actual, property interest is a cause of action for slander of title.”); *Sw. Guar. Trust Co. v. Hardy Road 13.4 Joint Venture*, 981 S.W.2d 951, 954 (Tex. App. 1998).

¹⁴² *Prappas v. Meyerland Cmty. Imp. Ass’n*, 795 S.W.2d 794, 795 (Tex. App. 1990).

¹⁴³ W. VA. CODE ANN. § 55-11-2 (LexisNexis Supp. 2008).

formal notice of the pendency of a suit is required only if the proceeding is one to subject real estate to debt or liability."¹⁴⁴ Many slander of title suits have arisen from the false filing of lis pendens, but as explained below, many courts have found lis pendens filings privileged.¹⁴⁵

For example, Oklahoma courts have stated that the notice of lis pendens "is cloaked with the same privilege attaching to the issues in litigation."¹⁴⁶ An earlier California decision explains:

Since the effect of a lis pendens is to give constructive notice of all the facts apparent upon the face of the pleading, and of those other facts of which the facts so stated necessarily put a purchaser on inquiry [], the recordation of a notice of lis pendens is in effect a republication of the pleadings. The disparagement of title arises, therefore, from the recordation of the notice of lis pendens as well as from the pleadings. The publication of the pleadings is unquestionably clothed with absolute privilege, and we have concluded that the republication thereof by recording a notice of lis pendens is similarly privileged.¹⁴⁷

South Carolina is in agreement with this view.¹⁴⁸ Notwithstanding the harsh result that privileged notices of lis pendens can affect, at least one decision has observed that "it does not extinguish every form of relief when a party files a lis pendens which is motivated by some malicious intent. The jurisdictions are in agreement that the proper action against a maliciously filed lis pendens is under abuse of process or malicious prosecution."¹⁴⁹

Despite the general agreement favoring absolute privilege for lis pendens, there is support for the contrary view.¹⁵⁰ One commentator reasons:

¹⁴⁴ State *ex rel.* Watson v. White, 408 S.E.2d 66, 71 (W. Va. 1991).

¹⁴⁵ See, e.g., Procacci v. Zacco, 402 So. 2d 425, 427 (Fla. Dist. Ct. App. 1981) ("Since the notice of lis pendens has no existence separate and apart from the litigation of which it gives notice, we hold that appellants' filing of a notice of lis pendens was a part of the judicial proceeding to determine the existence of an easement and thus, it is encompassed within the judicial proceedings privilege.").

¹⁴⁶ Morford v. Eberly & Meade, Inc., 879 P.2d 841, 843 (Okla. Civ. App. 1994).

¹⁴⁷ Albertson v. Raboff, 295 P.2d 405, 408 (Cal. 1956) (en banc) (citations and internal quotation marks omitted).

¹⁴⁸ Pond Place Partners, Inc. v. Poole, 567 S.E.2d 881, 896-97 (S.C. Ct. App. 2002).

¹⁴⁹ *Id.* at 897.

¹⁵⁰ See, e.g., *Ex parte* Boykin, 656 So. 2d 821, 826 (Ala. Civ. App. 1994); Montecalvo v. Mandarelli, 682 A.2d 918, 924 (R.I. 1996). The *Montecalvo* court explained:

A notice of lis pendens is filed on the public record for the purpose of warning all interested persons that the title to the subject property is being disputed in litigation and that, therefore, any person who subsequently

[T]he privilege granted to communications in the actual course of a judicial proceeding does not extend to a lis pendens notice since its recordation is a private act, outside the purview of judicial proceedings, undertaken for the purpose of calling attention to the pendency of litigation. It is arguable that denial of the privilege will inhibit use of the lis pendens procedure and thereby defeat its purpose. However, malice is necessary for an action of slander of title; hence a lis pendens notice recorded with probable cause and in good faith would furnish no basis for the action. . . . Since the recording of a lis pendens notice is not subject to judicial control, it would not be privileged, and it would be actionable upon proof that the claim was false and that the notice was filed maliciously.¹⁵¹

In this way, the filing of a lis pendens can also be thought of as conferring qualified privilege.¹⁵² At least one court has described the qualified immunity accorded a lis pendens as subject to two conditions: “(1) the pleader must have a reasonable ground for believing the truth of the pleading, and (2) the statements made in the pleading must be reasonably calculated to accomplish the privileged purpose.”¹⁵³

These principles tend to indicate that a slander of title action based on an unfounded notice of lis pendens may succeed only where there is actually no pending litigation to which the slanderous notice refers, or where the litigation has no connection to the property interest described in the notice.¹⁵⁴ In either case, it is important to remember that however the slander is published, the plaintiff’s claim must still meet the other requirements of the cause of action.

acquires an interest in the property does so subject to the risk of being bound by an adverse judgment in the pending case. The purpose of the notice is to preserve a party’s rights in the property pending the outcome of the litigation. As plaintiff has noted, the practical effect of filing a lis pendens may well be to render the property unmarketable during the pendency of the underlying dispute. If, however, a party files a notice of a lis pendens absent a good-faith belief in his or her claim to the title of the property, then he or she utters a statement knowing it is false and malice may properly be inferred.

Id. (internal citations omitted).

¹⁵¹ Frank W. Elliott, Jr., Note, *Libel and Slander—Lis Pendens—Filing of Lis Pendens Notice Not Privileged*.—*Albertson v. Raboff*, 287 P.2D 145 (Cal. 1955), 34 TEX. L. REV. 657, 659 (1956).

¹⁵² See *Westfield Dev. Co. v. Rifle Inv. Assocs.*, 786 P.2d 1112, 1116 (Colo. 1990); *Kensington Dev. Corp. v. Israel*, 419 N.W.2d 241, 245 (Wis. 1988).

¹⁵³ *Kensington Dev. Corp.*, 419 N.W.2d at 245.

¹⁵⁴ See *Hewitt v. Rice*, 154 P.3d 408, 412 (Colo. 2007); *Wendy’s of S. Jersey, Inc. v. Blanchard Mgmt. Corp.*, 406 A.2d 1337, 1339 (N.J. Super. Ct. Ch. Div. 1979).

D. *Instruments and Liens*

The single most common act supporting a slander of title claim in the energy context is the filing or recording of an unfounded claim against the mineral interest owned by another.

For example, an action for slander of title has been sustained against an oil and gas lessor who filed an affidavit to terminate a lease, claiming that the lessee had violated the lease by failing to produce in commercial quantities, when, in fact, the lessee was producing in commercial quantities.¹⁵⁵ The court determined that the lessee was reckless in concluding otherwise, which satisfied the malice requirement.¹⁵⁶ And as noted above, the act of publication in the *TXO* case was an unfounded recordation of a quitclaim deed:

The jury found that by recording a quitclaim deed which it knew to be frivolous, TXO satisfied the requirements for slander of title. TXO argues that recording a quitclaim deed cannot be construed as the publication of a frivolous statement with the intent to prevent others from dealing with the claimant as required for an action for slander of title. We disagree. Recording a quitclaim deed that one knows to be frivolous is no different from saying to a potential purchaser—"I don't think you should buy that land. You know there is a cloud on the title because of Mr. Signaigo's old deed."¹⁵⁷

Similarly, the filing of an invalid lease and subsequent refusal to release it has been held to support a slander action.¹⁵⁸ Other "[s]pecific examples . . . include mortgage holders, parties who have judgment liens, or parties who may have signed contracts to purchase or lease the property."¹⁵⁹ Even the unfounded filing of a mechanics lien has been found to support the cause of action,¹⁶⁰ though one commentator argues that those who file

¹⁵⁵ See *Duncan Land & Exploration, Inc. v. Littlepage*, 984 S.W.2d 318, 332 (Tex. App. 1998).

¹⁵⁶ *Id.*

¹⁵⁷ *TXO Prod. Corp. v. Alliance Res. Corp.*, 419 S.E.2d 870, 879–80 (W. Va. 1992); see also *Colquhoun v. Webber*, 684 A.2d 405, 411 (Me. 1996) (filing frivolous quitclaim deed during pendency of quiet title action could support slander of title suit); *Jumping Rainbow Ranch v. Conklin*, 538 P.2d 1027, 1030 (Mont. 1975) ("[T]he action of [the defendant] in filing his quitclaim deed was such as to warrant the necessary showing of malice to entitle plaintiff to punitive damages."); *Green v. Lemarr*, 744 N.E.2d 212, 226 (Ohio Ct. App. 2000) ("[W]e think the [defendants] could be held liable if they frivolously filed the quitclaim deed and took a deed back, as long as the remaining elements for slander of title . . . are also proven.").

¹⁵⁸ See *Reaugh v. McCollum Exploration Co.*, 163 S.W.2d 620, 622 (Tex. 1942).

¹⁵⁹ *Green*, 744 N.E.2d at 224.

¹⁶⁰ See, e.g., *Contract Dev. Corp. v. Beck*, 627 N.E.2d 760, 768 (Ill. App. Ct. 1994).

mechanics liens should be shielded by absolute privilege for “statements made in the course of litigation.”¹⁶¹

These are but a few of the most common methods constituting the publication of disparaging statements that may lead to a successful claim for slander of title in the context of a property-based energy law practice.

VI. CONCLUSION

The slander of title plaintiff does not occupy an enviable position. As briefly explored in this primer, the elements and proof required to establish a slander of title claim are demanding, both at the pleading and at the proving stage of litigation. In particular, the malice and special damages requirements pose particularly high hurdles for a party wronged by the overzealous landman or the unsophisticated, yet impatient operator. But for those rarer occasions, such as those illustrated by the *TXO* case, slander of title can be a uniquely powerful device to part the tortfeasor of significant assets to pay the injured party and potentially punish and prevent further wrongful conduct.

Ultimately, as the rush to lease (and re-lease) natural gas interests for future drilling throughout the Marcellus and Utica shale regions, practitioners must take care to ensure their clients do not allow ambitious methods to trod on the property rights of others. Equally so, they must be prepared to assess the contours of the increasingly complex transactions involving mineral interests so that any potential disparagement is uncovered and promptly remedied.

¹⁶¹ Michael G. Cortina, *Mechanics Liens and Slander of Title: The Case for Absolute Privilege*, 92 ILL. B.J. 267 (2004).