

## Potter v. Clear Channel Outdoor, Inc.

Court of Appeals of Texas, First District, Houston  
July 2, 2009, Opinion Issued  
NO. 01-07-00578-CV

**Reporter:** 2009 Tex. App. LEXIS 5077; 2009 WL 1886168

LARRY E. POTTER, Appellant v. CLEAR CHANNEL OUTDOOR, INC., Appellee

**Prior History:** [\*1] On Appeal from the 333rd District Court, Harris County, Texas. Trial Court Cause No. 2005-66527.

[Nat'l Adver. Co. v. Potter, 2008 Tex. App. LEXIS 2462 \(Tex. App. Houston 1st Dist., Apr. 3, 2008\)](#)

### Core Terms

leases, summary judgment, option to purchase, trial court, parties, attorney's fees, declaratory judgment, summary judgment motion, terminated, expiration, renewal, costs, declare, terms, permits, structures, Advertising, declaratory judgment action, affirmative defense, new lease, unambiguous, construe, waived, rights of parties, ambiguous, grounds, right of first refusal, quantum meruit claim, circumstances, unequivocally

### Case Summary

#### Procedural Posture

The 333rd District Court, Harris County (Texas) entered a final judgment granting summary judgment to appellee lease assignee on declaratory judgment claims regarding lease construction under [Tex. Civ. Prac. & Rem. Code Ann. §§ 37.001-011](#) (2008). Appellant lessor, who sought review, had sued for quantum meruit damages, a declaratory judgment, and fees/costs under in part [Tex. Civ. Prac. & Rem. Code Ann. § 37.009](#) (2008). Fees were denied.

#### Overview

This case involved a dispute concerning the construction of lease agreements. The trial court granted the assignee summary judgment. On appeal, the court affirmed in part, reversed in part, and remanded. The trial court's final judgment failed to actually declare any rights of the parties under [Tex. Civ. Prac. & Rem. Code Ann. § 37.008](#) (2008), which was error. The court declared that the lessor had an option to purchase the entire sign structure and permit that was the subject of each lease upon the expiration of the lease term. There was no evidence that the lessor expressly

waived his option to purchase and the evidence did not establish an implied intent to waive his option. Thus, the assignee failed to establish its affirmative defense of waiver. The trial court presumably did not award attorney fees or costs to the lessor under [Tex. Civ. Prac. & Rem. Code Ann. § 37.009](#) because it denied his motion for summary judgment on his declaratory judgment claim. Because the court reversed this and declared in his favor the issues before the trial court for declaratory judgment, the cause was remanded for the trial court to consider this issue.

#### Outcome

The court reversed the judgment to the extent that it rendered summary judgment for the assignee and implicitly granted it a declaratory judgment. The court affirmed the judgment to the extent that it implicitly rendered a take-nothing judgment against the lessor on his quantum meruit claim. The court remanded for the trial court to render a declaratory judgment for the lessor and to consider his related attorney fees and costs request.

### LexisNexis® Headnotes

Civil Procedure > Judgments > Entry of Judgments > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

Civil Procedure > Appeals > Standards of Review > Reversible Errors

**HNI** Language of a judgment can make the judgment final, even though it should have been interlocutory, when the intent to finally dispose of a case is unequivocally expressed in the words of a judgment. A judgment which grants more relief than a party is entitled to is subject to reversal, but is not, for that reason alone, interlocutory.

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Appellate Review

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Discretionary Jurisdiction

**HN3** In a declaratory judgment action, if a declaratory judgment would terminate the uncertainty or controversy

giving rise to the lawsuit, the trial court is duty-bound to declare the rights of the parties as to the matters on which the parties join issue. [Tex. Civ. Prac. & Rem. Code Ann. § 37.008](#) (2008). When a trial court errs by failing to declare the rights of the parties in its judgment, the appellate court may determine the rights of parties and render the judgment that the trial court should have rendered.

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Appellate Review

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > Cross Motions

**HN2** The appellate court reviews declaratory judgments under the same standards as other judgments. [Tex. Civ. Prac. & Rem. Code Ann. § 37.010](#) (2008). The appellate court looks to the procedure used to resolve the issue below to determine the standard of review on appeal. When a trial court resolves a declaratory judgment action on competing motions for summary judgment, the appellate court reviews the propriety of the declaratory judgment under the same standards that the appellate court applies in reviewing a summary judgment.

Civil Procedure > Appeals > Summary Judgment Review > Appealability

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > Cross Motions

**HN4** The appellate court reviews a trial court's decision to grant or to deny a motion for summary judgment de novo. Although a denial of summary judgment is not normally reviewable, the appellate court may review such a denial when both parties move for summary judgment and the trial court grants one motion and denies the other. When the trial court's ruling granting one summary judgment motion necessarily denies another pending motion for summary judgment on the same issue, the appellate court implies the ruling of denial. In a review of such cross-motions, the appellate court reviews the summary judgment evidence presented by each party, determines all questions presented, and renders the judgment that the trial court should have rendered.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

**HN5** Under the traditional summary judgment standard, the movant has the burden to show that no genuine issues

of material fact exist and that it is entitled to judgment as a matter of law. [Tex. R. Civ. P. 166a\(c\)](#). In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true, and every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Evidentiary Considerations > Absence of Essential Element

**HN6** A defendant moving for summary judgment must conclusively negate at least one essential element of each of the plaintiff's causes of action or conclusively establish each element of an affirmative defense. If the order granting the summary judgment does not specify the grounds upon which judgment was rendered, the appellate court must affirm the summary judgment if any of the grounds in the summary judgment motion is meritorious.

Contracts Law > Contract Interpretation > General Overview

Contracts Law > Types of Contracts > Lease Agreements > General Overview

**HN7** The court construes a lease under the well-established rules of contract construction. In construing a written contract, the primary concern is to ascertain and to give effect to the parties' intentions as expressed in the document. The court considers the entire writing and attempts to harmonize and to give effect to all of the provisions of the contract by analyzing the provisions with reference to the whole agreement. No single provision is given controlling effect. In harmonizing these provisions, terms stated earlier in an agreement must be favored over subsequent terms. The court construes contracts from a utilitarian standpoint bearing in mind the particular business activity sought to be served and will avoid when possible and proper a construction which is unreasonable, inequitable, and oppressive. If, after the pertinent rules of construction are applied, the contract can be given a definite or certain legal meaning, it is unambiguous, and the court construe it as a matter of law.

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview

**HN8** The mere fact that parties may disagree about the construction of a contract provision does not render it ambiguous.

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

**HN9** A reviewing court may consider the surrounding circumstances present at the time that the contract was entered into in order to determine whether the contract is ambiguous, but, once a reviewing court decides that a contract is unambiguous, extrinsic evidence may be not be utilized to determine the parties' intent.

Contracts Law > Contract Interpretation > Parol Evidence > Custom & Usage

**HN10** Extrinsic evidence of the trade usage meaning of a term within a particular industry may be considered in determining whether that term has a definite or certain legal meaning for the purpose of the contract.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Waiver

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

**HN11** The affirmative defense of waiver can be asserted against a party who intentionally relinquishes a known right or engages in intentional conduct inconsistent with claiming that right. In order to be entitled to a summary judgment on waiver, one has to establish conclusively each element of this affirmative defense.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Waiver

**HN12** Waiver is largely a matter of intent, and for implied waiver to be found through a party's actions, intent must be clearly demonstrated by the surrounding facts and circumstances. In order to establish waiver by conduct, the conduct must be unequivocally inconsistent with claiming a known right. It is an established rule of law that to prove an implied waiver of a legal right, there must be a clear, unequivocal and decisive act of a party showing a purpose or acts which amount to estoppel on his part.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

**HN14** *Tex. Civ. Prac. & Rem. Code Ann. § 38.001* (2008) permits recovery for attorney's fees and costs for variety of claims, including claims as to rendered services, performed labor, furnished material, or oral or written contract.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > General Overview

**HN15** If any attorney's fees relate solely to claim for which fees are unrecoverable, a claimant must segregate the recoverable fees from unrecoverable fees, and remand

is required when fees are not segregated and at least some of the attorney's fees are attributable only to claims for which the fees are not recoverable.

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Discretionary Jurisdiction

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

**HN13** Any award of costs and reasonable and necessary attorney's fees as are equitable and just in a declaratory judgment action is within the discretion of the trial court. *Tex. Civ. Prac. & Rem. Code Ann. § 37.009* (2008).

**Judges:** Panel consists of Chief Justice Radack and Justices Sharp and Taft.<sup>15</sup>

**Opinion by:** Tim Taft

## Opinion

### MEMORANDUM OPINION

Appellant, Larry E. Potter, appeals a judgment rendered upon a motion for summary judgment filed by appellee, Clear Channel Outdoor, Inc. ("Clear Channel"), in a dispute concerning the construction of lease agreements. We determine whether the trial court erred in granting Clear Channel's motion for traditional summary judgment and in denying Potter's motion for traditional summary judgment. We reverse the trial court's judgment in part, affirm the judgment in part, and remand this cause with instructions.

### Background

In 1997, National Advertising Company ("National"), a predecessor in interest to Clear Channel, and Potter executed 10 identical<sup>1</sup> ground leases, six of which are the subject of this appeal. The leases were for a 10-year term, with an effective starting date of August 1, 1995. Pursuant to each lease, National was permitted to erect billboard signs on tracts of land [\*2] belonging to Potter in exchange for the greater of a fixed monthly rental or a percentage of the gross income that National derived from selling advertising space on the billboard signs. Under paragraph nine of each lease, "at the termination of the lease," National had a "right of first refusal" to continue to rent the land if Potter chose further to rent or to use his

<sup>15</sup> The Honorable Tim Taft, retired justice, Court of Appeals for the First District of Texas, participating by assignment.

<sup>1</sup> The leases differed only with regard to the tract of property affected.

land for outdoor advertising. This right expired one month "after the lease expire[d]." Paragraph three of each lease also gave National, under certain conditions, the right to "terminate this lease" and provided Potter the option to purchase the entire sign structures and permits from National "[i]n the event of such cancellation or in the event this lease is terminated for any reason and the parties have not executed a new lease or renewal of this Lease."

During the term of the leases, Clear Channel purchased six signs from a predecessor outdoor advertising company, and those six leases were assigned to Clear Channel.<sup>2</sup> Clear Channel did not succeed in contacting Potter regarding renewal of its leases before their expiration date of July 31, 2005. [\*3] On August 1, 2005, Clear Channel sent the usual lease payments to Potter, but Potter returned the checks by a letter dated August 25, 2005, in which he noted that Clear Channel's leases had expired by their own terms on July 31, 2005, and that he was "declining to extend the ground leases for an additional one (1) year term on a holdover basis." On August 25, 2005, a representative of Clear Channel reached Potter, and they discussed renewing the leases. On August 29, 2005, Potter forwarded proposed renewal leases to Clear Channel, which Clear Channel received the following day. On September 1, 2005, Potter sent Clear Channel a letter informing Clear Channel that he intended to exercise his right to purchase the sign structures and permits, with the purchase price to be decided pursuant to the "terms of the ground lease."

After receiving Potter's September 1 letter, Clear Channel's attorney sent a letter to Potter detailing Clear Channel's [\*4] position that, because its leases had not "terminated, but rather [had] expired," paragraph three of the leases did not provide Potter the option to purchase the sign structures, and stating also that Clear Channel was

declining Potter's offer to purchase the signs.<sup>3</sup> The letter also recited that Clear Channel was willing to continue discussions with Potter to execute new leases or to renew the prior leases, as had already been communicated to Potter on August 30, but that if a new lease agreement was not reached by October 20, 2005, Clear Channel would begin removing the sign structures. Clear Channel continued to attempt to negotiate renewal leases with Potter after this letter, but expressed to Potter that it had problems with the language of the proposed renewal leases, and suggested alternate terms.

On October 18, 2005, Potter filed suit against Clear Channel. Potter sought (1) a temporary restraining order, temporary injunction, and permanent injunction preventing Clear Channel from removing the billboards; (2) a judgment in the amount equal to the fair market value for the use of the billboards on his properties beyond the contractual period under the theory of quantum meruit; and (3) a declaratory judgment that Clear [\*6] Channel had exercised its right of first refusal under paragraph nine by declining to accept the terms of Potter's proposed renewal leases and that Potter was therefore entitled to exercise his right to purchase the entire sign structures and permits from Clear Channel for the current market value of an installed fabricated structure. He also prayed for recovery of his attorney's fees and costs.

Clear Channel filed an answer that generally denied the allegations in Potter's petition, raised the affirmative defenses of waiver and ambiguity, and contained a counterclaim for declaratory judgment. In its counterclaim, Clear Channel sought declarations (1) that in order for the option to purchase under paragraph 3 to become effective, the lease must have "actually been terminated"; (2) that the leases had not terminated, but had expired; and (3) that therefore Potter did not have an option to purchase the signs. It also sought to recover its attorney's fees and costs.

<sup>2</sup> Three of the remaining leases were also the subject of litigation and of a separate appeal before this Court. See [Nat'l Adver. Co. v. Potter, No. 01-06-01042-CV, 2008 Tex. App. LEXIS 2462, 2008 WL 920338, at \\*1 \(Tex. App.--Houston \[1st Dist.\] Apr. 3, 2008, pet. denied\)](#) (memo op.).

<sup>3</sup> Paragraph three of the leases provided:

3. Lose [sic] of Use of Sign Structures. If at any time the highway view of [National's (later, Clear Channel's)] displays is obstructed or obscured, or the use or installation of such displays is prevented or restricted by law or by [National's (later, Clear Channel's)] inability to obtain or maintain any necessary permits or licenses, or if [\*5] there occurs a diversion of traffic from, or a change in the direction of traffic on highways leading past [National's (later, Clear Channel's)] displays, [National (later, Clear Channel)] may, at its option, terminate this lease as to such specific location by giving 30 days written notice to [Potter]. In the event of such cancellation or in the event this lease is terminated for any reason and the parties have not executed a new lease or renewal of this Lease, [Potter] shall have the option to purchase the entire sign structure and permits from [National (later, Clear Channel)] for the then current market value of an installed fabricated structure, such value to be determined by the average of three (3) bids to be obtained from three (3) major sign fabricators.

Potter filed a motion for traditional summary judgment on his declaratory judgment claim only; while that motion was still pending, Clear Channel filed its own motion for summary judgment that also addressed only the declaratory [\*7] judgment claims. Neither motion addressed the quantum meruit claim in Potter's petition, and Clear Channel's motion did not address Potter's claim for attorney's fees and costs.<sup>4</sup>

Potter's motion for traditional summary judgment sought declarations that (1) Clear Channel had exercised its right of first refusal by rejecting Potter's proposed lease agreement and (2) Potter was entitled to exercise his option to purchase sign structures and permits from Clear Channel. As grounds for his motion, Potter argued that

(1) Clear Channel's rejection of the terms of Potter's proposed renewal lease agreements was an exercise of its right of first refusal under paragraph nine of the leases and Clear Channel could no longer accept Potter's offer to extend the lease agreements and

(2) Potter was entitled to exercise his right to purchase the entire sign structures and permits pursuant to the terms of paragraph three of the Leases, because such paragraph gave him the option to purchase "in the event [that the] lease [was] terminated for any reason and the parties [had] not executed a new lease or renewal [\*8] of the lease." Potter asserted that because the leases had expired and there were no new leases or renewal of the prior leases between the parties, his option to purchase became effective.

In addition to a declaratory judgment in his favor, Potter sought recovery of his attorney's fees and costs.

In its motion for traditional summary judgment, Clear Channel also pursued a judicial declaration interpreting paragraph three of the leases. Clear Channel's motion did not specify whether Clear Channel was moving for summary judgment on its declaratory judgment counterclaim, or attempting to defeat Potter's declaratory judgment claim, or both, although language in the motion suggested the last.<sup>5</sup> As its grounds for the grant of its summary judgment, Clear Channel argued that

(1) the Leases were not ambiguous and Potter had no effective option to purchase because

the leases had "expired," rather than "terminated," and paragraph three provided Potter the option to purchase only upon the "termination" of the lease

(2) alternatively, the leases were ambiguous and should be construed against Potter and the leases should be construed to mean that the option to purchase did not arise in the event of [\*9] the expiration of the leases, but only on their termination; and

(3) alternatively, Potter had waived any option to purchase because discussions continued between Potter and Clear Channel about possible renewal of the leases after Potter had attempted to exercise his option to purchase.

Clear Channel prayed that summary judgment be granted "on all grounds stated" in the motion, that Potter "take nothing on his claim against Clear Channel," and that the court award Clear Channel its costs of court and reasonable attorney's fees. Clear Channel also prayed that, "if summary judgment for Clear Channel [was] not rendered as to all of Clear Channel's claims, or for all the relief requested," the trial court enter an order specifying the facts that were without substantial controversy.

On June 18, 2007, the trial court granted Clear Channel's motion for summary judgment and denied Potter's motion for summary judgment in an order that read:

On this day came to be considered Plaintiff Larry E. Potter's Motion for Summary Judgment and Defendant Clear Channel [\*10] Outdoor, Inc.'s Cross-Motion for Summary Judgment. The court, having considered the motion, pleadings, responses, and summary judgment evidence hereby DENIES Plaintiff's Motion for Summary Judgment and GRANTS Defendant's Cross-Motion for Summary Judgment.

It is therefore ORDERED that Plaintiff's Motion for Summary Judgment is DENIED and Defendant's Cross-Motion for Summary Judgment is GRANTED.

On August 14, 2007, the trial court issued a final judgment, confirming the grant of Clear Channel's motion and the denial of Potter's motion, and denying Clear Channel's request for attorney's fees. The judgment read:

<sup>4</sup> Potter's injunctive relief requests were resolved by way of a rule 11 agreement between the parties.

<sup>5</sup> In a later filing, Clear Channel stated that "both sides have filed motions for summary judgment regarding their respective declarations."

By Order dated June 18, 2007, the Court denied Plaintiff Larry E. Potter's Motion for Summary Judgment and granted Defendant Clear Channel Outdoor, Inc.'s Cross-Motion for Summary Judgment. In doing so, the Court failed to address Clear Channel's request for an award of attorney's fees. Accordingly, it is ORDERED that Defendant Clear Channel Outdoor, Inc.'s request for an award of attorney's fees is hereby denied.

This is a final and appealable judgment, which, in conjunction with the Court's order of June 18, 2007, disposes of all claims and parties in this cause.<sup>6</sup>

### Standard of Review

In two issues, Potter contends that the trial court erroneously granted Clear Channel's motion for summary judgment and erroneously denied his motion for summary judgment.

Both parties' motions sought summary judgments that would declare the parties' rights pursuant to the declaratory judgment actions.<sup>7</sup> *HN2* We review declaratory judgments under the same standards as other judgments. See TEX. CIV. PRAC. & REM. CODE ANN. §

37.010 (Vernon 2008). We look to the procedure used to resolve the issue below to determine the standard of review on appeal. City of Galveston v. Tex. Gen. Land Office, 196 S.W.3d 218, 221 (Tex. App.--Houston [1st Dist.] 2006, pet. denied). When a trial court resolves a declaratory judgment action on competing motions for summary judgment, "we review the propriety of the declaratory judgment under the same standards that we apply in reviewing a summary judgment." *Id.*

*HN4* We review a trial court's decision to grant or to deny a motion for summary judgment de novo. See Tex. Mun. Power Agency v. Pub. Util. Comm'n of Tex., 253 S.W.3d 184, 192, 199 (Tex. 2007) (citing rule for review of grant of summary judgment and reviewing denied cross-motion for summary judgment under same standard). Although a denial of summary judgment is not normally reviewable, we may review such a denial when both parties move for summary judgment and the trial court grants one motion and denies the other. *Id. at 192*. When the trial court's ruling granting one summary judgment motion necessarily denies another pending motion for summary judgment on the same issue, such as here, we imply the ruling of denial. See Frank's Int'l, Inc. v. Smith Int'l, Inc., 249 S.W.3d 557, 559 n.2 (Tex. App.--Houston [1st Dist.] 2008, no pet.). In our review of such cross-motions, we review the summary judgment evidence presented by each party, determine all questions presented, and render the judgment that the trial

<sup>6</sup> Nothing in the [\*11] record indicates that Potter's quantum meruit claim for the fair market value of the use of the billboards on his properties beyond the contractual period was ever presented to the court for resolution either by trial, summary judgment, or dismissal. However, the language of the "final judgment" indicates that the judgment was meant to dispose of *all* claims and *all* parties, and it clearly expresses the trial court's intent that the judgment be final. See Lehmann v. Har-Con Corp., 39 S.W.3d 191, 200 (Tex. 2001) (holding that *HNI* language of judgment can make judgment final, even though it should have been interlocutory, when intent to finally dispose of case is unequivocally expressed in words of judgment). "A judgment which grants more relief than a party is entitled to is subject to reversal, but is not, for that reason alone, interlocutory." *Id.* The judgment before us, therefore, is final, albeit subject to challenge as erroneous to the extent that it disposed of a claim without "an adequate basis for the rendition of judgment." See *id.* However, Potter does not complain on appeal, either by issue or argument, of the trial court's disposition of his quantum meruit claim. See TEX. R. APP. P. 38.1(i). [\*12] Accordingly, we will affirm that portion of the judgment without regard to the merits. See Garcia v. Nat'l Eligibility Express, Inc., 4 S.W.3d 887, 889 (Tex. App.--Houston [1st Dist.] 1999, no pet.) (citing Walling v. Metcalfe, 863 S.W.2d 56, 58 (Tex. 1993)).

<sup>7</sup> See TEX. CIV. PRAC. & REM. CODE ANN. §§ 37.001-.011 [\*13] (Vernon 2008).

We note that the trial court's final judgment failed to actually declare any rights of the parties. *HN3* In a declaratory judgment action, if a declaratory judgment would terminate the uncertainty or controversy giving rise to the lawsuit, the trial court is duty-bound to declare the rights of the parties as to the matters on which the parties join issue. See TEX. CIV. PRAC. & REM. CODE ANN. § 37.008 (Vernon 2008); Spawglass Constr. Corp. v. City of Houston, 974 S.W.2d 876, 878 (Tex. App.--Houston [14th Dist.] 1998, pet. denied); Calvert v. Employees Ret. Sys. of Tex., 648 S.W.2d 418, 419 (Tex. App.--Austin 1983, writ ref'd n.r.e.). The judgment in the case before us did not make any declarations regarding the matters for which declarations were sought by the parties. This was error. When a trial court errs by failing to declare the rights of the parties in its judgment, the appellate court may determine the rights of parties and render the judgment that the trial court should have rendered. See Spawglass Constr., 974 S.W.2d at 879; James v. Hitchcock Indep. Sch. Dist., 742 S.W.2d 701, 705 (Tex. App.--Houston [1st Dist.] 1987, writ denied); Am. Eagle Ins. Co. v. Lemons, 722 S.W.2d 229, 230 (Tex. App.--Amarillo 1986, no writ); [\*14] Calvert, 648 S.W.2d at 421.

court should have rendered. Tex. Mun. Power Agency, 253 S.W.3d at 192 (citing Comm'rs Court v. Agan, 940 S.W.2d 77, 81 (Tex. 1997)).

**HN5** Under the traditional summary [\*15] judgment standard, the movant has the burden to show that no genuine issues of material fact exist and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); Nixon v. Mr. Prop. Mgmt. Co., Inc., 690 S.W.2d 546, 548 (Tex. 1985). In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true, and every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor. Nixon, 690 S.W.2d at 548-49. **HN6** A defendant moving for summary judgment must conclusively negate at least one essential element of each of the plaintiff's causes of action or conclusively establish each element of an affirmative defense. Sci. Spectrum, Inc. v. Martinez, 941 S.W.2d 910, 911 (Tex. 1997). If the order granting the summary judgment does not specify the grounds upon which judgment was rendered, we must affirm the summary judgment if any of the grounds in the summary judgment motion is meritorious. FM Props. Operating Co. v. City of Austin, 22 S.W.3d 868, 872 (Tex. 2000).

### Clear Channel's Motion for Summary Judgment

Potter's first issue complains of the trial court's grant of [\*16] Clear Channel's motion for summary judgment. Potter challenges all three of Clear Channel's grounds for summary judgment, arguing that the trial court incorrectly interpreted the leases and that he did not waive his right to exercise his option to purchase.

#### A. Construction of the Leases

Clear Channel's first two grounds for summary judgment related to the construction of the leases and specifically to the question of whether the phrase,

. . . [i]n the event of such cancellation or in the event this lease is terminated for any reason and the parties have not executed a new lease or renewal of this Lease, [Potter] shall have the option to purchase the entire sign structure and permits from [National (later, Clear Channel)] . . .

that is contained in paragraph three of the leases

provided Potter an option to purchase the sign structures and permits when the lease terms expired. Clear Channel argued that the word "terminated" did not include the *expiration* of a lease. Potter argued that the phrase "terminated for any other reason" included the expiration of the leases at the end of their natural terms.

**HN7** We construe a lease under the well-established rules of contract construction. See Luccia v. Ross, 274 S.W.3d 140, 146 (Tex. App.--Houston [1st Dist.] 2008, pet. denied). [\*17] In construing a written contract, the primary concern is to ascertain and to give effect to the parties' intentions as expressed in the document. Frost Nat'l Bank v. L&F Distribs., Ltd., 165 S.W.3d 310, 311-12 (Tex. 2005). We consider the entire writing and attempt to harmonize and to give effect to all of the provisions of the contract by analyzing the provisions with reference to the whole agreement. Id. at 312. No single provision is given controlling effect. J.M. Davidson, Inc. v. Webster, 128 S.W.3d 223, 229 (Tex. 2003). "In harmonizing these provisions, terms stated earlier in an agreement must be favored over subsequent terms." Coker v. Coker, 650 S.W.2d 391, 393 (Tex. 1983). We construe contracts "from a utilitarian standpoint bearing in mind the particular business activity sought to be served" and "will avoid when possible and proper a construction which is unreasonable, inequitable, and oppressive." Frost Nat'l Bank, 165 S.W.3d at 312 (quoting Reilly v. Rangers Mgmt., Inc., 727 S.W.2d 527, 530 (Tex. 1987)). If, after the pertinent rules of construction are applied, the contract can be given a definite or certain legal meaning, it is unambiguous, and we construe it as a matter [\*18] of law. *Id.*

Both parties agree that the leases had expired, and that the parties had not executed new leases or a renewal of the leases, when Potter informed Clear Channel that he was exercising his option to purchase the sign structures and permits under the terms of the leases. Both parties assert that paragraph three of the leases, pertaining to such option to purchase, is unambiguous, although they construe the provision differently.<sup>8</sup>

We agree that the disputed language is unambiguous and so determined recently in another appeal before us involving three additional leases between Potter and National, containing identical language and executed on the same day as the leases at issue in this appeal.<sup>9</sup> In National Advertising Co. v. Potter, we decided that

<sup>8</sup> **HN8** The mere fact that parties may disagree about the construction of a contract provision does not render it ambiguous. See Sun Oil Co. (Delaware) v. Madeley, 626 S.W.2d 726, 727 (Tex. 1981).

<sup>9</sup> Apart from the particular tract of property affected by each lease, the leases in National Advertising were identical to those before us.

language identical to that before us in this appeal provided Potter the option to purchase sign structures and permits when the leases expired at the end of their natural terms. [See No. 01-06-01042-CV, 2008 Tex. App. LEXIS 2462, 2008 WL 920338, at \\*5-7 \(Tex. App.--Houston \[1st Dist.\] Apr. 3, 2008, pet. denied\) \[\\*19\]](#) (memo op.). We held that the leases were not ambiguous and that the word "terminate," as used in the leases, included the expiration of the lease term. [2008 Tex. App. LEXIS 2462, \[WL\] at \\*6-7](#). In so holding, we explained that

[e]xamining paragraph three and giving its terms their generally accepted meaning, it is clear that the parties intended that, in the event that a specific sign or location became useless by the occurrence of one of various specified situations, National was granted the right to immediately terminate its Lease of the specific location. Paragraph three grants Potter the option to purchase the sign structures and permits from National, "[i]n the event of *such cancellation*." (Emphasis added.)

However, paragraph three contemplates a second situation in which Potter is granted the option to purchase the signs and permits from National: "in the event this lease is terminated for any reason *and the parties have not executed a new lease or renewal of this Lease*." Paragraph three also governs in the event that the Leases are terminated "for any reason" and the parties do not execute a new lease or a "renewal." Use of the term "renewal" naturally contemplates an expiration. That the parties could have [\*20] intended the circumstance in which one party prematurely terminates the Lease and then "renews" it is not a reasonable interpretation. Hence, the parties must have intended "terminated," as used within the Leases, to include expiration . . . . The term[] "terminated". . . include[s] the expiration of the Leases on their natural terms . . . .

*Id.*

Clear Channel contends that there are material differences between *National Advertising* and this cause and cites to

different evidence before the trial court in the motions for summary judgment at issue and the fact that, in *National Advertising*, the parties presented an agreed statement of facts and filed an agreed motion for judgment based on the agreed facts. Clear Channel argues that extrinsic evidence presented to the trial court in this cause--evidence related to the negotiations in the original signing of the leases in 1997 and to the attempts to renew the leases in 2005--supports upholding the trial court's ruling, even though such ruling implicitly construes the contract contrary to our interpretation [\*21] of the same language in *National Advertising*. Clear Channel further argues that it is proper for us to consider the "circumstances surrounding the execution of an unambiguous contract" when interpreting that contract, citing to *City of Pinehurst v. Spooner Addition Water Co.*, 432 S.W.2d 515 (Tex. 1968).

Clear Channel has misconstrued the holding of *Pinehurst, HN9*. A reviewing court may consider the surrounding circumstances<sup>10</sup> present at the time that the contract was entered into in order to determine whether the contract is ambiguous, but, once a reviewing court decides that a contract is unambiguous, extrinsic evidence may be not be utilized to determine the parties' intent. *See Nat'l Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520-22 (Tex. 1995); *Sun Oil Co. (Delaware) v. Madeley*, 626 S.W.2d 726, 731-32 (Tex. 1981). Because we have determined that the language at issue is unambiguous, we do not consider the proffered extrinsic evidence in interpreting the unambiguous language of the leases at issue.<sup>11</sup>

After reviewing the summary judgment motions and responses in this case, and the accompanying evidence to the extent that it may be considered, we determine that our previous interpretation of the same language, in identical leases, signed by the same parties, on the same day, should govern our interpretation of the leases before us in this appeal. We conclude, for the reasons set out in our opinion in *National Advertising*, that paragraph three of the leases is not ambiguous and declare that, under its terms, Potter had an option to purchase the entire sign structure and permit which was the subject of each lease upon the expiration of the lease term.

#### **B. Waiver**

Clear Channel's final ground for summary judgment was its affirmative defense that, if Potter had an effective

<sup>10</sup> For example, *HN10* extrinsic evidence of the "trade usage" meaning of a term within a particular industry may be considered in determining whether that term has a definite or certain [\*22] legal meaning for the purpose of the contract. *See Nat'l Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 521 n.6 (Tex. 1995).

<sup>11</sup> We note, however, that the circumstances surrounding both the leases at issue in *National Advertising*, and those in the present case, were exactly the same because both sets of contracts were executed between the same parties on the same day under the same circumstances.

option to purchase, [\*23] he had waived that option because discussions continued between Potter and Clear Channel about possible renewal of the leases after the date that the leases expired and after the date on which Potter had attempted to exercise his option to purchase. As evidence for this ground, Clear Channel cited its own attempts to contact Potter in order to renew the leases, Potter's August 29 forwarding of proposed renewal leases in response to Clear Channel's overture to Potter on August 25, and a September 30 email from a representative of Clear Channel to Potter, in which the representative mentioned speaking to Potter and proposed certain terms for renewal of the leases.

*HNI1* "The affirmative defense of waiver can be asserted against a party who intentionally relinquishes a known right or engages in intentional conduct inconsistent with claiming that right." [Tenneco, Inc. v. Enter. Prods. Co., 925 S.W.2d 640, 643 \(Tex. 1996\)](#). In order to be entitled to a summary judgment on waiver, Clear Channel had to establish conclusively each element of this affirmative defense. See [Sci. Spectrum, 941 S.W.2d at 911](#). Therefore, Clear Channel was required to establish conclusively that Potter had either (1) expressly [\*24] waived his option to purchase or (2) engaged in conduct inconsistent with his option to purchase. See [Tenneco, 925 S.W.2d at 643](#).

Clear Channel did not do so. There is no evidence in the record that Potter expressly waived his option to purchase, and the evidence offered on this matter does not conclusively establish an implied intent on the part of Potter to waive his option to purchase. *HNI2* "Waiver is largely a matter of intent, and for implied waiver to be found through a party's actions, intent must be clearly demonstrated by the surrounding facts and circumstances." [Jernigan v. Langley, 111 S.W.3d 153, 156 \(Tex. 2003\)](#). In order to establish waiver by conduct, the conduct must be "unequivocally inconsistent" with claiming a known right. [Van Indep. Sch. Dist. v. McCarty, 165 S.W.3d 351, 353 \(Tex. 2005\)](#). The evidence on summary judgment does not conclusively establish that Potter engaged in "clear, unequivocal, and decisive acts" evidencing the intention to waive his option to purchase. See [Estes v. Wilson, 682 S.W.2d 711, 714 \(Tex. App.--Fort Worth 1984, writ ref'd n.r.e.\)](#) ("It is an established rule of law that to prove an implied waiver of a legal right, there must be a clear, unequivocal [\*25] and decisive act of a party showing a purpose or acts which amount to estoppel on his part."). We hold that Clear Channel did not meet its burden to be entitled to summary judgment on the affirmative defense of waiver.<sup>12</sup>

### C. Resolution

Having concluded that, under the unambiguous language of paragraph three of the leases, Potter had an option to purchase the entire sign structure and permit that was the subject of each lease upon the expiration of the lease term, and, having determined that Clear Channel did not conclusively establish that Potter waived his option to purchase the sign structures and permits, we hold that Clear Channel was not entitled to the summary judgment requested. We sustain Potter's first issue.

### Potter's Motion for Summary Judgment

In his second issue, Potter asserts that the trial court erred in denying his motion for summary judgment. As previously detailed, in his summary judgment motion, Potter sought two declarations from the trial court: (1) that Clear Channel had exercised its right of first refusal by rejecting Potter's [\*26] proposed lease agreement and (2) that Potter was entitled to exercise his option to purchase sign structures and permits from Clear Channel. He also sought attorney's fees.

We have already determined that the leases provided Potter an option to purchase the sign structures and permits upon the expiration of the leases, and, therefore, we hold that Potter was entitled to summary judgment declaring that he had such an option. Our resolution of Potter's other question in his declaratory judgment action--whether Clear Channel had exercised its right of first refusal--is likewise guided by our opinion in *National Advertising*. In that case, when deciding whether National had exercised its right of first refusal under an identical paragraph nine as in the leases before us, we stated, "Here, National declined to renew the Leases on the terms offered by Potter in his August 25, 2005 correspondence. Hence, National exercised its right of first refusal when it rejected Potter's offer." [Nat'l Adver., 2008 Tex. App. LEXIS 2462, 2008 WL 920338, at \\*4](#). For the same reasons stated in that opinion, we declare that Clear Channel exercised its right of first refusal when it declined to renew the leases under the terms offered by [\*27] Potter to Clear Channel in the letter mailed on August 29, 2005.

However, as to the issue of attorney's fees, Potter's summary judgment sought recovery of his attorney's fees and costs for both the declaratory judgment claim and his quantum meruit claim,<sup>13</sup> and the evidence provided to the trial court did not distinguish between fees related to each

<sup>12</sup> Neither Potter nor Clear Channel sought a declaratory judgment on the question of waiver and so we make no declaration on this matter.

<sup>13</sup> Potter's summary judgment motion specified that he was seeking attorney's fees and costs "pursuant to [TEX. CIV. PRAC. & REM. CODE § 37.001 et. seq.](#) and [*sic*] [TEX. BUS. & COMM. CODE § 38.011, et. seq.](#)" The first reference is clearly seeking

distinct claim.<sup>14</sup> Potter may not recover attorney's fees and costs for the quantum meruit claim on which he did not prevail or recover damages. See *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997). Additionally, *HNI3* any "award [of] costs and reasonable and necessary attorney's fees as are equitable and just" in a declaratory judgment action is within the discretion of the trial court. See *TEX. CIV. PRAC. & REM. CODE ANN. § 37.009* (Vernon 2008). The trial court presumably did not award attorney's fees or costs to Potter because it denied his motion for summary judgment on his declaratory judgment claim. Because we have reversed the trial court's denial of Potter's summary judgment, because we have declared in his favor the issues before the trial court for declaratory judgment, and because any award for costs and reasonable and necessary [\*28] attorney's fees "as are equitable and just" in a declaratory judgment action is discretionary, we conclude that cause should be remand to the trial court for it to consider the issue of Potter's attorney's fees and costs on his declaratory judgment.

We sustain Potter's second issue.

### Conclusion

We reverse the trial court's judgment in part, affirm the judgment in part, and remand this cause with instructions. We reverse the judgment to the extent that it rendered summary judgment for Clear Channel and implicitly granted a declaratory judgment for Clear Channel. We affirm the judgment to the extent that it implicitly rendered a take-nothing judgment against Potter on his quantum meruit claim. We remand this cause to the trial court with instructions to render a declaratory judgment in favor of Potter consistent with this opinion and to consider Potter's request for the award of attorney's fees and costs under *Texas Civil Practice and Remedies Code section 37.009*. See *TEX. CIV. PRAC. & REM. CODE ANN. § 37.009*.

Tim Taft

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recovery for attorney's fees related to his declaratory judgment action. See *TEX. CIV. PRAC. & REM. CODE ANN. § 37.009* (Vernon 2008) (permitting trial court to award "costs and reasonable and necessary attorney's fees as are equitable and just" in action for declaratory judgment). The second seems to be an attempt to recover attorney's fees related to the quantum meruit claim. See *HNI4 TEX. CIV. PRAC. & REM. CODE ANN. § 38.001* (Vernon 2008) (permitting recovery for attorney's fees and costs for variety of claims, including claims as to rendered services, performed labor, furnished material, or oral or written contract).

<sup>14</sup> See *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 313-14 (Tex. 2006) (reaffirming [\*29] rule that *HNI5* if any attorney's fees relate solely to claim for which fees are unrecoverable, claimant must segregate recoverable fees from unrecoverable fees, and holding that remand required when fees not segregated and at least some of attorney's fees are attributable only to claims for which fees are not recoverable).