IN THE SUPREME COURT OF TEXAS

No. 18-0676

CHICAGO TITLE INSURANCE COMPANY, PETITIONER,

v.

COCHRAN INVESTMENTS, INC., RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

Argued January 30, 2020

JUSTICE LEHRMANN delivered the opinion of the Court.

The principal issue in this case is whether a special warranty deed conveying real property limits the grantor's liability for allegedly breaching the implied covenant of seisin—that is, the covenant that the grantor owned the property being conveyed. The grantor purchased property at a foreclosure sale. The grantor and grantee then entered into a residential sales contract regarding the property, and the grantor conveyed the property by special warranty deed to the grantee. In connection with the conveyance, the grantee obtained title insurance from an insurer. The validity of the foreclosure sale to the grantor was later challenged, and the insurer assumed the grantee's defense and settled the suit. The insurer, as the grantee's subrogee, then sued the grantor for breach of the implied covenant of seisin and breach of the sales contract.

The trial court found for the insurer on both claims. The court of appeals reversed, holding that the special warranty deed did not imply the covenant of seisin, the grantor thus had not breached the covenant, and the merger doctrine barred the breach-of-contract claim because the deed included no covenant regarding the ability to convey property. We agree that the deed bars the insurer's recovery here, though for different reasons. Regardless of whether it implies the covenant of seisin, the deed limits the grantor's liability for failures of title to claims asserted by individuals "by, through and under" the grantor. Because the failure of title did not arise from such a claim, the grantor did not assume the risk for it and, therefore, was not liable for it. In turn, the merger doctrine bars the insurer's breach-of-contract claim, as the grantee would be unable to recover based on the limited scope of the special warranty deed's protection. Accordingly, we affirm the court of appeals' judgment.

I. Background

In 2009, William England and Medardo Garza owned equal shares of a parcel of real property in Houston, Texas. The property was subject to a deed of trust held by EMC Mortgage. In September 2009, England conveyed his interest in the property to Garza. Three months later, a bankruptcy proceeding was commenced against England. As part of that proceeding, England's conveyance to Garza was set aside as a fraudulent transfer. In December 2010, EMC Mortgage foreclosed its lien on the property, which Cochran Investments, Inc. subsequently purchased at a foreclosure sale.

In May 2011, Cochran and Michael Ayers entered into a residential sales contract regarding the property. The sales contract states that Cochran "agrees to sell and convey to [Ayers] and [Ayers] agrees to buy from [Cochran] the Property defined below" for a purchase price of

$125,000. Further, the contract states that, at closing, Cochran "shall execute and deliver a general warranty deed conveying title to the Property" to Ayers. The sales contract also includes a savings clause, which provides in pertinent part:

> 19. REPRESENTATIONS: All covenants, representations, and warranties in this contract survive closing. If any representation of Seller in this contract is untrue on the Closing Date, Seller will be in default. . . .

Cochran and Ayers closed on June 6, 2011, and Cochran executed a special warranty deed conveying title to Ayers. The deed states that Cochran "has GRANTED, SOLD, AND CONVEYED and by these presents does hereby GRANT, SELL, AND CONVEY unto [Ayers], all of that certain tract of land lying and being situated in Harris County, Texas" and provides a detailed description of the land. In addition to the land, the special warranty deed conveyed "all buildings, improvements and fixtures located thereon and all rights, privileges and appurtenances pertaining thereto." The deed also notes that, "[w]ithout limiting the grant or the warranty of title provided herein," Ayers "acknowledges that [Cochran] has made no representation or warranty as to the physical condition of the Property" and that Ayers "accepts the Property in its current physical condition, as is, after having inspected the Property to the extent [Ayers] desired." (Emphasis omitted.) Additionally, the deed binds Cochran and its successors and assigns "to WARRANT AND FOREVER DEFEND, all and singular the Property, subject to the matters stated herein, unto [Ayers, his successors, and his assigns], against every person whomsoever lawfully claiming or to claim the same or any part thereof, by, through and under [Cochran], but not otherwise."

In connection with the conveyance, Chicago Title Insurance Company issued an Owner's Policy of Title Insurance to Ayers, agreeing to "pay [Ayers] or take other action if [Ayers] ha[d] a

loss resulting from a covered title risk." That policy covered Ayers in the event he did "not have good and indefeasible title."

Four days after Cochran executed the special warranty deed, the trustee overseeing England's bankruptcy proceeding sued EMC Mortgage and Cochran, asserting that the foreclosure sale of the property violated the bankruptcy proceeding's automatic stay and seeking to set aside the sale. Ayers was subsequently added as a defendant to the suit and filed a claim with Chicago Title, which assumed his defense in the proceeding. The case was voluntarily dismissed after Chicago Title paid $45,000 to the bankruptcy trustee and $20,000 to Garza in exchange for their interests in the property.

Chicago Title, as Ayers's subrogee under the title policy, later sued Cochran, asserting claims for breach of the implied covenant of seisin and breach of contract.[1] The case proceeded to a bench trial, and the trial court rendered judgment for Chicago Title, finding that the foreclosure sale and accompanying deed to Cochran were void and that Cochran had breached (1) the covenant of seisin implied in the special warranty deed that conveyed the property to Ayers and (2) the residential sales contract with Ayers in connection with the sale of the property. The court awarded Chicago Title $125,000 in actual damages representing the amount of the purchase price and $11,000 in attorney's fees. Cochran appealed.[2]

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[1] Chicago Title also brought claims for money had and received and unjust enrichment, but those claims are no longer at issue. In addition, Cochran filed a third-party claim against EMC Mortgage for indemnity. EMC Mortgage's successor by merger, JPMorgan Chase Bank, N.A., filed a motion for summary judgment, which the trial court granted. The court of appeals affirmed, 550 S.W.3d 196, 206 (Tex. App.—Houston [14th Dist.] 2018), and Cochran did not file a petition for review challenging that portion of the court of appeals' judgment.

[2] After the trial court rendered its final judgment, Cochran timely requested findings of fact and conclusions of law. However, the trial court did not file any, nor did Cochran subsequently file a notice of past-due findings of fact and conclusions of law. It is therefore "implied that the trial court made all the necessary findings to support its judgment." *Roberson v. Robinson*, 768 S.W.2d 280, 281 (Tex. 1989).

The court of appeals reversed, rendering a take-nothing judgment in favor of Cochran. 550 S.W.3d 196, 206 (Tex. App.—Houston [14th Dist.] 2018).[3] First, the court held that the special warranty deed does not imply the covenant of seisin. *Id.* at 205. The court emphasized that a covenant is implied in a real-property conveyance only if it appears from the deed's express terms that the parties clearly contemplated the covenant to be implied, or if it is necessary from the deed's language to infer such a covenant in order to effectuate the full purpose of the deed as a whole. *See id.* at 202 (citing *HECI Expl. Co. v. Neel*, 982 S.W.2d 881, 888 (Tex. 1998)). Analyzing the deed's language, the court held that the deed does not make a representation or claim of ownership of the property at issue. *Id.* at 203–05. The court reasoned that, because section 5.023 of the Property Code provides that the use of the words "grant" or "convey" in a deed implies only a limited covenant that does not extend to ownership of the property being conveyed,[4] *id.* at 204–05 (citing TEX. PROP. CODE § 5.023(a)), the deed's granting clause does not make a representation or claim that the grantor owned the property at issue and, therefore, does not imply the covenant of seisin, *see id.* at 205.

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[3] The court of appeals originally issued an opinion on February 6, 2018. 550 S.W.3d at 199. Following Chicago Title's motion for rehearing en banc, the court withdrew its original opinion and issued a substituted opinion. *Id.*

[4] Section 5.023 of the Property Code provides:

> (a) Unless the conveyance expressly provides otherwise, the use of "grant" or "convey" in a conveyance of an estate of inheritance or fee simple implies only that the grantor and the grantor's heirs covenant to the grantee and the grantee's heirs or assigns:
>
> (1) that prior to the execution of the conveyance the grantor has not conveyed the estate or any interest in the estate to a person other than the grantee; and
>
> (2) that at the time of the execution of the conveyance the estate is free from encumbrances.
>
> (b) An implied covenant under this section may be the basis for a lawsuit as if it had been expressed in the conveyance.

TEX. PROP. CODE § 5.023.

Second, the court held that the merger doctrine bars Chicago Title's breach-of-contract claim. *Id.* at 205–06. The court emphasized that, under the merger doctrine, "deeds are generally regarded as the final expression of the parties' agreement and the sole repository of the terms on which they have agreed." *Id.* at 205. Although the sales contract contains provisions addressing any failure to transfer title, the court noted that the deed itself contains no such provisions. *Id.* at 205–06. Thus, the court concluded that, under the merger doctrine, Chicago Title may not "rely on the contract's conveyance provisions to redress a failure to transfer title." *Id.* at 206.

Chicago Title filed a petition for review, arguing that the court of appeals erred in reversing the trial court's judgment as to both the seisin claim and the contract claim. We granted the petition.

II. Analysis

A. Deed Interpretation Principles

Neither party argues that the deed is ambiguous. We "construe an unambiguous deed as a matter of law." *Stribling v. Millican DPC Partners, LP*, 458 S.W.3d 17, 20 (Tex. 2015). When construing an unambiguous deed, we "discern the parties' intent from the deed's language in its entirety 'without references to matters of mere form, relative position of descriptions, technicalities, or arbitrary rules.'" *Id.* (quoting *Luckel v. White*, 819 S.W.2d 459, 462 (Tex. 1991)). Further, we presume that the parties to a deed "intend every clause to have some effect and in some measure to evidence their agreement." *Altman v. Blake*, 712 S.W.2d 117, 118 (Tex. 1986).

B. Implied Covenant of Seisin

The first issue in this case is whether Chicago Title may recover for Cochran's alleged breach of the implied covenant of seisin. "A covenant of seisin is an assurance to the grantee that

the grantor owns the very estate in the quantity and quality" that she "purports to convey." *Jackson v. Wildflower Prod. Co.*, 505 S.W.3d 80, 92 (Tex. App.—Amarillo 2016, pet. denied); *see also* 5 TEX. PRAC., LAND TITLES AND TITLE EXAMINATION § 34.4.50 (3d ed. 2020 update). "A covenant in a deed or assignment to the effect . . . that [the grantor] 'has good right and authority to sell and convey the same' evidences the intention on the part of [the grantor] to convey the [property] itself and not merely the grantor's title and interest therein." *Childress v. Siler*, 272 S.W.2d 417, 420 (Tex. App.—Waco 1954, writ ref'd n.r.e.). The covenant of seisin is breached by the grantor at the time the instrument is made if she does not own the estate in the land she undertakes to convey. *Id.*; *see also Jones' Heirs v. Paul's Heirs*, 59 Tex. 41, 46 (1883); *Westrope v. Chambers' Estate*, 51 Tex. 178, 187 (1879). The measure of damages for breach of the covenant "where there is a total failure of title" is the consideration paid, with interest. *Childress*, 272 S.W.2d at 420; *see also Clifton v. Charles*, 116 S.W. 120, 122 (Tex. App. 1909, writ ref'd).

As a matter of longstanding common law, "in the absence of any qualifying expressions," the covenant of seisin is "read into every conveyance of land or an interest in land, except in quitclaim deeds." *Fender v. Farr*, 262 S.W.2d 539, 543 (Tex. App.—Texarkana 1953, no writ); *Childress*, 272 S.W.2d at 420. A quitclaim deed merely "conveys the grantor's rights in th[e] property, if any." *Geodyne Energy Income Prod. P'ship I-E v. Newton Corp.*, 161 S.W.3d 482, 486 (Tex. 2005). But if a deed, "taken as a whole," "discloses a purpose to convey the property itself, as distinguished from the mere" right, title, or interest of the grantor, then the instrument is not a quitclaim deed. *See Cook v. Smith*, 174 S.W. 1094, 1095 (Tex. 1915); *see also Geodyne*, 161 S.W.3d at 486; *Bryan v. Thomas*, 365 S.W.2d 628, 629–30 (Tex. 1963).

The deed in question is not a quitclaim deed that merely transferred Cochran's right, title, and interest in the property. Rather, the deed is a special warranty deed that conveyed the Property to Ayers. *See Paul v. Hous. Oil Co. of Tex.*, 211 S.W.2d 345, 356 (Tex. App.—Waco 1948, writ ref'd n.r.e.). Chicago Title argues that the deed thus necessarily implies a covenant of seisin, which Cochran breached by undertaking to convey property that it did not own.[5] Cochran responds that the special warranty deed contains no language indicating that the parties intended to imply the covenant of seisin. Cochran further contends that, if the covenant of seisin is implied in every instrument purporting to convey property, then every such instrument effectively becomes a general warranty deed, and a grantor would be unable to limit her liability.

We need not resolve whether the special warranty deed here implies the covenant of seisin because, even assuming it does, the deed contains a "qualifying expression[]" that disclaims Cochran's liability for the alleged breach of that covenant here. *See Childress*, 272 S.W.2d at 420. To determine whether a deed contains such a qualifying expression, we examine the deed's "language in its entirety." *Stribling*, 458 S.W.3d at 20; *see also Cook*, 174 S.W.2d at 1095 (stating that "[t]he intention of the instrument is to be confined, of course, to that which its terms reveal; but it should be considered in its entirety").

The deed at issue does not specifically reference the covenant of seisin or Cochran's right to convey, but Cochran argues that the deed's special warranty clause—in which Cochran agreed to warrant the property against persons claiming by, through, and under Cochran, but not otherwise—forecloses Cochran's liability for title failures that are not premised on such claims.

[5] In this Court, neither party complains of the trial court's determination that the foreclosure sale and the accompanying trustee's deed conveying the property to Cochran were void. We thus express no opinion on that conclusion.

See Ellis v. Jordan, No. 01-90-00001-CV, 1990 WL 93233, at *1 (Tex. App.—Houston [1st Dist.] July 5, 1990, no writ) (not designated for publication). Because the bankruptcy trustee and Garza did not claim the property by, through, and under Cochran, Cochran asserts that it is not liable to Ayers for the failure of title resulting from the foreclosure sale's violation of the automatic stay. Chicago Title disputes this reasoning, contending that "the principle of seisin, owning the property purporting to be conveyed," is "separate from" and "a prerequisite to" the agreement to defend the title against a third party's claim. Thus, Chicago Title argues, any limitation by the special warranty does not affect recovery under the covenant of seisin. For the reasons discussed below, we agree with Cochran that the special warranty clause limits Cochran's liability for a failure of title, thereby barring Chicago Title's recovery here.

Before examining the effect of the deed's language, we review the obligations imposed by a warranty clause. "A warranty clause in a conveyance, either general or limited, is no part of the conveyance proper; it neither strengthens, enlarges, nor limits the title conveyed, but is a separate contract on the part of the grantor to pay damages in the event of failure of title." *Bond v. Bumpass*, 100 S.W.2d 1047, 1049 (Tex. App.—Dallas 1936) (citing *Richardson v. Levi*, 3 S.W. 444, 448 (Tex. 1887)), *aff'd*, 114 S.W.2d 1172 (Tex. 1938). A warranty of title does not warrant the title of the grantor but instead warrants the title of the grantee. *See Gibson v. Turner*, 294 S.W.2d 781, 787 (Tex. 1956) (addressing warranty in an oil-and-gas lease). Further, a warranty of title runs with the land and is not breached "unless and until there has been an actual or constructive eviction" of the grantee by an individual with superior title. *Id.*; *Rancho Bonito Land & Live-Stock Co. v. North*, 45 S.W. 994, 996 (Tex. 1898); *Jones' Heirs*, 59 Tex. at 46; *Shannon v. Childers*, 202 S.W. 1030, 1031 (Tex. App.—El Paso 1918, writ ref'd) ("The mere existence of a superior title in

another, which has never been enforced, does not amount to a breach of the covenant of warranty."). The measure of damages in a suit for breach of warranty of title, like those for breach of the covenant of seisin, is the consideration paid "for whatever portion of the conveyance that was subject to a failure of title" with interest. *Stumhoffer v. Perales*, 459 S.W.3d 158, 165 (Tex. App.—Houston [1st Dist.] 2015, pet. denied) (citing *Sun Expl. & Prod. Co. v. Benton*, 728 S.W.2d 35, 37 (Tex. 1987)); *see also City of Beaumont v. Moore*, 202 S.W.2d 448, 453 (Tex. 1947).

A warranty of title may take the form of either a general or a special warranty. A general warranty applies to any failure or defect in the grantee's title, whatever the source. *See Gibson*, 294 S.W.2d at 787–88 ("The obligation [under a general warranty] is . . . that [the covenantor] will defend and protect the covenantee against the rightful claims of all persons." (citation omitted)); *Moore*, 202 S.W.2d at 453. By contrast, under a special warranty, the grantor "warrants the title only against those claiming 'by, through or under' the grantor." *Paul*, 211 S.W.2d at 356. To be sure, a special warranty deed still "conveys the land itself," and "the limited warranty does not, of itself, carry notice of defects of title." *Id.*; *see also Crow v. Van Ness*, 232 S.W. 539, 542 (Tex. App.—Amarillo 1921, no writ) ("The limited warranty does not destroy its effect as a conveyance of the land."). Nevertheless, "when a vendee accepts . . . a deed with special warranty, the presumption of law is that he acts upon his own judgment and knowledge of the title, and he will not be heard to complain that he has not acquired a perfect title." *McIntyre v. De Long*, 8 S.W. 622, 623 (Tex. 1888) (quoting *Rhode v. Alley*, 27 Tex. 443, 445 (1864)).

Texas appellate opinions on the specific issue of whether recovery for breach of the covenant of seisin is foreclosed by a special warranty are sparse and divided. In *Chesapeake Exploration, L.L.C. v. Dallas Area Parkinsonism Society, Inc.*, the Seventh Court of Appeals held

that an oil-and-gas lessee could pursue a claim against the lessor for breach of the covenant of seisin notwithstanding the fact that the leases contained special warranty clauses similar to the one at issue here. No. 07-10-0397-CV, 2011 WL 3717082, at *5 (Tex. App.—Amarillo Aug. 24, 2011, no pet.) (holding that special warranty deed implied the covenant of seisin). By contrast, in *Ellis*, the First Court of Appeals held that a grantee could not recover on a claim for breach of the covenant of seisin where the deed limited the "covenant of title by stipulating in the conveyance that the grantor is bound only to defend the title against persons claiming 'by, through, or under' the grantor." 1990 WL 93233, at *1.[6] Texas law on this issue is thus far from settled.[7]

Under our general precedent governing warranties of title, it is clear that Cochran's conveyance of the property to Ayers via special warranty deed did not affect the scope of that conveyance or Ayers's ability to qualify as a good-faith purchaser of the property. But we conclude that it did affect Cochran's liability for defects in its title. Again, a *general* warranty "is for the indemnity of the purchaser against the loss or injury he may sustain by a failure or defect in the [grantor's] title." *Gibson*, 294 S.W.2d at 787; *Moore*, 202 S.W.2d at 453; *Richardson*, 3 S.W. at 447 (noting that, under a general warranty, a grantor "agrees to pay damages if the title

[6] We recognize that *Ellis* is not designated for publication. We note its holding in light of the paucity of case law addressing the pertinent issue.

[7] Nor have courts across the country reached a consensus on this issue. While some jurisdictions have held or suggested that a special warranty limits the scope of liability for breach of the covenant of seisin, *see, e.g.*, *Dunn v. Dunn*, 3 Colo. 510, 512–14 (1877); *Mason v. Loveless*, 2001 UT App 145, ¶¶ 12–13, 24 P.3d 997, 1002, others have reached the opposite conclusion, *see, e.g.*, *Joiner v. Ardmore Loan & Tr. Co.*, 124 P. 1073, 1076 (Okla. 1912); *Hawk v. McCullough*, 21 Ill. 220, 222 (1859); *Dillow v. Magraw*, 649 A.2d 1157, 1169–70 (Md. Ct. Spec. App. 1994). Further, in some jurisdictions, the answer to this issue depends on whether a deed's special warranty is inconsistent with the covenant of seisin or contains express terms restraining the scope of the covenant of seisin. *Compare Tracy v. Greffet*, 54 Mo. App. 562, 564 (1893) (holding that a deed's special warranty did not limit liability for breach of covenant of seisin because the warranty did not use express terms to do so), *with Miller v. Bayless*, 92 S.W. 482, 484 (Mo. 1906) (holding that a deed's special warranty limited liability for breach of covenant of seisin and distinguishing the deed at issue from that in *Tracy*).

fails"). A special warranty limits the scope of that indemnity obligation to losses or injuries sustained by a failure or defect in the grantor's title arising by, through, or under the grantor. Absent that limitation, a special warranty deed effectively becomes a general warranty deed.

Chicago Title argues that the covenant of seisin and the warranty of title are separate and that the nature of the warranty does not affect Cochran's liability with respect to the covenant of seisin, which was breached the moment the deed was executed. Thus, Chicago Title argues that it is entitled to recover for the failure of Cochran's title, regardless of whether the title failed because of an individual claiming the title by, through, and under Cochran.

We disagree. The fact that the covenant of seisin and a warranty of title are distinct does not prevent a warranty clause from affecting the grantor's liability for breach of seisin. Again, when construing obligations in a deed, we look to its plain language. *See Stribling*, 458 S.W.3d at 20. According to the special warranty clause at issue here, Cochran assumed the risk for a failure or defect of title that resulted from an individual claiming the property by, through, and under Cochran, *but not otherwise*. So while we recognize that the covenant of seisin and a warranty of title are conceptually distinct obligations, at bottom the deed's language expressly limits liability for a failure of title, regardless of whether that failure of title falls within the scope of the covenant of seisin. Thus, reading the deed as a whole, we hold that it contains a qualifying expression that limits the scope of Cochran's liability for a failure of title—including in the form of a breach of the covenant of seisin.[8] *See Childress*, 272 S.W.2d at 420; *Garrett v. Hous. Land & Tr. Co.*, 33 S.W.2d 775, 777 (Tex. App.—Galveston 1930, writ ref'd).

[8] In addition to effectuating the intent of the parties according to the deed's language, such a limitation comports with our general observation, discussed above, that "when a vendee accepts . . . a deed with special warranty,

An underlying premise of our holding—namely, that one covenant can affect the scope of a second, distinct covenant—is consistent with our analysis in *Rowe v. Heath*, 23 Tex. 614 (1859). The issue in *Rowe* was whether one express covenant in a deed limited the scope of another express covenant. *Id.* at 618–19. In that case, the deed contained a general warranty stating: "For [the grantee], his heirs and assigns, to have and to hold forever, as his own right, title and property, free from the claim or claims of me [the grantor], my heirs, or creditors, and all other person or persons whomsoever, to claim the same, or any part thereof, lawfully." *Id.* This was followed by a second covenant that stated: "And further, I do bind myself . . . to warrant and forever defend, the right and title to said land, against all legal claim or claims to said land and premises, in virtue of said Copeland patent and deed to me." *Id.* at 619. We held that the second covenant, which resembled a special warranty, did not limit the scope of the preceding express general warranty. *Id.* at 619–20.

To reach that conclusion in *Rowe*, we did precisely what we do here: we discerned the intent of the parties based on the plain language of the deed as a whole. We noted that, "where the first covenant is general, a subsequent limited covenant will not restrain the generality of the preceding covenant, unless an express intention to do so appear." *Id.* at 619 (quotation omitted). Considering the covenants together, we concluded that "a covenant of general warranty must have been intended," as otherwise the general warranty "was unnecessary and unmeaning." *Id.* After all, if the parties intended that the grantee have the protections of only a limited warranty, then the inclusion of the general warranty in the deed would have no effect. Further, we noted that the

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the presumption of law is that he acts upon his own judgment and knowledge of the title, and he will not be heard to complain that he has not acquired a perfect title." *McIntyre*, 8 S.W. at 623 (quoting *Rhode*, 27 Tex. at 445).

phrasing of the special warranty did not reflect an intent to limit liability for claims through the grantor. *Id.* ("And if it had been the intention of the grantor, to warrant only against his own acts, it is reasonable to suppose he would have employed language usual and appropriate, to convey that meaning."). Additionally, "[t]he words, 'and further,' with which the [special warranty] begins, [did] not imply an intention to limit the preceding [general warranty], but rather the contrary." *Id.* Taken together, those aspects of the deed indicated that the inclusion of the special warranty merely "expresse[d] the right" under which the grantor "undertook to convey and warrant the title." *Id.* We thus concluded that the plain language of the deed did not manifest an intention to limit the full protections afforded by the deed's general warranty. *Id.* at 619–20.

The deed here is distinguishable from the instrument at issue in *Rowe* for several reasons. First, unlike the deed in *Rowe*, this deed contains no general warranty; rather, it contains only a special warranty that expressly and clearly limits the grantor's liability for title failures, such that the grantee may recover for the failure only if it results from an individual claiming the property by, through, and under the grantor. Second, and relatedly, unlike with the instrument in *Rowe*, this deed's special warranty clearly limits the scope of another covenant. In the absence of language indicating otherwise, a grantor will be liable for a breach of the covenant of seisin if she does not own the property when it is purported to be conveyed, regardless of the source of the failure of title. But again, the special warranty here expressly disclaims liability for a failure of title unless that failure arises from someone claiming the property by, through, and under Cochran. Thus, the special warranty here limits the circumstances in which the grantor will be liable for a failure of title that results from a breach of the covenant of seisin. Third, reading the special warranty to limit liability for title failures does not render the covenant of seisin unnecessary and meaningless.

In *Rowe*, we emphasized that there would be no purpose to the general warranty if we read the additional covenant to limit the scope of the general warranty's protections. *Id.* at 619. But here, the deed's special warranty does not similarly nullify the covenant of seisin, as the grantee may still (1) qualify as a good-faith purchaser without notice of title defects, *see Paul*, 211 S.W.2d at 356, and (2) recover for a breach of seisin where the failure of title occurred as a result of someone claiming the property by, through, and under the grantor. As such, the special warranty and the implied covenant of seisin can coexist in the deed. Thus, consistent with our reasoning in *Rowe*, the deed's special warranty contains the "express intention" to "restrain the generality" of liability for the implied covenant of seisin. 23 Tex. at 619 (quotation omitted).

Chicago Title argues that reading the special warranty clause to limit the scope of Cochran's liability for the covenant of seisin transforms every special warranty deed into a quitclaim deed. What distinguishes other types of deeds from a quitclaim deed, Chicago Title emphasizes, is the conveyance of property—which, as noted above, is necessary to imply a grantor's representation or claim of ownership (i.e., seisin). Chicago Title argues that, if we interpret the special warranty clause to restrict liability for a breach of the covenant of seisin, then we have effectively read out that conveyance of property, thereby making it indistinguishable from a quitclaim deed.

Chicago Title overstates the effect of our holding. The special warranty clause does not strengthen, enlarge, or limit the title conveyed or the title that the deed purports to convey. *See Gibson*, 294 S.W.2d at 787–88; *Bond*, 100 S.W.2d at 1049. Thus, the special warranty cannot transform the deed into a quitclaim deed. Instead, the special warranty clause limits the circumstances under which a grantee can recover for a failure of title, allowing it to do so for

claims by, through, and under the grantor, but not otherwise. *See Garrett*, 33 S.W.2d at 777. As such, the special warranty clause speaks to the grantor's liability, not its conveyance of property. And unlike a quitclaim deed, a special warranty clause still protects the grantee with respect to a failure or defect of title created by the grantor.

By contrast, and as noted, Chicago Title's reading would effectively transform special warranty deeds into general warranty deeds, rendering the limited warranty meaningless. The purpose of the special warranty is to limit the title defects for which a grantor may be liable—a term no doubt contemplated by the parties in their negotiations regarding the conveyance. Allowing a grantee to recover for any failure of title under a special warranty—regardless of whether such defect resulted from an individual claiming the property by, through, or under the grantor—would flout the very purpose of the special warranty's limitation and defy settled expectations regarding the responsibilities incurred under a special warranty.[9]

In sum, we hold that the special warranty deed here limits Cochran's liability for title defects to those arising from claims "by, through and under" Cochran. Chicago Title alleges no such defect.[10] Accordingly, although we do not share the court of appeals' reasoning, we agree with the court that Chicago Title may not recover damages here for breach of the covenant of seisin. We thus affirm the court of appeals' judgment as to that claim.

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[9] Of course, notwithstanding any limits on recovery for breach of the covenant of seisin, a grantee may still assert a claim against a grantor that the grantor fraudulently induced the grantee to enter into the conveyance, regardless of whether an individual claims the property by, through, or under the grantor. *See McIntyre*, 8 S.W. at 623; *Rhode*, 27 Tex. at 445.

[10] We note that Chicago Title has never alleged that it is entitled to recover under the special warranty; that is, Chicago Title does not claim that the failure of title arose from individuals claiming by, through, and under Cochran.

C. Breach of Contract

Chicago Title next challenges the court of appeals' holding that the merger doctrine bars Chicago Title's breach-of-contract claim for failure to convey title.[11] "The merger doctrine provides that '[w]hen a deed is delivered and accepted as performance of a contract to convey, the contract is merged in the deed.'" *Burlington Res. Oil & Gas Co. v. Tex. Crude Energy, LLC*, 573 S.W.3d 198, 209 (Tex. 2019) (quoting *Alvarado v. Bolton*, 749 S.W.2d 47, 48 (Tex. 1988)). Thus, where "the terms of the deed . . . vary from those contained in the contract," courts must look to the deed "alone to determine the rights of the parties." *Alvarado*, 749 S.W.2d at 48 (quoting *Baker v. Baker*, 207 S.W.2d 244, 249 (Tex. App.—San Antonio 1947, writ ref'd n.r.e.)). As such, the merger doctrine "operates when earlier contracts are 'contradicted in the deed.'" *Burlington*, 573 S.W.3d at 209 (quoting *Alvarado*, 749 S.W.2d at 48).[12]

Chicago Title argues that the merger doctrine does not bar its claim, as the pertinent obligations in the sales contract do not contradict the obligations in the deed. Chicago Title also contends that the presence of the savings clause in the sales contract—which provides that the contract's covenants, representations, and warranties survive closing and that Cochran would be in default if any of its contractual representations were untrue on the closing date—prevents the

[11] As noted above, the sales contract states that, at closing, Cochran "shall execute and deliver a general warranty deed conveying title to the Property" to Ayers. Chicago Title does not assert that Cochran breached the sales contract by failing to deliver a general warranty deed. Instead, Chicago Title asserts only that Cochran breached the sales contract "by failing to sell and convey to Ayers title to the property."

[12] There are some recognized exceptions to the merger doctrine. *Harris v. Rowe*, 593 S.W.2d 303, 306 (Tex. 1979). For example, the merger doctrine does not apply in the event of fraud, accident, or mistake in the formation of the deed. *Commercial Bank, Unincorporated, of Mason v. Satterwhite*, 413 S.W.2d 905, 909 (Tex. 1967). Additionally, where a sales contract that precedes a deed requires "performance of acts other than the conveyance" or "creates rights collateral to and independent of the conveyance," those requirements and rights survive a deed that is silent as to them. *Harris*, 593 S.W.2d at 307. Chicago Title does not argue that any exceptions apply here.

merger doctrine from barring its breach-of-contract claim.[13] Cochran responds that the parties' agreement, as exhibited in the deed, does not warrant against any title defects that existed prior to its acquisition of the property. Thus, Cochran contends, the merger doctrine bars Chicago Title's breach-of-contract claim.

We agree with Cochran. To the extent the special warranty deed limits Cochran's liability for failures of title in a way the contract does not, the terms of the deed and the contract vary, and the merger doctrine forecloses the contract claim. *Alvarado*, 749 S.W.2d at 48. As for the savings clause, that provision applies to representations that are untrue on the date of closing. Had Chicago Title pursued a claim that Cochran breached the sales contract by issuing a special warranty deed rather than the general warranty deed that the contract appears to have expressly contemplated, perhaps Chicago Title could proceed on that claim in light of the savings clause. But we need not and do not resolve that issue, as Chicago Title does not assert that Ayers was entitled to a general warranty deed.[14] Instead, Chicago Title's breach-of-contract claim essentially mirrors its breach-of-seisin claim: Cochran failed to convey the property because it did not own what it agreed and purported to convey. Regardless of whether that representation survived closing, the special warranty limits Cochran's liability with respect to that failure of title. Under that limitation, Chicago Title may recover for a failure of title only if it resulted from an individual claiming the

[13] The court of appeals did not address Chicago Title's argument regarding the sales contract's savings clause because Chicago Title asserted it for the first time in its motion for rehearing en banc. 550 S.W.3d at 202. We view the argument as subsumed within the issue of whether the merger doctrine bars the breach-of-contract claim—an issue that was presented and argued in the court of appeals. *See Greene v. Farmers Ins. Exch.*, 446 S.W.3d 761, 764 n.4 (Tex. 2014) ("We do not consider *issues* that were not raised in the courts below, but parties are free to construct new *arguments* in support of issues properly before the Court.").

[14] The record does not reflect the circumstances under which Ayers agreed to accept a special warranty deed at closing rather than a general warranty deed.

property "by, through and under" Cochran, "but not otherwise." Holding that the savings clause permits a breach-of-contract claim for the same failure of title for which the special warranty bars recovery would undo the effect of that warranty, rendering it meaningless. Accordingly, the special warranty forecloses Chicago Title's recovery for breach of contract.

III. Conclusion

We hold that the deed's plain language limits Cochran's liability for failures or defects of title to those failures or defects resulting from individuals claiming the property by, through, and under Cochran. Here, Chicago Title asserts no such claim. As such, Cochran could not be liable for breach of the covenant of seisin here. Nor may Chicago Title recover for breach of contract to the extent the claim is premised on a failure of title for which the special warranty limits liability. Accordingly, we affirm the court of appeals' judgment.

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Debra H. Lehrmann
Justice

OPINION DELIVERED: June 19, 2020