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OKLAHOMA

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I. ROYALTY OWNER LITIGATION

A. *Tenth Circuit Court of Appeals Affirms Decision of the United States District Court for the Western District of Oklahoma Certifying a Modified Royalty Owner Class*

In *Naylor Farms, Inc. v. Chaparral Energy, LLC,*[2] the plaintiff royalty owners (collectively, Naylor Farms) contended that Chaparral systematically underpaid royalties on production from approximately 2,500 Oklahoma oil and gas wells by improperly deducting from royalty payments certain costs that the plaintiffs contended should have been borne solely by Chaparral under Oklahoma law. The district court granted Naylor Farms' motion seeking certification of a

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2. 923 F.3d 779, 784 (10th Cir. 2019).

class of royalty owners under Rule 23 of the Federal Rules of Civil Procedure.[3] In the present proceedings, Chaparral has appealed the district court's order granting class certification.[4]

Naylor Farms brought this suit alleging "claims for breach of contract, breach of fiduciary duty, fraud, unjust enrichment, and failure to produce in paying quantities."[5] Naylor Farms asserted that Chaparral breached what was described by the court as the "implied duty of marketability ("IDM")"[6] by improperly deducting what were described as "GCDTP-service costs"[7] from the royalty payments Chaparral made to Naylor Farms and other similarly-situated royalty owners. More specifically, certain midstream companies acquired title to or possession of the gas and natural gas liquids ("NGLs") at or near the wellhead, and then performed certain GCDTP services and sold the treated gas to downstream purchasers. In turn, the midstream companies deducted from the gross proceeds the amount they received from the downstream sales of production, i.e., the costs and fees associated with performing the GCDTP services. They paid Chaparral the resulting net proceeds. Chaparral then computed royalty payments "based on the *net proceeds* it receives from the midstream companies, rather than . . . based on the gross proceeds the midstream companies receive from the downstream sales."[8] Naylor Farms asserted that this approach to calculating royalty payments "requires royalty owners to bear the costs of transforming unprocessed gas into a marketable product" in breach of the IDM.[9]

3. Naylor Farms, Inc. v. Chaparral Energy, LLC, No. CIV-11-0634-HE 2017, WL 18754, at *9 (W.D. Okla. Jan. 17, 2017) ("[P]laintiffs' motion for class certification [Doc. #134], with the stated modifications, is granted. Plaintiffs' fraud claim will be excluded and the class will be limited to include those leases with "Mittelstaedt Clauses" listed on plaintiffs' Exhibit 29.") By later proceedings, the class definition was further revised to specify June 1, 2006, as the commencement date of the class period. Naylor Farms filed its Amended Class Definition (including the incorporation of the revisions referred to in the district court's Order of January 17, 2017) with the clerk of the district court. See Doc. 175, filed April 17, 2017, and Doc. 176, filed April 18, 2017.

4. *Naylor Farms*, 923 F.3d at 783.

5. *Id.*

6. *Id*. ("The IDM imposes upon lessees 'a duty to provide a marketable product available to market.'") citing Mittelstaedt v. Santa Fe Minerals, Inc., 954 P.2d 1203, 1206 (Okla. 1998).

7. *Id.* (explaining that "GCDTP services" refers to the "gathering, compressing, dehydrating, transporting, and producing" of raw or unprocessed gas.)

8. *Id.* at 784.

9. *Id.*

Naylor Farms moved the court to certify a class of similarly situated royalty owners.[10] In opposition to that request, Chaparral argued that a determination of whether it breached the IDM would require an assessment of "individual issues, including the obligation created by each" individual oil and gas lease "and the gas produced from each" individual well,[11] as well as individual questions as to damages. Chaparral urged that those issues would predominate over any common questions. The district court disagreed and found that class certification was appropriate, except that it excluded Naylor Farms' fraud claim from the class certification order.[12]

Chaparral appealed. It asserted three primary arguments in support of its effort to obtain a reversal of the class certification order. First, Chaparral contended that *marketability* constitutes an individual question that predominates over any common questions. Second, it argued that distinctions in lease language also give rise to individual questions that likewise predominate in this case. Finally, Chaparral contended that there is a lack of evidence showing that it employs a uniform payment methodology to support certification. The Tenth Circuit proceeded to address "whether the district court abused its discretion in concluding that Naylor Farms satisfied Rule 23's certification requirements."[13]

The court first addressed the issue of marketability. The Tenth Circuit stated that "[i]t has been more than two decades since the Oklahoma Supreme Court ("OSC") has said anything meaningful about marketability,"[14] citing *Mittelstaedt v. Santa Fe Minerals, Inc, supra.* However, finding that *Mittelstaedt* did not provide guidance on the specific marketability questions presented in this appeal, the court stated that its "task is 'to predict how [the OSC] would rule' if it were to answer those questions."[15] The court then reviewed the principles and reasoning applied by the OSC in *Mittelstaedt*, and in the more recent Oklahoma Court of Appeals decisions in *Whisenant v. Strat Land Expl. Co.*[16] and *Pummill v. Hancock Expl. LLC.*[17]

10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 785.
14. *Id.*
15. *Id.*
16. 429 P.3d 703 (Okla. Civ. App. 2018).
17. 419 P.3d 1268 (Okla. Civ. App. 2018).

Chaparral contended that the district court erred in ruling "that (1) the question of when the gas became marketable can be answered via generalized, classwide proof and (2) as a result, the marketability question doesn't defeat predominance."[18] Chaparral additionally argued that the district court erred in treating marketability as a question of law, rather than as a question of fact. It asserted that a determination of the marketability question and whether Chaparral breached the IDM requires a "well-by-well analysis to determine whether any of the gas at issue was marketable at the wellhead."[19] Thus, the marketability question would defeat commonality and predominance.

However, the Tenth Circuit found that "the district court's ruling that marketability is subject to class-wide proof under the specific facts of this case is entirely consistent with the [Oklahoma Court of Civil Appeals'] decision in *Pummill.*"[20] With regard to Chaparral's reliance on the *Whisenant* decision, the court noted Chaparral's insistence that "marketability can *never* be susceptible to classwide proof because it will always require an individualized assessment of the gas produced by each well."[21] However, the court emphasized the *Whisenant's* finding that certain factual issues were not susceptible to generalized proof according to reference to *that particular case*. "[T]he *Whisenant* court recognized that the OSC has declined to adopt a uniform test for determining when gas becomes marketable [and instead] left the issue open to resolution on a case-by-case basis."[22] The court left open the possibility that, in some cases, a determination might be made as to "when gas became marketable without undertaking an individualized inquiry into the quality of that gas."[23]

The court then found that "the facts in *Pummill* (and, by extension, the facts in this [*Chaparral*] case) fit comfortably in the space 'left . . . open' by *Whisenant.*"[24] In light of the court's reading of *Pummill* and *Whisenant*, the Tenth Circuit predicted that the Oklahoma Supreme Court would hold:

18. *Naylor Farms,* 923 F.3d at 791.
19. *Id.* at 790.
20. *Id.* at 794.
21. *Id.*
22. *Id.*
23. *Id.* at 795.
24. *Id.*

> Under the facts of this case, a jury could determine when the gas at issue became marketable without individually assessing the quality of that gas; instead, a jury could make this determination based solely on the expert testimony that all the gas at issue was required to undergo at least one GCDTP service before it could "reach" and be "sold into" the pipeline market.[25]

The district court in *Chaparral* was found to have not abused its discretion by concluding that the question of marketability "*in this particular case* is subject to common, classwide proof for purposes of satisfying Rule 23's commonality and predominance requirements."[26]

The court next turned to Chaparral's contention that distinctions in oil and gas lease language present individual questions that predominated over any common questions. The district court below rejected that argument and found that "its decision to limit the class to leases containing a *Mittelstaedt* Clause renders such an individualized analysis unnecessary."[27] Most of the Tenth Circuit's discussion addressing this particular area of the appellants' arguments focuses on which issues were presented and preserved below. The Tenth Circuit was not persuaded that the district court abused its discretion in certifying the class despite the existence of what the court characterized as *minor* variations in oil and gas lease language.

Finally, on appeal, Chaparral urged that "Naylor Farms failed to demonstrate that Chaparral uses a uniform payment methodology to calculate royalty payments,"[28] and that such failure warranted the denial of class certification. However, while the existence of a uniform payment methodology, *alone*, was found by the court to be insufficient to meet the predominance requirement, the court rejected the notion that such a methodology is a necessary component for satisfying predominance. Moreover, the court noted that "[t]he fact that damages may have to be ascertained on an individual basis is not, standing alone, sufficient to defeat class certification."[29] Naylor

25. *Id.* at 781.
26. *Id.* at 795.
27. *Id.*
28. *Id.* at 798.
29. *Id.* at 798 (citing Menocal v. GEO Grp., Inc., 882 F.3d 905, 922 (10th Cir.

Farms presented evidence that individualized evidence will not be needed because its expert can determine damages on a class wide basis through the use of a model. The Tenth Circuit further noted that the district court could also, if needed, divide the class into subclasses for purposes of determining damages.[30] The district court was found to have not abused its discretion in concluding that individual questions about damages do not defeat predominance.

The Tenth Circuit Court of Appeals affirmed the district court's order granting Naylor Farms' motion for class certification subject to certain modifications of the class definition consistent with its opinion.

B. *Oklahoma Court of Appeals Reverses Certification of Class of Royalty Owners*

The Oklahoma Court of Appeals, in *Whisenant v. Strat Land Exploration Co.*,[31] reversed a decision of the District Court of Beaver County certifying a royalty owner *class*. Whisenant sued Strat Land alleging, on behalf of a proposed class of similarly situated royalty owners, the underpayment or non-payment of royalties on natural gas and its constituents from certain Oklahoma wells. The evidence showed that the putative class included approximately eighty-eight Oklahoma wells and approximately 1,000 royalty owners throughout the United States (¶ 15, note 11). The proposed class wells were located within, or adjacent to, Ellis, Harper, Beaver, and Texas Counties.[32]

Whisenant asserted that one of the issues of law and fact common to the proposed class was "whether gas [is] in Marketable Condition at the meter run/gathering line inlet."[33] He additionally argued, among other issues, that Strat Land paid royalties to him and to the proposed class using a common method based on the *net revenue* Strat Land received under its marketing contracts rather than

2018), *cert. denied,* 139 S. Ct. 143 (2018)).
30. *Id.* at 790.
31. 429 P.3d 703, 704 (Okla. Civ. App. 2018).
32. *Id.*
33. *Id.*

paying royalties based on the *gross amount* received by the midstream purchaser from its sale of the gas at interstate or intrastate markets.[34] The district court certified a class, subject to a series of exclusions not described below, consisting of all royalty owners in Oklahoma wells that:

> (a) [were] operated by [Strat Land]; (b) marketed by Strat Land to DCP Midstream (f/k/a Duke Energy Field Services)' and (c) that have produced gas and/or gas constituents (such as residue gas, natural gas liquids, helium, or condensate) from February 12, 2009 to the time Class Notice is given.[35]

The district court granted class certification under 12 O.S. § 2023(B)(3). Strat Land filed an interlocutory appeal of the class certification order.[36]

The court of appeals observed that the primary issue on appeal is whether there are common questions of law or fact. However, since the class was certified below under 12 O.S. § 2023(B)(3), the court noted the additional requirement that common issues *predominate* over other questions. Early in its discussion, the court stated that "[i]n the present case, class certification is inappropriate because a 'highly individualized' review of the facts pertaining to each of the numerous wells is necessary."[37] In concluding that the lower court's order granting class certification should be reversed, some of the key findings of the court of appeals included the following:

First, the court found that the standards in Oklahoma for determining whether certain types of post-production costs may be deducted in the computation of gas royalty payments, as recognized in the landmark case of *Mittelstaedt v. Santa Fe Minerals, Inc.*,[38] require a fact-intensive inquiry. That the trial court found "that Strat Land had

34. *Id.* at 705.
35. *Id.*
36. *Id.* at 705–06 (Under Oklahoma state court procedure, an order granting or denying class certification is "subject to a de novo standard of review by any appellate court reviewing the order." citing 12 O.S. Supp. 2014 § 2023(C)(2)).
37. *Id.* at 707 (The Oklahoma Court of Appeals cited in support of this conclusion its earlier decision in Strack v. Cont'l Res., Inc., 405 P.3d 131 (Okla. Civ. App. 2017), *cert. denied*).
38. *Id.*

a common corporate policy of not paying royalty on the gross value of the gas produced under the leases"[39] was insufficient to satisfy the predominance requirement of 12 O.S. § 2023(B)(3).[40] Rather, in discussing the complex analysis of determining whether the costs deducted in the computation of gas royalties were expenses necessary to make the gas a *marketable product*, the court of appeals stated that "highly individualized and fact-intensive review of each Class Members' claim would be necessary to determine if [the defendant] underpaid oil or gas royalties."[41]

Second, as a consequence of the above, the court of appeals rejected Whisenant's contention that "[c]lass action treatment will allow a large number of similarly situated individuals to prosecute their common claims in a single forum, simultaneously, efficiently, and without duplication of time, expense and effort on the part of those individuals, witnesses, the courts and/or [Strat Land]."[42] The court was likewise unpersuaded by Whisenant's contention that disposing of the case as a class action would "avoid the possibility of inconsistent and/or varying results in this matter arising out of the same facts."[43]

Third, the Oklahoma Court of Appeals declined Whisenant's assertion that "determination of the quality of gas and other facts pertinent to each well are susceptible to generalized proof."[44]

Fourth, the appellate court rejected the use of assumptions parallel to those used in the case of *Tyson Foods, Inc. v. Bouaphakeo,*[45] finding:

> [A]n assumption analogous to that forwarded by the employees in *Tyson—i.e.*, an assumption that, for each gas well within the proposed class, the royalty-

39. *Id.*

40. *Id.* at 708 (The court of appeals cited EQT Production Co. v. Adair*,* 764 F.3d 347, 366 (4th Cir. 2014) quoting "Even a plethora of identical practices will not satisfy the predominance requirement if the defendants'; common conduct has little bearing on the central issue in the litigation – in this case, whether the defendants underpaid royalties.").

41. *Id.* at 709 (citing Strack v. Cont'l Res., Inc., 405 P.3d 131 (Okla. Civ. App. 2017), and Foster v. Apache Corp., 285 F.R.D. 632, 638 (W.D. Okla. 2012)).

42. *Id.* at 710.

43. *Id.*

44. *Id.*

45. 136 S.Ct. 1036 (2016).

> valuation point and deductible costs can be set at the same average point and amount — is unwarranted.[46]

The court concluded that a class-wide determination based either on the variables as they existed with Whisenant's one well "or on an average sampling (*i.e.,* of gas quality, proximity of interstate pipelines, availability and proximity of processing plants, market realities, and so forth) would result in distorted and inconsistent awards to the various members of the class."[47] Citing *Tyson Foods, Inc. v. Marez,*[48] the court noted that "a judgment must be based upon evidence that establishes essential facts as probably, not merely possibly being true."[49]

Fifth, the court of appeals found "[a] reliance upon facts derived from other wells would be as impermissible as it would have been to determine liability in *Wal-Mart* based upon generalized evidence derived from other store managers."[50] The court of appeals rejected the plaintiff's assertion that class action certification was appropriate here based on their contention that the case would rely on admissible expert testimony to prove class-wide liability.

Finally, the court held that, even if Strat Land paid royalties to the members of the putative class using a common method, "the establishment of this common fact fails to resolve the issue of liability, an issue which remains individual rather than common."[51] The court specifically rejected Whisenant's contention that the alleged common method was either right or wrong, class-wide.

Concluding that the predominance and superiority requirements for class certification under 12 O.S. § 2023(B)(3) were not satisfied in this case, the court of appeals reversed the trial court's order granting class certification. Whisenant's subsequent petition for certiorari review by the OSC was denied by order issued on October 1, 2018. Mandate was issued on October 31, 2018.

46. *Whisenant*, 429 P.3d at 710–11.
47. *Id.* at 711.
48. 931 P.2d 760 (Okla. Civ. App. 1996).
49. *Whisenant*, 429 P.3d at 711.
50. *Id.*at 712.
51. *Id.*

II. OIL AND GAS LEASE CANCELLATION, TERMINATION AND BREACH OF OBLIGATION CASES (OTHER THAN ROYALTY)

A. *Court of Appeals Affirms the District Court's Finding that the Term Assignments at Issue in this Case Required the Commencement of the Well Within the Primary Term or any Extension Thereof, but did Not Require Completion of the Well within the Primary Term.*

In the case of *Blue Dolphin Energy, LLC v. Devon Energy Production Company, LP,*[52] the plaintiffs appealed the district court's order granting partial summary judgment in favor of the defendant Devon. This appeal was assigned to the Oklahoma Court of Appeals' accelerated docket under OSC Rule 1.36, and the case was considered based on the briefs filed with the district court, without appellate briefing.

The plaintiffs had entered into a Term Assignment of Oil and Gas Leases with Felix Energy, LLC (Devon's predecessor) in April 2014. In January of 2016, Felix merged with Devon, and Devon assumed the interests covered by the assignments. The Blue Dolphin plaintiffs alleged that the assignment:

> contained a "primary term of three (3) years, commencing on the first day of the calendar month that immediately follows the Effective Date, which was April 30, 2014." Plaintiffs [Blue Dolphin] state in the petition that the Assignments "required the assignee to complete a well capable of producing in paying quantities prior to May 1, 2017, which is the expiration of the primary term." [Blue Dolphin plaintiffs] contend that because Defendant failed to complete the well by May 1, 2017, the primary term in the lease "expired and the secondary term never commenced."[53]

The plaintiffs asserted that the leasehold interests covered by the subject assignment reverted back to the Blue Dolphin plaintiffs because Devon did not complete any wells by the end of the May 1,

52. Case No. 117,134 (Okla. Civ. App. May 30, 2019) (Not for Publication); Court Issue, 90 Okla. B.J. 707, 779–80 (Vol. 12) (June 22, 2019)

53. *Blue Dolphin Energy,* No. 117,134 at 2–3.

2017 primary term. They further alleged that Devon trespassed and interfered with the plaintiffs' right of exclusive possession of the property underlying the assignments of leases "by remaining on the property, continuing to conduct operations thereon, and extracting oil and gas from the property without Plaintiffs' authorization."[54] Finally, the plaintiffs argued that Devon continuously converted plaintiffs' crude oil and natural gas produced after the May 1, 2017 termination of the assignment of leases.

The Blue Dolphin plaintiffs moved for partial summary judgment in their favor, contending that: (a) the letter agreement and term assignments in favor of Felix, now Devon, unambiguously required completion of a well by May 1, 2017; (b) Devon did not complete a well by May 1, 2017; and (c) without a completed well by May 1, 2017, the term assignments expired and reverted to the plaintiffs.

Defendant Devon filed a combined: (a) response in opposition plaintiffs' motion for partial summary judgment; and (b) cross-motion for partial summary judgment in favor of Devon. It asserted, among other allegations, that the assignments were extended because Devon was engaged in drilling or completion operations as of May 1, 2017. The district court denied the plaintiffs' motion and granted the defendant Devon's cross-motion for partial summary judgment. The Blue Dolphin plaintiffs appealed.

The Oklahoma Court of Appeals first examined certain detailed provisions of the Term Assignment of Oil and Gas Leases and the related Letter Agreement of April 16, 2014 to assess whether those terms were ambiguous:

> "The mere fact the parties disagree or press for a different construction does not make an agreement ambiguous." *Id.* ¶ 14. "A contract is ambiguous if it is reasonably susceptible to at least two different constructions." *Id.*[55]

The court recited a series of additional rules of construction.

54. *Id.* at 3–4.
55. *Id.* at 9.

Blue Dolphin contended that the assignments required that Devon complete a well by May 1, 2017, in order to avoid the expiration of the assignments. Blue Dolphin further asserted that the language of the documents allowed Devon to continue to hold the lands so long as Devon commenced drilling or reworking operations within ninety days of the completion of the prior well as either a commercial producer or a dry hole.

However, Devon argued that since it was engaged in operations relating to its well through May 1, 2017 and those operations were ongoing through the completion of the well as a commercial producer in July of 2017, the primary term of the Term Assignment was extended through the completion.

At the hearing on the summary judgment motions, the trial court found that the primary term of the assignment extended past May 1, 2017, for the purpose of allowing Devon to complete its ongoing well operations. The court quieted title in favor of Devon. Blue Dolphin appealed.

The Oklahoma Court of Appeals agreed with the trial court that the assignments only required the *commencement* of the well within the primary term or any extension thereof, and the diligent continuation of drilling operations through the completion of the well as a commercial producer. The Court of Appeals affirmed the trial court's grant of partial summary judgment in favor of Devon and held that the primary term of the lease was extended under the language of the term assignment to allow Devon to continue ongoing drilling operations through to their completion.

III. OIL AND GAS CONTRACTS, TRANSACTIONS AND TITLE MATTERS

A. *Court Addresses Lawsuit by Private Business Group to Obtain a Copy of Public Real Estate Records from the County Clerks for Use in the Group's Business of Selling Rights of Access of its Copies of the Records*

The case of *TexasFile, LLC v. Boevers*[56] presented Texas File's appeal of the trial court's denial of its motion for summary judgment and that court's granting of summary judgment in favor of

56. 437 P.3d 211 (Okla. Civ. App. 2018).

the defendant County Clerks of Kingfisher County and Garvin County.

TexasFile is in the business of providing (via internet) remote access images of county land records to its subscribers. TexasFile, at the time of these proceedings, did business in Texas, New Mexico, and a few counties in Oklahoma. It had contracts with county officials in Blaine, Logan, Oklahoma, and Grady Counties, Oklahoma, under which it received digital land records for its business, and subscribers were allowed to access the images of the public land records.

On May 6, 2016, TexasFile submitted a request to the County Clerk of Kingfisher County, pursuant to the Oklahoma Open Records Act, for a "complete electronic copy of all the Kingfisher County land records that are currently available in electronic format." The court noted that TexasFile did not request the associated tract index. The communication specifically requested all records that were currently available on OKcountyrecords.com. The County Clerk did not respond to that request. TexasFile made a second request for an electronic copy of the land records on January 11, 2017.

On May 15, 2017, the County Clerk of Kingfisher County responded and denied Texas File's request, as described in more detail in paragraph five of the court's opinion.

TexasFile commenced the present declaratory judgment and mandamus action against the County Clerk of Kingfisher County "asking the trial court to enter an order determining TexasLink was entitled to an electronic copy of the Kingfisher County public land records maintained by the County Clerk, pursuant to the Oklahoma Open Records Act, and compelling the County Clerk of Kingfisher County to make available the land records of the Kingfisher County Clerk's office in an electronic format at a reasonable fee."[57]

The Kingfisher County and Garvin County Clerks joined in a Motion to Consolidate the present case with the separate lawsuit TexasFile had instituted on the same issues with regard to Garvin County. The district court treated that motion as a Motion to Intervene and granted intervention to the Garvin County Clerk.[58]

TexasFile filed a prompt Motion for Summary Judgment and Brief in Support that set out in detail the facts and law that TexasFile

57. *Id.* at 212–13.
58. *Id.* at 213.

urged in support of its contention that the requests it had made of the County Clerk were valid and should be honored. It contended that the case cited by the Kingfisher County Clerk, *County Records, Inc. v. Armstrong*, was inapplicable to this appeal. TexasFile asserted that the *Armstrong* case was distinguishable because it involved a request for the tract index, which was and is prohibited by statute. In contrast, TexasFile did not request a copy of the tract index. Additionally, the *Armstrong* court relied on the Abstractors Act, which is not involved in the present action.[59]

The Oklahoma Court of Appeals stated that "[t]he issue presented on appeal is whether a county clerk is required to provide an entity with an electronic copy of the county land records maintained by the county clerk when the copies will be used for commercial purposes."[60]

After proceeding through a detailed review of the issues and pertinent authorities, including the *Armstrong* case and the Open Records Act (which we will not attempt to fully outline in this case summary), the Court of Appeals held that the trial court did not err in denying TexasFile's request for the county land records of the two County Clerks in this case. It *affirmed* the granting of summary judgment in favor of the County Clerks of Kingfisher and Garvin Counties. The Court of Appeals also rejected TexasFile's assertion that the district court erred in allowing the County Clerk of Garvin County to intervene in this case. It found that the intervention at issue here met the requirements of Oklahoma's intervention statute and served the interest of judicial economy.

IV. SURFACE USE, SURFACE DAMAGES, OKLAHOMA SURFACE DAMAGES ACT, CONDEMNATION AND ENVIRONMENTAL CASES

A. *Interpretation of the Oklahoma Surface Damages Act as Applying to One Who Owns a Current Possessory Interest in the Surface*

59. *Id.*
60. *Id.* at 214.

The case of *Hobson v. Cimarex Energy Co.*[61] presented the question of "whether a vested remainderman is a *surface owner* under the [Oklahoma] Surface Damages Act."[62]

The OSC held that a vested remainderman is not a "surface owner" under the Act. Rather, for purposes of the Surface Damages Act ("SDA"), the term "surface owner" refers to one who holds a current possessory interest.[63]

The father in this case held a present "life estate" in the surface rights of the subject property in Canadian County, Oklahoma. The son held a "vested remainder interest" in the surface rights. Before drilling the subject well, the oil and gas lessee ("Cimarex") reached an agreement with the life tenant regarding surface damages under the SDA. After the well was drilled, Cimarex paid the life tenant in accordance with the agreement. The son (remainderman) sued Cimarex claiming that Cimarex should have negotiated with him as well under the SDA, and he was entitled to compensation under the Act. In response, Cimarex contended that a future interest owner does not qualify as a surface owner under the SDA. Cimarex asserted, in the alternative, that a "future interest owner does qualify as a surface owner and his cause of action is against the life tenant."[64]

The trial court held that a vested remainderman does not qualify as a surface owner under the SDA and dismissed the action with prejudice. On appeal, the Oklahoma Court of Civil Appeals disagreed and found that the SDA focuses on ownership rather than possession. It reversed and remanded the case for further proceedings. The Oklahoma Supreme Court granted Cimarex's petition for writ of certiorari.

The Oklahoma Supreme Court observed at the outset of its opinion that the present appeal "concerns the interpretation of 'surface owner' under the SDA."[65] It noted that "[t]he SDA defines 'surface owner' as 'the owner or owners of record of the surface of the property on which the drilling operation is to occur.'"[66] The court went on to

61. No. 116,721, 2019 WL 4438043 (Okla. Sept. 17, 2019).
62. *Id.* at *1. *See* Surface Damages Act (codified as amended at OKLA. STAT. 52 § 318.2 (2010)).
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* (citing OKLA. STAT. 52 § 318.2(2) (2010)).

make certain additional key findings and rulings in reaching its decision:

1.The SDA's definition of *surface owner* was found by the court to be ambiguous.[67]

2.The court observed that a vested remainder interest (which the son owned in this case) becomes possessory only when the preceding estate (here, the father's life estate) comes naturally to its end. "The lessee of a mineral lease is statutorily required to negotiate with the person or persons holding a current possessory interest in the surface of the land."[68] The court noted that, in this case, the son would not hold a possessory interest until his father's life estate came to a natural end.

3.The court observed that "[i]nterpreting *surface owner* as requiring current possessory interest gives effect to legislative intent and promotes justice."[69] [Emphasis added] To require a possessory interest "does not modify the rights of the life tenants and vested remaindermen. A life estate entering a new minerals lease must still seek the remainderman's consent because removal of minerals will certainly affect the corpus of the property. [Citation omitted] Additionally, if the life tenant's transactions with the mineral leaseholder constitute an unreasonable injury to the remainderman's estate, the remainderman may bring a waste claim. [Citation omitted] A remainderman maintains recourse for the definite removal of corpus and potential waste from all other actions by the life tenant."[70]

4.The court concluded by recognizing, again, that the SDA's definition of "surface owner" was ambiguous.[71] "This Court is persuaded by the common meaning, expressed legislative intent, and interests of justice that the SDA's use of *surface owner* applies only to those holding a current possessory interest. Under the SDA, a mineral lessee must negotiate surface damages with those who hold a current possessory interest in the property. A vested remainderman does not hold a current possessory interest until the life estate has come to its nature end."

67. *Id.*at *3.
68. *Id.* at *2.
69. *Id.* at *3.
70. *Id.*
71. *Id.*

5.The Oklahoma Supreme Court vacated the decision of the Court of Appeals and affirmed the order of the trial court.

Note: Four (4) Justices concurred in the opinion, and a Fifth justice concurred specially. Four (4) justices dissented and three of those joined in the dissenting opinion written by Justice Darby.

B. *Tenth Circuit Affirms the Lower Court's Dismissal of the Proposed Class Action Lawsuit by Homeowners for Alleged Increases in the Cost of Insurance Due to Earthquake Issues*

In *Meier v. Chesapeake Operating L.L.C.,*[72] the plaintiff "homeowners brought a class-action lawsuit against operators of wastewater disposal wells for hydraulic fracturing operations, alleging the injection wells were significantly increasing seismic activity across larger portions of Oklahoma. The only damages the homeowners sought were the increased costs of obtaining and maintaining earthquake insurance."[73] More specifically, the homeowners sought to recover " '[t]he value of premiums paid to obtain earthquake insurance coverage; and/or . . . [t]he excess amount required to maintain earthquake insurance coverage after 2009,' as well as punitive damages."[74] The lawsuit was filed in the District Court of Payne County, Oklahoma. However, the defendants removed the case to the United States District Court for the Western District of Oklahoma under the Class Action Fairness Act. 28 U.S.C. § 1332(d).

The named defendants moved to dismiss the lawsuit based on the homeowners' alleged lack of standing and failure to state a claim. The federal district court held that (a) the homeowners did have standing to sue, (b) but it dismissed their suit for failure to state a claim. The court predicted that "the Oklahoma Supreme Court, if confronted with the issue, would find the relief requested by plaintiffs not legally cognizable under the circumstances present in the case at bar."[75] After its review of case law from Oklahoma and other states, the court found no authority to support an award of insurance premiums under the circumstances presented. The plaintiff homeowners appealed.

72. 778 F. App'x 561, 563 (10th Cir. 2019).
73. *Id.*
74. *Id.*
75. *Id.* at 564.

The Tenth Circuit initially addressed the homeowners' motion to certify stated questions in this appeal to the Oklahoma Supreme Court. Citing prior Tenth Circuit authority regarding certification of questions to the highest state court, [76] the court observed as follows:

> While we apply judgment and restraint before certifying . . . we will nonetheless employ the device [certification of questions to the state courts] in circumstances where the question before us (1) may be determinative of the case at hand and (2) is sufficiently novel that we fell uncomfortable attempting to decide it without further guidance.[77]

The Tenth Circuit declined the request that it certify the question to the OSC. First, the court found that it was highly unlikely, given the state of the legal authority, that the OSC would find in favor of the homeowners. It cited prior commentary to the effect that questions ought not to be certified if the answer is reasonably clear. Additionally, the court found it to be significant that the homeowners never requested certification of the question until the district court ruled against them on the merits. It found that the fact that a party only raises certification of the question after an adverse district court ruling "weighs heavily against certification."[78] Citing those two primary reasons, the Tenth Circuit declined to certify the question and, instead, proceeded to consider the merits of the question of "whether, under Oklahoma law, a homeowner can sue for increased insurance premiums absent any actual damage to property."[79]

The appellate court found that, while no Oklahoma authority specifically addressed the question at issue, "other states have consistently failed to recognize a cause of action for increased insurance premiums based on a tortfeasor's negligence."[80] The Tenth Circuit concluded that it was "highly unlikely the Oklahoma Supreme

76. *Id*.
77. *Id.* (quoting Pino v. United States, 507 F.3d 1233, 1236 (10th Cir. 2007)).
78. *Id.* at 565.
79. *Id.*
80. *Id.* at 566.

Court would allow proportional recovery for unmaterialized risk here, given its refusal to extend the loss-of-a-chance doctrine elsewhere."[81]

The Tenth Circuit engaged in further analysis of additional case law and concluded that, "[b]ecause the homeowners pleaded no legally cognizable claim for relief, the district court properly dismissed their complaint under Rule 12(b)(6)." The court declined to certify the question to the OSC and affirmed the district court's dismissal of the lawsuit.

C. *Tenth Circuit Affirms District Court's Exclusion of Two Expert Witnesses for the Plaintiff and Summary Judgment Ruling in Favor of Defendants*

The plaintiff in *Hall v. Conoco Inc.*[82] lived near the defendants' (ConocoPhillips) Oklahoma refinery as a child. "Roughly two decades later, Ms. Hall developed a form of leukemia," which was alleged to have resulted from her early exposure to the refinery's emissions of benzene.[83] Hall sued ConocoPhillips for negligence, negligence *per se*, and strict liability.[84] In her effort to prove the alleged link between the refinery's emissions and her development of leukemia, Hall proposed to present three expert witnesses at trial. The district court granted ConocoPhillips' motion to exclude the expert testimony of two of the proposed experts (*i.e.,* Dr. Gore and Dr. Calvey). The court also granted summary judgment to ConocoPhillips finding that, in the absence of the testimony of the excluded witnesses, Hall had not presented sufficient evidence linking her disease to benzene exposure.[85] Hall appealed.

The Tenth Circuit Court of Appeals began its review of the issues by reviewing the primary standards applicable to the exclusion of expert testimony. The court further observed that expert testimony must be determined to be reliable before the district court can admit the testimony. "The district court's assessment of reliability is review for an abuse of discretion,"[86] which includes an assessment of whether

81. *Id.* at 567.
82. 886 F.3d 1308, 1310 (10th Cir. 2018).
83. *Id.*
84. *Id.*
85. *Id.* at 1311.
86. *Id.*

the reasoning and methodology is both scientifically valid and applicable to a particular set of facts.

The appellate court reviewed and summarized the pertinent facts below in detail and concluded that Dr. Gore's proposed testimony could be justifiably regarded by the district court as unreliable "because of his failure to (1) justify ruling in benzene, or (2) rule out idiopathic[87] causes."[88] The Tenth Circuit found that the district court did not abuse its discretion in excluding Dr. Gore's opinion. With respect to Dr. Calvey, the court noted that her testimony "was excluded in part because Dr. Calvey had not 'adequately address[ed] the issue of exposure.'"[89] Hall did not challenge that rationale, which the Tenth Circuit found "[foreclosed] reversal of the exclusion of Dr. Calvey's testimony."[90]

Turning to the summary judgment ruling in favor of the defendants, Hall argued that circumstantial evidence (*e.g.,* "the presence of hydrocarbon leaks and odors in her neighborhood, groundwater contamination, a high benzene reading near her residence . . ."[91]) was sufficient to defeat summary judgment. However, the Tenth Circuit found that the circumstantial evidence did not "create a genuine issue of material fact on causation because of the need for expert testimony on the link between her disease and benzene exposure and quantification of Mr. Hall's exposure to benzene."[92] Without the testimony of Dr. Gore and Dr. Calvey, Hall could not meet her burden on the foregoing causation issues. The Tenth Circuit affirmed the district court's summary judgment ruling in favor of ConocoPhillips.

V. TRIBAL AND INDIAN LAND MATTERS

A. *Tenth Circuit Court of Appeals Affirms District Court's Finding of Trespass by Pipeline Owner Who Continued to Operate Pipeline After Expiration of its Limited Term Easement, but Reversed the*

87. Dr. Gore and other experts described an "idiopathic" disease as a disease in which the cause is unknown. *Id.* at footnote 1.
88. *Id.* at 1316.
89. *Id.*, citing *Hall v. Conoco Phillips,* 248 F.Supp.3d 1177, 1193 (W.D. Okla. 2017).
90. *Id.*
91. *Id.*
92. *Id.*at 1317.

Permanent Injunction Below Based Upon the Standard Applied in Granting the Injunction

The dispute presented in *Davilla v. Enable Midstream Partners L.P.*[93] arose in connection with the expiration of a twenty-year pipeline easement that covered certain Native American Indian allotted lands in Oklahoma. Enable Intrastate Transmission, LLC owned and operated a natural gas pipeline that traversed the lands. After the easement expired, Enable did not remove the pipeline, but rather continued to operate it. Enable ultimately approached certain allottees and sought a new twenty-year easement. It also applied to the Bureau of Indian Affairs ("BIA") for approval of a new easement. However, Enable failed to obtain approval for the proposed new easement from the allottees of a majority of the equitable interests in the land as required by applicable regulations.

As a result, the BIA cancelled Enable's right-of-way application. As Enable continued to operate the pipeline, a large group of individuals who held certain rights in the subject lands (the Allottees) filed suit in federal court alleging that Enable was trespassing on their land. They asked the court to enter an injunction compelling Enable to remove its pipeline. The parties were able to stipulate to most of the relevant facts. The Allottees moved for summary judgment on the issues of liability for trespass and injunctive relief. The court granted the Allottees' motion and requests for relief. Enable appealed.

Enable asserted two primary arguments on appeal. First, it argued that "the district court erred in granting summary judgment in favor of the Allottees on their trespass claims."[94] Second, Enable asserted that "the district court erred in issuing a permanent injunction to enforce the summary judgment ruling."[95]

In addressing the issues raised on appeal, the Tenth Circuit noted at the outset that "it is *the law*, not the material facts, that complicates this case."[96] The court further recognized that "[b]ecause we lack a federal body of trespass law to protect the Allottees' federal property interests, we must borrow state law to the extent it comports

93. 913 F.3d 959 (10th Cir. 2019).
94. *Id.* at 964.
95. *Id.* at 964–65.
96. *Id.* (Emphasis added by the court).

with federal policy."[97] The court went on to observe that "[t]he State of Oklahoma recognizes a right of action in trespass where one person 'actual[ly] physical[ly] inva[des] . . . the real estate of another without the permission of the person lawfully entitled to possession.'"[98] The Tenth Circuit concluded as follows:

> Our reading of Oklahoma law thus yields three elements constituting the Allottees' federal trespass claims. First, the Allottees must prove an entitlement to possession of the allotment. Second, they must prove Enable physically entered or remained on the allotment. Finally, they must prove Enable lacked a legal right—express or implied—to enter or remain. The stipulated facts already described definitively prove the first two elements.[99]

However, Enable took issue with the entry of summary judgment on the *third* element of the trespass claim. Enable contended that it had produced evidence of consent sufficient to prove a legal right to maintain the pipeline on the subject lands despite the expiration of the easement. More specifically, Enable showed that, in 2004, it had "obtained written consent forms from five of the thirty-seven individual Allottees in this case,"[100] showing that the five were willing to grant a new right-of-way for the pipeline in exchange for cash consideration.

While the Tenth Circuit noted that "evidence of a plaintiff's consent to a defendant's entry on the land will defeat liability in cases where the plaintiff's consent itself creates a right to enter or remain,"[101] it found that such evidence would not be sufficient in the present context.

> When it comes to maintaining a pipeline over Indian allotted land, however, Congress has dictated the prerequisites of a right to enter by statute. Enable thus

97. *Id.*
98. *Id.* at 966.
99. *Id.*
100. *Id.*
101. *Id.* at 967.

> has no legal right to keep a structure on the Allottees' land unless and until it secures a right-of-way for that purpose from the Secretary of the Interior. *See* 25 U.S.C. § 323. The Secretary must, in turn, have the approval of the relevant Indian stakeholders.[102]

The court found that the authorities cited by Enable fell short of holding "that one cotenant has no right of action for trespass under Oklahoma law when another cotenant—much less a *small minority* of co-tenancy interests—has agreed to a right-of-way easement."[103] Moreover, the court observed that, even if Oklahoma law were to provide that such evidence could defeat a trespass claim, "federal courts should only incorporate state rules of decision into federal claims to the extent those rules are consistent with federal law and policy."[104] The court concluded that Enable's view of the law would "frustrate federal Indian land policy, effectively robbing Indian allottees and the government of meaningful control over alienation."[105] Enable lacked a legal right to keep the pipeline in the ground.

The Tenth Circuit then turned to the second key argument of Enable with regard to the trespass claim—*i.e.,* that, even if the easement had expired, no duty to remove the pipeline ever arose because the Allottees never demanded that Enable remove it. Recognizing, again, that Oklahoma law would be incorporated into the subject federal claim so long as it did not frustrate federal policy, the court found that Oklahoma case law does not create a requirement that prior demand be made.[106] Rather, citing provisions of the Restatement (Second) of Torts, "the easement's expiration created a duty to remove the pipeline. . . Indeed, there would have been no sense in limiting the easement term to twenty years otherwise."[107]

The court concluded that "Enable acquired the pipeline *already knowing* the right-of-way would eventually expire. It

102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 967–68.
106. *Id.* at 969.
107. *Id.* The court did, however, discuss the easement holder's potential right to re-enter the property after the expiration of the easement for the purpose of removing the pipeline. *Id.* at 969–70.

therefore cannot—and indeed does not—claim it lacked notice of its duty to remove or intent to maintain the trespass."[108]

Finally, the Tenth Circuit reviewed Enable's challenge to the permanent injunction issued by the district court requiring Enable to remove the pipeline. As to this third basis for the appeal, the court agreed with Enable. The court recognized that a district court abuses its discretion when it bases its decision on an erroneous conclusion of law. Here, "the district court relied primarily on Oklahoma law—with supplemental authority from other federal courts—to conclude that 'equity will restrain [a continuing] trespass.' [citations omitted] As a result, it did not apply the usual four-factor test guiding federal courts' grant of permanent injunctive relief."[109]

The court found that, in determining whether to apply Oklahoma law or federal law in determining the standards for a permanent injunction, the court should consider:

> (1) "whether application of state law would frustrate specific" federal interests, (2) whether there is a "need for a nationally uniform body of law," and (3) other considerations such as whether "application of a federal rule would disrupt commercial relationships predicated on state law."[110]

The Tenth Circuit held that the district court erred because the circumstances in the present lawsuit indicated a distinct need for nationwide legal standards. "This uniform standard is necessary because the Secretary has undoubtedly approved easements over and across Indian land in multiple states."[111] The court noted that similar circumstances as those in the present dispute could lead other easement holders to be subject to an order of removal upon expiration of their easements. If the court did not apply a uniform standard in determining those issues, "an easement holder in Oklahoma and one in Kansas could be subject to differing permanent injunction standards

108. *Id.* at 970.
109. *Id.* at 971.
110. *Id.* at 972.
111. *Id.*

despite both receiving an easement from the Secretary of the Interior pursuant to the same federal program."[112]

> By failing to apply the federal courts' traditional equity jurisprudence to its remedy analysis, the [district court] committed an error of law and thus abused its equitable discretion. Accordingly, we must reverse the injunction order and remand for a full weighing of the equities.[113]

The Tenth Circuit Court of Appeals affirmed the district court's grant of summary judgment in favor of the Allottees. It reversed the entry of the permanent injunction, and remanded the case for further proceedings.

B. *United States Supreme Court Defers Decision to Allow for Additional Briefing and Oral Arguments in Pending Challenge to Tenth Circuit Court of Appeals Decision on Whether Congress Ever "Disestablished" the Muscogee (Creek) Nation Reservation*

In a decision issued August 8, 2017, in the appeal of the defendant's conviction for an alleged brutal crime, the Tenth Circuit Court of Appeals reached findings and conclusions that are of substantial concern to both the Oklahoma energy industry and the business community generally.[114] Murphy, a member of the Muscogee (Creek) Nation asserted in this appeal that he was wrongly prosecuted and convicted in the Oklahoma state courts for a crime that occurred in Indian Country (as defined in 18 U.S.C. §1151) over which the federal courts have exclusive jurisdiction. The state district court rejected Murphy's argument, finding that the crime had occurred on state land.

In a 126-page opinion addressing the issues on appeal, the Tenth Circuit found that, under the principles of *Solem v. Bartlett*,[115] Congress never *disestablished* the Creek Reservation. The case was

112. *Id.*
113. *Id.* at 971.
114. Murphy v. Royal, 866 F.3d 1164 (10th Cir. 2017).
115. 465 U.S. 463, 470 (1984).

remanded to the state district court to issue a writ of habeas corpus vacating *Murphy's* conviction and sentence.

Royal filed a Petition for Writ of Certiorari to the United States Supreme Court on February 6, 2018. The Petition was granted by the Court on May 21, 2018. Multiple amicus curiae briefs were filed. The parties and certain of the amicus participants presented oral argument to the Supreme Court on November 27, 2018.

On December 4, 2018, the Supreme Court directed the parties, the Solicitor General, and the Muscogee (Creek) Nation to file supplemental briefs addressing two questions:

> (1) Whether any statute grants the state of Oklahoma jurisdiction over the prosecution of crimes committed by Indians in the area within the 1866 territorial boundaries of the Creek Nation, irrespective of the area's reservation status. (2) Whether there are circumstances in which land qualifies as an Indian reservation but nonetheless does not meet the definition of Indian country as set forth in 18 U. S. C. §1151(a).[116]

The supplemental briefs were filed in late December 2018 and in January 2019. On June 27, 2019, the appeal in *Murphy* was restored to the calendar for re-argument but without specifying a particular date. As of the date this report was prepared, no specific date appeared to have been set for the presentation of the anticipated further oral arguments before the Court.

As a final note for those who are only lightly watching for further developments in this case, the case appears to be destined to experience at least three name changes during the several years it has pended on appeal. At the time the Tenth Circuit proceedings were filed and through the date the Tenth Circuit issued its decision, the case was entitled *Murphy v. Royal*.[117] Mr. Terry Royal was, at that time, the Warden of the Oklahoma State Penitentiary. When initial oral arguments were presented to the United States Supreme Court in

116. Order for Supplemental Briefing, Carpenter v. Murphy, 139 S. Ct. 626 (2018) (No. 17-1107) https://www.supremecourt.gov/qp/17-01107qp.pdf [https://perma.cc/2ZCZ-3W9X].

117. *Murphy*, 866 F.3d 1164.

the Fall of 2018, the case was entitled *Carpenter v. Murphy,*[118] because Mr. Mike Carpenter had assumed the role of Interim Warden of the Oklahoma State Penitentiary. By letter dated July 25, 2019, counsel for the Petitioner notified the Clerk for the United States Supreme Court that Mr. Tommy Sharp now serves as the Interim Warden of the Oklahoma State Penitentiary and will be automatically substituted as the Petitioner in this appeal in future proceedings.

VI. OTHER ENERGY INDUSTRY CASES

A. *Carried Working Interest Owner Sues to Recover its Claimed Share of Production Proceeds Under the Production Revenue Standards Act*

The court in *Abraham v. Palm Operating, LLC,*[119] was presented with a suit by Abraham alleging violations of Oklahoma's Production Revenue Standards Act, conversion, and restitution. Specifically, Abraham (a carried working interest owner in an oil and gas lease covering the Elias Kerns No. 2 well) sued the well operator (Palm) and the first purchaser (Pacer) for his alleged share of the proceeds from the sale of production. Abraham also sued the defendants for *interest* on the unpaid proceeds based on the alleged violation of the Production Revenue Standards Act ("PRSA"),[120] actual and punitive damages for conversion, and for restitution. The first purchaser, Pacer, denied liability and asserted, as affirmative defenses, the expiration of applicable statutes of limitation, laches, and waiver. Pacer further alleged that Abraham lacked clear marketable title, and that any failure by Pacer to make payment was due to Abraham's negligence or lack of diligence, as well as error by the operator Palm or prior operators.

The trial court granted summary judgment in favor of Abraham for $22,859.52 in production proceeds plus 12% interest, costs, and attorney fees. The purchaser, Pacer, appealed.

The Oklahoma Court of Appeals noted at the outset of its decision, in footnote 2, that the parties disputed whether Abraham's

118. Brief for Petitioner at 2, Carpenter v. Murphy, 139 S. Ct. 626 (2018) (No. 17-1107).
119. 447 P.3d 486, 487 (Okla. Civ. App. 2019).
120. *Id.*

ownership[121] interest was properly characterized as a "carried working interest" (notwithstanding the fact that the assignment in Abraham's favor stated that it was assigning a carried working interest). However, the court stated that the "type of ownership interest Abraham has is not material to this dispute."[122]

As for the primary issue presented in the appeal, the court found that one of the most important facts on appeal was that the parties agreed that at Palm's (the operator's) direction, the purchaser (Pacer) paid to Palm the working interest proceeds for the production the purchaser took from the well. Pacer asserted that it had no liability for the production proceeds after it paid them to the producing owner/operator Palm, pursuant to 52 O.S. 2011, §570.10(C)(1). The court further noted that the evidentiary materials before the court showed that Palm was the producing owner under the PRSA.

Abraham additionally argued that Section 570.10(C)(1) did not apply to this case "because, according to Abraham, while Palm may have been the producing owner of *some* of the production, it was not the producing owner of the portion of the production attributable to Abraham's interest."[123] Rather, Abraham was the owner of that production. After discussing the operation of the PRSA provisions in further detail, the Court of Appeals concluded:

> The evidentiary materials in the record show that Abraham was not the operator or producing owner and that Palm was the operator and producing owner. Abraham has not disputed Pacer's assertion that it paid the proceeds of production to Palm and therefore, under §570.10(C)(1), Pacer has discharged its liability for payment of proceeds of production. Pacer was therefore entitled to judgment as a matter of law on all of Abraham's claims against Pacer.[124]

Finally, in apparent indication as to the reason why Abraham pursued recovery against the purchaser of production with greater effort than the operator, the court advises in footnote 3 of its opinion

121. *Id.* at 488 n.2.
122. *Id.*
123. *Id.* at 489.
124. *Id.*

that, before this case was filed, Palm's assets had been placed in receivership in an action filed by a bank in another county, and Palm's predecessor in title had sought bankruptcy protection. Abraham asserted that he dismissed his claims against Palm. In contrast, Pacer contended that Abraham's claims against Palm were simply stayed.[125]

125. *Id.* at 488 n.3.