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ARKANSAS COURT OF APPEALS

DIVISION III
No. CV-20-704

TAYLOR FAMILY LIMITED PARTNERSHIP "B" APPELLANT V. XTO ENERGY, INC. APPELLEE	Opinion Delivered December 14, 2022 APPEAL FROM THE FRANKLKIN COUNTY CIRCUIT COURT, NORTHERN DISTRICT [NO. 24OCV-18-174] HONORABLE DENNIS CHARLES SUTTERFIELD, JUDGE REVERSED AND REMANDED

WAYMOND M. BROWN, Judge

This is an appeal of the Franklin County Circuit Court's order granting summary judgment to the appellee, XTO Energy, Inc. (XTO). The court determined the appellant, Taylor Family Limited Partnership "B" (Taylor), failed to demonstrate a genuine issue of material fact as to whether XTO, its oil and gas lessee, fulfilled its implied duty to restore the surface of Taylor's land after XTO had abandoned two of its natural-gas wells. Taylor now appeals the order granting summary judgment, arguing that the circuit court erred when it determined that the scope of XTO's implied duty to restore the property was limited to the measures set forth in administrative regulations or a "reasonably prudent operator" standard. For the reasons that follow, we reverse and remand.

I. *Factual Background*

This case focuses on two natural-gas wells that XTO leased from Taylor. The wells at issue—both named for the original parties to the oil and gas leases—are "Taylor FLB 2" and "EY Hill 1-32."

A. Taylor FLB 2

On August 4, 1960, Carolyn and Jeta Taylor, the appellant's predecessors in interest, executed an oil and gas lease (the "Taylor Lease") that covered a tract of land (the Taylor FLB Tract) they owned in Cecil Field in Lincoln County. The lease was executed in favor of Stephens Production Company and Arkansas Louisiana Gas Company, and it continued for a term of one year. The lease also contained a secondary term that allowed it to be extended for a period "as long thereafter as oil or gas is or can be produced from [the Taylor land] or lands with which [the Taylor land] is pooled hereunder."

The Taylor lease further granted its oil and gas lessees "the right to explore and produce oil and gas," specifically including the rights to lay pipelines; to build tanks, power stations, and other structures; and to construct roads and bridges. The lease also granted the general right to build "any other structures, equipment, servitudes, and privileges which may be necessary, useful, or convenient to or in connection with [their] operations" on the Taylor FLB Tract.

Shortly after the parties executed the Taylor lease, the Arkansas Oil and Gas Commission (AOGC) pooled the Taylor FLB Tract with other leased tracts that were located in Cecil Field. The pooled tracts were collectively named the Taylor FLB natural gas unit

("Taylor FLB Unit"), and the first well in the unit, the Taylor FLB 1 well, was drilled in 1961 and produced for over fifty years until XTO plugged and abandoned the well in 2012.

XTO's predecessor in interest, Arkla Exploration Company, began drilling the Taylor FLB 2 well—one of the wells at issue in this case—in 1989. Taylor FLB 2 produced natural gas until 2017, when it was plugged and abandoned. Two of the remaining wells in the Taylor FLB natural gas unit, including Taylor FLB 3 and Taylor FLB 4, are still operating.

B. EY Hill 1-32

Taylor's predecessors in interest also executed an oil and gas lease in favor of E.Y. Hill and Maggie Hill concerning a tract of land in an adjoining township. The terms of the lease, including the surface rights granted to the lessee, were similar to the Taylor lease. Drilling at the EY Hill 1-32 well site began in 1958. Taylor acquired the surface rights to the EY Hill tract several years later.

The EY Hill 1-32 well produced natural gas for sixty years. XTO plugged and abandoned that well in 2017.

C. The Litigation

On October 19, 2018, Taylor filed a complaint seeking compensatory damages, injunctive relief, and attorney's fees. The complaint alleged that XTO had not fulfilled its implied duty to restore the property at each well "as nearly as practicable to the same condition as it was before the drilling commenced." Specifically, Taylor alleged that the land suffered unrepaired surface damage from roads, shale pads, and pipelines that were installed

during the drilling operation and that underground pipelines were left behind. Further, Taylor asserted that XTO failed to remove a meter shed that served the Taylor FLB 2 well.

As a result of these alleged failures, Taylor argued that it had incurred "surface damages upon its real property," and it sought damages including "the expense [associated with] the removal of the roadway traversing its property," as well as "the cost[s] to remove the existing shale, restore the original contour [of the land], apply topsoil, apply mulch and re-seed the ground to establish a desirable grass cover to prevent erosion." Taylor also sought an injunction ordering XTO to "remove the meter shed at the Jeta Taylor well site [and] all abandoned pipelines traversing [its] properties" and to "restore the . . . property to is pre-drilling condition after removal of the pipelines."

XTO filed an answer on November 26, 2019. The answer admitted the location of the abandoned wells but otherwise denied the material allegations in the complaint. XTO also affirmatively pleaded, among other things, that Taylor has "suffered no surface damage."

XTO followed with a motion for summary judgment on February 3, 2020. The motion asserted that "while an [oil and gas] operator has a duty to restore, this duty does not require the operator to improve [Taylor's] land to a subjectively better condition, nor does it impose liability on an operator who otherwise engaged in prudent, reasonable, and ordinary drilling operations[.]" Summary judgment was appropriate, XTO said, "because at all times, [it] followed Arkansas Oil and Gas Commission Regulations, including General Rule B-9(e),

in cleaning up the former well sites."[1] Further, XTO argued that it "acted as a reasonably prudent operator at all times," and Taylor made "no factual allegation about XTO violating an AOGC rule or committing a single unreasonable or negligent act in the conduct of its drilling operations." In fact, according to XTO, "[a]bsent an allegation of unreasonable conduct or negligence, [it] is simply not liable for any harm to [Taylor's] property because any deterioration caused by XTO's ordinary and reasonable drilling operations is allowed as natural wear and tear and is excepted from its duty to restore."

Regarding its efforts to restore the property, XTO contended that it performed "extensive work" and "returned the property to [Taylor] in nearly as good a condition as it was prior to drilling, normal wear and tear excepted." In particular, XTO said it had "removed all well pads and left behind no concrete, tools, pits, trash, or debris." In addition, XTO "employed a contractor to apply topsoil, seed, mulch, and fertilizer to the former well sites."

XTO additionally argued that it had no obligation to remove the roads or the meter shed that remained on Taylor's property. The first road, which extended from Highway 41 to the FLB 2 well, "is also used by XTO to access other producing wells in the Taylor FLB Unit," and therefore, XTO had no duty to remove the road until its oil and gas leases expired.

[1]We set forth the relevant text from Rule B-9(e) again in our discussion of the issues, but for reference here, the relevant part of the rule provides that "all production equipment, concrete bases, machinery, and equipment debris shall be removed from the [well] site." It also requires operators to fill any drilling "rat holes," and to fill "any other excavations." Finally, the rule provides that "the overall well site [shall be] graded or contoured to prevent erosion." 118.03.1-B-9(e) Ark. Admin. Code (WL current through May 15, 2022).

XTO also claimed that it did not install the second road that traversed the EY Hill tract. Rather, the road "existed long before [Taylor] acquired the property, and evidence indicates that [Taylor] or its predecessors used the road in its cattle farming operations or to reach the house [at the end of the road]."

XTO offered the affidavit of Jamie Sorrells, its senior land and surface coordinator, in support of its motion for summary judgment. Mr. Sorrells testified that the FLB 2 well site and the meter shed are located at the end of the road leading from Highway 41. The meter shed, according to Mr. Sorrells, houses gas meters that monitor the natural gas produced at other wells in the Taylor FLB Unit, and "one must use the same road that leads to the former Taylor FLB 2 well site to access the meter shed" and other well sites in the Taylor FLB Unit. Regarding the road that crossed the EY Hill tract, Mr. Sorrells testified as follows:

> To reach the EY Hill 1-32 well site, one must enter the EY Hill Tract from West Anice Road, and traverse to the south approximately one hundred (100) feet. The road then naturally continues southwest past the well site, until it terminates at a house located on the EY Hill tract, also owned by [Taylor]. Neither XTO nor its predecessors constructed the road that led to the house. The house appears to be serviced by utilities, and has a running electric meter, and a satellite dish. There is no other apparent road access to the house.

Mr. Sorrells also testified about XTO's efforts to restore the surface of the land near the abandoned wells. He explained that XTO "began plugging, abandoning, and remediating" the Taylor FLB 2 and EY Hill 1-32 well sites in 2017. "In each instance, he said, "XTO followed the rules imposed by the Arkansas Oil and Gas Commission[.]" In particular, XTO hired a contractor to "complete the plugging process" and a second

contractor to "remove the wellhead, connected pipelines, and all other well equipment from the well site." Mr. Sorrells also stated that "after all the well equipment was removed, [the contractor] broke up and removed the materials that made up the former well pads at each location" and "applied topsoil, seed, fertilizer, and mulch in order to encourage vegetation at each well site." According to Mr. Sorrells, the total cost of plugging and remediating the wells was over $70,000, and he estimated "that the former well sites have established over 80% - 85% vegetation as of the end of the growing season in 2019." Mr. Sorrells also declared that "[n]either XTO, nor its contractors, left behind any equipment, well materials, tools, trash, debris, ponds, pits, or anything else related to the Taylor FLB 2 well or the EY Hill 1-32 well."

Mr. Sorrells concluded by testifying that an AOGC representative inspected the property after XTO had finished its restoration. He added that the AOGC inspector "never suggested to [him] or anyone else at XTO that XTO's reclamation efforts were inadequate or in violation of any state law," and Taylor did not complain that "[its] properties suffered from contamination . . . or that XTO's drilling operations were in any way wrongful or negligent . . . or that [its] properties suffered from any erosion."

Taylor filed a response to XTO's motion for summary judgment on February 24, 2020. Taylor insisted that Arkansas's rule regarding and oil and gas operator's implied duty "to restore the surface, as nearly as practicable, to the same condition as it was before drilling," as first set forth in *Bonds v. Sanchez-O'Brien Oil and Gas Co.*, 289 Ark. 582, 715 S.W.2d 444 (1986)—and not AOGC rules—governs whether XTO met its duty to restore the

Taylor FLB 2 and EY Hill 1-32 well sites. Taylor argued, in fact, that "[t]he Oil and Gas Commission rules are less restrictive than the common-law rule set forth [in *Bonds*]," and in any event, XTO "had a duty to comply with both." Taylor further argued that even if the circuit court correctly concluded that XTO "only had to comply with the Oil and Gas Commission rules, [XTO] still [fell] short of compliance[.]"

In support of its response, Taylor attached deposition testimony disputing the amount of money that XTO claimed it had spent on the restoration of the well sites as well as its assertions that it had applied sufficient topsoil and that vegetation had been almost fully restored at the sites. Taylor also pointed to testimony indicating that XTO had left gravel and shale behind on the surface of the former drilling pads; that it did not fill holes as required by AOGC rules, and that XTO had failed to restore the contour of the land at the EY Hill well site.

The circuit court entered an order granting XTO's motion for summary judgment on October 20, 2020. The court ruled that AOGC General Rule B-9(e) "defined the scope of the operator's implied covenant and duty to restore the surface" and "establish[es] the appropriate standard of conduct of an operator." The court observed that "the rule protects property owners and is consistent with *Bonds*" because it "allocates the responsibility of well site cleanup to the operator." Also, "[t]he phrase 'as nearly as practicable' in *Bonds* is in line with the prudent operator standard" previously observed in Arkansas, and the *Bonds* standard itself "suggests that the operator's restoration obligations are to be tempered by a standard of reasonableness."

Applying the foregoing standard, the circuit court concluded that XTO "met its implied covenant and duty to restore[.]" According to the court, the undisputed facts in the case demonstrated that XTO "did all that it was required to do" in the course of "plugging and abandoning the wells." In particular, XTO "followed all AOGC rules applicable to plugging and well site cleanup," and "it employed adequate and reasonable measures to restore [Taylor's] property to the degree practicable." Taylor also "never complained to the AOGC about XTO's clean-up measures" and "failed to submit any evidence to suggest that AOGC found that XTO's reclamation efforts were inadequate or in violation of any law or rule." In fact, according to the circuit court, Taylor "does not contend that XTO acted negligently . . . in its operations or clean-up and well site restoration." "Rather," the court said, "[Taylor] contends that its property has changed merely as a natural consequence of there being a gas well located on its property." Such a complaint of "ordinary wear and tear . . . does not give rise to liability because a lessee can only be liable to a surface owner for damages when its use of the surface is unreasonable." Accordingly, the circuit court ruled that XTO is entitled to summary judgment because it "demonstrated that there is no material fact in dispute as to whether it followed all AOGC rules and met its implied covenant to restore[.]"

II. *Standard of Review*

"The burden of sustaining a motion for summary judgment is always the responsibility of the moving party."[2] "Further, all proof submitted must be viewed favorably to the party resisting the motion, and any doubts and inferences must be resolved against the moving party."[3] "When a movant makes a prima facie showing of entitlement, the respondent must meet proof with proof by showing a genuine issue as to a material fact."[4] "Summary judgment is not proper, however, where evidence, although in no material dispute as to actuality, reveals aspects from which inconsistent hypotheses might reasonably be drawn and reasonable minds might differ."[5] Indeed, "[t]he object of summary-judgment proceedings is not to try the issues, but to determine if there are any issues to be tried[.]"[6] "[I]f there is *any doubt whatsoever*, the motion should be denied."[7]

A. Scope of Duty to Restore

As indicated above, Taylor first contends that the circuit court erred when it determined that the scope of XTO's implied duty to restore the surfaces of the FLB and EY

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[2]*Wade v. Bartley*, 2020 Ark. App. 136, at 8, 596 S.W.3d 555, 560.

[3]*Id.*

[4]*Id.*

[5]*Id.*

[6]*Id.*

[7]*Id.* (emphasis added).

Hill tracts was governed by AOGC General Rule B-9(e) or the reasonably prudent operator standard established in Arkansas Code Annotated section 15-73-207(b) (Repl. 2009).[8] According to Taylor, the Commission's rule and the statute cannot overrule *Bonds*, which held that an oil and gas lease implies a duty "to restore the surface, as nearly as practicable, to the *same condition* as it was before drilling," therefore imposing a higher standard of care. (Emphasis added.) XTO responds that the circuit court appropriately determined that the scope of its duty to restore the surface of Taylor's land was governed by General Rule B-9(e) or, alternatively, by a reasonably prudent operator standard that requires repair of surface damage only in cases of negligence.

Arkansas has long held that mineral lessees have "a duty to act for the mutual advantage of both [themselves] and [their lessors]," which, among other things, means that they must "act in a reasonable and prudent manner."[9] As relevant here, mineral lessees have "an implied right to go upon the surface to drill wells to [their] underlying estate[s], and to occupy so much of the surface beyond the limits of his well as may be necessary to operate his estate and remove its products."[10] This implied right, however, "[is] to be exercised in due

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[8]The statute provides that a mineral lessee shall, among other things, "[d]evelop and operate the leased miner estate as a prudent operator for the mutual benefit of the mineral lessor and mineral lessee."

[9]*Amoco Prod. Co. v. Ware*, 269 Ark. 313, 319, 602 S.W.2d 620, 623 (1980).

[10]*McFarland v. Taylor*, 76 Ark. App. 343, 346, 65 S.W.3d 468, 471 (2002) (citing *Diamond Shamrock Corp. v. Phillips*, 256 Ark. 886, 511 S.W.2d 160 (1974).

regard for the rights of the surface owner," which means that the mineral lessee's "use of the surface . . . must be reasonable." *Id.*[11]

In *Bonds*, the supreme court decided that a mineral lessee's duty to reasonably use the surface warranted implying a duty to restore it after drilling operations have stopped.[12] In *Bonds*, the surface owner sued after Sanchez-O'Brien Oil and Gas Company left "water pits, concrete slabs, dams, and winrock stones on the surface [of the land]" after it plugged and abandoned its well.[13] The supreme court, after discussing conflicting authority from other jurisdictions, adopted the view that a duty to restore the surface of the land should be implied in mineral leases. The court reasoned that implying the duty was consistent with the current practice of members of the oil industry, which, out of concern for the environment, had "already voluntarily begun to clean up their abandoned sites[.]"[14] The court also observed that

> to hold otherwise would allow the lessee to occupy the surface, *without change*, after the lease has ended. This would constitute an *unreasonable surface use, and no rule is more firmly established in oil and gas law than the rule that the lessee is limited to a use of the surface which is reasonable*.[15]

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[11]76 Ark. App. at 346–47, 65 S.W.3d at 471.

[12]*See Bonds*, 289 Ark. at 585, 715 S.W.2d at 446.

[13]*Id.* at 583, 715 S.W.2d at 445.

[14]*Id.* at 585, 715 S.W.2d at 446.

[15]*Id.* (emphasis added).

Accordingly, the court held that "the duty to restore the surface, as nearly as practicable, to the same condition as it was before drilling is implied in the lease agreement."[16] We view *Bonds* as holding that a lessee unreasonably uses the surface when, after the lease has expired, he or she continues to occupy the surface to a degree that prevents or impairs the surface owner's use of the property. What those damages may be will surely differ depending on the particular facts of each case.

AOGC General Rule B-9(e) is no doubt relevant to whether a mineral lessee met its implied duty to restore. Consistent with *Bonds*, the rule requires remediation of conditions that would surely interfere with the mineral lessor's use and enjoyment of the surface. It provides that lessees must fill and grade all plugging pits within "thirty days after conclusion of plugging activities."[17] They must also remove "[a]ll production equipment, concrete bases, machinery, and equipment debris" from the well site.[18] The rule also requires operators to fill any drilling "rat holes," fill "any other excavations," and grade and contour the overall well site "to prevent erosion."[19] Accordingly, compliance with General Rule B-9(e), *vel non*, is relevant to determining whether a mineral lessee fulfilled its duty in a particular case.[20]

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[16] *Id.*

[17] 118.03.1-B-9(e)(4) Ark. Admin. Code.

[18] *Id.* at B-9(e)(5).

[19] *Id.* at B-9(e)(6)–(7).

[20] With that said, we do not adopt General Rule B-9(e) as the sole standard defining reasonable conduct, as XTO argues here. The measures set forth in the rule do not go far

In summary, we hold that the implied duty to restore, as recognized in *Bonds*, obligates mineral lessees to restore the surface of the property to a condition that does not prevent or impair an existing or intended use by the surface owner. As we discuss in the next section, whether a lessee's efforts to restore the property falls short in that regard is necessarily a question of fact that must be determined on a case-by-case basis.

B. Remaining Issues of Material Fact

Taylor next argues that even if the circuit court did not err when it determined the scope of XTO's duty to restore under *Bonds*, summary judgment was inappropriate because genuine issues of material fact remain as to whether XTO acted in a reasonably prudent manner when it restored the Taylor FLB 2 and EY Hill well sites. We agree.

Whether XTO breached the mineral lease by failing to meet its implied duty to restore the surface of Taylor's property is "usually a question of fact,"[21] and questions of fact remain in this case. For example, there is deposition testimony that conflicts with Mr. Sorrells's assertion that XTO complied with General Rule B-9(e)'s requirement that it grade and contour the well sites. Both David Taylor and Brad Callahan, a contractor who has restored coal mines for the Arkansas Department of Environmental Quality, testified in their

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enough to address the supreme court's concern that a mineral lessee "may continue to occupy the surface, without change, after the lease has ended." *Bonds*, 289 Ark. at 446, 715 S.W.2d at 446. The rule says nothing about other structures—such as the roads and meter shed at issue here—that a mineral lessee may build and leave behind after drilling operations have concluded.

[21]*See Reynolds Forestry Consulting and Real Estate, PLLC v. Colbey*, 2019 Ark. App. 209, at 13, 575 S.W.3d 176, 184,

depositions that XTO failed to restore the EY Hill well site to the contour of the adjoining land. There is also conflicting testimony concerning the extent to which XTO still uses the road that allowed access to the Taylor FLB 2 site. Mr. Sorrells's deposition suggests that the entire road is still used to access the operational sites, while Mr. Taylor testified that there is a branch of the road (that he wants removed) that serviced only the abandoned Taylor FLB 2 site. Accordingly, because it appears that genuine issues of material fact remain as to whether XTO fulfilled its duty to restore, we reverse and remand the case to the circuit court.

III. *Conclusion*

The implied duty to restore, as recognized in *Bonds*, obligates mineral lessees to restore the surface of the property to a condition that does not prevent or impair an existing or intended use by the surface owner. Genuine issues of material fact remain, moreover, as to whether XTO met its duty to restore in this case.

Reversed and remanded.

KLAPPENBACH and GRUBER, JJ., agree.

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