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Mark D. Christiansen
MChristiansen@elbattorneys.com

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OKLAHOMA

Mark D. Christiansen[†]

I. NON-OPERATOR V. OPERATOR AND OTHER OIL AND GAS OPERATIONS-RELATED CASES

A. *The Oklahoma Supreme Court addressed two certified questions from the United States Bankruptcy Court for the Western District of Oklahoma regarding certain lien and trust fund rights under applicable statutes.*

The case of *White Star Petroleum, LLC v. MUFG Union Bank, N.A.*¹ presented two questions of state law certified to the Oklahoma Supreme Court by the United States Bankruptcy Court for the Western District of Oklahoma:

- (1) Are the “trust funds” create[d] by Title 42 O.S. § 144.2, entitled “Creation and Appropriation of Trust Funds for Payment of Lienable Claims,” limited to obligations due non-operator joint working interest owners, or do such funds

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[†]Mark D. Christiansen is an energy and resources lawyer with the Oklahoma City litigation firm of Edinger Leonard & Blakley PLLC.

1. *White Star Petroleum, LLC v. MUFG Union Bank, N.A.*, No. 118746, 2020 WL 6142712 (Okla. Oct. 20, 2020).

include payments due [to] holders of mechanic's and materialmen's liens arising under and perfected by Title 42 O.S. § 144?

- (2) Does the Oil and Gas Owners' Lien Act of 2010 grant an operator and non-operator working interest owner a lien in proceeds from purchasers of oil and gas which is prior and superior to any claim of the holder of a mechanic's and materialmen's lien asserted under Title 42 O.S. § 144?²

The above questions were certified to aid in the bankruptcy court's resolution of two particular adversarial proceedings.

The *first* proceeding sought adjudication of the priority, validity, and value of approximately 2,000 mechanic's and materialman's liens ("M&M liens") asserted by seventy-eight unpaid vendors over various interests held by White Star. The *second* proceeding sought an order of the bankruptcy court directing several first purchasers of oil and gas to turn over approximately two million dollars to White Star—the money held in suspense after the purchasers received statutory lien notices from the M&M lien claimants.

The Oklahoma Supreme Court considered and reformulated the *first* certified question instead ask: "Whether the funds held in trust pursuant to 42 Oklahoma Statutes section 144.2 for payment of lienable claims created by 42 Oklahoma Statutes section 144 are limited to joint-interest billing payments received by operators for services rendered by the lienholders?"³

The Court answered the above reformulated question in the negative. The Court stated, "Nothing in the text or history of [section] 144.2 limits the types of revenue [that] should be held in trust for payment of lienable claims."⁴ The Court found no basis for White Star's assertion that the applicability of section 144.2(A) should be limited to obligations between third-party vendors and operators, stating that the Court would not imply limitations in the text of a statute that were not clearly expressed.⁵

The Oklahoma Supreme Court also answered the *second* certified question in the negative. White Star argued that the liens they held and affiliated, non-operating working interest owners under the Oil and Gas Owners' Lien Act (the "Act") were superior to those held by M&M lien claimants. However, based on the text and legislative

2. *Id.* ¶1.

3. *Id.* ¶10.

4. *Id.*

5. *Id.* ¶21.

history of the Act, the Court found that the M&M lien claimants were in parity to operators and non-operating working interest owners pursuant to that Act. Therefore, they were entitled to the same super-priority as White Star and its affiliated non-operating working interest owners.

In sum, regarding the first question of law certified by the bankruptcy court, the funds that must be held in trust for payment of lienable claims pursuant to section 144.2 are not exclusively limited to joint-interest billing payments received by operators for services rendered by the lienholders. On the second question, the Court found that the Act does not grant operators and non-operating working interest owners a lien in proceeds from the sale of oil and gas, which is prior and superior to any claim of the holder of a mechanic's and materialmen's lien asserted under section 144.

B. The Oklahoma Supreme Court found that if affected landowners are known, or reasonably discoverable, notice provided by publication results in an unconstitutional exercise of jurisdiction and a denial of due process.

In *Purcell v. Parker*,⁶ both the petitioners-Appellants and the respondents-appellees owned interests in real property that contained or abutted Colbert Lake (the "Lake") in McClain County. They also owned real property that contained Colbert Creek, which was the sole source of water that feeds the Lake. Water from the Lake was used for firefighting, drinking water for livestock, and recreational use for residents in the area.

On May 10, 2017, the Parkers executed a Right of Entry and Purchase Access Agreement with Select Energy Services ("Select"). The agreement allowed Select (or their appointed representatives) the right of entry and the right of access to their real property for the purpose of water transfer from the Lake for Select's drilling and fracking operations. The respondents sought a permit from the Oklahoma Water Resources Board ("OWRB") to sell water from the Lake to oil and gas companies for use in fracking operations.

On May 15, 2017, the OWRB issued a provisional temporary permit to Select without actual notice to the petitioners. The permit allowed the diversion of 3,200 gallons per minute from a diversion point located on the Lake for the purpose of oil and gas drilling and mining.

6. *Purcell v. Parker*, No. 118,328, 2020 WL 5903862 (Okla. Oct. 6, 2020).

The Parkers applied for a long-term surface and stream water permit to withdraw water from the Lake. Although the petitioners' family lived in the area for decades and were known by the Parkers, the Parkers provided the landowners notice by publication as required by 82 Oklahoma Statutes 2011 section 105.11. Because the petitioners did not timely protest, the OWRB did not hold a hearing or individual proceeding regarding the Parker's permit application.

On June 20, 2017, the OWRB issued the stream water permit authorizing the Parkers to take and use 109 acre-feet of water per calendar year, at a rate not to exceed 3,360 gallons per minute. Although the petitioners did not receive actual notice of the permit applications, the OWRB issued the stream water permit after a meeting in which the petitioners apparently discovered the permits and were given five minutes to comment.

On July 20, 2017, the petitioners filed a petition in the District Court of McClain County. The petitioners' first claim for relief was for a declaratory judgment determining the stream use permit invalid based on insufficient actual notice to the petitioners. Second, the petitioners sought another declaratory judgment to nullify the temporary permit for lack of notice to the petitioners. The petitioners' third and fourth claims for relief were for judicial review of the stream permit and an accounting. On October 16, 2017, the petitioners added claims for conversion and unjust enrichment.

Over a year later, the trial court entered a summary order denying judicial review of the OWRB proceedings and the constitutional challenges to the petitioners' notice pursuant to section 105.11. The trial court certified its summary order for interlocutory appeal. Thereafter, the Oklahoma Supreme Court granted the landowners' petition for certiorari to review the certified interlocutory order to address the issue of the level of notice constitutionally required in the proceeding. In particular, the action addressed whether section 105.11 and the rules of the OWRB in conjunction were constitutionally sufficient. If the notice by publication permit process was not free from prejudicial error, the permits granted thereunder would be invalidated.

Title 82 Oklahoma Statutes 2011 section 105.11 requires notice by publication, and the Court found that the specified procedure for notice by publication was indisputably followed in this case. After reviewing a series of prior court decisions to provide certain guidance in the present case, the Oklahoma Supreme Court concluded:

“[I]f the affected landowners are known, or reasonably discoverable, notice provided by publication results in an unconstitutional exercise of jurisdiction and a denial of due process. There is no excuse for failing to give personal notice of something that directly affects landowners when such landowners are known or easily discoverable”⁷

The Court reversed the decision below, which granted the water permit without first providing proper notice and remanded the case for proceedings consistent with the Court’s above decision.

II. LITIGATION OVER ROYALTIES AND OTHER PAYMENTS TO LESSORS

The appellate court reversed and remanded the trial court’s order granting summary judgment in favor of Peters on her claim that the underlying oil and gas lease expired due to the lessee’s alleged failure to make a bonus payment provided for under the lease. The case of *Peters v. EOG Resources, Inc.*⁸ involved an oil and gas lease that Jacqueline Peters (“Peters”) executed with T.S. Dudley Land Company, Inc. (“TSDI”) under which TSDI was the lessee. The lease included an option to extend, which stated:

“Lessee at its sole option may extend the primary term of this lease for an additional period of [t]wo years by causing to be delivered to Lessor on or before the expiration date of the primary term stated hereinabove an additional bonus payment equal to the bonus per net mineral acre paid at the execution of the original lease, which payment shall cover the entire [t]wo-year term”⁹

The oil and gas lease did not include any express terms setting out how or where TSDI should deliver the bonus payment.

TSDI assigned the subject lease to EOG Resources (“EOG”) in June 2016; however, the record does not address when or if EOG notified

7. *Id.* ¶24.

8. *Disposition of Cases Other Than by Published Opinion, Court Issue #118,091*, 91 OKLA. B. J. 611, 647 (June 19, 2020) (discussing a summary of *Peters v. EOG Resources, Inc.*).

9. Appeal from Dist. Ct. McClain Cty, Okla., at 2, *Peters v. EOG Resources, Inc.*, No. 118.091, (Okla. Civ. App. Jun. 1, 2020).

Peters that it had acquired the lease. On or before March 1, 2018, EOG mailed a check for the bonus payment to Peters at the address stated in the lease. The check was returned as undeliverable on or about March 15, 2018. On March 22, 2018, EOG sent a second letter to the same address, asking Peters to verify that the Oklahoma City address to which the check had been sent was a current address.

After the term of the oil and gas lease expired, Peters's granddaughter and attorney-in-fact, Shelli Bradbeary, contacted EOG about the extension payment. The court's opinion discussed at length the gaps in information and the uncertainty as to the factual history from that point.

On June 22, 2018, Peters filed the present action "to quiet title and for a determination that EOG had no right, title, or interest in the minerals subject to the [l]ease. Peters contended that the [l]ease automatically terminated when the bonus payment was not delivered to Peters before the end of the primary term of the Lease."¹⁰ Peters and EOG both moved for summary judgment.

On May 30, 2019, the trial court granted Peters's motion for summary judgment and denied EOG's countermotion for summary judgment. The trial court stated:

Though the trial court found EOG attempted payment in good faith and had no notice of Peters' change in address, the court found that the Lease required actual delivery [of the payment] to Peters, and that EOG failed to show it took any other steps before the Lease terminated to ascertain Peters' address, which the court determined would have been discoverable with reasonable diligence . . . [T]he court determined that the Lease automatically terminated, and that the equitable rule against forfeiture did not apply because EOG did not show that circumstances outside of its control prevented timely delivery of the bonus payment.¹¹

EOG appealed. The Oklahoma Court of Appeals issued a nineteen-page opinion addressing the complex issues presented on appeal. In addressing the extent of guidance provided under the oil and gas lease, the Court stated in part as follows:

10. *Id.* at 3.

11. *Id.* at 5.

Here, the Lease contained no terms specifying where or how payment must be made but only specified that it be delivered . . . while the lease required that changes in *ownership* be provided in writing before the lessee must take the change into account, the Lease contained no language requiring Peters to provide written notice of a change in address to the lessee, nor any term limiting EOG to delivery only to the address identified in the preamble of the Lease.¹²

The Court observed later in its opinion:

[W]e find nothing in the Lease language [that] provides that EOG's attempt to deliver payment was sufficient as a matter of law to extend the Lease term. The trial court did not err in determining that EOG's attempted payment did not in itself extend the Lease¹³

Because the Lease was not extended by EOG's attempted delivery of payment, the issue before the trial court was whether the equitable rule against forfeiture should apply¹⁴

Here, the trial court determined that the Lease terminated and the equitable rule against forfeiture did not apply because it concluded that EOG 'failed to take any steps to accomplish the timely payment upon learning the address was incorrect' and that 'Plaintiff's correct address would have been discoverable with reasonable diligence.' First, we find no facts of record establishing whether EOG could have learned of Peters' change in address with reasonable diligence, and the trial court identified none in its findings Nothing of record addresses how EOG would have obtained Peters' new address, or whether it could have

12. *Id.* at 11.

13. *Id.* at 12–13.

14. *Id.* at 13.

been accomplished before the Lease terminated. This finding is unsupported by the record.¹⁵

The Court concluded in part:

In sum, the material facts of record, even if undisputed, do not compel a single inference, on which to base summary judgment, that EOG failed to exercise reasonable diligence in attempting to make payment, and was itself responsible for failure to delivery [of the bonus payment] within the Lease term. Therefore, a dispute of fact remains on whether the equitable rule of forfeiture applied to protect EOG from termination of the Lease.

While it is undisputed that EOG took initial steps to make payment before the Lease term expired, a question remains as to whether its steps to make timely payment were reasonable upon discovery that Peters' address may not be correct, and whether EOG's inability to make timely payment was the fault of a third party or EOG. We remand this action for the further proceedings to address these issues¹⁶

The Oklahoma Court of Appeals reversed and remanded the trial court's May 30, 2019, order granting summary judgment in favor of Peters.

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

A. *Oklahoma Court of Appeals found that it was undisputed that the subject well ceased production for more than 120 days and that required activity to save the leases did not resume.*

The lawsuit in *Bollenbach v. Spess Oil Company, Inc.*¹⁷ reached the Oklahoma Court of Civil Appeals after Spess Oil Company, Inc. ("Spess") appealed the district court's denial of its motion for new trial

15. *Id.* at 14–15.

16. *Id.* at 17–18.

17. *Disposition of Cases Other Than by Published Opinion, Court Issue #118,362*, 91 OKLA. B. J. 1117, 1167 (Oct. 2, 2020).

in an action to quiet title and to cancel Spess's interest in certain oil and gas leases. This summary of the appellate court's twenty-page opinion will only note certain aspects of the court's discussion.

The plaintiff-mineral owners in this action sought to quiet title to, or cancel, certain oil and gas leases that allegedly held the Crosswhite 27A well. The plaintiffs asserted that the well had ceased production in paying quantities, resulting in the termination of certain oil and gas lease in accordance with their terms.

In the course of detailed proceedings, the trial court granted the plaintiffs' motion for partial summary judgment and certified that ruling for immediate appeal under 12 Oklahoma Statutes 2011 section 994(A). Spess subsequently filed a timely application for new trial alleging various errors in the prior proceedings. The application for new trial was denied on September 27, 2019, and Spess appealed. The key rulings from the court of appeals' lengthy decision are described below.

First, the court found that the habendum clauses contained in the subject oil and gas leases provided that the leases would continue in effect beyond their primary terms as long as oil, gas, or both were produced—under Oklahoma law this means production in paying quantities.¹⁸ As recent affirmation of this longstanding principle of Oklahoma oil and gas law, the court noted the decision in *Hall v. Galmor* that “[i]n the context of cases where the well was not actually producing,” the term “produced” means “capable of producing in paying quantities.”¹⁹

Second, the court of appeals included the following key ruling in its twenty-one page opinion:

When production in paying quantities ceases under the terms of a habendum clause, common law allows a reasonable time for resumption of drilling operations after a temporary cessation, unless the agreement contains a cessation of production clause, as in this case [The Subject Leases provide] that, if after the expiration of the primary term, the well “shall be incapable of producing,” the lease would terminate unless Spess resumed operations for drilling a well within 120 days from such cessation.²⁰

18. See *Steward v. Amerada Hess Corp.*, 604 P.2d 854, 858 (Okla. 1979).

19. *Hall v. Galmor*, 427 P.3d 1052, 1063–64 (Okla. 2018).

20. Appeal from Dist. Ct. Kingfisher Cty, Okla., at 13–14, *Bollenbach v. Spess*

Third, Spess argued that it was irrelevant whether the Crosswhite 27A well was producing in paying quantities was irrelevant and that Spess only needed to show that the well was *capable* of producing in paying quantities in order to extend the subject leases. In contrast, the plaintiffs asserted that the capability of production from the well would satisfy the habendum clause and prolong the oil and gas leases only if the well was shut-in. The plaintiffs alleged that if the well was actively producing, it must produce in paying quantities in order to satisfy the habendum clauses of the oil and gas leases. In sum, the plaintiffs contended that the Crosswhite 27A well must have been *producing* in paying quantities in order to keep the leases in force and effect beyond their primary terms.

Fourth, after additional detailed analysis and discussion, the court of appeals stated that “[i]n short, Spess did not successfully dispute Plaintiffs’ undisputed material facts that the well ceased production in paying quantities for a protracted period in 2015 and 2016. The requirement of continued production in the Habendum Clause was not satisfied, and the Cessation Clause was therefore triggered.”²¹

Lastly, the court of appeals found that “the well ceased production for more than 120 days and that production did not resume . . . [T]he well was active but not produc[ing] in paying quantities for more than 120 days.”²² The court observed that Spess “supplied no acceptable evidentiary support to the contrary and presented nothing to support an equitable argument that the [s]ubject [l]eases should be deemed capable of production or should not terminate.”²³ The court of appeals concluded that “[t]he district court did not err in denying [p]laintiffs’ application for new trial after granting summary judgment to [p]laintiffs.”²⁴

B. Court of Appeals affirmed the trial court’s judgment in favor of the Defendants, finding that the Plaintiffs’ term mineral interest had expired.

In *Roggow, First Successor Trustee v. Teders*,²⁵ the appellants (plaintiffs below) appealed from the trial court’s summary judgment

Oil Co., No. 118,362, (Okla. Civ. App. Sep. 18, 2020).

21. *Id.* at 17.

22. *Id.* at 17–18.

23. *Id.* at 18.

24. *Id.* at 18, 20.

25. *Roggow v. Teders*, No. 117,569, slip op. at 1 (Okla. Civ. App. Apr. 30,

order quieting title to certain mineral interests and an oil and gas lease in the appellees (defendants below). The issue on appeal was whether the trial court erred in holding that the temporary cessation of production doctrine resulted in the termination of the plaintiffs' mineral interests in certain Kingfisher County lands. The mineral interest at issue was reserved by deed for a period of twenty years and as long thereafter as minerals are *produced*. The appellate court stated:

In the present case, the Warranty Deed required production of oil, gas or other minerals to continue Plaintiffs' ownership interest in the mineral estate past the primary term. It is undisputed the only producing well on the property ceased to continuously produce, for multiple periods, during the secondary term. Pursuant to the dictates of *Ludwig*, Plaintiffs' term mineral interest therefore expired and such interest reverted to the Defendants. Because Defendants are entitled to judgment as a matter of law, the judgment of the trial court is affirmed.²⁶

C. Oklahoma Court of Appeals, applying Pennsylvania law, affirmed trial court's denial of oil and gas lessors' claims for reformation unjust enrichment, and unconscionability

The case of *Corbett v. Anadarko E&P Company, LP*²⁷ presented the oil and gas lessor-Corbetts' appeal of the district court's rulings in favor of defendant-Anadarko in the Corbetts' suit for: (1) reformation of an oil and gas lease covering Pennsylvania²⁸ lands, (2) denial of a claim for unjust enrichment, and (3) denial of a claim that the oil and gas lease at issue was unconscionable.

The court's opinion described the key factual assertions that led to this litigation. In 2006, the mineral owner-Corbetts began discussions with a leasing agent for Anadarko, concerning the proposed granting of an oil and gas lease covering the Corbetts' property. The discussions for the proposed lease involved two tracts of land. The

2020).

26. *Id.* at 10.

27. *Corbett v. Andarko E&P Co., L.P.*, No. 117,721 (Okla. Civ. App. Sept. 17, 2020).

28. *Id.* at 3 n.2 (observing that the tracts are located in Pennsylvania and the circumstances surrounding execution of the lease occurred in Pennsylvania. The parties agree that Pennsylvania law controls the parties' legal relationship).

“Overton Tract” was jointly owned by the plaintiffs, Kim and Kevin Corbett (the “Corbetts”). The “Herrick Tract” was owned only by Kevin Corbett. The two tracts were located approximately twenty miles apart.

The court of appeals’ opinion describes certain details of the negotiations, drafting, and revisions to the proposed oil and gas lease, including that the one oil and gas lease was ultimately drafted to cover both distinct tracts of land referred to above.²⁹ Testimony presented at the trial (with summary judgment entered earlier in favor of the other three defendants) established that it was common practice in Pennsylvania, and not unlawful, to lease non-contiguous tracts in a single oil and gas lease. The Corbetts also alleged that they questioned the approach of having the two distinct tracts covered by a single oil and gas lease and were assured Anadarko would split the tracts and account for each tract separately. However, Anadarko’s leasing agent denied those allegations and stated that she did not have authority to make any such representations. On June 6, 2006, the Corbetts executed the oil and gas lease with Anadarko. The court of appeals then described additional aspects of the factual history of the underlying dispute in detail.

At the nonjury trial—which occurred over the objection of the Corbetts—the trial court denied the Corbetts’ claims for reformation and unjust enrichment and found that the oil and gas lease was enforceable and *not* unconscionable. The Corbetts appealed.

The Oklahoma Court of Appeals first addressed the Corbetts’ claim for reformation of the oil and gas lease and damages based on the alleged false or mistaken representations of the leasing agent. However, Anadarko denied making any such representations, and the oil and gas lease provided that any representations would not be binding. The trial court found that there was no basis for the Corbetts to seek reformation on the ground of false or mistaken representations. The trial court stated, “The Corbetts accepted rentals and royalties for both tracts. They signed the ratification and division order covering both tracts. Last, they demanded development of the Overton Tract

29. *Id.* at 3 (indicating that the leasing agent presented the Corbetts with an initial oil and gas lease form that covered only the Overton Tract. The Corbetts advised that they wanted to also lease the Herrick Tract. The leasing agent, after checking title, submitted to the Corbetts a new lease form describing *both* tracts in the one lease).

after expiration of the primary term when the Overton lease would have terminated unless covered by a single lease.”³⁰

The court of appeals concluded that the trial court did not err in denying the Corbetts’ reformation of the oil and gas lease. The appellate court further found that the denial of reformation effectively confirmed the validity of the lease. Regarding the Corbetts’ claim of alleged unjust enrichment, the court of appeals found that a claim for unjust enrichment may only arise when a transaction of the parties not otherwise governed by an express agreement confers a benefit on the defendant to the plaintiff’s detriment, without any corresponding exchange of value. “[I]f there is a written contract, it must be unenforceable before unjust enrichment is available, otherwise the measure of damages is the damages from breach of contract. The trial court correctly ruled that given a valid written contract, there is no claim for unjust enrichment under Pennsylvania law.” Finally, the court of appeals concluded that the trial court did not err in declining to find the oil and gas lease unconscionable: “That finding would depend upon Pennsylvania law and none was cited to so hold An Oklahoma Court does not decide new law for another state.”

The court of appeals found that the “Corbetts’ original petition claims [were] barred by applicable Statutes of Limitations. The facts of the case clearly show that Corbetts knew of their claim or had sufficient notice that they had a claim against Anadarko more than five years prior to filing their lawsuit yet continued to accept payments from Anadarko.”³¹ The court of appeals held that the trial court did not err in its foregoing rulings below. It affirmed the judgment of the trial court.

*D. Oklahoma Court of Civil Appeals Reversed Lower Court Order
Dismissing Claims for Fraud and Related Causes of Action*

In *Devon Energy Production Co., L.P. v. Wyckoff*,³² the Oklahoma Court of Civil Appeals reviewed Devon’s appeal of the trial court’s judgment granting Wyckoff’s motion to dismiss for failure to state a claim on which relief could be granted under 12 Oklahoma Statutes section 2012(B)(6).

Devon alleged that the defendants’ attorney “approached Devon about entering into leases with his two clients regarding lease holdings

30. *Id.* at 15..

31. *Id.* at 16–17.

32. *Devon Energy Prod. Co., L.P. v. Wyckoff*, 457 P. 3d 284, 284 (Okla. Civ. App. 2019).

that had recently been released”³³ by another company. Devon and the defendants executed two new oil and gas leases covering land in Woodward County, Oklahoma. Devon paid almost \$1.6 million for the two leases. The court found that Devon assumed responsibility for a title search³⁴ and noted that the new lease did not provide any warranty of title by the defendants. Devon subsequently learned that Chesapeake’s only interest in the property at issue was a wellbore in the Wyckoff 2-3 well located on the leased premises. A 1956 lease covering multiple sections, including the mineral acres Devon understood it was acquiring under the new lease, was still held by production from one or more wells. As a result, Wyckoff had no mineral acres available for lease at the time they entered into the new leases with Devon. Yet, the defendants argued that because they did not warrant title to Devon, the defendants should be permitted to keep the lease payments Devon made.

In the present lawsuit, Devon asserted claims for breach of implied covenant of quiet enjoyment, actual fraud, constructive fraud, rescission, and unjust enrichment. The court reviewed Devon’s appeal under a *de novo* standard. After reviewing prior, relevant decisions, the appellate court concluded that the district court’s decision should be reversed in light of Devon’s allegation of fraud. The court cited findings in a prior case that “the doctrine of *caveat emptor* would ‘not shield a seller from purporting to sell that which he does not have.’”³⁵ Here, Devon alleged the defendants knew or should have known that the net mineral acres were not available for lease to Devon because they were covered by the 1956 lease that continued in force and effect by production.

On the record before it, the court could not determine whether any fraud was perpetrated; “In light of the uniquely fact-specific fraud claim presented here, [d]efendants did not meet”³⁶ their burden to show the legal insufficiency of the petition. The court of civil appeals reversed the district court’s order granting the defendants’ motion to dismiss Devon’s petition for allegedly failing to state a claim upon which relief could be granted. The cause was remanded to the district court for further proceedings.

33. *Id.* at 285.

34. *Id.* at 285 n.2 (noting that “Devon’s title search did not reveal an existing 1956 lease at the time the parties entered into the lease agreement.”).

35. *French Energy, Inc. v. Alexander*, 818 P.2d 1234, 1239 (Okla. 1991).

36. *Wyckoff*, 457 P. 3d at 287.

IV. OIL AND GAS CONTRACTS, TRANSACTIONS AND TITLE MATTERS

In late December 2019, the U.S. Bankruptcy Court for the Southern District of Texas (Houston Division) in *Alta Mesa Holdings, LP v. Kingfisher Midstream*³⁷ held that certain oil and gas gathering agreements between Alta Mesa (as producer) and Kingfisher (as gatherer) “ran with the land” under the applicable Oklahoma law and were *not* subject to rejection under section 365 of the Bankruptcy Code.³⁸ The court entered summary judgment in favor of Kingfisher on the issue of rejection.³⁹

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

A. *Operator in an Oklahoma Surface Damages Act Proceeding Demanded a Jury Trial, and the Jury Returned a Verdict More Favorable to the Operator, the Operator’s claim for Attorney’s Fees was Denied.*

In *State of Oklahoma ex rel. Commissioners of the Land Office v. Stephens and Johnson Operating Co., Inc.*,⁴⁰ the operator appealed the lower court’s denial of its application for attorney’s fees under Oklahoma’s Surface Damages Act.⁴¹

When the operator and surface owner were unable to reach an agreement regarding the amount of surface damages incurred by the surface owner in connection with drilling operations on *four* oil and gas wells, the surface owner initiated proceedings under the Surface Damages Act. The trial court appointed three appraisers to assess the damages. Two of the three appraisers used a majority report, setting damages at \$450,000.00. The minority appraiser assessed damages in the much lower amount of \$120,515.00. Dissatisfied with the majority report, the operator demanded a jury trial.

The jury awarded damages in favor of the surface owner in the amount of \$206,192.97. Neither the operator nor the surface owner

37. *In re Alta Mesa Res., Inc.*, 613 B.R. 90, 95 (Bkrtcy. S.D. Tex. 2019).

38. *Id.*

39. *Id.*; see *In re Badlands Energy, Inc.*, 608 B.R. 854 (Bkrtcy. D. Colo. 2019) (another decision reaching a similar conclusion under Utah law). *But see In re Sabine Oil & Gas Corp.*, 550 B.R. 59 (Bkrtcy. S.D.N.Y. 2016) (applying Texas law for a case reaching an opposing outcome).

40. *State ex rel. Comm’rs of the Land Office v. Stephens & Johnson Operating Co.*, 474 P.3d 869, 871 (Okla. 2020).

41. *Id.* at 870.

appealed. The operator then filed an application to recover attorney's fees and costs in the amount of \$359,458.71. The trial court denied the operator's request, and the Operator appealed. The Oklahoma Court of Appeals affirmed the denial of fees and costs. Both the trial court and the court of appeals found that Oklahoma's Surface Damages Act did not provide for an award of fees and costs under the facts of this case. The court of appeals found that the Surface Damages Act provides for costs and attorney's fees to be assessed only when the party demanding a jury trial fails to obtain a verdict more favorable than the appraisers' assessment.

The Oklahoma Supreme Court granted certiorari to review the Court of Appeals' decision. The Oklahoma Supreme Court found in part:

Here, the express requirements for Operator's requested award of attorney fees and costs under § 318.5(F) have not been satisfied. Under the plain terms of the Act, only the non-jury demanding party may recover its fees and costs and only when the jury-demanding party failed to obtain a more favorable verdict than the appraiser's award. The terms of § 318.5(F) are equally applicable in their treatment of the demanding party, regardless of whether a surface owner or an operator demands the jury trial. This is not a prevailing party provision. Because Operator was the jury-demanding party and received a more favorable verdict, it is not entitled to fees herein under the plain terms of the SDA.⁴²

The Court proceeded to review in detail a chronology of prior decisions regarding the award of attorney's fees in cases under the Oklahoma Surface Damages Act. That discussion should be reviewed by any parties who are researching this topic. The Oklahoma Supreme Court summarized its conclusion as follows:

Operator demanded the jury trial herein and the jury returned a verdict for less than the amount of the appraisers' award, a more favorable result to Operator. The cases awarding fees and costs to surface owners

42. *Id.* at 872.

under § 318.5(F) of the SDA have no application in this case because that provision is limited to situations where the jury demanding party fails to obtain a verdict more favorable than the appraisers' award. Likewise, cases awarding attorney fees under § 55(D) to landowners that obtained a verdict in excess of the appraisers' award by 10% are also inapplicable in this case because that statute allows an award of fees solely to land owners. Consequently, Operator, the party demanding the jury trial in this case, is not entitled to an award of attorney fees under Oklahoma statutory or case law. The trial court properly denied Operator's request for fees and costs.⁴³

The court of appeals' opinion was withdrawn, and the judgment of the trial court was affirmed by the Oklahoma Supreme Court. The Court found that cases awarding fees and costs to surface owners under section 318.5(F) of the Surface Damages Act have no application in this case because that provision is limited to situations where the jury-demanding party *fails* to obtain a verdict more favorable than the appraisers' award.⁴⁴

*B. Oklahoma Supreme Court Affirmed District Court's Denial of
Exceptions to Report of Commissioners in Pipeline
Condemnation Action*

In *Natural Gas Pipeline Co. of America LLC v. Foster OK Resources LP*,⁴⁵ NGPL condemned easements for access to operate and maintain two interstate natural gas pipelines and to clear title issues involving the pipelines. Foster disputed NGPL's attempted exercise of eminent domain and asserted that NGPL's taking did not meet the legal standard of necessity. However, Foster did not dispute that NGPL possessed the right of eminent domain where the prerequisites for eminent domain were present.

The district court appointed three commissioners to determine the just compensation owed to Foster due to NGPL's taking of the several easements. After the commissioners filed their report, Foster filed exceptions to the report. After conducting a hearing, the district court

43. *Id.* at 874.

44. *Id.*

45. *Nat. Gas Pipeline Co. of Am. LLC v. Foster OK Res. LP*, 465 P. 3d 1206, 1206 (Okla. 2020).

overruled Foster's exceptions; Foster appealed. The Oklahoma Supreme Court retained the appeal—there was no earlier ruling by an intermediate appellate court.

In its appeal, Foster first argued that the existing easement agreements between Foster and NGPL precluded NGPL from seeking the additional easements through condemnation. Foster argued that NGPL sought to use eminent domain to bypass the existing easement agreements and obtain permanent easements that conflicted with and abrogated the protections negotiated by the parties in the easement agreements. The Court disagreed and held that the right of condemnation is inalienable and cannot be waived, contracted away, or surrendered in whole or in part.⁴⁶ The Court determined that the temporary and permanent easements sought by NGPL through this condemnation proceeding were outside the scope of the existing easement agreements. The Court added that even if the existing easement agreements contemplated similar rights, those agreements did not divest NGPL of its right to eminent domain.

Foster next argued that NGPL's taking did not meet the legal standard of necessity for a public use. The Court found that the word "necessity" in connection with condemnation proceedings does not mean an absolute necessity but only a reasonable necessity, such as would combine the greatest benefit to the public with the least inconvenience and expense to the condemning party and property owner.⁴⁷ The Court concluded that the taking of the easements through condemnation was necessary and was not fraudulent, in bad faith, or an abuse of discretion.

However, Foster asserted that the taking sought through this lawsuit was not necessary and amounted to fraud, bad faith, or an abuse of discretion because another optional means of access to the pipelines was available to NGPL. Yet the Oklahoma Supreme Court found that it "is well settled in Oklahoma that where a condemner has selected and designated a route for taking, the courts will not inquire into the matter to demand why some other route was not chosen."⁴⁸ The Court cited the prior decision in *Graham v. Tulsa*,⁴⁹ which discussed the decision of the Idaho Supreme Court in *Grangeville Highway District*

46. *Id.* at 1210 (citing in support of this holding its prior decision in *Burke v. Okla. City*, 250 P.2d 264 (Okla. 1960)).

47. *Id.* at 1211 (citing *White v. Pawhuska*, 265 P. 1059, 1062 (Okla. 1928)).

48. *Id.* (citing *Owens v. Okla. Tpk. Auth.*, 283 P.2d 827, 830 (Okla. 1954), and *City of Tulsa v. Williams*, P. 876, 879 (Okla. 1924)).

49. *Id.*

v. Ailshie.⁵⁰ The Court in *Ailshie* held that defendants in condemnation actions cannot prevail merely by showing there is other land in the immediate neighborhood available and equally useful.⁵¹ The Oklahoma Supreme Court observed that other states similarly held that simply because some other available route may be sufficient or may even be more desirable was not adequate to show fraud, bad faith, or an abuse of discretion. In particular, the Court held that NGPL's taking and resort to condemnation did not amount to fraud, bad faith, or an abuse of discretion merely because other means of access to the pipelines were available to NGPL.⁵²

In determining the necessity of NGPL's taking, the Court found that NGPL's request for a permanent, nonexclusive easement over Foster's road was reasonably necessary and that Foster produced no evidence indicating that NGPL's taking was fraudulent, in bad faith, or an abuse of discretion.

In sum, the court held that: (1) NGPL did not contract away its right of eminent domain by entering into earlier easement agreements with Foster; (2) that NGPL had another means of access to its pipelines was insufficient to show that NGPL's taking was fraudulent, in bad faith, or an abuse of discretion; (3) NGPL's condemnation of Foster's property was for a public use and met the legal standard of necessity; and (4) arguments relating to the necessity of surveying Foster's property in computing the just compensation due to Foster were premature and could not be determined before the anticipated jury trial on that issue. The court affirmed the district court's ruling.

VI. OTHER ENERGY INDUSTRY CASES

The Oklahoma Court of Appeals reversed a district court's ruling invalidating a city ordinance on the grounds that the ordinance conflicted with a state statute. The case of *Magnum Energy, Inc. v. Board of Adjustment for the City of Norman*⁵³ presented the review of a "quasi-judicial administrative decision" from the City of Norman's Board of Adjustment (the "Board"). Magnum Energy sought a variance from a city ordinance requiring umbrella liability insurance as a condition to issuing a drilling permit within the Norman city limits. The Board denied the request. Magnum appealed that decision

50. *Id.*

51. *Id.* at 720.

52. Grangeville Highway Dist. V. Ailshie, 290 P. 717, 720 (Idaho 1930).

53. *Magnum Energy, Inc. v. Bd. of Adjustment for the City of Norman*, No. 117,912, slip op. at 1 (Okla. Civ. App. June 4, 2020).

to the Cleveland County District Court. The district court found that the city ordinance conflicted with a state statute regulating oil and gas production and was, therefore, invalid as applied to Magnum. The district court granted summary judgment in favor of Magnum; the Board appealed. The court of appeals found that a *de novo* standard of review applied in this appeal.

The court of appeals observed at the outset of its decision that “[t]he dispositive question on appeal is whether there is a conflict between the [City of Norman’s] ordinance and the state statute.” Citing the prior decision in *Vinson v. Medley*,⁵⁴ the court of appeals found that “[f]or matters of general statewide concern, a municipal ordinance will be invalid if it conflicts with a state enactment.”⁵⁵ The court of appeals further stated that “[a] city charter supersedes state law *only* when it affects a subject that is deemed to lie exclusively within municipal concern.”⁵⁶ The court further found “[a] conflict between a state statute and municipal ordinance exists when ‘both contain either express or implied conditions that are inconsistent and irreconcilable with one another. If one is silent on the issue and the other speaks to it, there can be no conflict.’”⁵⁷

In the present appeal, the court stated that the ordinance at issue “is an insurance requirement that must be met for the [c]ity to issue a permit; it is a business practice safeguarding the health, safety, and welfare of the [c]ity and its citizens.”⁵⁸ In contrast, the Oklahoma statute at issue⁵⁹ “regulates oilfield operations and allow[s] for municipal control over indirectly regulated oil and gas operation concerns of a wellsite, such as public nuisances, property setbacks, and flood prevention.”⁶⁰ The court additionally recognized that 17 Oklahoma Statutes section 52 specifies the scope of the Corporation Commission’s authority. That statute provides that “[t]he Corporation Commission and incorporated cities and towns shall have exclusive jurisdiction over permit fees for the drilling and operation of oil and gas wells.”⁶¹

The court of appeals held that the Oklahoma Corporation Commission’s exclusive jurisdiction over certain areas of oil and gas

54. *Id.* at 3.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 5 ((citing *Gant v. Okla. City*, 6 P.2d 1065, 1068 (Okla. 1931)).

59. *See generally* OKLA. STAT. tit. 52, § 137.1 (2020).

60. *Magnum Energy, Inc.*, No. 117,912 at 5.

61. *Id.* at 6.

regulation did not preclude the city's ordinance. The court found that the ordinance was enforceable and that the District Court's contrary conclusion was an error and therefore reversed in this appeal.