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United States Court of Appeals
Tenth Circuit

August 10, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

COLT ENERGY, INC.; WILD RIVER ENERGY, LLC,

Plaintiffs - Appellants,

v.

SOUTHERN STAR CENTRAL GAS PIPELINE, INC.,

Defendant - Appellee.

No. 22-3099
(D.C. No. 5:20-CV-04059-HLT)
(D. Kan.)

ORDER AND JUDGMENT*

Before **HOLMES**, Chief Judge, **TYMKOVICH**, and **CARSON**, Circuit Judges.

In Kansas, a party may recover for temporary nuisance only if the nuisance is abatable by reasonable means. So, to survive summary judgment on such a claim, a plaintiff must present evidence that a defendant can abate the nuisance without unreasonable hardship and expense. Here, Plaintiffs allege that Defendant created a temporary nuisance when natural gas migrated from Defendant's sub-surface storage gas operation into Plaintiffs' leases. But Plaintiffs offered no evidence to the district court about the abatability of the alleged nuisance. Based on this lack of evidence,

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

the district court granted Defendant's motion for summary judgment. Our jurisdiction arises under 28 U.S.C. § 1291. We affirm.

I.

Plaintiffs Colt Energy, Inc. and Wild River Energy, LLC acquired seventeen oil and gas leases from M.A.E. Resources in 2017. The leases, located in Anderson County, Kansas, included the Rook and Koch leases located in Section 21. At the time of acquisition, neither lease was producing any oil. Beneath both leases is the Squirrel Sand Formation, which has produced oil for nearly eighty years.

Adjacent to the Rook and Koch leases, Defendant Southern Star Central Gas, Inc. operates the South Welda gas storage field. Defendant purchases and transports natural gas from sources beyond the field and injects the gas into the sub-surface Colony Sand Formation. Vertically, the natural gas injection must first bypass the Squirrel Sand—which also sits beneath Defendant's operation—to reach Colony Sand. A portion of the Upper Cherokee Shelf, a formerly non-permeable barrier of shale and siltstone, divides the Squirrel Sand and Colony Sand formations by nearly 100 feet.

Over several decades, oil production and storage gas activities compromised the Upper Cherokee Shelf, allowing communication between the Colony and Squirrel Sands. To combat potential storage gas migration, Defendant installed a compressor to capture the gas which migrated into Squirrel Sand and inject it back into Colony Sand. Defendant also sought to combat the migration of its stored gas through regulatory means by petitioning the Federal Energy Regulatory Commission

("FERC") to expand its certificate of public convenience and necessity to include Squirrel Sand both vertically and horizontally.[1] Defendant needed this expansion because South Welda's original 1937 certificate vertically limited natural gas storage to Colony Sand. In 2008, FERC obliged the vertical expansion request, but denied the horizontal expansion request.

FERC denied Defendant's petition for horizontal expansion of its certified storage area because Defendant's disclosures lacked significant evidence of storage gas migration outside its existing boundaries. FERC did acknowledge that a portion of M.A.E. Resources' leases—which Plaintiffs subsequently acquired—contained "storage gas reported."[2] After further investigation, FERC determined that storage gas encroached only on Section 29 of M.A.E.'s interests. Both the Rook and Koch leases are located in Section 21. So neither lease at issue contained reported storage gas according to FERC.

Yet one year after Plaintiffs acquired the leases (and ten years after FERC's horizontal expansion denial), Plaintiffs experienced a blowout in Section 21 when

[1] A FERC-issued certificate of public convenience and necessity permits natural-gas companies to "engage in the transportation or sale of natural gas" across state lines. 15 U.S.C. § 717f(c)(1)(A).

[2] The disclosures defined "storage gas reported" as "areas with Squirrel Sandstone wells that (as evidenced during visual inspection or operation comment) produce more than a slight hydrocarbon vapor and exhibit increased pressure, or gas-filled well bores with measurable pressure." Appellant's App. Vol. 2 at 52.

attempting to restore Rook lease operations.[3] The blowout released hydrogen sulfide ("H2S"), a potentially lethal chemical compound. Finding difficulty controlling the release, Plaintiffs shut in the well.[4] The next year, Plaintiffs began testing Rook lease wells and many registered abnormally high pressures. And two years after testing began, a second well blew out on the Rook lease.

Plaintiffs attributed the high-pressure gas and blowouts to Defendant's storage gas operation. With that belief, Plaintiffs sued Defendant alleging that, among other things, the migrating storage gas created an intentional nuisance. But to avoid an apparent Kansas statute-of-limitations bar, Plaintiffs asserted that the gas was only a temporary nuisance.[5] So, for relief, Plaintiffs requested that Defendant abate the interference. At summary judgment, the district court found that Plaintiffs failed to provide evidence of the storage gas's abatability.[6] As a result, the district court granted Defendant's motion for summary judgment. Plaintiffs appeal.

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[3] A blowout is "[a] sudden, violent expulsion of oil, gas and [m]ud [] (and sometimes water) from a drilling well, followed by an uncontrolled flow from the well." 8 Patrick H. Martin and Bruce M. Kramer, Williams & Meyers, Oil and Gas Law (LexisNexis Matthew Bender 2022). "It occurs when high pressure gas is encountered in the hole and sufficient precautions [] have not been taken." Id.

[4] "Shut in" means "[t]o close down a producing well temporarily . . . ." Id.

[5] "If permanent damages are sought, an action claiming such damages must be brought within two years." Miller v. Cudahy Co., 858 F.2d 1449, 1454 (10th Cir. 1988) (citing Gowing v. McCandless, 547 P.2d 338, 343 (Kan. 1976)). Plaintiffs sued more than two years after the first blowout.

[6] The district court also held that Plaintiffs offered no calculation of temporary damages and no evidence suggesting that the storage gas may be present under the Koch lease or that Defendant acted intentionally. But we need not reach those issues

II.

"We review a summary judgment de novo, applying the same standard that the district court should have applied." Water Pik, Inc. v. Med-Sys., Inc., 726 F.3d 1136, 1143 (10th Cir. 2013). "A party is entitled to summary judgment if, viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Affliction Holdings, LLC v. Utah Vap or Smoke, LLC, 935 F.3d 1112, 1114 (10th Cir. 2019) (citing Hobbs ex rel. Hobbs v. Zenderman, 579 F.3d 1171, 1179 (10th Cir. 2009)); see also Fed. R. Civ. P. 56(a).

Because we have subject matter jurisdiction through party diversity, we apply the appropriate state substantive law as announced by the highest court of the forum state. Blanke v. Alexander, 152 F.3d 1224, 1228 (10th Cir. 1998). Here, the appropriate state substantive law is Kansas law.

III.

We must decide whether a genuine issue of material fact exists concerning the storage gas's abatability. Plaintiffs claim that Defendant's migrated storage gas caused an intentional private nuisance. Under Kansas law, an "[i]ntentional private nuisance is a tort relating to the intentional and unlawful interference with a person's use or enjoyment of his or her land." Byers v. Snyder, 237 P.3d 1258, 1268 (Kan.

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here. Rather we assume, for the purposes of analysis, the existence of a nuisance caused by Defendant's storage gas on Plaintiffs' leases and focus only on Defendant's ability to abate the nuisance.

App. 2010) (citing Smith v. Kan. Gas Serv. Co., 169 P.3d 1052, 1061 (Kan. 2007)). An intentional private nuisance requires a plaintiff to show that a defendant intended to and did create a substantial and unreasonable inference with the use and enjoyment of the land. Williams v. Amoco Prod. Co., 734 P.2d 1113, 1124 (Kan. 1987).

A plaintiff must also plead temporary and/or permanent damages. Miller v. Cudahy Co., 858 F.2d 1449, 1454 (10th Cir. 1988). Here, Plaintiffs seek only temporary damages. Damages are temporary "when caused by an abatable nuisance or condition, or by defects which can be repaired or remedied at reasonable expense." McAlister v. Atl. Richfield Co., 662 P.2d 1203, 1212 (Kan. 1983).

But Kansas law does not fully define "abatable." So we must determine what the Kansas Supreme Court would say if presented with this question. See Reeves v. Enter. Prod. Partners, LP, 17 F.4th 1008, 1012 (10th Cir. 2021) (citing Wade v. EMCASCO Ins. Co., 483 F.3d 657, 666 (10th Cir. 2007)). To do so, we look to Kansas lower court decisions, appellate decisions in other states, district court decisions interpreting Kansas law, as well as the "general weight and trend of authority" in the relevant area of law. Id. (citing Wade, 483 F.3d at 666).

Our evaluation of Kansas's nuisance jurisprudence convinces us that the Kansas Supreme Court would use the definition of "abatability" from the Restatement (Second) of Torts. Kansas courts have incorporated other components of the Restatement when discussing nuisance actions. See, e.g., United Proteins, Inc. v. Farmland Indus., Inc., 915 P.2d 80, 85 (Kan. 1996) (applying the Restatement's rule and comments on intentional nuisance); Sandifer Motors, Inc. v. City of Roeland

Park, 628 P.2d 239, 247 (Kan. App. 1981) (beginning intentional nuisance analysis with the Restatement's position). And even when Kansas courts do not cite the Restatement, their definitions closely track. For example, in McAlister, the Kansas Supreme Court considered temporary nuisance damages, saying they exist "when caused by an abatable nuisance or condition, or by defects which can be repaired or remedied at reasonable expense." Id. at 1212. The Restatement similarly expresses that an "abatable physical condition" is "one that reasonable persons would regard as being susceptible of abatement by reasonable means," that is, "without unreasonable hardship or expense." Restatement (Second) of Torts § 839 cmt. f (Am. L. Inst. 1979).

So we must decide whether Plaintiffs created a genuine dispute of material fact about the abatability of the storage gas "by reasonable means"; or, said another way, whether Plaintiffs presented evidence to show Defendant could abate the storage gas migration "without unreasonable hardship or expense." Id.

Plaintiffs contend that they created a sufficient fact dispute to avoid summary judgment with evidence showing Defendant installed a compressor in 1981. In their view, the installation reveals Defendant's ability to abate the gas migration by collecting it from Squirrel Sands and recompressing it back into the storage field. It is true that Defendant's Director of Storage Operations, Charles McConnell, testified generally that the compressor's purpose was gas collection and recompression. And it may fairly be assumed that the compressor effectively removes *some* migrated storage gas from *somewhere* within Squirrel Sand and restores it to Colony Sand.

But these general statements and propositions are insufficient to result in a reversal of the district court's summary judgment in this case.

As the district court correctly determined, McConnell's deposition testimony tells us nothing about whether Defendant could abate storage gas if it migrated into the Rook and Koch leases. McConnell mentioned neither the Koch lease nor the Rook lease specifically, and he did not discuss the effect of compression on removing gas from Section 21—where the leases are located. So the testimony is insufficient to create a genuine issue of material fact as to whether Defendant can reasonably abate storage gas from the relevant leases.

Plaintiffs also rely on Defendant's FERC application. Defendant, to prevent the migration of storage gas from South Welda, requested that FERC expand the horizontal footprint of its certificate of convenience and necessity. To achieve this goal, Defendant proposed to enhance its current compression efforts for better gas capture and reinjection. The proposal included the area of Section 21 covering the Koch and Rook leases as a "Proposed Priority Expansion Area" and that they contained "Storage Gas Reported." But FERC apparently rejected that assertion.

Indeed, FERC denied the request for horizontal expansion because Defendant failed to offer enough evidence of gas migration. FERC cited its follow up discussions with then leaseholder M.A.E. which disclosed storage gas concerns on Section 29 only. This denial left FERC with no reason to opine on whether Defendant could reasonably abate any storage gas on the Koch and Rook leases. As

FERC saw it, hardly any gas existed so the situation presented no reason to consider abatement strategies for Section 21.

Nor does the plan offer any explicit belief that Defendant could abate gas from those two leases. Rather, the proposal casts doubt that Defendant considered Section 21 abatement feasible. Had Defendant truly believed it could achieve abatement, the vertical proposal would have sufficed. Instead, Defendant sought to protect others from high pressure gas by proposing to acquire their land—hardly an endorsement of nuisance abatement from another's property by reasonable means.

And even if the proposal had offered a reasonable abatement strategy specific to the Koch and Rook leases in 2008, it leaves the next fifteen years uncharted. The proposal is no crystal ball. If gas migrated onto one or both leases during that time, the proposal does nothing to establish that fact. And more importantly, if the gas has migrated, the proposal cannot tell us whether Defendant could reasonably abate it. This lack of recency alone undermines the ability of the proposal to establish migration and abatability. Paired with its lack of evidence that gas in Section 21 is abatable, the proposal cannot create a dispute of material fact as to gas abatement from the Rook and Koch leases.

As a final note, Plaintiffs also furnished no expert witness to opine on the gas's abatability. Kansas law requires an expert witness if an issue "is too complex to fit within the common knowledge exception and is beyond the capability of a lay person to decide." Hare v. Wendler, 949 P.2d 1141, 1148 (Kan. 1997). We see no reason to believe a lay person—on his or her own—would understand the complex

engineering and geological principles necessary to determine the feasibility of removing escaped natural gas from one formation and reinjecting it back into its original formation. This strategy seems especially complex given the now permeable nature of the previously impermeable formation. Thus, Plaintiffs needed an expert witness to address abatability and did not present one.

Because Plaintiffs failed to create a genuine issue of material fact relating to reasonable means for abating the Koch and Rook leases and offered no expert testimony on the subject, we AFFIRM the district court's grant of Defendant's motion for summary judgment.

Entered for the Court

Joel M. Carson III
Circuit Judge