Judgment rendered June 10, 2015.

NO. 49,494-CA
NO. 49,495-CA
(consolidated cases)

ON REHEARING

EN BANC

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * * *

NO. 49,494-CA

SAMSON CONTOUR ENERGY E & P, L.L.C

Plaintiff-Appellant

versus

BILLY JEAN SMITH, ET AL

Defendants-Appellees

NO. 49,495-CA

JOE LYNN ROBINSON AND MARK ALLEN SMITH, INDEPENDENT CO-ADMINISTRATORS OF THE SUCCESSION OF EFFIE SMITH CONNELL

Plaintiff-Appellees

versus

SAMSON CONTOUR ENERGY E & P, L.L.C.

Defendant-Appellant

* * * * * *

Originally Appealed from the
Twenty-Sixth Judicial District Court for the
Parish of Webster, Louisiana
Trial Court Nos. 66462 & 67054

Honorable Allen P. Self, Jr., Judge

* * * * * *

GLENN L. LANGLEY
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Counsel for Appellant

GRAYDON K. KITCHENS, JR.

Counsel for Appellees,
Gary Carl Smith, Mark
Alan Smith, Individually,

and Rose Marie Smith McDonald

JOHN C. CAMPBELL — Counsel for Appellees, Joe Lynn Robinson, Individually, Nelda Robinson Gremillion and Peggy Robinson Brunson

SARAH A. KIRKPATRICK
DAVID R. TAGGART — Counsel for Appellees, Succession of Effie H. Smith Connell, Joe Lynn Robinson, Co-Administrator and Mark Alan Smith, Co-Administrator

* * * * * *

Before BROWN, WILLIAMS, STEWART, CARAWAY, MOORE, LOLLEY and PITMAN, JJ.

BROWN, C.J., concurs in part and dissents in part with written reasons.
CARAWAY, J., concurs with written reasons.
MOORE, J., concurs for the reasons assigned by Judge Caraway.

WILLIAMS, J.

We granted rehearing to reconsider our earlier opinion in this matter. We note that in the concursus proceeding filed in October 2006, Samson included a claim alleging the payment of royalties to individuals in excess of the amount owed. In September 2010, the trial court rendered a partial summary judgment ordering the disbursement of funds in the court registry and reserving the rights of the parties to assert other claims. In August 2012, Samson filed a motion to amend the concursus petition to assert claims alleging the payment of excess royalties to Billy Smith, Mark Smith and Gary Smith.

On review, we conclude that Samson's claims alleging the payment of excess royalties to the Smiths were reserved in the partial summary judgment. Thus, the trial court erred in failing to allow Samson to amend its petition to assert any claims individually against Mark Smith, Gary Smith and the estate of Billy Smith for their alleged receipt of payments in excess of the royalty amounts due under the mineral lease.

We note that any such claims by Samson are separate and distinct from the Succession's claim for unpaid royalties as lessor under the mineral lease. Consequently, this court's decision in the present matter will not have a res judicata effect upon Samson's claims against the above-named individuals.

Mineral Code Article 140 allows the assessment of damages against a mineral lessee as a type of penalty. A statute which authorizes the imposition of punitive or other penalty damages is strictly construed by the courts. *Ross v. Conoco, Inc.*, 02-0299 (La. 10/15/02), 828 So.2d 546. The

language of Article 140 indicates that the trial court may impose damages up to double the amount of royalties due; generally, such a maximum penalty should be reserved for the most blameworthy conduct.

Regarding the penalty assessed in this case, the trial court correctly awarded damages because Samson failed to pay the royalty amount due after receiving notice from the Succession's representative. The record shows that the royalties owed accrued to the significant amount of $1.3 million through Samson's oversight and neglect. However, after reviewing the entire record, we find that Samson's failure to pay the correct royalty amount does not involve the type of egregious conduct that would support the court's award of double the amount of royalties due. Consequently, we conclude that the trial court abused its discretion in awarding an amount greater than $650,000 as damages in addition to the royalty of $1.3 million. Accordingly, we shall amend the judgment to reduce the damage award.

For the forgoing reasons, rehearing is granted for the purpose of amending the judgment to award the Succession damages of $650,000 in addition to the royalty amount of $1,301,149.13 and remanding this matter to allow Samson to amend its petition as described above. The trial court is directed to proceed accordingly based upon such amended petition. Rehearing is otherwise denied and the trial court's judgment is affirmed in all other respects as provided in this court's original opinion. Costs of rehearing are assessed one-half to appellant and one-half to appellees.

REHEARING GRANTED IN PART; OTHERWISE DENIED; AMENDED AND REMANDED FOR FURTHER PROCEEDINGS.

CARAWAY, J., concurring.

I concur to address this unique fact setting involving the mineral lessee/operator's failure to pay lease royalties. In the absence of the receipt of a portion of the unpaid royalties by one of the succession representatives, the full force of the punitive remedies of the Mineral Code, La. R.S. 31:137-141, could have been imposed. Those remedies are designed to protect the lessee from the harshest consequence of its breach of contract. Before the Mineral Code, the remedy of dissolution of the lease was a much greater threat to the lessee. See, Official Comment Mineral Code Article 137, La. R.S. 31:137. In this case, we do not rescind these leases with 19 producing wells in Section 8 for Samson's nonpayment of the royalties. Instead, we reduce the punitive damages authorized by the Mineral Code to one-fourth of the maximum amount that arguably could have been imposed.

The voluminous Section 8 wells produced an embarrassment of riches where both sides attempt to hide. The Mineral Code provisions, however, place the prime responsibility on Samson to properly make payment of royalties for its leases no matter how many wells were producing. Samson initially suspended royalty payments due to the dispute over the validity of the Connell donation. Then, in June 2006 with the dispute resolved, Samson recognized the standing of the Connell Succession to receive the suspended royalties and, in July, paid $946,237.88 for part of the Section 8 royalties affected by the disputed donation. A complete accounting for the royalties attributable to the disputed Connell donation in the summer of 2006 would have revealed to the succession representatives Samson's

failure to have suspended an additional $1,301,149.13 (hereinafter the "$1.3M") for 6 other wells, and, most importantly, Mark Smith's receipt of part of the $1.3M along with his father and brother. Had that complete accounting been made by Samson in June and July of 2006, could the Succession's claim for the Mineral Code's punitive measures be heard? I think not, as the embarrassment of riches should have amicably resolved the matter.

Yet, Samson's failure to explain, account, and pay continued. In October 2006, Samson's concursus allegations admitted, in my view, that all royalties attributable to the disputed ½ Connell interest should have been suspended since April 2004 and were due and payable in 2006 to the Succession because of the rescission of the Connell donation.

The concursus effectively admitted: (i) Samson received notification in April 2004 and properly suspended royalty payments pending resolution of the Connell donation dispute, (ii) Samson operated 19 wells in Section 8 including the six wells which generated the $1.3M in royalties, (iii) the Connell Succession was still under administration with duly appointed co-administrators, (iv) gas from the six wells had been produced and marketed before the filing of the concursus, and (v) Samson received notification of the judgment nullifying the Connell donation. Nevertheless, despite these basic admissions surrounding the donation dispute and Samson's acknowledgment of the pending Connell Succession, the concursus erroneously reached one most important legal conclusion and was entirely vague and incomplete regarding the $1.3M accounting issue at the center of

this dispute.

Paragraph 19 of the concursus petition expressed an improper legal conclusion as follows:

> The nullity of the donation from Effie Smith Connell to Billy Jean Smith would result in Billy Jean and the succession of Betty Smith Robinson each owning one-half (½) of the minerals produced from property upon which the parties claim lease royalties.

From all that had been alleged, however, the Connell family's ownership for the entirety of the royalty interest for the Samson leases following the nullification of the donation was: Billy Jean Smith ¼, Succession of Betty Smith Robinson ¼, and the Succession of Effie Smith Connell ½. Despite Samson's recognition in Paragraph 19 of the Robinson succession, Samson erroneously ignored the Connell Succession's rightful administrative claim to the suspended and future royalties, effectively incorporating a *de facto* judgment of possession for the Connell ½ interest in favor of her son and her daughter's succession. In my view, with all that Samson alleged in the concursus, royalties for all 19 wells in Section 8 attributable to the ½ mineral interest involved in the Connell donation were shown as due and payable to the Succession of Connell no later than the filing date of the concursus, and probably months before. La. R.S. 9:1516; La. R.S. 31:137, *et seq*. Instead, Samson asserted that those royalties had already devolved to the presumed descendants of Connell before the Succession's formal conclusion.

Additionally, Samson never directly addressed its $1.3M problem in the concursus. In Paragraph 6, the pleading identified the six wells drilled

after Samson's suspension of the royalties in 2004. The pleading further alleged that gas production had previously accrued from those wells. Yet, it never revealed that $1.3M in royalties attributable to the suspended ½ mineral interest was paid out to the Smith family members.[1] It ambiguously asserted that prior to the nullification of the Connell donation, "Samson had paid some royalties based on" that donation. With part of the focus of the concursus on the prior accrual of royalties for these six wells and the possibility of past "over-payments" to the named defendants, including the Smith family members, Samson completely failed again to specifically advise the Succession that its co-administrator had erroneously been paid royalties after the suspension for the disputed Connell donation.

If the donee of the Connell donation had been a third party outside of the family who had erroneously received $1.3M in royalty payments, the Succession's demand for those unpaid royalties under the Mineral Code after revocation of the donation would trigger within 30 days a full accounting, payment of suspended royalties, and payment of the $1.3M paid in error to the wrong party. Nevertheless, taken as a whole, Samson's concursus suggests by its silence that payment of the $1.3M to the Smiths as presumed heirs was not in error and by its allegation in Paragraph 19 that the Succession was owed no royalties. With the recognition of a succession's standing in our law, La. C.C.P. art. 3191(A), and specifically in La. R.S. 9:1516, Samson's admissions on the face of the concursus

[1]Significantly, the Mineral Code requires the lessee to respond to the lessor, when appropriate, by stating a reasonable cause for nonpayment of royalties. La. R.S. 31:138. Samson's defense appears to be that it properly paid the Smiths and therefore the Succession is owed nothing. Yet, even with the filing of the concursus, Samson never reported to the Succession its justification for the nonpayment of the $1.3M.

demonstrate to me a clear violation of its obligation under the Mineral Code to pay the Succession royalties attributable to the ½ Connell interest, including the $1.3M.

As indicated above, Samson's nonpayment of the $1.3M in royalties in this case could have produced punitive damages in the amount of $2.6M based upon jurisprudence of this court. *Wegman v. Central Transmission, Inc.*, 499 So.2d 436 (La. App. 2d Cir. 1986), *writ denied*, 503 So.2d 478 (La. 1987). The Mineral Code states that "[t]he court may award as damages double the amount of royalties due." La. R.S. 31:139. The Official Comment speaks of the punitive damages as follows: "[T]his compensating remedy is the award of double the amount due." Official Comment, La. R.S. 31:137. Under the general law of conventional obligations, the measure of damages when the object of performance is a sum of money is interest. La. C.C. art. 2000. This clear distinction between the performance owed or amount due and damages indicates that the double punitive damages awarded in *Wegman* over and above the amount of royalties due was the correct measure of the maximum penalty for nonpayment of royalties. Such award is also in keeping with the redactors' concern that the very harsh loss to the lessee of great value by lease rescission should be, for the most part, avoided in favor of a meaningful punitive remedy to the lessor. *Id*.

In this case, I believe $650,000 in punitive damages is meaningful, instead of lease rescission, and is the maximum punitive measure allowable. I disagree with the majority's statement that this reduction from the

maximum punitive remedy results somehow from the type of egregious conduct exhibited by Samson. Nonpayment of royalties, like nonpayment of rents for a predial lease, is a breach of contract, and rescission of the contract, which remains a possible remedy, indicates to me that nonpayment alone is egregious enough. The amount of nonpayment in this instance, which Samson somehow never quite determined until 2007, is an egregiously large and unjustified amount.

With that said, however, I believe $650,000 is the maximum allowed penalty for this case because Mark Smith, as the co-administrator of the Succession, had a fiduciary duty to account for the $1.3M that he and his family received. Code of Civil Procedure Article 3191(A) required Mr. Smith to collect all property of the Succession as a fiduciary. His duty extended to reviewing the royalty payment data he had received for his personal royalties on all Section 8 wells, including the six wells in question. As discussed above, Samson did not specifically report to him in the summer of 2006 (or thereafter, with its concursus pleading) that he had been paid a portion of the $1.3M. Nevertheless, Samson's counsel's letter of March 15, 2007, reported enough information of the overpayments on the six wells for Mark Smith to immediately account as fiduciary for his receipt of those royalties. In that 2007 letter, Samson finally provided enough information to allow Mr. Smith and the other Smith heirs to resolve the issue with the Succession.

Thus, the inordinate delay preceding Samson's 2007 report amounts to improper payment of royalties and failure to identify what it now asserts

as a reasonable cause for nonpayment. Samson's overpayment of royalties to presumed heirs and not to the duly authorized Succession is a nonpayment of royalties sanctionable by the punitive damages of the Mineral Code. Accordingly, I respectfully concur.

BROWN, CHIEF JUDGE, concurring in part and dissenting in part

In April 2004, Samson received a letter from Nelda Robinson Gremillion notifying Samson of pending litigation regarding the donation to Billy Jean Smith. This was the first notice that Samson had that the donation was being questioned. In response, Samson placed Effie Smith Connell's 1/2 mineral interest that she had donated to her son, Billy Jean Smith, in suspense for all the properties (Billy Jean Smith and his sister had also inherited a 1/4 interest each from their father which Samson continued to pay). At the same time, in April 2004, a new well was completed in Section Eight. Revenues from that well were paid utilizing the old pay decks. Connell's1/2 interest was paid in accordance with the donation to Billy Jean Smith and his two sons, Gary and Mark Smith. That situation continued for five additional wells which were drilled in Section Eight. These six wells were in pay status rather than suspense status. Experts for all parties agreed that the amount paid to the Smiths before the pay decks were corrected was $1,301,149.13 ("1.3 million").[2]

In February 2005, Samson received an uncertified copy of judgment annulling the 1996 donation to Billy Smith. Approximately 1 1/2 years later, in July 2006, the co-administrators of the Connell succession, Mark Smith and Joe Robinson, corresponded with Samson recognizing that Billy Smith had sent Samson a certified letter requesting that all royalties be held in escrow until the succession could be completed, and further stating, "Due to complications and delays in completion of the closing of (Connell's)

[2]$650,000 was paid to Billy Jean Smith and $325,000 each was paid to Mark and Gary Smith.

estate, we request . . . that future royalties be paid to her Estate. . .” Letters of administration were attached. In July 2006, Samson immediately responded and put the properties where payment had been suspended in pay status and released payment in the amount of $946,237.88 to the succession. This payment included the current month’s revenue for the six new wells. The pay decks for those six wells were changed to show Connell’s 1/2 interest being paid to the succession. The revenues paid to the Smiths for the six new wells drilled from the middle of 2004 to the middle of 2006 were not addressed. It is this money paid to the Smiths that is at issue in this case *sub judice*.

In July 2006, Nelda Robinson Gremillion e-mailed Samson that the posted check was an underpayment and stated, “We have not determined which properties have, or have not been paid...but we are certain that an error or omission has occurred somewhere in accounting...or perhaps in properties transferred. Hopefully, there is a simple explanation.” Thereafter, Nelda Gremillion sent another e-mail in which she stated that the estate’s interest in wells in Section Eight was $2,119,730. Joe Robinson, co-administrator, also wrote seeking information. Curiously, there was nothing sent to Samson from Mark Smith, the other co-administrator and recipient of the overpayment.

Due to obvious problems among the heirs, in October 2006, Samson filed a concursus petition naming and citing the succession and all the individual heirs of Effie Smith Connell as claimants-defendants seeking a global resolution of royalty accounting matters. Additionally, Samson

specifically sought to "be allowed to make such adjustments as may be appropriate to account for payments previously made to the parties which, depending upon the decision of this Court, should have been properly credited to other defendants." The concursus petition referred generally to all wells in Section Eight.

Having received no response from anyone to the concursus, in March 2007, Samson's attorney sent a letter to the succession's attorney noting that an answer had not been filed in the concursus and seeking a resolution to include credits for overpayment. Samson attached a listing of all payments to the Smiths for the six wells at issue herein. Specifically, Samson stated:

> The concursus suit we filed on behalf of Samson Contour on October 11, 2006, has been pending for sometime and no one has filed an answer. In an effort to get the case moving forward, I have enclosed the list of wells and the amounts paid for production from each of these wells to Gary Carl Smith, Mark Allen Smith and Billy Jean Smith from April 2004 through December 2006 (the list, however, shows through May 2006). I hope that this information will assist you in trying to reach an agreement for the consensual sharing of production and resolution in this matter. Please also remember that some of the production which was paid to Billy Jean Smith based on donations later declared null may need to be recouped depending upon the outcome of this suit.
>
> In any case, I believe we should get our responsive pleadings on file as soon as possible. If no resolution can be reached, we will then at least be able to move forward with the concursus.

The response quickly came in May 2007, when the succession, through both co-administrators, Mark Smith and Joe Robinson, filed an action to cancel the leases for nonpayment of royalties.

The succession of Effie Smith Connell consists of two groups. Billy Smith's heirs would inherit one-half and his sister, Betty Smith Robinson's

heirs would inherit the other half.[3] Mark Smith and Joe Robinson were co-administrators of the Connell succession. The Smiths, including Mark Smith, were timely paid all of the $1.3 million royalties for Connell's1/2 interest for production from the six new wells in 2004 - 2006. Thus, the Smiths were overpaid and the Robinsons underpaid.

Warren Martindale testified as an expert for the succession. He explained that proper accounting practice to correct an overpayment was "to reverse and rebook and either recoup over time or ask for payment back from the owner that was overpaid." Samson's supervisor, John Sniveley, testified that at the time of Nelda Gremillion's e-mail all of the revenues had been paid out either to the succession or the Smiths.

Resolving Samson's overpayment to the Smiths

Having been overpaid, the Smiths had no cause of action against Samson for their royalties or for penalties and attorney fees. Both Samson and the succession, however, had causes of action under the concept of unjust enrichment and for an accounting from the Smiths. Even so, the trial court *sua sponte* enjoined Samson from pursuing any claim against any heir and then found that Samson must, by way of the succession, pay the Smiths, for a second time, their share of the royalties plus penalties and attorney fees. What the Smiths could not do, the succession did for their benefit. This is a legal absurdity.

Louisiana Civil Code art. 2299, which addresses the obligation to restore, provides that a person who has received a payment or a thing not

[3]Both Billy Jean Smith and Betty Smith Robinson had died.

owed to him is bound to restore it to the person from whom he received it.

The 1995 Revision Comments to La. C.C. art. 2299 provide that:

> (a) This provision is based on Article 2301 of the Louisiana Civil Code of 1870.
>
> (b) Article 2301 of the Louisiana Civil Code of 1870 declares: "He who receives what is not due to him, whether he receives it through error or knowingly, obliges himself to restore it to him from whom he has unduly received it." Louisiana courts interpreting this provision have correctly ordered persons who received things or payments not owed to return them to the persons who made the delivery or the payment. Under Article 2299, as under Article 2301 of the Louisiana Civil Code of 1870, the person who receives a thing or a payment not owed, whether knowingly or through error, must restore it to the person from whom he received it.

In *Matthews v. Sun Exploration and Production Co.*, 521 So. 2d 1192, 1198 (La. App. 2d Cir. 1988), this court found:

> Recent jurisprudence has properly interpreted the Code Articles to provide that negligence per se by a payer is not a bar to recovery for the payment of a thing not due. (Citations omitted).
>
> We believe the defendant's error in overpaying Mrs. Chamberlin amounted to an ordinary or "honest" mistake as contemplated by the Civil Code Articles. Consequently, Sun's error in making the overpayment does not bar its recovery of these funds.

The fact that the mistake was due to negligence on the part of the person who made the payment will not preclude a recovery. Negligence in paying does not give the payee the right to retain what was not his due, unless he was misled or prejudiced by the mistake. *Matthews, supra.*

The trial court's decision not to allow the amendment by Samson to specify claims for fraud and unjust enrichment was based upon the belief that the amendment was not related to the conduct, transaction or

occurrence set forth in the original concursus pleading. This was clear error.

La. C.C.P. art. 1153 provides:

> When the action or defense asserted in the amended petition or answer arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of filing the original pleading.

This article requires only that the amending petition's thrust factually relate to the conduct, transaction or occurrence originally alleged. *Gunter v. Plauche*, 439 So.2d 437 (La.1983). In Samson's concursus petition, recoupment of overpayments was specifically pled. This factual allegation is a crucial element in Samson's statement of the case and unquestionably is an element arising out of the conduct, transaction or occurrence attempted to be set forth in the original pleading. I concur with the new majority in reversing that part of the trial court's judgment and remanding to allow the amendment and to conduct further proceedings after the amendment.

Samson's Payment to The Succession

A Samson employee made a mistake in not vetting the title abstract records with other departments. Samson supervisor John Sniveley explained that this case "was a timing issue." A new well was being set up and the divisional analysis "was building ownership off the (current deck) while the other interest was being changed." Samson did not act willfully or intentionally. Samson did not personally benefit from this mistake. In its March 2007 letter to the succession's attorney, Samson set out the details of the $1.3 million and asked to resolve the matter including credits for

overpayments. In response to this request, the succession filed this lawsuit to recover the royalties already paid with double penalties, interest and attorney fees.

Samson claims that it timely paid in full all the royalties at issue in this case. Samson argues that the $1.3 million payment to the Smiths is a valid payment of the very interest that the succession is administrating and is now claiming. Samson asserts that the succession representatives, including Mark Smith, who in fact received the royalty payment at issue, are bound to credit and account for payments made by Samson to the Smiths, and those heirs are bound to account to the succession representatives for payments they received. I agree.

A willful act is generally one in which the actor intended the end result. *Peacock's, Inc. v. South Central Bell*, 455 So. 2d 694 (La. App. 2d Cir. 1984). The Louisiana Supreme Court in *State v. Vinzant*, 200 La. 301, 7 So. 2d 917 (1942), stated that "willfullness" and "negligence" are incompatible and are direct opposites of each other. "Negligence" is characterized by the absence of intent, whereas "willfullness" is characterized by purpose or design. "Clearly, the words 'willfully' and 'wantonly' are not synonymous with the words 'negligently' and 'recklessly', the former implying intention or deliberation and the latter mere carelessness or lack of due and reasonable care or disregard for the rights and safety of others." *Vinzant*, 7 So. 2d at 922.

Given an operator's large volume of oil and gas production, the numerous and disparate leases under which production is carried out, the

varying royalty fractions, the minute decimal interests, and the cumbersome calculation models that often dictate royalty payments, as well as the thousands of diverse payees receiving royalty payments, it is inevitable that either human or electronic error will occasionally cause incorrect royalty distributions. In this case there were several changes in division orders and the pay decks. There were successions, exchange deeds, donations, deaths, and annulments. As Mr. Sniveley said, two events crossed at the same time in two separate divisions and one did not know the other.

The failure to pay the succession was neither willful nor wanton but was negligent. Samson actually paid the royalties owed to one set of heirs, which included Mark Smith, who was a co-representative of the succession. The trial court's ruling allowed the Smiths to keep the $1.3 million they received in error and required Samson to pay an additional $1.3 million to the succession, together with another $1.3 million in penalties and $505,000 in attorney fees.

Division and transfer orders are binding upon underpaid royalty owners until revoked, but only as a general rule. In the typical case, the correct total of proceeds is paid out to royalty owners as a group and any errors made in the division orders affect only the allocation of proceeds among the royalty owners. In this situation where it is a succession rather than an individual heir claiming to be underpaid, the appropriate remedy is for the succession's accounting process. The succession could reverse and rebook and either recoup over time or ask for payment back from the

Smiths.[4] To permit the succession as an underpaid royalty owner in such a situation to recover on behalf of the overpaid heirs from the operator would subject the payor to repayment of the royalties, double penalties, interest and legal fees. This might be different if Samson personally benefitted from the erroneous division order. Samson received no benefit or advantage from this mistake.

I would reverse the award of $1.3 million to the succession, penalties and attorney fees.

[4]I find *Hall v. James*, 43,263 (La. App. 2d Cir. 06/04/08), 986 So. 2d 817, to be distinguishable but if not then it is wrong.