

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 93-7549
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ESTATE OF ELAINE NICHOLS,

Plaintiff-Appellant,

versus

GEORGIA PACIFIC CORP.,

Defendant-Appellee.

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Appeal from the United States District Court for the
Southern District of Texas
(CA 90-271)
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(January 12, 1995)

Before GARWOOD, JOLLY and SMITH, Circuit Judges.*

GARWOOD, Circuit Judge:

Plaintiff-appellant the Estate of Elaine Nichols (the Estate) filed this action, in a Texas state court, against the Georgia Pacific Corporation (GPC) seeking damages for (1) the conversion of gypsum and (2) deficient reclamation practices. The case was removed to the court below on the basis of diversity of

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

citizenship. Subsequently, the district court granted summary judgment in favor of GPC on both issues. The Estate now brings this timely appeal, complaining that the district court erred in granting summary judgment on either issue. We affirm in part and reverse and remand in part.

Facts and Proceedings Below

In the late 1940's and early 1950's, Don Drake (Drake) purchased four tracts of land located in Hardeman County, Texas, from GPC's predecessor in interest, Certain-Teed Products Corporation (CTP). In the deeds conveying the property to Drake, CTP specifically reserved to itself ownership of "all oil, gas[,] coal, gypsum, gypsite and other minerals of every kind and description beneath the surface of" the land. CTP also reserved the right to the "use of the surface of" the land "necessary and/or convenient to," among other things, "mine, quarry, produce[,] store, remove, bring to the surface . . . use, deal with, dispose of and exploit any and all oil, gas, coal, gypsum, gypsite and other minerals of every kind and description" and the right to "work, pump, operate[,] use or abandon any and all mines, wells, beds, seams, veins, strata, sands, reservoirs, or pools at any time located beneath the surface of said lands." The deeds also provide that:

"the grantor herein, its successors and assigns, in the exercise of said rights and privileges herein reserved, shall, at any and all times, have the right to conduct upon or under the surface of the above described lands strip-mining operations, or any other form or manner of mining operations which may be reasonably necessary and/or convenient in order to mine, produce, save, remove, and market any and all oil, gas, coal, gypsum,

gypsite and other minerals of every kind and description that may be beneath the surface of said above described lands."

Drake's interest in the surface property was inherited by his son Kenneth and then by Kenneth's wife Elaine Nichols. The Estate became the owner of the property upon the death of Elaine Nichols in 1989. The property consists of four tracts totaling approximately seven hundred acres.

On September 12, 1990, the Estate filed this lawsuit against GPC for (1) conversion of surface gypsum and (2) failure to reasonably reclaim the surface estate. On October 17, 1990, the case was removed on the basis of diversity. Subsequently, on February 23, 1993, the district court ruled that all the gypsum removed was owned by GPC and granted GPC's partial summary judgment motion against the entirety of the Estate's conversion claims.

On March 4, 1993, GPC filed a motion for partial summary judgment for the Estate's reclamation claims.¹ GPC asserted that the claims were barred by the statute of limitations. On March 10, 1993, following selection of the jury, the district court informed the parties that they would discuss the issues presented by GPC's motion the following morning.²

At the March 11, 1993, hearing, the district court noted that

¹ GPC entitled its motion a motion for partial summary judgment because it conceded that statute of limitations might not bar the claims regarding GPC's construction of a dam on the property.

² The Estate maintains that no formal hearing was scheduled for the motion. The Estate contends that on the morning of March 11 it was prepared to begin trial and had no notice that the district court intended to have a hearing on the merits of the summary judgment motion.

GPC's motion on the eve of trial was untimely because it was filed long after the March 21, 1992, filing deadline for dispositive motions. The district court also observed that GPC had neither "offered an explanation for not having met the deadline" nor made "any showing of good cause for its untimeliness." Nevertheless, the district court concluded that GPC's position had merit. After listening to the parties' arguments, the district court on March 11, 1993, granted summary judgment in favor of GPC on all of the Estate's reclamation claims. The Estate filed a timely notice of appeal to this Court.

Discussion

On appeal, the Estate argues that the district court erred in granting summary judgment in favor of GPC on the issue of ownership of the gypsum. In addition, the Estate asserts that the district court erred in granting summary judgment in favor of GPC on its reclamation claims because: (1) the claims were not barred under the statute of limitations; (2) its claims concerning reclamation practices which occurred after the filing of the lawsuit could not be barred; and (3) the March 11, 1993, summary judgment was granted in violation of the ten-day notice requirements of Federal Rule of Civil Procedure 56. This Court reviews the grant of summary judgment *de novo*, applying the same standard as the district court. *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 975 (5th Cir. 1991).

I. Ownership of the Gypsum

The Estate asserts that the district court erred in its February 23, 1993, grant of summary judgment against the Estate's

claims for conversion of gypsum. Acknowledging that the deeds reserved to GPC all gypsum located beneath the surface, the Estate maintains it is the owner of all gypsum at or near the surface. The Estate contends that, pursuant to the Texas Supreme Court decision in *Reed v. Wylie*, 597 S.W.2d 743, 745 (Tex. 1980), some of the gypsum mined was a mineral "at the surface" since it existed at a subsurface depth shallow enough for its removal by surface destructive strip-mining to be a reasonable method of production.

A. *Reed v. Wylie*

In *Reed*, the Texas Supreme Court was faced with the question whether a deed reserving to the grantor an interest in "oil, gas, and other minerals" included an interest in lignite. *Id.* at 744. The *Reed* court determined that "the substance will not be granted or retained as a mineral if it is shown that any reasonable method of production would destroy or deplete the surface." *Id.* at 747.³ The rule established in *Reed* "is based on a presumed general intent that a surface owner would not consent to the reservation of a substance when the surface must be destroyed to mine it, unless a specific intent to the contrary is expressed in the instrument." *Hobbs v. Hutson*, 733 S.W.2d 269, 271 (Tex. App.SOTexarkana 1987).

However, the *Reed* decision only serves as guidance when construing a general, unspecific reservation or conveyance of

³ *Reed* has been overruled, at least as to whether uranium is included in a post-June 8, 1983, conveyance or reservation of "other minerals," by *Moser v. United States Steel*, 676 S.W.2d 99, 101 (Tex. 1984). See also *Friedman v. Texaco, Inc.*, 691 S.W.2d 586 (Tex. 1985). The reservations at issue here, however, were all made before 1960, so *Moser* is inapplicable. See *Friedman*.

minerals in a deed. *Schwarz v. State*, 703 S.W.2d 187, 189 (Tex. 1986) (noting that the *Reed* decision is "merely a device for construing ambiguous conveyances"). See also *Atlantic Richfield Co. v. Lindholm*, 714 S.W. 2d 390, (Tex. App.SQCorpus Christi 1986) (citing *Reed* to help determine whether a reservation of oil, gas and "other minerals" included uranium). As a result, "[i]f there is an express conveyance of a specific substance . . . we are not bound to follow the . . . *Reed* presumption." *Schwarz*, 703 S.W. 2d at 189.

Reed is not applicable to the instant case because the reservation by CTP specified that ownership of "gypsum" was reserved. All of the deeds reserved "all oil, gas, coal, gypsum, gypsite and other minerals of every kind and description beneath the surface" (emphasis added). In addition, the deeds expressly reserved to CTP and its successors the right to conduct strip mining on the land. The presumed intent rule of *Reed* is not applicable and, as a result, the fact that surface destructive strip mining of the gypsum was a reasonable method of production does not abrogate GPC's ownership of the gypsum.

B. Undisputed evidence

GPC presented the affidavit of its Chief Mining Engineer David Moody (Moody) to support its contention that it had never mined or taken any gypsum "located at or on the surface of" the Estate's property. Moody's affidavit stated that GPC "has only mined, appropriated and used gypsum located beneath the surface of the lands in question." The Estate did not offer any evidence

rebutting Moody's affidavit. Thus, the undisputed evidence requires the finding that gypsum was never removed from the surface, but only from beneath the surface.

The grant of summary judgment against the Estate's conversion claims was proper since (1) *Reed* is not applicable to a particular substance which is specifically named as being the subject, or one of the subjects, of an express reservation or conveyance, especially where the instrument expressly authorizes the mineral owner to strip-mine such substance, and (2) the undisputed evidence establishes that the gypsum was taken only from beneath the surface.

II. Reclamation Claims

The Estate challenges the district court's grant of summary judgment based on its ruling that all of the reclamation claims were entirely barred by the two-year statute of limitations. The Estate asserts that its claims are not barred by limitations because GPC's duty to reasonably reclaim⁴ did not arise until after it ceased its strip-mining activity on a tract of land. The Estate also contends that its claims concerning the dam constructed on the property could not be barred by limitations because they accrued after its initial filing of the lawsuit in September 1990.

A. Statute of limitations

The applicable statute of limitations for physical damage to

⁴ The parties appear to assume that under Texas law a mineral owner has a duty to reasonably reclaim the surface estate. GPC does not contest the existence of this cause of action by the Estate. Accordingly, we also so assume for purposes of this appeal.

real property is *Tex. Civ. Prac. & Rem. Code Ann.* § 16.003(a), which provides: "[a] person must bring suit for trespass for injury to the estate or to the property of another . . . not later than two years after the day the cause of action accrues."

B. Permanent damages v. temporary damages

GPC argues that summary judgment was proper because the Estate's reclamation claims were for permanent damages which occurred continuously with strip-mining activities conducted over a period of several decades before suit was filed. GPC contends that its mining operation was one continuous process and any suit for damages caused by strip-mining on any part of the Estate's property is barred by the statute of limitations.

The Estate asserts that its claims are for temporary damages and encompass several different acts on different areas of its land. The Estate argues that even if the statute of limitations is a bar to actions occurring more than two years prior to its lawsuit, GPC is still liable for those unreasonable reclamation practices which occurred after September 12, 1988.

Pursuant to the Texas Supreme Court's decision in *Bayouth v. Lion Oil Co.*, 671 S.W.2d 867, 868 (Tex. 1984), "[a]n action for permanent damages to land accrues, for limitation purposes, upon discovery of the first actionable injury and not on the date when the extent of the damages to the land are fully ascertainable." Permanent damages are defined as those injuries which "result from an activity of such a character and existing under such circumstances that it will be presumed to continue indefinitely;

the injury must be constant and continuous, not occasional, intermittent or recurrent." *Id.*

"Temporary injuries . . . [are] found where the injury is not continuous, but is sporadic and contingent upon some irregular force such as rain." *Id.* (citing *Kraft v. Langford*, 565 S.W.2d 223 (Tex. 1978)). "[A] characteristic of a temporary injury is the ability of a court of equity to enjoin the injury causing activity. An injury which can be terminated cannot be a permanent injury." *Kraft*, 565 S.W.2d at 227.

According to GPC, if the damages are permanent and its initial strip-mining and reclamation activities began several decades ago, it cannot be sued for any strip-mining and reclamation activities which are currently conducted on the land. We do not agree. GPC could not presently begin strip-mining activities on a particular untouched tract or section of the Estate's property and be protected by the statute of limitations against a suit filed one year later for failing to reclaim or negligently reclaiming that particular tract or section. Assuming, as the parties apparently do, that surface damaging strip mining is not itself actionable, but that there is an independent cause of action for failing to reclaim the thus-damaged land or for doing so negligently, then such a cause of action would not accrue before the strip mining was completed as to the tract or area in question and not until reclamation there was renounced, abandoned, or completed. This is so whether the damage is characterized as permanent or temporary in nature.

We decline to decide whether or which of the Estate's claims for damages from negligent or unreasonable reclamation practices are temporary or permanent since the record is not fully developed on the nature of GPC's reclamation activities on the land. We note that, regardless of which theory is adopted, at least some of the claims may be barred by the two-year statute of limitations. However, the present record does not affirmatively establish as a matter of law that all such claims are so barred. In view of the lack of factual development and the premature nature of the district court's order granting the summary judgment, this is something which should initially be addressed by the district court on remand.

C. Construction of the dam

The Estate also asserts that, as part of its reclamation practices, GPC negligently constructed a dam on its property. The Estate has alleged that the dam is defective and dangerous and is expected to cause future flooding on and damage to not only its own property but also the property of neighboring third parties (thus exposing the Estate to liability to such parties). The Estate maintains that since the dam was constructed after September 1990, claims relating to the dam cannot be barred by the two-year statute of limitations. We agree. Moreover, this claim was in substance excepted from GPC's March 4, 1993, motion for summary judgment. The district court's grant of summary judgment on the Estate's claim concerning the construction of the dam was erroneous.

D. Summary judgment

The record in this case does not support the summary judgment dismissing all the reclamation claims. Moreover, the district court acted too summarily in granting the March 4, 1993, summary judgment on March 11, 1993, without allowing the ten days required by Rule 56(c). *Cf. Powell v. United States*, 849 F.2d 1526, 1579 (5th Cir. 1988).

We accordingly reverse the March 11, 1993, summary dismissal of all the reclamation claims, and remand for further proceedings.

Conclusion

For the foregoing reasons, the district court's summary judgment order regarding the conversion claims is AFFIRMED. The district court's summary judgment order on the reclamation claims is REVERSED and REMANDED for further proceedings not inconsistent herewith.

AFFIRMED in part, REVERSED in part, and REMANDED