NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 CA 2041

JOSEPH A. ROUGON, ET AL.

VERSUS

BP AMERICA PRODUCTION COMPANY

Judgment Rendered: May 6, 2011

* * * * * * *

Appealed from the
Eighteenth Judicial District Court
In and for the Parish of Pointe Coupee, Louisiana
Trial Court Number 38,716

Honorable William C. Dupont, Judge

* * * * * * *

William S. Strain
David M. Ellison, Jr.
Baton Rouge, LA
and
John Wayne Jewell
New Roads, LA

Attorneys for
Plaintiffs – Appellees
Joseph A. Rougon, et al.

Donald J. Brannan
Robert J. Redfearn
New Orleans, LA

Attorneys for
Defendant – Appellant
BP America Production Co.

* * * * * *

BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

WELCH, J.

BP America Production Company (BP), appeals a judgment rendered against it in favor of numerous mineral lessors, in the amount of $247,783.00 in damages, upon finding that BP failed to act as a reasonably prudent operator. We affirm.

BACKGROUND

Most of the facts forming the basis of this dispute have been stipulated to by the parties. Plaintiffs are owners of mineral and royalty interests in lands contained within the confines of 21,900' TUSC RA SUA created by Order Number 1046-E of the Office of Conservation, State of Louisiana, on October 31, 2001. All of the plaintiffs executed mineral leases in favor of Chevron which were conveyed to Amoco Production Company, to which BP is the successor in title (referred to collectively as BP). On September 1, 1993, BP became the operator of record in the Judge Digby Field. On April 4, 1996, BP spudded the Parlange #5 Well and logged that well on September 29, 1996. On August 22, 2000, BP obtained a permit to drill a well named W.C. Parlange #12 to test the 21,900' sand. In August of 2000, BP commenced drilling the well, which was located on lands leased by W.C. Parlange, Jr. Neither Mr. Parlange nor his successors in title are parties to this lawsuit.

From January through April, 2001, BP logged Parlange #12 Well to depths of 23,272' in the 21,900' sand, which was seen as potentially productive. From April through May 13, 2003, BP ran a liner, 3-1/2 tubing, installed trees, and released the rig on May 13, 2001. On July 24, 2001, BP completed the well as a producer of hydrocarbons in the 21,900' sand. The well was initially tested and produced pursuant to an Order of the Commissioner of Conservation for the State of Louisiana (Commissioner) granting a 90-day "test allowable" of 13,089 million cubic feet (MCF) per day, effective July 24, 2001, through a 90-day period ending

no sooner than October 24, 2001, based upon a to-be proposed 1,280 acre unit, and royalties were paid on that basis. The first allowable granted by the Commissioner was conditioned on BP paying royalty on production from the well during the period of the allowable on the basis of those mineral and royalty interests to be included within the ultimate Commissioner's unit to be formed around the well. At that time, it was the policy of the Commissioner's office that if an application or pre-application notice was filed concerning the creation of a Commissioner's unit around the well, which at that point in time did not have an allowable permitting production therefrom, any allowable granted for the period between such filing and issuance of an order creating the Commissioner's unit would be conditioned on royalty being paid on production to the owner of those mineral and royalty interests ultimately included within the unit as formed.

On August 8, 2001, BP formed a contractually declared 30 acre unit around the well as to depths greater than 21,850' below the earth's surface, which were not presently unitized by the Order of the Commissioner. On August 9, 2001, the Commissioner granted BP an allowable for production for the 30 acre declared unit during a period from August 9 through August 15, 2001, of 13,089 MCF per day, which, pursuant to BP's request, was increased on August 16, 2001 to 63,650 MCF per day.

On August 17, 2001, pursuant to the Commissioner's Rules of Procedure, BP filed with the Commissioner a pre-application notice of its intention to seek an order from the Commissioner creating a 1,280 acre unit around the well for the 21,900' sand. A pre-application conference concerning the proposed filing was requested and then held on September 6, 2001. On September 7, 2001, BP filed its application for the creation of a 1,280 acre unit and a hearing was held before the Commissioner on October 30, 2001. On November 14, 2001, the Commissioner issued Order No. 1046-E creating the requested unit effective as of October 30,

2001, which superseded and replaced the declared unit.

No portion of the acreage subject to plaintiffs' leases was included in the declared unit and they were not paid any royalty on production attributable thereto. In this lawsuit, plaintiffs sought to recover royalties attributable to production from the Parlange #12 Well from August 9, 2001, through October 29, 2001, the period of time between the creation of the declared 30 acre unit and the final unitization of the 1,280 acre tract. The parties stipulated that during the period of August 9, 2001, through October 30, 2001, the well produced a total of 3,401,950 MCF valued at $8,679,554.54. The parties stipulated that if plaintiffs are entitled to any portion of such production during that period of time, their interest in such production would be valued at $247,783.00.

In the trial court, plaintiffs urged that BP failed to act as a reasonably prudent operator for the mutual benefit of all parties by: (1) failing to develop the minerals for the mutual benefit of both parties; (2) failing to timely apply for and seek unitization of the 21,900' sand in order to obtain a Commissioner's unit prior to or shortly after the completion and production of the Parlange #12 Well; and (3) failing to shut in or greatly reduce the volume of production from the Parlange #12 Well pending unitization proceedings.

BP, on the other hand, insisted that it acted as a reasonably prudent operator in pursuing the creation of the Commissioner's unit around the well. It also relied on Article 11 of each of the plaintiffs' leases which provided that if a lessor considered that the operations were not being conducted in compliance with the lease, it was required to notify the lessee in writing of the facts relied upon as constituting a breach, and the lessee had sixty days thereafter to commence any operations necessary to comply with the requirements of the lease. BP argued that plaintiffs agreed to what constitutes "reasonably prudent conduct" on the part of BP in connection with breaches of the provisions of their leases, and that plaintiffs

stipulated that if BP met or commenced or resolved or cured the alleged breach within sixty days of the receipt of written notice thereof, such would constitute "reasonably prudent conduct" and bar any action based on such breaches by BP. BP argued that even it one found that it tested the well and determined it was productive in the 21,900' sand and had actual or constructive knowledge of the drainage of the plaintiffs' lands, BP would have had sixty days thereafter within which to commence an action to resolve the alleged drainage, and in fact, BP took such action within twenty-three days.

A two day bench trial was held, during which the parties introduced the testimony of seven witnesses and documentary evidence. BP's expert, Mr. William Robbins, a geologist who handled BP's unitization proceedings, offered his expert opinion that the earliest time BP could have filed a pre-application notice with the Commissioner to commence unitization proceedings, consistent with conservation policy, would have been July 24, 2001, the date on which the well was completed and BP obtained a productive test. He testified that if BP initiated unitization proceedings prior to that time, it would not have acted as a reasonably operator because they did not have a successful test until that time. He also acknowledged that if BP had continued to produce the well on the 90-day test allowable issued by the Commissioner, it would have paid 200% of the royalty it normally pays. Instead, on August 9, 2001, BP declared the 30 acre unit. The witness admitted that at the time the declared unit was created, the tests had been done and the well was producing. He also admitted that at the time the 30 acre unit was created, BP was aware it was going to file for the 1,280 unit, and that it created the 30 acre unit in part for business reasons to prevent BP from having to pay double royalties on the production from the well.

Thomas Wayne Lee, who was involved in the unitization proceedings at issue from the planning stages until the well was finally unitized, testified that after

BP had been granted the 90-day conditional allowable by the Commissioner to begin production, BP paid the Parlanges 100% royalties and also paid the lessees it had previously identified as being included in the planned 1,280 acre unit royalties. Mr. Lee admitted that after the well started producing, BP could have shut it down, it could have continued to produce the well on a lease basis by paying double royalties, it could have reduced the flow of the well to reduce the loss to the other royalty owners that did not participate, or form a declared unit, and BP believed that forming the declared unit was the best option. The evidence showed that soon after BP formed the declared unit on August 9, 2001, pursuant to BP's request, the maximum flow of the well was increased by the Commissioner from 13,089 MCF per day to 63,650 MCF per day. Mr. Lee acknowledged that the mineral lessees outside of the 30 acre declared unit did not receive any royalties from the time the 30 acre unit was declared until the time the 1,280 acre unit was ultimately formed, an over 80-day period. However, the Parlanges received roughly 97% of the production royalties from the date the declared unit was formed until the Commissioner's final unit was established. The court questioned the witness as to whether there was any other reason BP decided to create the 30 acre dedicated unit other than to keep from having to pay double royalties, and the witness responded that it was a business decision that was the best thing for BP to do.

Michael J. Veazy, a consulting petroleum engineer who was hired by plaintiffs to offer an opinion, examined BP's records relating to the subject well and the records of the Office of Conservation. He testified that on August 9, 2001, when BP declared and formed the 30 acre unit, the well had produced more than half a billion cubic feet of gas. He testified that a prudent operator would have brought the well on slowly and gradually increased production. However, his analysis of the production rate of the well revealed a "pretty rapid" increase in the production rate.

John Aldridge, the former director of the Office of Conservation's engineering division, reviewed records of the hearing on unitization of the Parlange #12 Well and the rules of procedure in proceedings before the Commissioner, and offered his opinion that it is not a requirement to have a successful test to begin the pre-unitization process; the Commissioner will not issue an order until proof of the productivity of the sand to be unitized is presented. He stated that although BP could have begun unitization proceedings at an earlier date, it elected to institute unitization proceedings after it tested the well. He stated that the most prudent way to protect the interest of all of the parties is to start the unitization proceedings before the test results are in and then delay the hearing before the Commissioner or have it held open for the reception of the test.

Mr. Robert Brennan, BP's resource manager for the Tuscaloosa team drilling in the Judge Digby Field for the past ten years, stated that he participated in decisions to drill, produce, and unitize wells on behalf of BP. He testified that prior to testing and actually bringing gas to the surface, BP could not know that Parlange # 12 Well was going to prove productive with hydrocarbons, although he stated that BP was "hopeful" from its initial calculations. He also admitted that BP invested money to complete the well before the test was completed. Mr. Brennan testified at length regarding the decisions made by BP in the production and unitization stages and offered explanations as to why BP produced the well at high rates in the early stages of production instead of producing it at a lower rate before the Commissioner's unit could be created.

Robert Martin, a landman, testified as an expert in the customs and usages of the oil and gas industry and the appropriate conduct of a prudent operator given the circumstances in this case. He had been involved in the unitization of eighty to one hundred units. He testified that the primary function of an operator drilling a well in an area that has several leases is to protect all of the leases to make sure

they receive their equitable share of production. Based on the time line that had been introduced into evidence in this case, Mr. Martin testified that BP, as a prudent operator, should have begun unitization proceedings at the time the well was logged on April 7, 2001. He further stated that under no circumstances would he have recommended the creation of a 30 acre declared unit to commence producing a well prior to containing the entire 1,280 acre tract.

Following the conclusion of the evidence, the trial court entered judgment in favor of plaintiffs for the stipulated amount of the royalty payments they should have received for production during the disputed time period in the amount of $247,783.00. The court found as a fact that BP's action in forming the initial 30 acre declared unit was solely for the purpose of protecting BP from the possibility of paying double royalties. Such actions, the court concluded, were in direct contravention of BP's obligation to act as a reasonable prudent operator "for the **mutual benefit** *of himself* **and** his lessor." (Emphasis supplied). The court further found that the evidence and testimony established conclusively that the ultimate 1,280 acre unit was always intended to be the unit for the well at issue.

In this appeal, BP contends that it did not breach the statutory or jurisprudential duty to act as a reasonably prudent administrator to protect an adjacent landowner from damage. It insists that under Louisiana law, a reasonable period between the knowledge of drainage and commencement of unitization proceedings to protect against drainage is both acceptable and noncompensable. BP urges that it acted reasonably and prudently when it placed the well on production after the test period on August 9, 2001, and proceeded diligently toward unitization of the lands around the well, filing its application to do so only eight days after the commencement of the complained of drainage. It also reurges its argument based on Article 11 of the lease, insisting that by contract, the parties stipulated that if BP commenced to resolve or cure any breach within sixty days of

knowledge thereof, such would constitute "reasonably prudent conduct" and bar any action based upon such breaches by the lessors. It claims that it did commence to cure the breach within eight days after the uncompensated drainage occurred.

The trial court's ultimate conclusion that BP did not act in a reasonable and prudent manner is a factual determination governed by the manifest error standard of review. This court may not reverse a factual finding of the trial court unless we find that it is not reasonable based on the record and the record demonstrates that the finding is clearly wrong. **Stobart v. State**, 617 So.2d 880, 882 (La. 1993). We find that the record clearly supports the trial court's factual finding and the finding is not clearly wrong. Moreover, we find no merit to BP's claim that its conduct in forming the declared unit for its financial benefit is the type of conduct that could be cured under Article 11 of the paragraph. BP would have this court read the provision to authorize it to act unreasonably and imprudently in draining the land subject to plaintiffs' leases of minerals for a period of sixty days. We decline to so read the contract.

CONCLUSION

For the foregoing reasons, the judgment appealed from is affirmed. All costs of this appeal are assessed to appellant, BP America Production Company.

AFFIRMED.