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SUPREME COURT

COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY  
CASE NO.: 2008-SC-000280

CODY C. HEER

APPELLANT

v.

APPEAL FROM METCALFE CIRCUIT COURT  
CIVIL ACTION NO.: 05-CI-00163

and

COMMONWEALTH OF KENTUCKY  
COURT OF APPEALS  
CASE NO.: 2006-CA-001735-MR

CORA FRASER, VIRGINIA JANES,  
SUE HOOD AND JANETTE PHILLIPS

APPELLEES

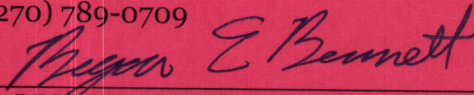
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BRIEF FOR APPELLANT  
CODY C. HEER

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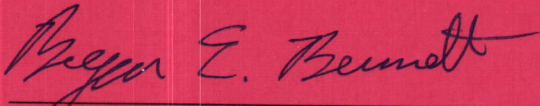
CERTIFICATE OF SERVICE

In accordance with CR 76.12(5) and (6) as well as CR 76.40(2), the undersigned certifies that the original and ten copies of this brief were tendered for filing by transmitting same by registered mail to the Hon. Susan Stokley Clary, Clerk of the Supreme Court, 209 Capital Building, 700 Capital Avenue, Frankfort, Kentucky 40601-3488.

The undersigned further certifies that true and correct copies of the foregoing were served by mailing same first class postage prepaid to the following: Hon. William Colvin, 103 West Court Street, P.O. Box 147, Greensburg, Kentucky, 42743-0147; Judge Phillip Patton, 300 Courthouse Square, Glasgow, Kentucky, 42141; Mary M. Shive, Metcalfe Circuit Clerk, P.O. Box 485, Edmonton, Kentucky, 42129-0485; and Hon. Sam Givens, Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky, 40601.

The undersigned further certifies that the record on appeal was not checked out from the Metcalfe Circuit Court Clerk.

All on this 11<sup>th</sup> day of May, 2009.

  
Bryan E. Bennett

## **INTRODUCTION**

This case presents the issue as to whether or not Cody C. Heer commenced an oil well on the Appellees' property by digging out, reworking and producing oil from a well that had been abandoned for approximately ten years.

The questions of law in this case are whether the published opinion rendered by the Court of Appeals changed this Commonwealth's long-standing public policy favoring the facilitation and development of work in oil, gas and other minerals by narrowly defining the "commencement of operations" clauses in oil and gas leases and not following the broader definition of "commencement of operations" that is found throughout the United States.

## **STATEMENT CONCERNING ORAL ARGUMENT**

Cody C. Heer does not believe that an oral argument would be helpful in this case.

## STATEMENT OF POINTS AND AUTHORITY

INTRODUCTION .....	i
STATEMENT CONCERNING ORAL ARGUMENT .....	i
STATEMENT OF POINTS AND AUTHORITY .....	ii
STATEMENT OF THE CASE .....	1
ARGUMENT .....	6

**1. The evidence supported the jury's unanimous verdict that Mr. Heer's digging out and reworking an oil well abandoned for approximately ten years constituted commencing a well as understood by the parties in their lease agreement. .... 6**

*Smith v. Decker*, Ky., 374 S.W.2d 487 (1964) ..... 6

*Little v. Paige*, Ky., 810 S.W.2d 339 (1991) ..... 6

*Durbin v. Osborne*, Ky., 166 S.W.2d 841 (1942) ..... 6, 7, 8, 9, 11

*Litton v. Mountaineer Land Company*, Ky., 796 S.W.2d 860 (1990). .... 7

*Kuntz, Law of Oil and Gas*, at Section 32.3, Matthew Bender & Company, Inc. (Copyright 2005). .... 8, 9, 11

*Kothmann v. Boley*, Tex., 308 S.W.2d 1 (1957). .... 8, 9

*Snakard v. Moore Oil, Inc.*, (WD Okla. 1957), 150 F.Supp. 250, 8 O & Gr. 285; Remanded on joint motion (10<sup>th</sup> Cir. 1957), 249 F.2d 318. .... 8

*Kuntz, Law of Oil and Gas Treatise* ..... 9, 10

*West v. Continental Oil Company*, (5<sup>th</sup> Cir. 1952), 194 F.2d 869, 1 O&Gr. 581. . 10

*Kaszar v. Meridian Oil & Gas Enterprises, Inc.*, 499 N.E.2d 3 (Oh. Ct. App. 1985)10, 11 ..... 10, 11

*Williams & Meyers, Oil and Gas Law*, Matthew Bender & Company, Inc., Section 618 (2008) ..... 10

Matthew Bender & Company, Inc.'s *Law of Oil and Gas Lease's*, Second Edition, Section 7.04 (2004) ..... 10

<i>H.B. Cameron, et al. v. Lebow, Ky., 338 S.W.2d 399 (1960)</i> .....	10
<i>Corpus Juris Secundum, A Contemporary Statement of American Law</i> 58 CJS, Section 260, page 253 (1998) .....	11
<i>Humphress v. Skelly Oil Company, 83 F.2d 989 (C.C.A. 5<sup>th</sup> Cir. 1936)</i> .....	11
<i>Lewis v. Bledsoe Surface Mining Company, Ky., 798 S.W.2d 459, 461-462 (1990)</i>	15
<i>Crest Coal Company, Inc. v. Bailey, Ky., 602 S.W.2d 425 (1980)</i> .....	15
<i>Chappell v. GTE Prods. Corp., 803 F.2d 261 (6<sup>th</sup> Cir. 1986)</i> .....	15
<b>CONCLUSION</b> .....	16
<b>APPENDIX</b> .....	17

## STATEMENT OF THE CASE

On January 21, 2005 Cody Heer met with Cora Fraser, Virginia Janes, Sue Hood and Janette Phillips at a Captain D's Restaurant in Glasgow, Kentucky to discuss entering into an oil lease agreement. (May 24, 2006 Trial Videotape Record at 12:36:07) (Hereinafter referred to as VTR).<sup>1</sup> At this meeting, Cody Heer and the Fraser sisters entered into an Oil and Gas Lease. The lease was executed on January 21, 2005 and contained two important provisions. Paragraph number three of the lease, entitled Commencement of Operations, stated:

**3. COMMENCEMENT OF OPERATIONS.** If no well be commenced on said premises on or before the 1 day of July, 2005 this lease shall terminate as to both parties.

(See January 21, 2005 Oil and Gas Lease entered as Plaintiff's Exhibit A at the trial of this action at VTR 10:08:03 and attached hereto as Appendix No. 2). The Oil and Gas Lease also contained an Addendum which provided:

Instead of up-front money for lease, Cody Heer will attempt to get a permanent right-of-way, twenty foot wide.

(See Appendix No. 2). This was the first oil and gas lease Mr. Heer had attempted to handle by himself. (VTR 10:26:25).

Mr. Heer made several attempts to secure a right-of-way for the Fraser sisters. Mr. Heer purchased a twenty percent (20%) interest in an oil lease on an adjoining property. (VTR 12:39:50). That oil lease provided that shipments of oil and equipment could go over and through property that adjoined the land of the Fraser sisters. (VTR 12:39:50).

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<sup>1</sup> The Appellees, Cora Fraser, Virginia Janes, Sue Hood and Janette Phillips will be referred to throughout this Brief as the "Fraser sisters".

However, this property was owned by Louie Froggett, who testified that he ran Mr. Heer off of his property and signed trespassing warrants on Mr. Heer for crossing his property with equipment to get to the land of the Fraser sisters. (VTR 11:04:29). Mr. Froggett also testified that Mr. Heer did attempt to purchase a lease from him to the Fraser sisters' property and that he turned down Mr. Heer's offer to purchase. (VTR 11:06:37).

Mr. Heer testified that he attempted to purchase a right-of-way to the Fraser sisters' property from David Froggett but David Froggett was not interested in selling a right-of-way to the Fraser sisters' property. (VTR 12:43:37). Mr. Heer also testified that he attempted to purchase a right-of-way easement from a Mr. Chadwick whose property adjoins the Fraser sisters. Likewise, Mr. Chadwick refused to sell Mr. Heer a right-of-way for the Fraser sisters. (VTR 12:42:59). According to testimony given by Robert Chadwick, the Fraser sisters' property can be reached by traveling approximately 1,000 feet up a creekbed that flows through Mr. Chadwick's property. (VTR 11:19:13).

Mr. Heer testified that he learned from discussions with several members in the local community that traveling through the creekbed was the old route that was used to get to the Fraser sisters' property. (VTR 12:42:05). Roger Pickett, who has been in the business of servicing oil wells in the Metcalfe County area for approximately 30 years, also testified in this trial. (VTR 10:50:05). Mr. Pickett testified that when he used to service the original oil well on the Fraser sisters' property 10 to 15 years ago, that traveling up the creekbed through Mr. Chadwick's property was how he and other people went in and out from the Fraser property. (VTR 10:57:24). After learning of this information Mr. Heer attempted to establish a prescriptive easement across Mr. Chadwick. (VTR 12:42:05). However, when Mr. Heer attempted to use the prescriptive easement he had trespassing complaints filed

against him by Mr. Chadwick. (VTR 10:14:02). Mr. Heer then attempted to enforce the prescriptive easement by filing a civil lawsuit in the Metcalfe Circuit Court making a claim for prescriptive easement across Mr. Chadwicks' property to the property of the Fraser sisters. (VTR 12:54:41). Fraser sister, Sue Hood, testified in this action that her biggest complaint with Mr. Heer was that he was unable to secure a right-of-way for the Fraser sisters' property. (VTR 10:46:18).

Following the signing of the January 21, 2005 lease Mr. Heer also immediately began preparations to get an oil well up and running on the property of the Fraser sisters. Mr. Heer hired a bulldozer to help open up an old access road. (VTR 12:45:37). Mr. Heer also paid to put several loads of gravel down on the access road. (VTR 12:46:42). Mr. Heer then hired Roger Pickett to come in and dig out an abandoned oil well that existed on the Fraser sisters' property. (VTR 12:46:46). Mr. Heer testified that he paid Mr. Pickett approximately \$3,600.00 to dig out and rework the abandoned well on the Fraser sisters' property. (VTR 10:21:39). Mr. Heer testified that he then spent \$7,000.00 on new steel rods and tubes for Mr. Pickett to place in the abandoned well. (VTR 10:22:01). Mr. Heer testified that the total amount he spent for services and equipment to get the abandoned well on the Fraser sisters' property producing oil was approximately \$25,000.00. (VTR 12:47:21).

Only two and a half weeks after the lease was signed, Mr. Pickett appeared on the property of the Fraser sisters to dig out and rework the abandoned well. Mr. Pickett worked on the well on February 7, 2005, February 8, 2005 and February 9, 2005. (VTR 12:50:07). Mr. Pickett testified that he had ran a business servicing oil wells for approximately 30 years. (VTR 10:50:05). Mr. Pickett testified that when he got to the well on the Fraser

sisters' property he could tell it had been abandoned and not been operational for at least 10 years. (VTR 10:52:45). Mr. Pickett's observation as to how long the well on the Fraser sisters' property had been abandoned was also supported by testimony from the Fraser sisters. Sue Hood testified that the well on the Fraser sisters' property had likewise been abandoned for approximately 10 years. (VTR 10:44:03). Ms. Hood testified that during the previous ten years no one had operated or leased the oil well located on their property. (VTR 10:44:22).

Mr. Pickett testified that he found an abandoned well of the Fraser sisters' property that could not pump oil. (VTR 10:52:52). Mr. Pickett testified that he had to dig out approximately 10 to 15 feet of sand, dirt, mud and rock that was located at the bottom of the abandoned well on the Fraser sisters' property before the well could be pumped. (VTR 10:55:35). Mr. Pickett testified that he dug this debris out of the well using a sandbucket or bailer to pull it out. (VTR 10:55:59 and VTR 10:56:39). Mr. Pickett testified that he took all of the old rods and tubing out of the abandoned well and put all new tubing in the well on the Fraser property so that it could pump oil. (VTR 10:54:59). Mr. Pickett testified that he actually used to service the well on the Fraser property but had not serviced that well for approximately 10 years. (VTR 10:57:18).

Mr. Heer testified that after Mr. Pickett's work on the abandoned well, he was able to get the well on the Fraser sisters' property to produce oil. Only two and a half months after the lease was signed Mr. Heer was able to sale a load of oil. Mr. Heer testified that he sold a load of oil from the Fraser sisters' property to Barrett Oil on April 5, 2005, well before the July 1, 2005 deadline for him to commence operations on the property. (VTR 12:51:18). This April 5, 2005 load of oil contained approximately 80.89 barrels of oil. (VTR 1:07:05).

The Fraser sisters all received a royalty check for the oil sold in April 2005. (VTR 1:07:05). Ms. Hood also testified that she received a royalty check from the sale of oil before July 1, 2005. (VTR 10:44:53). Mr. Heer testified that he continued to produce oil after the July 1, 2005 deadline and sold two more loads of oil after July 1, 2005. The last load of oil was sold on May 6, 2006. (VTR 1:07:59).

On September 28, 2005 the Fraser sisters filed a Complaint in Metcalfe Circuit Court initiating this action, claiming that Mr. Heer had breached the property's lease agreement because he had not attempted to get twenty foot wide right-of-way and because Mr. Heer had not drilled a well on their property before July 1, 2005. On May 24, 2006 a trial was conducted before a jury in Metcalfe Circuit Court.

Following deliberations the jury **unanimously** found that Mr. Heer commenced a well on the Plaintiffs' property on or before July 1, 2005. (See May 30, 2006 Judgment attached hereto as Appendix No. 3). The Fraser sisters then filed a Motion for a Judgment Notwithstanding the Verdict. On July 20, 2006 the Metcalfe Circuit Court entered an order granting the Fraser sisters' Motion for a Judgment Notwithstanding the Verdict which found that the evidence presented indicated that Mr. Heer had not commenced a well on or before July 1, 2005 and that Mr. Heer's Oil and Gas Lease with the Fraser sisters had expired on July 1, 2005. (See July 20, 2006 Order granting Motion for a Judgment Notwithstanding the Verdict attached hereto as Appendix No. 1). On March 14, 2008 the Court of Appeals issued a published opinion which narrowly defined commencement of operations. (See March 14, 2008 Opinion of the Commonwealth of Kentucky, Court of Appeals attached hereto as Appendix No. 4). On March 11, 2009 this Court granted discretionary review.

## ARGUMENT

1. **The evidence supported the jury's unanimous verdict that Mr. Heer's digging out and reworking an oil well abandoned for approximately ten years constituted commencing a well as understood by the parties in their lease agreement.**

The Court of Appeals in *Smith v. Decker*, Ky., 374 S.W.2d 487 (1964), held that it is a matter of **public policy** for the courts to look to the facilitation of development of work in oil, gas and other minerals, and **a lessee, who in good faith, is prosecuting work for development with reasonable diligence will be protected against cancellation of his lease.** *Id.* The court also stated in the same opinion that **equity does not favor forfeitures** and the intent must be clear and inequitable as well as the conditions therefore. *Id.* The Kentucky Supreme Court in the case of *Little v. Paige*, Ky., 810 S.W.2d 339 (1991), reaffirmed that the Kentucky's public policy, as set forth in *Smith v. Decker*, would look to the facilitation and development of work in oil, to a lessee who in good faith is prosecuting work for development with reasonable diligence and will protect against the cancellation of his lease. *Id.* at 340.

In defining commencement of operations both the trial court and the Court of Appeals relied heavily upon the case of *Durbin v. Osborne*, Ky., 166 S.W.2d 841 (1942). The *Durbin* case does contain several important points of law regarding the "commencement of a well". **However, *Durbin* is not conclusive on the issue as to whether or not the digging out and reworking of an abandoned well constitutes "commencing a well".** In *Durbin* a lessee agreed to drill a well on certain property within 40 days or to pay the lessor's delay rentals until a well was completed. *Id.* at 842. The lessees drilled, to a greater depth, an old well, but abandoned it because the oil discovered was not in

marketable quality. *Id.* The lessees then drilled a new well to the oil bearing sand, but plugged and abandoned it as dry hole. *Id.* On appeal of the lessees, the court found that the lessees began to drill within 40 days, they did not have to pay any rental, that the lessees showed good faith in the exploring and development of the lease and that the lessees met their obligation to begin to drill a well on the premises within 40 days. *Id.* at 844.

*Durbin* provided several important points of law which are useful in determining the definition of "commencing a well". *Durbin* held that what constitutes the beginning of a well is to be determined from the **facts and circumstances of each case**. *Id.* at 843. The *Durbin* case held that particular clauses of a lease are to be read **in light of the purpose of the parties**. *Id.* *Durbin* further held that the **element of good faith between the parties is an important consideration that must be considered in determining whether the commencement of a well had begun**. *Id.* *Durbin* finally held, that where it appears that the lessee in good faith, a substantially complied with the terms of an oil and gas lease, as the lease will be held valid. *Id.*

The law stated in *Durbin* has more recently been reaffirmed by the Kentucky Supreme Court in the case of *Litton v. Mountaineer Land Company, Ky.*, 796 S.W.2d 860 (1990). In *Litton*, a mining company leased land from the lessors. The lease contained a hand-written clause that provided that the lease could have been declared void if mining operations did not commence within three years. *Id.* at 861. Though the mining company did not actually begin removing coal from the lessor's property within three years, it was shown that the mining company had secured permits to mine, constructed haul roads, bridges and dams. *Id.* The mining company then ignored the lessors' notice that the lease was void because mining operations had not timely begun and began removing coal from

the land. *Id.* The lessors brought suit and were awarded damages for trespass by the trial court, but the Court of Appeals reversed the judgment. The Kentucky Supreme Court then upheld the appellate court's order. *Id.* at 862.

The Kentucky Supreme Court, in making its determination, held that the coal mining case was one of first impression in Kentucky. The Supreme Court then stated that Kentucky courts had established precedent in the cases of oil and gas leases and cited to *Durbin v. Osborne*. *Id.* at 861. The court stated that in Kentucky **actual drilling of an oil well is unnecessary** when acts such as moving machinery on the premises showed a bonafide intention to proceed with the completion of a well. *Id.*

A further analysis of what constitutes commencement of a well can be found in the oil and gas treatise known as *Kuntz, Law of Oil and Gas*, at Section 32.3, Matthew Bender & Company, Inc. (Copyright 2005). The *Kuntz, Law of Oil and Gas*, Section 32.3(b) provides that commencement of a well can be had by reworking an old abandoned well. *Kuntz* reads as follows:

In most of the cases, the physical activity on the land consisted of preparations for the drilling of a new well. There are, however, several cases where the physical activity of the lessee involved entering or preparing to enter a well which had previously been drilled. It has been held that the commencement of work in re-drilling an old well constitutes the commencement of a well within the meaning of the drilling clause.<sup>2</sup> It has also been held that the acts of searching for the buried surface casing of an abandoned well, aided by the use of a bulldozer before midnight of the day on which the well must be commenced constitutes the commencement of a well.<sup>3</sup>

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<sup>2</sup> *Durbin v. Osborne*, Ky., 166 S.W.2d 841 (1942) and *Kothmann v. Boley*, Tex., 308 S.W.2d 1 (1957).

<sup>3</sup> *Snakard v. Moore Oil, Inc.*, (WD Okla. 1957), 150 F.Supp. 250, 8 O & Gr. 285; Remanded on joint motion (10<sup>th</sup> Cir. 1957), 249 F.2d 318.

**The holding that the process of commencing operations to rework or deepen an abandoned well constitutes the commencement of a well is primarily justified by the reasoning that such activity serves the basic purpose of the lease.** In cases so holding, it also appears that the court felt that its construction was fortified by the acquiescence of the lessor,<sup>4</sup> or the court found additional comfort in taking the view that opening a collapsed or plugged well constitutes drilling.<sup>5</sup> Despite the supporting grounds for the ultimate conclusion, such cases do stand for the proposition that the primary objective of the parties is the production of oil or gas and that such primary objective should control over a narrow definition of the term “drill”.

An application of the proposition just described would lead to the conclusion that the terms of the drilling clause are satisfied **if the lessee cleans out an abandoned but unplugged well and perforates the casing in a productive zone, although drilling equipment is not used.**

*Kuntz, Law of Oil and Gas*, at Section 32.3, Matthew Bender & Company, Inc. (Copyright 2005). (Emphasis added).

The *Kuntz, Law of Oil and Gas Treatise* relied heavily upon the case of *Kothmann v. Boley* in reaching the above stated conclusions. In *Kothmann*, the Texas Supreme Court reviewed a case in which the lease provided that it should terminate unless a well was commenced within 60 days from the date of the lease. *Kothmann*, 308 S.W.2d at 1. Within that period the lessees commenced operations on a well that had previously been plugged and abandoned as dry hole. *Id.* The operations resulted in production of gas in paying quantities. *Id.* The plaintiff’s claim that this operation was not a “commencement of well” as contemplated by the lease and that the lessees did nothing more than rework an old well. *Id.* The court noted that the old abandoned well was drilled 400 feet deeper than the previous well and that these operations in reworking the old abandoned well constituted

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<sup>4</sup> *Durbin v. Osborne*, Ky., 166 S.W.2d 841 (1942).

<sup>5</sup> *Kothmann v. Boley*, Tex., 308 S.W.2d 1 (1957).

a commencement within the meaning of the lease.

The *Kuntz, Law of Oil and Gas Treatise* also relied upon the case of *West v. Continental Oil Company*, (5<sup>th</sup> Cir. 1952), 194 F.2d 869, 1 O&Gr. 581. **In this case it was held that production from a well previously drilled which had ceased to produce in paying quantities will satisfy the terms of a subsequent lease, when, because of market conditions, oil was produced at a profit. *Id.***

In the case of *Kaszar v. Meridian Oil and Gas Enterprises, Inc.*, 499 N.E.2d 3 (Ohio Ct. App. 1985), the Ohio Court of Appeals held that commencement of operations under an oil and gas lease may consist of any trivial or comparatively insignificant matter that showed any act which provided a tendency to produce oil. *Id.* The concept that courts should use a very liberal definition of commencement in determining whether or not a commencement of operations clause has been met appears in the majority of state's in this country, even where only the most modest preparations for drilling have been made. See *Williams & Meyers, Oil and Gas Law*, Matthew Bender & Company, Inc., Section 618 (2008) and see also Matthew Bender & Company, Inc.'s *Law of Oil and Gas Lease's*, Second Edition, Section 7.04 (2004).

Kentucky common law also supports the proposition that an appellate court should review the term commencement of a well liberally. Kentucky cases all point to the proposition that production is the main objective for any oil and gas operation. The Court of Appeals in the case of *H.B. Cameron, et al. v. Lebow*, Ky., 338 S.W.2d 399 (1960) stated that it is well recognized that the initial production of any part of the land leased constitutes compliance with the requirement that wells be drilled within a specified time and that such performance extends to all parts of the leasehold. *Id.*

The good faith of the lessee is also a factor to be considered in determining whether or not a commencement of a well has begun. *Durbin*, 166 S.W.2d at 843. In fact the Kentucky Court of Appeals in *Durbin*, held that where good faith of the lessee appears, a substantial compliance with the terms of the oil and gas lease as to the time to commence the well is sufficient. *Id.* The factor of good faith is also discussed in the *Kuntz, Law of Oil and Gas*, Section 32.3. Essentially, the good faith factor is designed to prevent a flurry of activity on the land just before the end of the primary term. *Id.* The *Corpus Juris Secundum, A Contemporary Statement of American Law*, also discussed good faith as an element to consider in determining what constitutes commencement. The CJS specifically reads:

The element of good faith is an important consideration in determining when drilling or other development will be deemed to have begun.<sup>6</sup>

Under a lease requiring the commencement of operations by a specific date, it has been held that commencement may be consist of trivial and comparatively insignificant matters,<sup>7</sup> and that any act, the performance of which has a tendency to produce the desires result, is a commencement.<sup>8</sup> It has been held by some authorities that drilling operations or a well may be deemed to have been commenced notwithstanding the act of drilling,<sup>9</sup>...

58 CJS, Section 260, page 253 (1998).

*Kuntz Law of Oil and Gas*, Section 32.3, also discusses the element of good faith as being a factor to be considered and determined whether or not commencement of the well

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<sup>6</sup> *Durbin v. Osborne*, Ky., 166 S.W.2d 841 (1942).

<sup>7</sup> *Kaszar v. Meridian Oil and Gas Enterprises, Inc.*, 499 N.E.2d 3 (Ohio Ct. App. 1985).

<sup>8</sup> *Kaszar v. Meridian Oil and Gas Enterprises, Inc.*, 499 N.E.2d 3 (Ohio Ct. App. 1985).

<sup>9</sup> *Humphress v. Skelly Oil Company*, 83 F.2d 989 (C.C.A. 5<sup>th</sup> Cir. 1936).

has begun.

In the case at hand it was the intent of the parties to have a well that could produce oil on the Fraser sisters' property. Mr. Heer testified that he fully commenced operations of a well by digging out the abandoned well on the Fraser sisters' property, replacing the tubing and equipment and getting that well to produce oil before July 1, 2005. (VTR 12:52:31). In fact, Mr. Heer's significant acts in getting the abandoned well on the Fraser sisters' property to produce oil demonstrated Mr. Heer's good faith in performing under the lease.

Following the signing of the January 21, 2005 lease Mr. Heer also immediately began preparations to get an oil well up and running on the property of the Fraser sisters. Mr. Heer immediately hired a bulldozer to help open up an old access road. (VTR 12:45:37). Mr. Heer also paid to put several loads of gravel down on the access road. (VTR 12:46:42). Mr. Heer then hired Roger Pickett to come in and dig out an abandoned oil well that existed on the Fraser sisters' property. (VTR 12:46:46). Mr. Heer testified that he paid Mr. Pickett approximately \$3,600.00 to dig out and rework the abandoned well on the Fraser sisters' property. (VTR 10:21:39). Mr. Heer testified that he then spent \$7,000.00 on new steel tubing and rods for Mr. Pickett to place in the abandoned well. (VTR 10:22:01). Mr. Heer testified that the total amount he spent for services and equipment to get the abandoned well on the Fraser sisters' property producing oil was approximately \$25,000.00. (VTR 12:47:21).

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approximately 30 years. (VTR 10:50:05). Mr. Pickett testified that when he got to the well on the Fraser sisters' property he could tell it had been abandoned and not been operational for at least 10 years. (VTR 10:52:45). Mr. Pickett's observation as to how long the well on the Fraser sisters' property had been abandoned was also supported by testimony from the Fraser sisters. Sue Hood testified that the well on the Fraser sisters' property had likewise been abandoned for approximately 10 years. (VTR 10:44:03). Ms. Hood testified that during the previous ten years no one had operated or leased the oil well located on their property. (VTR 10:44:22).

Mr. Pickett testified that he found an abandoned well of the Fraser sisters' property that could not pump oil. (VTR 10:52:52). Mr. Pickett testified that he had to dig out approximately 10 to 15 feet of sand, dirt, mud and rock that was located at the bottom of the abandoned well on the Fraser sisters' property before the well could be pumped. (VTR 10:55:35). Mr. Pickett testified that he dug this debris out of the well using a sandbucket or bailer to pull it out. (VTR 10:55:59 and VTR 10:56:39). Mr. Pickett testified that he took all of the old rods and tubing out of the abandoned well and put all new tubing in the well on the Fraser property so that it could pump oil. (VTR 10:54:59). Mr. Pickett testified that he actually used to service the well on the Fraser property but had not serviced that well for approximately 10 years. (VTR 10:57:18).

Mr. Heer testified that after Mr. Pickett's work on the abandoned well, he was able to get the well on the Fraser sisters' property to produce oil. Mr. Heer testified that he sold a load of oil from the Fraser sisters' property to Barrett Oil on April 5, 2005, well before the July 1, 2005 deadline for him to commence operations on the property. (VTR 12:51:18). This April 5, 2005 load of oil contained approximately 80.89 barrels of oil. (VTR 1:07:05).

The Fraser sisters all received a royalty check for the oil sold in April 2005. (VTR 1:07:05). Ms. Hood also testified that she received a royalty check from the sale of oil before July 1, 2005. (VTR 10:44:53). Mr. Heer testified that he continued to produce oil after the July 1, 2005 deadline and sold two more loads of oil after July 1, 2005. The last load of oil was sold on May 6, 2006. (VTR 1:07:59).

Mr. Heer's actions of deepening the abandoned well by having Mr. Pickett dig out 10 to 15 feet of debris and replacing all of the equipment in the well should constitute commencement of a well as shown by the above-cited law. When one considers the specific facts and circumstances of this case and when one reads the commencement of the well portion of Mr. Heer's lease in light of the true purpose of the lease, i.e. to get a functioning well on the Fraser sisters' property, it is clear that Mr. Heer complied with the section of the parties' oil and gas lease that required him to commence a well on or before July 1, 2005. **The above-cited law is clear that actual drilling of a well is unnecessary to comply with the "commencement of a well" clause of a lease if substantial steps are taken to produce oil.** Mr. Heer took the substantial steps necessary to produce oil and actually was producing and selling oil before the July 1, 2005 deadline for commencing a well. The evidence presented in this case supports the jury's verdict that Cody Heer commenced a well upon the property of the Fraser sisters before July 1, 2005.

A motion for a judgment notwithstanding the verdict is governed by CR 50.02. A motion for a judgment notwithstanding the verdict may only be granted upon the failure of the trial court to grant a motion for a directed verdict which was made at the close of all evidence. The considerations governing a proper decision on a motion for a judgment notwithstanding the verdict are exactly the same as those first presented on a motion for

directed verdict at the close of all evidence.

In an opinion by Justice Lambert, the Supreme Court of Kentucky has restated the directed verdict test and motion for a judgment notwithstanding a verdict test in Kentucky. *Lewis v. Bledsoe Surface Mining Company, Ky.*, 798 S.W.2d 459, 461-462 (1990). *Lewis* held that in reviewing a motion for a directed verdict or a motion for a judgment notwithstanding the verdict, all evidence which favors the party prevailing before the jury must be taken as true and that the reviewing court is not at liberty to determine the credibility or weight which should be given to the evidence, as these were functions reserved for the jury. *Id.* *Lewis* further held that the party prevailing before the jury is entitled to all reasonable inferences which may be drawn from the evidence and that the verdict of the jury may only be set aside if it is “palpably or flagrantly” against the evidence as to indicate that it was reached as a result of passion or prejudice. *Id.* Kentucky courts have held that a judgment notwithstanding the verdict should be granted only if one fair and reasonable conclusion can be drawn from the evidence and only if the case should not have been submitted to the jury. *Crest Coal Company, Inc. v. Bailey, Ky.*, 602 S.W.2d 425 (1980). Furthermore, a judgment notwithstanding the verdict is a question of law that is freely reviewable by an appellate court. *Chappell v. GTE Prods. Corp.*, 803 F.2d 261 (6<sup>th</sup> Cir. 1986).

The trial court’s order granting the Fraser sisters motion for judgment notwithstanding the verdict and the Court of Appeal’s opinion should be overturned and the jury’s verdict finding that Mr. Heer had commenced a well before July 1, 2005 should be reinstated.

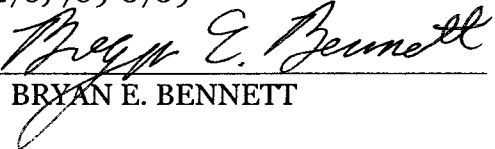
## CONCLUSION

The Court of Appeals' opinion changes the Commonwealth of Kentucky's long-standing policy in favor of facilitating the development of oil, gas and other minerals. The Court of Appeals' opinion narrowly defines the term "commencement of operation" or "commencement of a well," that puts Kentucky out of touch with the national trend holding that the commencing of operations to re-work an abandoned well constitutes commencement of a well. Wherefore, it is requested that the Kentucky Supreme Court issue an opinion overturning the Trial Court's order granting the Faser sisters judgment notwithstanding the verdict and the opinion of the Kentucky Court of Appeals which narrowly defined the term "commencement".

Respectfully submitted:

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