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

** ** ** ** ** **

REPLY BRIEF FOR APPELLANT CODY C. HEER

Respectfully submitted:

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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 21ST day of July, 2009.

Bryan E. Bennett
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

REPLY ARGUMENT

The argument advanced by the Appellees in their response brief urges this Court to adopt a rigid interpretation of the terms "commencement of a well," as found in oil and gas leases to require drilling when a lessee opts to put an abandoned well into production in order to commence a well. Appellant Cody Heer (Heer) submits that there is a distinction between "commencement of a well" and "drilling a well." The following discussion demonstrates that Heer did commence a well under the terms of the lease. This argument is buttressed by the longstanding public policy in Kentucky for courts to favor the development of work in oil, gas and other minerals.

1. The lease does not require "drilling" in order for there to be a "commencement of a well."

Paragraph number three of the lease at issue, entitled Commencement of Operations, states:

> **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.[1]

The landmark Kentucky case on commencement of a well is *Durbin v. Osborne*, Ky., 166 S.W.2d 841 (1942). *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. (Emphasis added). The *Durbin* case held that particular clauses of a lease are to be read **in light of the purpose of the parties.** *Id.* (Emphasis added). The Appellees contend that Heer did not commence a well under *Durbin* because he did not drill any deeper than the original well. The Appellees have failed, however, to see a crucial difference between *Durbin* and

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[1]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 to Heer's original brief as Appendix No. 2.

the case at hand. In *Durbin*, the lease required the lessees to "drill a well." *Id.* In the case at hand, Heer was only required to "commence a well."

Heer also finds support in a mining case styled *Litton v. Mountaineer Land Company*, Ky., 796 S.W.2d 860 (1990). In *Litton*, the Kentucky Supreme Court, relying on Summers, *The Law of Oil and Gas*, Vol. 2 § 349, made the following statement:

> The general rule seems to be that actual drilling is unnecessary, but that the location of wells, hauling lumber on the premises, erection of derricks, providing a water supply, moving machinery on the premises and similar acts preliminary to the beginning of the actual work of drilling, when performed with the bona fide intention to proceed thereafter with diligence toward the completion of the well, **constitute a commencement or beginning of a well** or drilling operations within the meaning of this clause of the lease.

Litton, 796 S.W.2d at 861. (Emphasis added).

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.[2] 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.[3]

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,[4] or the court found additional comfort in taking the view that opening a collapsed or plugged well constitutes drilling.[5] 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. The Appellees argue that *Kothmann* is distinguishable due to the fact that the abandoned wells reworked in *Kothmann* had never produced in paying quantities. However, this fact was not material to the Court's decision. Further, *Kothmann* sheds light on the weakness of the Appellees' argument that "commencement" of a well requires "drilling." In *Kothmann*, the court noted that the lease

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[2]*Durbin v. Osborne*, Ky., 166 S.W.2d 841 (1942) and *Kothmann v. Boley*, Tex., 308 S.W.2d 1 (1957).

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

[4]*Durbin v. Osborne*, Ky., 166 S.W.2d 841 (1942).

[5]*Kothmann v. Boley*, Tex., 308 S.W.2d 1 (1957).

at issue in that case required a well to be "commenced and drilled." *Kothmann*, 308 S.W.2d at 9. The lease at issue in this case only requires "commencement."

Finally, and most important, the *Kothmann* court noted that the principal objective of the lease was "the discovery and production of oil, gas or other minerals." *Id.* at 8. The court noted that the deadline for "commencement and drilling" was to compel the lessee to start work toward achieving these stated objectives. *Id.*

A consistent theme in the above-cited authority is the courts' reliance on the basic purpose of the lease, i.e., the discovery and production of oil or gas, in determining whether a lessee has commenced a well. Heer testified at trial that he spent a total of $25,000.00 on services and equipment to get the abandoned well capable of production. (VTR 12:47:21). The reason he did this, of course, was to discover and produce oil and/or gas, which was the intention of the parties in entering the lease agreement. The record shows that Heer sold 80.89 barrels of oil on April 5, 2005. (VTR 12:51:18). Heer was able to do this two months before his deadline to "commence" a well. Based on the reasoning of the *Kothmann* court, **Heer met the objective of the lease by discovering and producing oil**. Therefore, application of the technical definition of "commencement of a well" being proffered by the Appellees would lead to an inequitable result.

2. Kentucky has a longstanding policy of favoring the development of work in oil, gas and other minerals.

The Appellees' argument runs afoul of a longstanding public policy in Kentucky. In *Smith v. Decker*, Ky., 374 S.W.2d 487 (1964), the Court 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.* (Emphasis added). 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.* (Emphasis added).

The Kentucky Supreme Court in the case of *Little v. Paige*, Ky., 810 S.W.2d 339 (1991), reaffirmed that 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.

It cannot be argued that Heer acted in bad faith when he spent $25,000.00 to bring an abandoned well into production. Through his diligence, Heer was able to not only commence a well prior to the July 1, 2005 deadline, but was able to produce 89.80 barrels of oil by April 5, 2005. As noted above, this Court has previously held that a "lessee, who in good faith, is prosecuting work for development with reasonable diligence will be protected against cancellation of his lease."[6] Heer asks this Court for application of that precedent.

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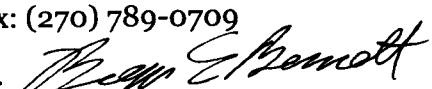
By: 
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[6]*Smith v. Decker*, Ky., 374 S.W.2d 487 (1964).