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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 JEANETTE PHILLIPS

APPELLEES

* * * * *

**BRIEF FOR APPELLEES,
CORA FRASER, VIRGINIA JANES, SUE HOOD
AND JEANETTE PHILLIPS**

Respectfully submitted:

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CERTIFICATE OF SERVICE

In accordance with CR76.12(5) and (6) as well as CR76.40(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. Sam Givens, Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Judge Phillip Patton, 300 Courthouse Square, Glasgow, Kentucky 42141; Tommy A. Garrett, Metcalfe Circuit Clerk, P.O. Box 27, Edmonton, Kentucky 42129-0485; and Hon. Bryan E. Bennett, 105 East Main Street, Campbellsville, Kentucky 42718.

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

On this July 2nd, 2009.

Bill Colvin
William Colvin

INTRODUCTION

The Court of Appeals and the Trial Court have correctly applied Kentucky law that Appellant Heer's routine maintenance on an existing oil well which was already capable of producing oil in commercial quantities does not satisfy the "commencing a well" clause in the Oil and Gas Lease from Appellees. Both Courts have correctly defined "commencing a well" as a good faith effort by a Lessee towards drilling a new well, or drilling an existing well deeper, or drilling the hole larger to obtain commercial production from a well which has not previously produced oil in commercial quantities.

STATEMENT CONCERNING ORAL ARGUMENT

The Appellees do not believe an oral argument would be helpful to the Court.

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COUNTERSTATEMENT OF THE CASE

Appellant Cody Heer has appealed from the Court of Appeals decision (Appendix 1) which affirmed the Trial Court's Judgment N.O.V. (Appendix 2) holding that Appellant did not satisfy the "Commencement of a well" clause during the primary term of the lease.

The Appellees are four sisters, Cora Fraser, Virginia Janes, Sue Hood and Jeanette Phillips, hereafter referred to as the Fraser Sisters. Each sister owns a one-fourth interest in 180+/- acres in Metcalfe County which they acquired from their mother in 1988. The property was accessed by a county road until 1988 when it was closed by Metcalfe County Fiscal Court. Subsequent to this closing, access to their property became "permissive." (T.V., 05/24/06, 10:38:10).*

The Fraser property was once leased to East Fork Crude which produced oil in commercial quantities from a well over a period of 10 to 15 years. Roger Pickett, d/b/a Roger Pickett and Sons, pumped and maintained the well for East Fork. East Fork's access to the well was the Fraser Sisters' permissive use through property owned by Robert Chadwick. Mr. Chadwick withdrew permission for the Sisters and East Fork to travel through his property (T.V. 05/24/06, 10:57:05). With no access, East Fork abandoned the well.

On January 21, 2005, the Fraser Sisters leased the property to Appellant Heer for the primary term of six (6) months. (Appendix 3, p.1 and p.4). The lease contained two paragraphs which are relevant to the issues on

Appeal:

“If no well be commenced on said premises on or before 1 (sic) day of July 2005, this lease shall terminate as to both parties.”

“Instead of upfront money for the lease, Cody Heer will attempt to get a permanent right of way, 20 feet wide.”

A short time after the lease was signed, and without a permissive easement or permanent right-of-way, Appellant Heer bulldozed a road through the property of adjoining landowners Michael Johns and David Froggett for Roger Pickett, d/b/a Roger Pickett and Sons to move a service unit onto the Fraser property to perform maintenance on the well which East Fork had produced during the 10 to 15 years before it abandoned the lease. (T.V. 05/24/06, 12:45:30) Johns and Froggett ordered Appellant to stop traveling through their property. Next, Appellant, without permission, bulldozed a road through Robert Chadwick's property. On April 5, 2005 Chadwick filed criminal charges against Appellant Heer alleging criminal mischief and criminal trespass. The District Court placed Appellant under \$5,000 bond and Ordered him to stay off of Chadwick's property. (T.R.A. p.84 and Appendix 4, p.1)**

On October 6, 2005, Appellees filed suit to have their lease to Appellant voided alleging (1) the Appellant had not obtained a permanent right-of-way for the Appellees and neither they nor he had access to the well and (2) Appellant had not “commenced a well” (Appendix 5, p.2, Complaint).

At trial, Appellant Heer contended that during the primary term Roger Pickett's activities on the well which East Fork had been producing satisfied

the "commenced a well" clause in the lease. Mr. Pickett was called by the Plaintiffs on direct to explain those activities (T.V. 05/24/06, 10:50:45; 10:52:20; 10:58:12):

COLVIN: Q. You were on the property between January 21st and July 1, 2005 at Mr. Heer's request?

PICKETT: A. Yes.

Q. When you were on the property, did you drill a well?

A. No, I didn't drill no well. I cleaned one out and put it on a pump.

Q. Did you deepen an existing well by boring and augering or anything to deepen that well?

A. No. (T.V. 05/24/06, 10:50:30)

* * * * *

Q. Was the rig you had in there doing the service work, and that was putting in the rods and tubing, was it capable of drilling?

A. No. (T.V. 05/24/06, 10:52:20)

* * * * *

Q. Cleaning out a well like this, your activity up there, and replacing rods and tubing, is that routinely referred to as "service work?"

A. Right.

Q. Maintenance?

A. Right. Just regular maintenance.

Q. If a well has been in existence, lets say for several years, and is pumped everyday, over time will sediment and a little bit of "fall in" accumulate in the bottom of that hole?

A. Right. Sure will.

Q. So if a well is pumped everyday, from time to time periodically, you have to go in there with a bailer like you did and

A. And clean them out.

Q. ... and clean them out?

A. Right.

Q. As the term as used in the oil business, that would not be considered deepening or drilling a well, would it?

A. No. It would just be "cleaning out" more or less.

Q. Is that similarly true with rods and tubing that over time the chemicals in there will destroy the metal in the rods and tubing, and they won't work, and you have to replace them?

A. Right.

Q. Is it just about like servicing a car?

A. Pretty well, yes. (T.V. 05/24/06, 10:58:12)

Over the objection of counsel for Appellees, the Trial Court gave an instruction to the jury that the term "reworking" the oil well which East Fork had been producing would satisfy the "commence a well" clause of the lease. Appellees objected to this instruction because the term "reworking" was not used in the lease and, in any event, routine maintenance such as that performed by Mr. Pickett, does not constitute "commencing a well." Appellees also objected to the Court instructing the jury that Appellant's unsuccessful "attempts" to obtain a right-of-way satisfied the consideration clause in the lease because Appellees could not have anticipated Appellant Heer would have operated the lease without a right-of way by trespassing to get there. Appellees concede that Appellant did not guarantee them a right-of-way. The

word "attempt" was meant to clarify that in the event Appellant Heer was unsuccessful in getting a right-of-way, he would not owe the Appellees additional consideration. It was not contemplated by the Appellees that Appellant would have a valid lease if he trespassed on adjoining landowners to access their property.

Although Appellant acknowledged he had agreed to file a legal action to establish a permanent right-of-way for Appellees (T.V. 05/24/06, 01:04:20), he did not initiate legal action until January 2006, which was six months after the primary term of the lease had expired, two months after the Appellees filed the underlying suit, and one month after this case was initially set for Trial (T.R.A. p.38). When Appellant filed the suit against Robert Chadwick, he filed "pro se," contending he was unable to find an attorney to represent him. (T.V. 05/24/06, 12:54:20).

The Jury returned a favorable Verdict for the Appellant. Judgment was entered on May 30, 2006 (Appendix 6). The Fraser Sisters then filed a Motion for Judgment Notwithstanding the Verdict. The following colloquy is from the Hearing on Appellees Motion for JNOV, Trial Judge Phillip Patton presiding with William Colvin appearing for Appellees and Hon. Barry Gilley appearing for Appellant (V.R., 07/03/06, 09:24:13 to 09:30:00)***:

Judge Patton: I have reviewed this. I have not read what I got it in today's mail word for word, but I will. Alright, let me hear your Motion.

Colvin: Your Honor, it's the Plaintiffs' contention this case really is one that should be ruled on by the Court. After the conclusion of all the evidence, I do not believe there are

any factual issues which are in dispute. It's just a matter of applying the law to those facts.

Of course, it is our contention that we should have the Directed Verdict, but if we were not (entitled to the directed verdict), then we would stipulate that the Defendant should have had a directed verdict because we do, I think, agree on the history of Mr. Heer's activities, Roger Pickett's activities out there (on the lease).

Judge Patton: That was the guy that came in cleaned out the well, or whatever he did?

Colvin: Yes. If there are any facts that Mr. Gilley thinks are in dispute, I would like to address those perhaps before I state the legal grounds.

Judge Patton: Mr. Gilley, are there any facts that you think of that are in dispute? My memory of it is that it all boils down to what "commencing a well" means.

Gilley: The whole case is hinged on it. We have discussed that since way before this all started at two Summary Judgment Motions and a Motion in Limine. That was the issue of the case and that and what an "attempt" on was..

Judge Patton: Getting the right-of-way?

Gilley: Getting the right-of-way. I think the jury has determined that. We are at a position, Judge, a jury has determined what the facts are. His Motion is either you are right or you are wrong on "commencing a well" and I don't think there's anything else to argue about, I think that's all there is.

Judge Patton: Has anyone found any more Kentucky law than what we kind of discussed and knocked around on the day of Trial over there? I think maybe in your Motion that I read a couple weeks ago you had cited some cases, but anything that you can think of that needs to be added?

Colvin: No, I can't think of anything that needs to be added. Our position simply is that, until the day of the Trial, the Defendant had argued that he had deepened the well (drilling to obtain production). The morning of the Trial, he changed that theory that "cleaning out a well" was

synonymous with "deepening." I think the Instructions your Honor offered the morning of the Trial, before you changed it, (Instructions) were correct.

Judge Patton: It (the Instruction) did required that it be deepened.

Colvin: Yes.

Judge Patton: And we talked about it a little bit and then I, over lunch I suppose, based on some treatise that Mr. Gilley had . . .

Gilley: And then I loaned that to Mr. Colvin that day.

Judge Patton: I did recall the treatise was 20 or more years old . . .

Gilley: Yes sir.

Judge Patton: And it had been updated . . .

Gilley: Updated and I have the updated, let me think of the name of the book, it's not Kuntz's anymore, it is, Morrison, I believe

(Mr. Gilley's comments not relevant to the issue are not transcribed in this Brief)

Colvin: Well, the problem of course, was that when the Defendant cited Kuntz and the Texas case, he (Mr. Gilley) pointed to one word in there that said "re-working" a well meant commencing a well, but we didn't have the Texas case to read.

Judge Patton: No we didn't.

Colvin: We did not have that. And the case is Kothman V. Boling, and when we read that case there were actually two wells drilled into production for the first time, in the Texas case. . .

Judge Patton: In addition to the deepening.

Colvin: Yes.

Judge Patton: And did you attach that case to what you filed earlier?

Colvin:

Yes I did. And the thing about it, in the Kothman v. Boling case out of Texas, and also in Durbin V. Osborne, what happened in both those instances, the definition of "commencing a well" meant to bring a well into production for the first time. So the Kentucky well, Durbin/Osborne, that had been a dry hole. And it was re-leased, and you know, there was some question about whether the landowner and the lessee agreed that he could just deepen that well or drill a new well, but in any event, he deepened an existing well, but he brought it into production "for the first time." And then in the Texas case, there were actually two wells. One of the wells had been filled up with concrete, rock, dirt, it had been plugged. So the lessee went in there and he drilled that well deeper by, I think, 300 feet and he brought it into production "for the first time."

Judge Patton: Okay.

The Trial Court granted Appellees Motion for Judgment N.O.V. by Order of July 19, 2006 that Appellant Heer did not "commence a well," but did not address the right-of-way issue (Appendix 5, p.1. and T.R.A., p.6 and 7).

COUNTERARGUMENTS

"COMMENCEMENT OF A WELL" DEFINED:

The Appellant contends the "commencement of a well" clause was satisfied by performing routine maintenance on a well already capable of producing oil in commercial quantities. There simply is no authority to support Appellant's argument.

The case law defining "commencement of a well" is well settled in Kentucky and all other jurisdictions. "Commencement of a well" means "the good faith efforts towards drilling operations to discover oil or gas in commercial quantities in a well which has not previously produced oil or gas, and at a minimum, some performance towards drilling." The only exception to this definition is when there is specific language in the lease giving the "commencement clause" a different meaning. The landmark cases defining "commencement of a well" are Coffee et al v. Bushong et al, Ky., 18 S.W.2d 973 (1929), Durbin v. Osborne, Ky., 166 S.W.2d 841 (1942), Litton v. Mountaineer Land Company, Ky., 796 S.W.2d 860 (1990) and Little v. Page, Ky., 810 S.W.2d 339 (1991). Appellant's maintenance on a well already capable of producing oil cannot be construed to mean "drilling to discover oil." A well can be "commenced" only once. East Fork Crude "commenced" the well. Appellant merely performed maintenance on the well.

Appellees submit there are no jurisdictions which define "commencement of a well" any differently than Kentucky defines commencement, and no jurisdiction has held that "routine service and maintenance" of a well already capable of producing oil in commercial

quantities satisfies the "commencement of a well" clause absent specific language in the lease to the contrary.

The Appellant has cited Kuntz Law of Oil and Gas, Matthew Bender and Company, Inc., Vol. 3, Sec. 32.3, Pg. 74 - 79 (copyright 1989 and 2007 Cumulative Supplement), and several cases cited by *Kuntz* in support of his contention that cleaning out accumulated sediment and replacing rods and tubing in a well already capable of producing oil in commercial quantities means the same thing as "reworking and deepening." Not so! All cases cited in *Kuntz* have one thing in common which is that the reworking or deepening of an abandoned well was specifically directed at achieving first time production in a well which had not previously produced oil or gas in commercial quantities.

Another case the Appellant relies on to define "reworking" is Kothmann v. Boley, Tex., 308 S.W.2d 1 (1957). (*Boley* was also cited by the Trial Court in support of its Judgment N.O.V.) In *Boley*, the "reworking" was actually the "drilling" and the discovery of oil in commercial quantities for the "first time" in wells which had not previously produced oil or gas.

The Appellant also cites West v. Continental Oil Company, 194 F.2d 869 (1952) for the proposition that "drilling operations" may be defined by *reestablishing* production from a well which has previously produced. In *Continental*, the lessee had first leased the property in 1945, drilled, and had produced oil, but ceased production because of the low price of oil. Continental leased the property again in 1947 and paid West \$32,747.00 for a new lease. The new lease contained the following provision:

“As used in this lease, drilling operations shall include any activity on the leased premises in a good faith effort to . . . reestablish production from such premises.”

The Continental Court pointed out the definition of “drilling operations” was specifically defined in the lease as “reestablishing production” and that Court clearly took into consideration the Lessor and Lessee had agreed at the time of the execution of the lease that “reestablishing production” in a well would satisfy the drilling operations clause. The Fraser/Heer Lease contained no such provision.

In this case, “a good faith effort towards commencing a well” on the property of the Fraser Sisters required that Appellant first acquire a right-of-way. Appellees acknowledge that they were not “guaranteed” a right-of-way, but it is illogical that Appellant could have carried on commercial operations on Appellees property without a right-of-way, or that the Appellees would have agreed to waive upfront money in the absence of a permanent right-of-way, or that they acquiesced in the Appellant committing criminal trespass to access to their property.

The primary objective when interpreting a contract is to effectuate the intention of the parties, 3D Enterprises Contracting Corp. v. Louisville and Jefferson County Metropolitan Sewer Dist., Ky., 174 S.W.3d 440 (2005). In construing the contract, the Court must find out the intention of the parties and ascertain how they meant the contract to operate at the time they entered into it, Wilcox v. Wilcox, Ky., 406 S.W.2d 152 (1966). The Appellant was well aware he did not have a right-of-way to the property at the signing of the lease (T.V. 05/24/06, 10:38:20). He also knew how difficult it would be

for him to obtain a right-of-way because the Fraser Sisters had been unsuccessful in their efforts for the seventeen years they had owned the property (T.V. 05/24/06, 10:38:40). Appellee Jeanette Phillips' son, (her P.O.A.) Gary Phillips was present when the terms of the lease were being discussed (T.V. 05/24/06, 11:20:07). He told Appellant the only access to the property was with the permission of adjoining landowners. Phillips emphasized to Appellant that without a permanent right-of-way, Appellant couldn't get to their property (T.V. 05/24/06, 11:23:40).

Appellant knew that if he was to acquire a right-of-way to the Fraser property, it would be necessary to file a suit against one of the adjoining landowners because all adjoining landowners had informed him within weeks after January 21, 2005 that they would not give him permission to travel through their property nor would they sell him a right-of-way. He acknowledges he promised the Fraser Sisters he would initiate a suit if necessary. "Good Faith" would have compelled him to file the suit soon after the lease was signed and before he bulldozed roads over the protest of the adjoining landowners. That Appellant and Appellees agreed a well could be commenced without a right-of-way to the property defies logic.

The Trial Court pointed out that if "commencement of a well" is susceptible of two definitions, one definition being "the drilling of a well" and the other definition being "maintenance of a well already capable of producing oil in commercial quantities," the definition most favorable to the Appellees should be applied because the Appellant furnished the Oil and Gas Lease contract and the phrase should be construed most favorably to the Fraser

Sisters. Perry v. Perry, Ky., App., 143 S.W.3d 632 (2004). Applying this same rule of construction of a contract to the right-of-way clause, if it can be interpreted that securing a right-of-way was a condition precedent to the Appellant legally going on the property, his failure to obtain a right-of-way voided the lease.

As a matter of law, the Appellees/Plaintiffs were entitled to a directed verdict/Judgment N.O.V. because Appellant did not commence a well and on the right-of-way issue based on either of two legal causes: (1) failure of consideration, and (2) impossibility of performance. Without access, it was impossible for Appellant to operate the lease.

CONCLUSION

Every Appellate Decision in the Commonwealth, and all Appellate Decisions from all other jurisdictions define "commencing a well" as the good faith effort towards producing oil in commercial quantities from a well which has never been capable of producing oil in commercial quantities. This Court should uphold the Decisions of the Court of Appeals and the Trial Court. To reverse these Courts would mean the creation of new law and changing the legal definition of "commencing a well" which the hundreds, if not thousands, of existing leases which Landowners and Lessees relied on at the time they executed their Contracts.

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