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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001489-MR

CODY C. HEER — APPELLANT

v. — APPEAL FROM METCALFE CIRCUIT COURT
HONORABLE PHIL PATTON, JUDGE
ACTION NO. 06-CI-00002

ROBERT CHADWICK AND
ELLEN CHADWICK — APPELLEES

AND — NO. 2006-CA-001735-MR

CODY C. HEER — APPELLANT

V. — APPEAL FROM METCALFE CIRCUIT COURT
HONORABLE PHIL PATTON, JUDGE
ACTION NO. 05-CI-00163

CORA FRASER; VIRGINIA JANES;
SUE HOOD AND JANETTE PHILLIPS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND LAMBERT, JUDGES; HENRY,[1] SENIOR JUDGE.

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

ACREE, JUDGE: Cody C. Heer appeals from orders of the Metcalfe Circuit Court entered in two separate but related actions. The appeals, therefore, have been consolidated. We will, however, address them independently.

***Heer v Fraser, et al*, No. 2006-CA-001735**

In this case, the facts are not in dispute. In January 2005, Heer entered into an oil and gas lease with Cora Fraser and her three sisters (the Fraser sisters) which included the condition that "[i]f no well be commenced on said premises on or before the 1 [sic] day of July 2005 this lease shall terminate as to both parties."

For the Fraser sisters, obtaining access to their landlocked property was as important as tapping the oil reserves under it. So, as consideration, the lease agreement included the provision that, "[i]nstead of upfront money for lease, Cody Heer will attempt to get permanent right of way, 20 foot [sic] wide."

This was not the first time the Fraser sisters leased the property. Approximately 10 to 15 years earlier, East Fork Crude had rights to, and did successfully, extract oil and gas. For part of that leasehold period, East Fork Crude traversed an adjoining property with the permission of the owner, Robert Chadwick. But the withdrawal of Chadwick's permission caused East Fork Crude to end its lease.

Once Heer had leased the property, he attempted to purchase a permanent easement from the owners of three separate

properties surrounding the Fraser sisters' land. All of those adjoining property owners declined. They also denied Heer permission to temporarily travel on their land to access the property during the lease term.

Undaunted, Heer hired a bulldozer operator to construct a roadway across Robert Chadwick's property to the Fraser sisters' land, approximating the route previously used by East Fork Crude. Chadwick filed criminal mischief and criminal trespass charges against Heer who was ordered to stay off Chadwick's property. However, Heer apparently continued to trespass as he pursued his oil production plans.

Heer hired Roger Pickett to clean out the old East Fork Crude oil well on the property and to install replacement rods and tubes in the well. At trial, Pickett testified that the work he performed was considered "regular maintenance." This maintenance alone was sufficient to re-establish the old East Fork Crude well and once again effectuate the successful extraction of commercial quantities of crude oil. However, no drilling, deepening or widening of the well occurred and no new wells were drilled.

In April 2005, Heer was able to produce and sell a load of oil from the Fraser sisters' property. He delivered a small royalty check to the Fraser sisters for the oil sold.

Despite the royalty check, the Fraser sisters were disappointed that Heer had secured no legal means of entry and egress to their property. Furthermore, they also believed Heer

did not comply with the lease agreement's requirement that he commence a well before July 1, 2005. On October 6, 2005, the Fraser sisters filed a complaint in Metcalfe Circuit Court asserting these claims and seeking termination of the lease and ejection of Heer from their property.

All of the issues in both appeals can be dispensed with by focusing on one issue – whether a well was commenced on the property. There is no factual dispute regarding what Heer did to produce commercial quantities of oil. Therefore, resolution requires our examination of how this case proceeded and how the law was applied to these facts.

In preparation for a jury trial, both parties submitted proposed jury instructions which differed significantly in their definition of the term "commencement of a well." Relying largely on the instruction submitted by Heer's attorney, the trial court crafted the following:

INSTRUCTION NUMBER 2

Definitions

> You shall use the following legal definitions to apply to the evidence that you have heard herein.
>
> 1. "Commencement of a well" means the drilling of a new well, or the re-drilling, re-working or deepening of an abandoned well to bring it into production.

Both parties moved for a directed verdict and both motions were denied. The case was submitted to the jury which returned a verdict in favor of Heer. The Fraser sisters moved for a judgment notwithstanding the verdict (JNOV) or, alternatively, for a new trial. At the hearing of these motions, the Fraser sisters withdrew their motion for a new trial but pressed their right to a JNOV. The essence of the Fraser sisters' argument was that the judge had erroneously instructed the jury by defining "commencement of a well" to include "re-working . . . an abandoned well[.]"

On July 19, 2006, the Metcalfe Circuit Court granted the sisters' motion for JNOV.

Typically, a trial judge faced with a motion for judgment notwithstanding the verdict must assess the quantum of evidence presented. *See, e.g., Bierman v. Klapheke*, 967 S.W.2d 16, 18-19 (Ky. 1998). Our review of this JNOV is atypical because it is not based on the judge's rejection of the jury's assessment of the evidence. Here, Judge Patton, candidly assessed his own work and admirably concluded he had erroneously instructed the jury on the law, specifically, that he had presented to the jury the wrong legal meaning of the term "commence a well."[2]

[2] It is not clear, and Heer does not assert, that Instruction Number 2 was not a factor in the verdict. Therefore, we cannot say "that the error has been 'cured' by the verdict." John S. Palmore, *Kentucky Instructions to Juries, Civil*, § 13.17 (2005) *citing Fuson v. VanBebber*, 454 S.W.2d 111, 113 (Ky.1970).

Our review of this judgment notwithstanding the verdict, then, offers only two alternatives. If the original instruction was correct, as Heer asserts, then the circuit court committed error by granting the JNOV. If the original instruction was incorrect, as the Fraser sisters assert, then the circuit court cured the error by granting the JNOV. John S. Palmore, *Kentucky Instructions to Juries, Civil*, § 13.18 (2005) *citing Blair v. Louisville & N. R. Co.*, 390 S.W.2d 178, 181 (Ky. 1965)(erroneous instruction becomes immaterial once court holds the party against whom the error is claimed was entitled to a directed verdict). Our determination of the correct alternative is strictly a matter of law, which we review *de novo*. *Radioshack Corp. v. ComSmart, Inc.*, 222 S.W.3d 256, 259-60 (Ky.App. 2007).

Both parties make superior arguments. Heer's argument can be summarized as follows:

"What constitutes beginning of a well is determined from the facts and circumstances of each case[,]" *Durbin v. Osborne,* 292 Ky. 464, 166 S.W.2d 841, 843 (1942), and, in this case, the jury determined that Heer had commenced a well. Furthermore, argues Heer, authorities emphasize that "the primary objective of the parties [to an oil and gas lease] is the production of oil or gas and that such primary objective should control[.]" 3 Eugene Kuntz, *A Treatise on the Law of Oil and Gas* § 48.3(a)(1)(1998 & Cum.Supp. 2005). Following this reasoning Heer argues that, since he did produce commercial

quantities of oil, it would be incongruous to hold that he did not commence a well. Finally, Heer asserts that "[t]he element of good faith is an important consideration . . . and that any act, the performance of which has a tendency to produce the desired result, is a commencement." 58 C.J.S. Mines and Minerals § 260 (2007).

The Fraser sisters make equally compelling arguments. They correctly note that in every case cited in the briefs involving the re-working of an abandoned well there is a common factor not present in the case before us. The factor is that the re-working resulted in the *first* production of commercial quantities of oil or gas. We would add to that a second factor. We found that in each case in which an existing well is re-worked, there has been additional drilling, either to a greater depth or by widening the shaft.

In the most factually similar Kentucky case, *Durbin v. Osborne*, 292 Ky. 464, 166 S.W.2d 841 (1942), a well had been drilled in 1919, but oil had not been discovered in commercial quantities. Nearly 20 years later, Osborne leased the property on the condition that a well would be drilled within 40 days. The lessee removed the old casing and *drilled an additional 16 feet* in depth. Oil was discovered at that additional depth in commercial quantities *for the first time*.

In the Texas case of *Kothmann v. Boley*, 308 S.W.2d 1 (1957), which cites *Osborne*, a previous lessee drilled three dry wells and then plugged those holes with concrete, rocks, mud,

and other materials. Kothmann leased the property and agreed to commence a well within 60 days. He focused his attention on those previously drilled and later plugged wells. His attempt at the first well was fruitless. At the second, however, after drilling through the plug to the original 3,000 foot depth, *he drilled an additional 400 feet* where commercial quantities of oil were discovered in that well *for the first time*. At the third, the original five-inch shaft *was widened* and commercial quantities of oil were discovered *for the first time*. It was significant to the Texas court that

> Before minerals could be discovered or produced, however, it was necessary to open a hole *where none existed*. This petitioners did by boring from the surface through mud, cavings, rock, cement and other materials to a depth where *gas was discovered in commercial quantities*.

Kothmann at 3 (emphasis supplied); *see also Wellman v. Energy Resources, Inc.*, 210 W.Va. 200, 557 S.E.2d 254, 258, 267 (2001)(Lessee "reworked the previously-abandoned well drilled by the prior lessee and placed it back in operation" but "did not commence the drilling of a well under any construction of the evidence[.]"

Heer, however, cites *West v. Continental Oil Co.*, 194 F.2d 869 (5th Cir. 1952) for the proposition that new drilling is not necessary where a previously abandoned well is put back into production. As the Fraser sisters point out, *West* is easily distinguishable because the parties to the lease construed by the court in *West* carefully defined "drilling operations" to

include "reestablish[ing] production" from an existing well. *West* at 872. Those parties "clearly t[ook] into consideration the case of a well in existence on the leased premises at the time of the execution of the lease." *Id.* Heer and the Fraser sisters did not.

We therefore hold that Heer did not comply with the lease's requirement that he commence a well before July 1, 2005. Heer neither drilled the existing well deeper or wider, nor did he produce commercial quantities of oil from that well for the first time. The Fraser sisters were entitled to a directed verdict prior to trial and, therefore, the entry by the Metcalfe Circuit Court of a judgment notwithstanding the verdict in their favor is affirmed.

***Heer v Chadwick, et al*, No. 2006-CA-001489**

In this case, Cody Heer asserted his entitlement to an easement by adverse possession across the property of Robert and Ellen Chadwick. He claimed that entitlement because of the leasehold interest he acquired from the Fraser sisters on January 21, 2005, and through his predecessors-in-interest, East Fork Crude, the Fraser sisters, and their predecessors-in-interest. The Metcalfe Circuit Court entered summary judgment in favor of the Chadwicks because Heer produced no evidence to establish the existence of an easement by adverse possession.

Heer appeals claiming: (1) the summary judgment was premature as he had not completed discovery; and (2) he did not

receive notice of the hearing at which the summary judgment motion was argued.

We need not address Heer's arguments in this case because we held, *supra*, that he no longer owns any interest in the dominant tenement. For this reason, the summary judgment, and the order denying Heer's motion to alter, amend or vacate the summary judgment of the Metcalfe Circuit Court is affirmed.

ALL CONCUR.

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