

No. 34224

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

RICKEY DRAKE,

Appellant,
Plaintiff Below,

v.

WACO OIL & GAS COMPANY, INC.,
a corporation,

Appellee,
Defendant Below.

Civil Action No.: 07-C-09
Circuit Court of Braxton County
Judge Facemire

REPLY BRIEF ON BEHALF OF RICKEY DRAKE

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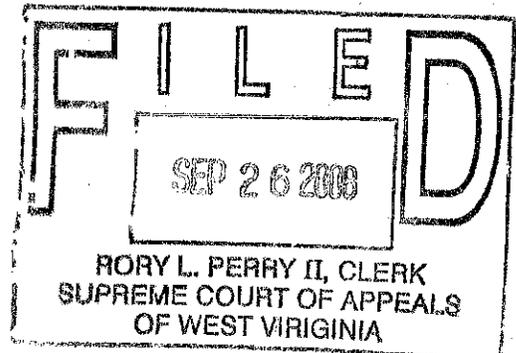


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TABLE OF CITATIONS

1. Sommers v. Bennett, 68 W.Va. 157, 69 SE 690 (1910);
2. McConaha v. Rust, 219 W.Va. 112, 632 SE2d 52 (2006);
3. Smith v. United Fuel Gas Company, 113 W.Va. 178, 166 SE 533 (1932);

STATUTE

W.Va. Code § 55-18-13

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REPLY BRIEF OF APPELLANT RICKEY DRAKE

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FACTS OF THE CASE

In its brief, the appellee makes various allegations concerning the facts of the case which are not contained within the record. Specifically, appellee alleges that appellant negotiated with appellee with respect to the lease and

advised his sister, the lessor, that the lease was "fair, reasonable and acceptable." Appellee goes on to state the transaction was done "with a full acquiescence, understanding acceptance of... Rickey L. Drake." The alleged facts are not in the record. While the appellant does not deny that he was involved in the negotiations concerning the lease, such involvement is irrelevant to a determination of the issue raised in this action. As was noted in the petition, the appellant and his sister were unaware of the respective ownership interests in the subject oil and gas at the time that the lease was entered into. Appellant agrees with appellee, however, that there is no evidence of other than good faith dealings by the parties leading up to the execution of the lease.

ARGUMENT

The appellee is attempting to restate the issue before the court. That attempt being the case, the authorities relied on by the appellee in its brief are not applicable to the situation at hand. For example, the appellee cites W.Va. Code §55-8-13 as the statutory basis for an accounting. That statute speaks in terms of an accounting being appropriate by one cotenant against another when one cotenant has received more than his just share or proportion. This case does not involve a question of whether Karen Drake received more than that to which she was entitled. The situation at hand involves the taking of an oil and gas lease by the appellee from one of two cotenants and then removing

Drake's gas without authority. In this situation, the question is whether the lease which was lawfully taken by the oil and gas company from one cotenant has any applicability to the other cotenant. All of the cases cited in the appellant's brief speak to this issue and are consistent in holding that under those circumstances the cotenant who did not enter into the lease has the option of accepting the lease, in which case he is subject to it, or rejecting the lease and being paid for his value of the minerals removed, less cost of production.

One of the cases addressing W.Va. Code §55-8-13 is Sommers v. Bennett, 69 SE 690, 68 W.Va. 157 (1910), which, in discussing this code section, specifically notes that the accounting would be for the royalty to be paid as the lease was ratified by the co-owner of the minerals who did not enter into the lease. Had the lease not been ratified by action of the non-leasing cotenant the accounting would not have been only for the royalty.

Similarly, McConaha v. Rust, 219 W.Va 112, 632 S.E.2d 52 (2006), does not address the situation at hand as the issues discussed in the case concerning claims of the cotenants were based upon cotenants failing to account for rents owed to fellow cotenants when they were using more than their share of the common property. While it should be noted that the court in McConaha did not address the issue at hand as the accounting claim had been dismissed by the circuit court, which dismissal was not challenged on appeal, to the extent that the discussion is even germane it does not apply to the situation in which a lease has been taken from one cotenant only.

The appellee also cited Smith v. United Fuel Gas Company, 113 W.Va. 178,

166 SE 583 (1932), in which it is interesting to note the court's language that one cotenant who wrongfully removed his cotenant's coal, "can be sued in trespass, or, if he sells, ... can waive the tort, and sue for the money had and received, because the one has received money from the sale of property belonging to the other. ... His act was wrong, a waste, in violation of the right of his cotenant; and this cotenant can follow up the property, and base his demand on his wrongful taking and conversion." (citation omitted) 166 SE at 534. Thus, this case contains the same contradictory language as many of the others in which it is stated that a cotenant can sue his cotenant in trespass when he takes his cotenant's minerals.

A careful reading of Smith reveals that it is consistent with the appellant's position. It was, in fact, discussed in the petition. In Smith all of the oil and gas was leased, but on different terms in separate leases. The question was whether the cotenants had to account to one another. Certain cotenants claimed the right to an accounting of royalties under the leases. The lower court had concluded that the cotenants failed to opt to benefit from each other's leases. This court disagreed, finding that:

"We find no basis for the exercise of an option on the part of any of the litigants to treat either lease as for the benefit of all the cotenants. The right to so treat these leases was accorted by law, and we find no waiver or estoppel of that right. No estoppel, waiver, or limitation is pleaded." 166 SE at 534.

Since the complaining cotenants had claimed the right to account under the leases, the option was decided to have been made and an accounting of royalties ordered.

The position put forth by the appellee is simply not supported by the authority cited. Further, if that position had any validity there would be no need for all owners of oil and gas to be under lease as any one of them could bind the others to the terms of the lease. Clearly, such a conclusion is completely contrary to the law and common sense.

CONCLUSION

For all of these reasons and those contained within the petition the appellant, Rickey Drake, submits that the Circuit Court of Braxton County incorrectly answered the certified question and that the correct answer is:

“The correct measure is the value of the gas less reasonable cost of production.”

Respectfully submitted,



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