

Commonwealth of Kentucky
Court of Appeals

NO. 2002-CA-001178-MR

MINERALS MANAGEMENT GROUP, INC.

APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE MARC I. ROSEN, JUDGE
ACTION NOS. 97-CI-01015 & 97-CI-01016

DOVIE CHANDLER; CLYDE E. NEWMAN;
ANNA NEWMAN; AND GARIS L. PRUITT,
ATTORNEY FOR APPELLEES

APPELLEES

OPINION AND ORDER

AFFIRMING IN PART, REVERSING IN PART AND REMANDING

** ** * * * * *

BEFORE: BUCKINGHAM, McANULTY, AND PAISLEY, JUDGES.

McANULTY, JUDGE. Appellant Mineral Management Group appeals the judgment in the Boyd Circuit Court following a jury trial in which it was found to have abandoned the natural gas leases on the properties of appellees Dovie Chandler, and of Clyde E. and Anna Newman. On appeal, appellants argue that there was insufficient evidence of abandonment, the court improperly instructed the jury on the law of abandonment, and the award of

attorney fees was improper. We affirm in part, reverse in part and remand.

Appellants first argue that there was insufficient evidence to submit the issue of abandonment to the jury. They contend that the period of inactivity at the leased properties in question was explained by their evidence at trial. They argue that the leased premises were never relinquished. They further contend that the trial court erred in allowing proof of forfeiture for breach of the lease itself to substitute for proof of abandonment at trial.

Abandonment is the intentional and actual relinquishment of the leased premises. Hiroc Program, Inc. v. Robertson, Ky. App., 40 S.W.3d 373 (2000). The intention to abandon must be shown by clear, unequivocal and decisive evidence in order for an abandonment to be established. Cameron v. Lebow, Ky., 366 S.W.2d 164, 165 (1962). The burden of proof is on the one relying on the abandonment. Browning v. Cavanaugh, Ky., 300 S.W.2d 580 (1957). To constitute abandonment by a lessee, there must be shown both an intention to abandon and actual relinquishment of the leased premises. Fuqua v. Chester Oil Co., Ky., 246 S.W.2d 1007, 1008 (1952). Mere lapse of time and nonuse are not, alone, enough to constitute abandonment of oil and gas leasehold interests. Pro Gas, Inc. v. Har-Ken Oil Co., Ky., 883 S.W.2d 485, 488 (1994).

The standard of review of a judgment entered upon a jury verdict is limited to determining whether the trial court erred in failing to grant a directed verdict. Lewis v. Bledsoe Surface Mining Co., Ky., 798 S.W.2d 459 (1990). We have reviewed the evidence in this case and we conclude that the trial court did not err in submitting the case to the jury. Appellant did show through letters that it had been trying to find new purchasers for their Boyd County wells, of which the Chandler and Newman wells were two. But the jury could have believed that the Chandler and Newman wells had been abandoned due to appellee's failure to maintain the wells or correct the damage which had occurred to them from oil getting into the lines. We agree with the trial court that a question as to abandonment was presented, and affirm the trial court's denial of a directed verdict to appellant.

Next, appellant argues that the trial court erred in instructing the jury as to the issue of abandonment. The trial court determined that this was an action in equity, in which the jury must find certain facts before the court rendered a judgment. The complained of interrogatories read as follows:

INTERROGATORY NO. 2

Do you believe from the evidence that Minerals Management Group, Inc. intended to and did abandon the property of the Chandlers for any substantial period of time?

INTERROGATORY NO. 3

Do you believe from the evidence that Minerals Management Group, Inc. intended to and did abandon the property of the Newman's [sic] between 9/15/95 and 6/29/97 for any substantial period of time, without the intent to resume operation of the wells within that time or a reasonable time thereafter?

Appellant argues that the instruction is erroneous because, under the case law, the jury needed to find that appellant intended to and did abandon the property for longer than "a substantial period of time." Appellant argues the jury was required to find that appellant abandoned the property on a permanent basis. Appellant tendered instructions in which the jury would have been required to decide whether they believed that Minerals Management Group intended to resume operation of the well at some time in the future.

The purpose of instructions is to inform the jury of what it must believe from the evidence in order to resolve each dispositive factual issue in favor of the party who bears the burden of proof as to that issue. Webster v. Commonwealth, Ky., 508 S.W.2d 33 (1974). We agree that the jury interrogatories did not accurately state the law of abandonment to the jury in order for them to make a meaningful finding. Appellant is correct that abandonment must be accompanied by an intent to give up permanently one's claim to the property. Rice v. Rice, 243 Ky. 837, 50 S.W.2d 26, 30 (1932). The jury could have

responded in the affirmative to the interrogatories believing that the appellant intended to and did abandon the property for a substantial period of time and for some time thereafter, yet the jury could also have believed that appellant maintained an intention to return to the property and resume production. If so, then such a factual finding should not have produced the judgment that an abandonment occurred. Thus, we believe the interrogatories did not sufficiently inform the court of the jury's findings as to appellant's intent. As a result, we find that the jury instructions were erroneous and prejudicial, and we reverse on this issue.

Finally, appellant argues that the trial court erred in awarding appellees attorney fees as damages in this case. Kentucky follows the general rule which does not permit the allowance of attorneys' fees in the absence of a statute or contract expressly providing therefor. Holsclaw v. Stephens, Ky., 507 S.W.2d 462, 480 (1973); Craig v. Keene, Ky. App., 32 S.W.3d 90 (2000). In the case at bar, no contract or statute has been cited which would provide for the award of attorney fees. Thus, attorney fees were not authorized. Furthermore, we do not find any equitable doctrine whereby the award of attorney fees could be supported in equity. Kentucky State Bank v. AG Services, Inc., Ky. App., 663 S.W.2d 754 (1984). Therefore, we

agree that the trial court erred in awarding attorney fees as a matter of equity in this case.

Finally, appellant filed a motion to strike appellees' brief due to the inclusion therein of a document as an exhibit which appellant says was not admitted at trial nor included in the record on appeal. Additionally, appellant argues that appellees referred to the closing arguments of counsel in their brief which also were not made part of the record on appeal. Our review of the trial videotape and the exhibit binder shows that the letter was not admitted into the record as part of the testimony of Doug Hamilton of the Department of Mines and Minerals. Therefore, the document on page 19 of the appendix of appellees' brief should be stricken from the brief, and not be considered as evidence in the appeal.

For the foregoing reasons, we reverse the judgment of the Boyd Circuit court and remand for further proceedings consistent with this opinion.

IT IS HEREBY ORDERED that the document on page 19 of the appendix of appellees' brief be and the same is hereby stricken from said brief.

ENTERED: May 30, 2003

/s/ William E. McAnulty
JUDGE, COURT OF APPEALS

PAISLEY, JUDGE, CONCURS.

BUCKINGHAM, JUDGE, CONCURS IN PART AND DISSENTS IN
PART AND FILES SEPARATE OPINION:

BUCKINGHAM, JUDGE, CONCURRING IN PART AND DISSENTING
IN PART: I respectfully dissent from the portion of the
majority opinion that reverses and remands for a new trial due
to the erroneous jury instructions. Although the instructions
may not have been perfect, I do not believe that the jury was
misled. I concur with the remaining portions of the majority
opinion.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT:

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BRIEF AND ORAL ARGUMENT FOR
APPELLEE:

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