O/a 2-5-88

SUPREME COURT OF FLORIDA

CASE NO. 70,845

CONWAY LAND, INC., etc., et al.,

Petitioners,

vs.

DAVID E. TERRY, et al.,

Respondents.
_____/

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

Introduction

Consistently throughout their brief, the Respondents advise the Court that the character of a royalty interest must be determined by reference to the instrument by which it is created. For example, at page 8, they cite authority for the proposition that "the term 'royalty' does not have a single fixed definition because it is interpreted by reference to the instrument in which it is used...." Again, at page 14 of the Respondents' brief, the comment is made: "As stated earlier, when defining the word 'royalty' in a given situation, the character of the instrument is an essential detail that must not be ignored...." The overriding irony in the Respondents' approach to the problem before this Court is that despite the acknowledged need for close scrutiny of the instruments in question, they urge a characterization of their interest in a 38-page brief citing abstract principles without giving full and fair consideration to the language of the instruments from which that interest arises. At page 33 of their brief, this forensic technique is brought to a question-begging conclusion in the following language:

> "As has been demonstrated above, the strict legal precepts of the rule against perpetuities are not violated by the royalty interest reserved in this case because it is a presently vested interest in real property."

Obviously, the conclusion does nothing more than assume the very matter which is in dispute -- namely, the nature of the royalty interest as vested or not vested.

Reply

At page 1 of the Respondents' brief, they characterize the action of the Fifth District Court of Appeal as follows:

> ... the Fifth District Court of Appeal found that the disputed reservation was intended by the grantor to reserve an interest in real estate of fee simple duration....

The Fifth District Court of Appeal did not place itself in the position of fact finder with respect to intent. It simply viewed the documents in question and, without extensive concentration on their language, characterized the interest reserved as a vested interest in real property on the basis of what the court considered "the better reasoned authority."

In the first sentence on page 6 of the Respondents' brief, they refer to the real property conveyed by Respondents' predecessor to Petitioners' predecessors as "large tracts of potential oil and gas lands." If it was the intent of the Respondents to suggest to the Court that the land in question has any measurable potential for the production of oil, gas or minerals, the Petitioners would point out that such conclusion is factually unsupported by the record.

In a reference to Miller v. Carr, 137 Fla. 114, 188 So. 103 (1939), the Respondents at page 20 of their brief contend that under Miller, the determinative issue is whether the instrument under consideration " ... is concerned with royalty that has been taken from the land, or, on the other hand, is concerned with royalty that might be taken from the ground." The Petitioners do not believe this is a meaningful analysis of the Miller opinion. The Miller court focused the inquiry on the time when

the right accrued. The court indicated that a right to payment on the severance of oil from the land should be classified as personal property. The court stated:

> The weight of authority appears to be that royalties under an oil or gas lease, when the oil is severed from the land, is personal property.... (at 107)

The language in the deeds under which the Respondents claim is quoted at page 7 of the Petitioners' merits brief. That language clearly indicates that what was reserved was nothing more than a right to a payment measured by royalties accruing on the severance of oil, minerals or gas from the land. Factually, Miller v. Carr dealt primarily with the character of an interest in royalty after the severance of oil. However, a royalty interest before severance is far more intangible and speculative than after severance. Indeed, the interest is a mere expectancy. It would, therefore, be both illogical and inconsistent with Miller to hold that while an interest in payment after severance is personal property, the more speculative interest in payment prior to severance is real property.

The case of Amerada Hess Corp. v. Morgan, 426 So.2d 1122 (Fla. 1st DCA 1983), cited by Respondents at page 34 of their brief, supports the Petitioners' contention. The relevant issue in the Amerada case was whether or not the holders of a royalty interest were indispensable to an action brought to quiet title to land in Santa Rosa County, Florida. The royalty owners, Thomas E. MacMillan and Elvira MacMillan, acquired a mineral lease covering a part of the property subject to the action. The

MacMillans, instead of working the lease, assigned their rights under the lease to Amerada Hess Corporation in return for which they reserved a royalty equivalent to 27.5% of the oil and gas produced. The Second District held that the MacMillans were not indispensable parties because their royalty interest would not be affected by the quiet title action. The court stated:

> ... First, as pointed out by appellees, after the MacMillans' assignment to Amerada Hess, the MacMillans no longer had an obligation to any party with respect to Tracts 2 and 3, and were the owners and holders of an overriding royalty interest, which is a non-possessory right to receive money. They retained no right to enter upon the land to develop or produce minerals, and Amerada Hess, as the owner of the MacMillans' "working interest," assumed only the obligation to pay the MacMillans' overriding royalty of 27.5%.... (p. 1125)

The Respondents retained an interest which, like that of the MacMillans, was simply a non-possessory interest in the receipt of money after the production of oil, gas or minerals. Their interest was, in all significant respects, identical to that which the MacMillans retained upon their assignment of the mineral lease.

At page 24, the Respondents' brief states that the opinion of the Second District Court of Appeal in Welles v. Berry, 434 So.2d 982 (Fla. 2d DCA 1983), "stands for the proposition that the holder of the executive (mineral) rights generally does have a duty to the non-executive (royalty) owner." The Petitioners submit that this is not an accurate comment on Welles v. Berry. The warranty deeds containing the reservation under which the Respondents claim show on their face that the grantee paid a substantial consideration for the fee title to the land. In that

circumstance, according to Welles v. Berry, the reservation of a royalty interest does not imply a duty on the part of the fee owner to the royalty holder to attempt exploitation and production. The court in Welles v. Berry stated:

> ...5: That in many royalty reservations, particularly where a substantial cash consideration accompanies the reservation, development appears from the facts to be an incidental or speculative purpose only, and covenants should not be and are not implied either in law or in fact. (P. 989-88) (emphasis added)

Thus, Welles does not stand for the proposition that there generally is a duty owed to the royalty owner by the fee owner.

The case of Hanson v. Ware, 274 S.W.2d 359 (Ark. 1955) is relied on by the Respondents for the proposition that their interest should not be considered subject to the rule against perpetuities. The Hanson case, which the Respondents gratuitously deem the leading case, is factually distinguishable. The deed which was before the Court in Hanson contained an unequivocal grant of a one-sixteenth part of all oil and gas produced and saved, etc. The opinion states:

> ... Of primary importance is the granting clause, which transfers a one-sixteenth part of all oil and gas produced and saved by Wingfield...from either the leased or unleased premises. 46 ALR 2d 1262, 1265 (emphasis added)

The pertinent language in the Respondents' deeds does not transfer an interest in oil, minerals or gas. Rather it reserves a right to share "royalty," which in the context of the documents means a right to a payment which accrues, if at all, upon a severance of a sufficient quantity and quality of oil, gas or minerals to be of value.

The Hanson court's approach to the question is embodied in

the following language of the opinion:

> ... the Appellee's answer that since the royalty interest vested at once it is immaterial that its enjoyment was indefinitely postponed. This alone is hardly a sufficient answer to the contention, for it begs the question by assuming that the Appellee's interest was present or vested, rather than future and contingent, which is really the issue to be decided. Id. (emphasis added)

In the present case as in Hanson vs. Ware, the issue to be decided with respect to the rule against perpetuities is whether the Respondents' interest is present and vested or future and contingent. That issue can be decided only by adverting to the language of the instruments in question. It is respectfully submitted that the relevant language in those instruments reserves a right which is nothing if not future and contingent in nature. The language imposes no duty on the fee owner to explore for oil, minerals or gas and reserves to the grantor no right of exploitation or development. The fortuitous choice of a fee owner to undertake such an operation is the first contingency standing between the "right" and the realization of a return. The second is success in the production effort. Over neither contingency did the Respondents have even the slightest degree of control -- actual or constructive.

Conclusion

The Respondents' right is simply an ephemeral expectancy. If under Miller v. Carr, supra, p. 2, a right to the payment of royalties upon the severance of oil from the ground is personal property, it makes no sense to characterize as a vested interest in real property the far more speculative interest of the Respondents which is a right to share in royalties if and when oil, minerals or gas is severed in measurable quantities from real property. The policy of this state is to foster marketable titles. By classifying Respondents' claim as a vested interest in real property, the District Court has promoted the clouding of land titles by interests so speculative as to defy rational valuation. The result was fundamentally unsound.

DATED this 18 day of January 1988.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondents' Reply Brief was furnished by U.S. Mail to ROBERT N. REYNOLDS and ARNOLD D. BARR, ESQS., 9100 S. Dadeland Blvd., Miami, FL 33156, Attorneys for Co-Defendants, Respondents; and to RICHARD W. LASSITER, ESQ., P.O. Box 1273, Orlando, FL 32802, Attorney for Plaintiff, Respondent City of Orlando, this 18 day of January, 1998.

John A. Reed, Jr.