[Cite as *Woods v. Big Sky Energy*, 2019-Ohio-554.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DALE R. WOODS, et al. Plaintiffs–Appellees -vs- BIG SKY ENERGY, et al. Defendants–Appellants	JUDGES: Hon. W. Scott Gwin, P.J Hon. William B. Hoffman, J. Hon. John W. Wise, J. Case No. CT2017-0031 O P I N IO N
CHARACTER OF PROCEEDINGS:	Appeal from the Muskingum County Court of Common Pleas, Case No. CH2016-1061
JUDGMENT:	Affirmed in part, Reversed in part and Remanded
DATE OF JUDGMENT ENTRY:	February 6, 2019
APPEARANCES:	
For Plaintiff-Appellee W. EVAN PRICE, II P.O. Box 20244 Columbus, Ohio 43220	For Defendant-Appellant GINO PULITO, ESQ. Pulito and Associates, LLC 230 Third Street Elyria, Ohio 44035

Hoffman, J.

{¶1} Appellants Big Sky Energy, Inc., Big Sky Petroleum, LLC, and Robert Barr, in his individual capacity and doing business as Big Sky Petroleum, LLC, appeal the judgment entered by the Muskingum County Common Pleas Court declaring the oil and gas lease between the parties terminated as of March 1, 2016, due to a lapse of production and quieting title in Appellees Dale and Lynn Woods with respect to the lease, and awarding Appellees compensatory damages in the amount of $28,066.39 and punitive damages in the amount of $28,066.39 for conversion of royalties due under the lease.

STATEMENT OF THE FACTS AND CASE

{¶2} On May 22, 1968, Appellees' predecessor in title, Russell and Marjorie Sandel, granted an oil and gas lease to Weaver Oil and Gas Corporation (hereinafter the "Weaver Lease"). The Weaver Lease had a primary term of ten years, and provided in paragraph seven as follows:

> If, after the expiration of the primary term of this lease, production on the leased premises shall cease, this lease shall not terminate, provided that Lessee commences operations for drilling, reworking, plugging back, or deepening a well within 60 days from such cessation, and this lease shall remain in force during the prosecution of such operations or additional drilling, reworking, plugging back, or deepening operations commenced while such operations are in progress or within 30 days after the cessation thereof, and if production results therefrom, then until it is marketed and so long as production continues.

{¶3} The Weaver Lease was subsequently assigned several times, including an assignment to Dover Atwood Corporation. Dover Atwood Corporation assigned and sold its interest in the Weaver Lease to Appellant Barr on July 11, 2001, who used Appellant Big Sky Energy to operate the well.

{¶4} Marjorie Sandel conveyed the property subject to the Weaver Lease to her daughter, Marlene Woods, in the 1990's. Robert Woods acquired the property from the estate of his wife, Marlene Woods, in 2008. Robert Woods conveyed the property to his son and his wife, Appellees herein, on July 14, 2008.

{¶5} Subsequent to the transfer, Appellee Dale Woods began to try to obtain production records from the well from Appellants, who failed to produce records. After years of struggling to obtain information regarding the well and the Weaver Lease, Appellees filed the instant action in the Muskingum County Common Pleas Court on May 11, 2016, including causes of action for quiet title, conversion, unjust enrichment, trespass, breach of contract, breach of implied covenant to reasonably develop, breach of implied covenant to explore further, and declaratory judgment.

{¶6} The case proceeded to bench trial. At trial, Appellees presented evidence the well ceased production in December 2015, and had not resumed operations. Production ceased because the Ohio Department of Natural Resources (ODNR) refused to approve a bond from Appellants' preferred insurance company. Appellants were ordered by ODNR to stop production on all wells until a replacement bond was posted. Appellant Barr admitted Appellant Energy could have sought the requested bond from another insurer, but refused to do so as a matter of principle because Barr disagreed with ODNR's decision. The order from ODNR barring Appellant Energy from operating under

the former bond remained in litigation when trial commenced in the instant case. Appellant Barr further admitted failing to notify Appellees production had ceased on the well.

{¶7} Appellants failed to produce the requested production records on the well until ordered to do so on March 7, 2017, during a status conference in the instant litigation on a motion to compel. The records demonstrated discrepancies between the amount of royalties paid and the amount of royalties due based on revenue generated from the well.

{¶8} Following trial, the trial court found Appellants liable for conversion of royalties in the amount of $28,066.39. Because of Appellants' attempts to conceal records which would demonstrate their failure to pay the full amount of royalties due Appellees, the court found an award of punitive damages justified, and awarded punitive damages in the amount of $28,066.39. The court declared the Weaver Lease terminated by its terms for failure of production effective March 1, 2016, and quieted title in Appellees as of March 1, 2016. The court dismissed all remaining causes of action set forth in the complaint.

{¶9} It is from the April 20, 2017 judgment of the court Appellants prosecute this appeal, assigning as error:

I. THE TRIAL COURT ERRED AS A MATTER OF LAW AND FACT WHICH WAS UNSUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE BY TERMINATING THE WEAVER OIL AND GAS LEASE BASED UPON NONPRODUCTION WHEN THE LEASE INCLUDED A

FORCE MAJEURE CLAUSE WHICH EXPRESSLY PROHIBITED SUCH TERMINATION.

II. THE TRIAL COURT ERRED AS A MATTER OF LAW AND FACT WHEN IT AWARDED COMPENSATORY DAMAGES IN THE AMOUNT OF $28,066.39 AND PUNITIVE DAMAGES IN THE AMOUNT OF $28,066.39.

I.

{¶10} In their first assignment of error, Appellants argue the court's finding the lease was terminated due to nonproduction is against the manifest weight of the evidence.

{¶11} Appellants argue the lease should not terminate for nonproduction under paragraph seven, cited above, because the force majeure clause found in paragraph twelve of the lease applies. That clause provides in pertinent part:

> This lease shall not be terminated, in whole or in part, nor shall Lessee be held liable for damages, for failure to comply with the express or implied covenants hereof, if compliance therewith is prevented by or if such failure is the result of interference by an act of God…riots, wars, court actions, any Federal or State laws, executive orders, rules, or regulations, whether valid or invalid, and similar factors beyond Lessee's control.

{¶12} Appellants argue compliance with paragraph seven regarding well production was prevented by ODNR's order, which was outside their control. Appellants

argue our standard of review is de novo, as it involves a question of contract interpretation. *See Witte v. Protek Ltd.,* 5th Dist. Stark No. 2009CA00230, 2010-Ohio-1193. However, Appellant is challenging the court's factual determination as to whether Appellants' termination of production of the well was due to a factor beyond their control. Appellants' argument does not challenge the court's interpretation of the contract, but rather the court's conclusion Appellants could have complied with paragraph seven and continued production of the well. As such, we find the appropriate standard of review in the instant case is whether the judgment is against the manifest weight of the evidence.

{¶13} As an appellate court, we are not the trier of fact; instead, our role is to determine whether there is relevant, competent, and credible evidence upon which the factfinder could base its judgment. *Tennant v. Martin–Auer,* 188 Ohio App.3d 768, 936 N.E.2d 1013, 2010–Ohio–3489, ¶ 16, citing *Cross Truck v. Jeffries,* 5th Dist. Stark No. CA–5758, 1982 WL 2911. A reviewing court, in addressing a civil manifest weight challenge, must determine whether the finder of fact, in resolving conflicts in the evidence, clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *See Hunter v. Green,* Coshocton App. No. 12–CA–2, 2012–Ohio–5801, 2012 WL 6094172, ¶ 25.

{¶14} Appellant Robert Barr testified ODNR suddenly refused to accept his insurance policy because "I've been in court with ODNR and I'm not a yes man. I question their authority. They're like little dictatorships. And so, they found every reason possible to cause me problems." Tr. 220. Barr testified he did not try to get insurance through another company. Tr. 221. Upon questioning from the court, Barr testified:

THE COURT: You're trying to prove a point with ODNR and with regard to the insurance company and bonding; right? You believe you're right and you believe they're wrong?

THE WITNESS: Correct.

{¶15} Tr. 224.

{¶16} Barr admitted he "potentially" could have bought insurance and been bonded by another insurance company, and admitted there are other companies currently operating wells under bonds from different insurance companies. Tr. 222.

{¶17} Based on Barr's testimony, we find the trial court's finding Appellants were not prevented from operating the well by a government order outside their control is not against the manifest weight of the evidence. Rather than attempting to seek coverage from a different insurance company which would have allowed him to continue production on his wells throughout Ohio, Appellant Barr instead chose to fight the ODNR order as a matter of principle, to demonstrate he was right and ODNR was wrong. We find the trial court did not err in finding paragraph twelve did not apply, and the lease terminated pursuant to paragraph seven on March 1, 2016.

{¶18} The first assignment of error is overruled.

II.

{¶19} In their second assignment of error, Appellants argue the court erred in its calculation of damages for conversion of royalties due under the lease. We agree.

{¶20} The measure of damages in a conversion action is the value of the converted property at the time it was converted. *United Bank, Div. of the Park Natl. Bank*

v. Expressway Auto Parts, Ltd., 5th Dist. No. 15CA51, 2015-Ohio-4554, 49 N.E.3d 776, ¶ 34; *Congress Lake Club v. Witte,* 5th Stark App. No. 2007CA00191, 2008-Ohio-6799, 2008 WL 5340219, ¶ 66.

{¶21} The trial court awarded compensatory damages for conversion in the amount of $28,066.39, and awarded punitive damages in the same amount.[1] However, we cannot determine from the record how the trial court arrived at this figure for compensatory damages. The amount of compensatory damages appears to be derived from Appellees' Summary Exhibit No. 1, which shows the amount of lost revenue, not converted royalties, for the time period. In explaining this damage figure, counsel for Appellees stated in closing argument:

> So what this does is, it goes back four years, to June of 2012, adds up the oil revenue – gas revenue, the oil revenue, and then it subtracts out the royalties that would have been paid on that – on the assumption that all those royalties were indeed paid during that period. I don't think that is an accurate statement, but again, for purposes of calculating the damages, that gives us 28,000…
>
> THE COURT: Is the $20,000, $28,066.39, is that the exact amount? Is that the number you're going—
>
> MR. PRICE: Yes. That is the first number. That's for the – the lost revenue.

[1] Pursuant to R.C. 2315.21(D), the trial court's award of punitive damages was limited to two times the amount of compensatory damages.

{¶22} Tr. 239.

{¶23} The trial court's damage award appears to be based on revenue from the well, rather than the correct measure of damages for conversion, which is the amount of royalties owed on that revenue converted by Appellants in this case. Appellees are not entitled to revenue from the well, but rather for the converted royalties only. We therefore remand this case to the trial court to determine damages in an amount not exceeding the royalties due pursuant to the lease[2], during the time period not barred by the statute of limitations for conversion, up to March 1, 2016 (the date the lease was terminated), less any royalties found actually paid pursuant to the lease for that time period. Because the court based its award of punitive damages on an incorrect measure of compensatory damages, the trial court must also adjust the punitive damage award according to the new calculation of damages.

{¶24} The second assignment of errors is sustained.

[2] From Appellees' Summary Exhibit Number One, the amount of royalties due appears to be $4,009.49.

{¶25} The judgment of the Muskingum County Common Pleas Court is affirmed in part, reversed is part as to damages only, and remanded for a redetermination of damages, consistent with this opinion.

By: Hoffman, J.

Gwin, P.J. and

Wise, J. concur