[Cite as *Wildcat Drilling v. Discovery Oil*, 2018-Ohio-5392.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

WILDCAT DRILLING, LLC,

Plaintiff-Appellee/Cross-Appellant,

v.

DISCOVERY OIL AND GAS, LLC,

Defendant-Appellant/Cross-Appellee.

OPINION AND JUDGMENT ENTRY
Case No. 17 MA 0018

Motion for Reconsideration

BEFORE:
Gene Donofrio, Carol Ann Robb, Kathleen Bartlett, Judges.

JUDGMENT:
Denied

Atty. Molly Johnson, Johnson & Johnson Law Firm, 12 West Main Street, Canfield, Ohio 44406, for Plaintiff-Appellee/Cross-Appellant, and

Atty. David Detec and Atty. Thomas Hull II, Manchester Newman & Bennett, LPA, The Commerce Building, Atrium Level Two, 201 East Commerce Street, Youngstown, Ohio 44503, for Defendant-Appellant/Cross-Appellee.

Dated:
December 27, 2018

PER CURIAM.

{¶1} Defendant-appellant/cross-appellee, Discovery Oil and Gas, LLC, has filed an application for reconsideration asking this court to reconsider our decision and judgment entry in which we reversed the judgment of the Mahoning County Common Pleas Court granting summary judgment in its favor and affirmed the judgment granting summary judgment in favor of plaintiff-appellee/cross-appellant, Wildcat Drilling, LLC. See *Wildcat v. Discovery*, 7th Dist. No. 17 MA 0018, 2018-Ohio-4015.

{¶2} App.R. 26, which provides for the filing of an application for reconsideration in this court, includes no guidelines to be used in the determination of whether a decision is to be reconsidered and changed. *Matthews v. Matthews*, 5 Ohio App.3d 140, 143, 450 N.E.2d 278 (10th Dist.1981). The test generally applied is whether the motion for reconsideration calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not at all or was not fully considered by us when it should have been. *Id.* An application for reconsideration is not designed for use in instances where a party simply disagrees with the conclusions reached and the logic used by an appellate court. *State v. Owens*, 112 Ohio App.3d 334, 336, 678 N.E.2d 956 (11th Dist.1996). Rather, App.R. 26 provides a mechanism by which a party may prevent miscarriages of justice that could arise when an appellate court makes an obvious error or renders an unsupportable decision under the law. *Id.*

{¶3} Discovery takes issue with our determination that the trial court did not err in awarding Wildcat prejudgment interest and that the trial court did err in ruling that Wildcat was required to indemnify Discovery. In Discovery's first assignment of error, Discovery argued that Wildcat was not entitled to prejudgment interest for numerous reasons. Relevant to this motion, Discovery argued that Wildcat was not entitled to prejudgment interest because Wildcat breached the contract between the parties and because Wildcat is not an "aggrieved party" and therefore not entitled to prejudgment interest. We affirmed the trial court's award of prejudgment interest largely based on the fact that the contract provided for Wildcat to receive interest on any unpaid sums at a

rate of 18% annually. *Wildcat*, at ¶ 26, 35-36. Thus, we affirmed the trial court's award of prejudgment interest in favor of Wildcat. *Id.*

{¶4} Discovery now contends that *Sanders v. Ohio Edison Co.*, 69 Ohio St.3d 582, 635 N.E.2d 19 (1994) applies for purposes of invalidating Wildcat's award of prejudgment interest because Wildcat breached the contract first. *Sanders*, however, is inapplicable here.

{¶5} In *Sanders*, an insurance policy between an insurer and an insured provided that the insurer would defend the insured against any action seeking damages "even if any of the allegations of the suit are groundless, false, or fraudulent." *Id.* at 586. The insured was sued and the insurer refused to defend the insured. *Id.* at 583. The insured settled the action and sought damages from the insurer. *Id.* at 583-584. The insurer argued that it was not liable for the settlement because the insured breached the policy when it settled the action without the insurer's consent. *Id.* at 585. The Ohio Supreme Court held that the insurer was liable for the settlement because the insurer breached the policy first by not defending the insured. *Id.* at 585-586.

{¶6} Discovery argues that Wildcat's use of brine water at the drilling site was a crime and that by committing a crime, Wildcat breached the contract first. Individual terms in a contract should not be defined in isolation, but rather as a whole within the context of an entire agreement. *Shops at Boardman Park, LLC v. Target Corp.*, 7th Dist. No. 13 MA 0188, 2016-Ohio-7283. While the contract at issue provided for Wildcat to not commit any crimes, the contract also provided that Wildcat was to indemnify Discovery for any monetary damages as a result of illegal conduct. The contract provided Discovery with a remedy against Wildcat for any crimes Wildcat may have committed. To the extent Wildcat's conduct was a breach of the contract, it was not a material breach and did not relieve Discovery of its obligations under the contract. See *Ohio Educ. Ass'n v. Lopez*, 10th Dist. No. 09AP-1165, 2010-Ohio-5079, ¶ 12-17.

{¶7} Addressing Discovery's aggrieved party argument, Discovery again argues that *Gray v. Petronelli*, 11th Dist. No. 2016-T-0030, 2017-Ohio-2601, and *Protek, Ltd. v. Lake Erie Screw Corporation*, 5th Dist. No. 2005CA00018, 2005-Ohio-5958, apply and bar Wildcat's recovery of prejudgment interest. In both of these cases,

the respective appellate courts held that a breaching party in a contract action is not entitled to prejudgment interest but only the quantum meruit damages.

{¶8} Unlike the contract in the present case, there is no indication that the contracts in *Gray* and *Protek* provided for interest on unpaid sums. Thus, neither the *Gray* or *Protek* courts addressed whether a breaching party is entitled to prejudgment interest when the contract itself provides for interest on unpaid sums. In the present case, we held that because the contract provided for Wildcat to receive interest on unpaid sums and Wildcat fulfilled its obligations under the contract, Wildcat is entitled to prejudgment interest. *Wildcat*, at ¶ 26.

{¶9} Discovery also argues that *Shelly Co. v. Karas Properties, Inc.*, 8th Dist. No., 98039, 2012-Ohio-5416, controls the indemnity issue and under *Shelley*, Wildcat should be required to indemnify Discovery for the ODNR fine. *Shelley*, however, is also inapplicable here.

{¶10} In *Shelley*, a commercial lease required the lessor to indemnify the lessee for any fines the lessee experienced due to pre-existing environmental infractions on the property. *Id.* at ¶ 2-4. Both parties were fined due to a pre-existing environmental infraction and the lessor refused to indemnify the lessee. *Id.* ¶ 7-8. The trial court ordered the lessor to indemnify the lessee for the fines. *Id.* at ¶ 9. On appeal, the lessor argued that the lessee did not satisfy the requirements of *Globe Indem. Co. v. Schmitt*, 142 Ohio St. 595, 53 N.E.2d 790 (1944) and therefore was not entitled to indemnification. *Shelley* at ¶ 24. The Eighth District held that *Globe* did not apply because it involved "an insurance company's right to subrogation after adjusting claims brought against its insured and its insured's codefendant, who was jointly liable to an injured third party." *Id.*

{¶11} Unlike the indemnification process in this case, both parties in *Shelley* were fined for violations and both parties engaged in the settlement process. Therefore, no notice was needed because both parties were concurrently engaged in the settlement process. In this case, Discovery provided no notice to Wildcat about the ODNR fine meeting. We declined to apply *Shelley* on this basis and instead applied *Brown v. Gallagher*, 4th Dist. No. 12CA3332, 2013-Ohio-2323, finding that the facts were similar to the case at hand.

{¶12} In *Brown*, a valid indemnification clause existed, the indemnitee agreed to a payment without notifying the indemnitor of said payment, and the indemnitor refused to indemnify due to the lack of notice of the payment. This is a very similar set of facts to the case at bar and therefore controls the indemnification clause at issue.

{¶13} Based on the above, Discovery has not called to our attention an obvious error in our decision nor has Discovery raised an issue for our consideration that was either not at all or was not fully considered by us when it should have been.

{¶14} For the reasons stated above, Discovery's application for reconsideration is hereby denied.

JUDGE GENE DONOFRIO, concurs.

JUDGE CAROL ANN ROBB, concurs.

JUDGE KATHLEEN BARTLETT, concurs.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.