

RENDERED: AUGUST 21, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001265-MR

WENDELL RIGSBY

APPELLANT

v. APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 07-CI-00546

ASHLAND INC.; ASHLAND OIL, INC.,
NOW ASHLAND INC.; AND ASHLAND EXPLORATION
HOLDINGS, INC., PREVIOUSLY AS ASHLAND
EXPLORATION, INC.

APPELLEES

AND

NO. 2008-CA-001428-MR;

CAROL SKAGGS

APPELLANT

v. APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 08-CI-00110

ASHLAND INC.; ASHLAND OIL, INC.,
NOW ASHLAND INC.; AND ASHLAND EXPLORATION

HOLDINGS, INC., PREVIOUSLY AS ASHLAND
EXPLORATION, INC.

APPELLEES

NO. 2008-CA-001429-MR

ARTHUR JENKINS

APPELLANT

v. APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 08-CI-00111

ASHLAND INC.; ASHLAND OIL, INC.,
NOW ASHLAND INC.; AND ASHLAND EXPLORATION
HOLDINGS, INC., PREVIOUSLY AS ASHLAND
EXPLORATION, INC.

APPELLEES

NO. 2008-CA-001430-MR

GARNETT SKAGGS

APPELLANT

v. APPEALS FROM LAWRENCE CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 08-CI-00112

ASHLAND INC.; ASHLAND OIL, INC.,
NOW ASHLAND INC.; AND ASHLAND EXPLORATION
HOLDINGS, INC., PREVIOUSLY AS ASHLAND
EXPLORATION, INC.

APPELLEES

NO. 2008-CA-001431-MR

v. APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 08-CI-00113

ASHLAND INC.; ASHLAND OIL, INC.,
NOW ASHLAND INC.; AND ASHLAND EXPLORATION
HOLDINGS, INC., PREVIOUSLY AS ASHLAND
EXPLORATION, INC.

APPELLEES

NO. 2008-CA-001432-MR

LESLEE PHELPHRY

APPELLANT

v. APPEALS FROM LAWRENCE CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 08-CI-00114

ASHLAND INC.; ASHLAND OIL, INC.,
NOW ASHLAND INC.; AND ASHLAND EXPLORATION
HOLDINGS, INC., PREVIOUSLY AS ASHLAND
EXPLORATION, INC.

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON AND THOMPSON, JUDGES; LAMBERT,¹ SENIOR
JUDGE.

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

THOMPSON, JUDGE: In this appeal, the sole issue presented is whether appellants were required to tender or return the amount of money received pursuant to a settlement agreement executed as the result of a prior action filed against appellees. We conclude that appellants were required to do so and, therefore, affirm the trial court's order dismissing the action.

In 1996, the six appellants filed actions against Ashland Inc. and Ashland Exploration, Inc. (Ashland) asserting trespass, nuisance, and negligence claims as a result of oil exploration and production activities on appellants' property. Appellants' claims focused on allegations that Ashland's activities resulted in the release of naturally-occurring radioactive material (NORM).

In 1997, appellants and Ashland settled the claims and, as a result, the parties executed a settlement agreement and release pursuant to which the stated consideration given by Ashland to appellants was an undisclosed amount of money. The settlement agreement is pivotal to the present controversy.

The agreement contains several provisions which reference Ashland's participation in the "Martha Reclamation Program." The program was the result of the discovery of NORM in the Martha Oil Field in Johnson County and a subsequent 1995 agreement entered into between the Commonwealth of Kentucky and Ashland in which Ashland agreed to remediate and restore property in the area including that owned by appellants.

Material to the settlement agreement entered into between appellants and Ashland was Ashland's participation in the Martha Reclamation Program and appellants' release of Ashland's liability. Paragraph four of the parties' agreement states: "Furthermore as specifically stated in Section 8 of this Settlement Agreement and Release, the parties intend to foreclose the possibility of future litigation of Claims arising out of Ashland's implementation and completion of the Martha Reclamation Program." In part, paragraph eight states:

The Claimants agree that this Settlement Agreement and Release includes settlement, release, and a covenant not to sue as to any and all claims associated with Ashland's reclamation, remediation, and restoration of the Property pursuant to the state-approved implementation and completion of the Martha Reclamation Program, including, but not limited to, the detection, removal, transportation, storage, and ultimate disposal of radioactive and any other material, as well as the restoration of properties which have been remediated.

Finally, and again emphasizing that appellants released any claims as a result of Ashland's remediation of the property involved in the controversy, paragraph ten states in emphasized print:

BY ENTERING INTO THIS SETTLEMENT AGREEMENT AND RELEASE, THE CLAIMANTS AGREE AND UNDERSTAND THAT THEY ARE RELEASING, AND COVENANTING NOT TO SUE CONCERNING ANY RIGHT TO ASSERT ANY CLAIMS CONCERNING ASHLAND'S OPERATIONS, ANY TYPE OF ALLEGED CONTAMINATION BY ASHLAND, OR ASHLAND'S IMPLEMENTATION AND COMPLETION OF THE MARTHA RECLAMATION PROGRAM, NOW OR AT ANY TIME IN THE FUTURE.

The present controversy was initiated in November 2007, when appellants filed an action against Ashland purporting to seek specific performance of a remediation portion of the settlement agreement and additional monetary compensation because of Ashland's alleged fraudulent breach of that agreement. Appellants alleged that they did not discover Ashland's failure to remediate the radioactive waste on their property until 2007 when they hired a radiation safety officer who conducted tests and discovered illegal, hazardous, and toxic levels of radioactive material on the property. Although each acknowledged in their complaints that Ashland obtained a full release on their properties from the Kentucky Department of Environmental Protection, appellants contended that the scientific basis used for release of property under the Martha Reclamation Plan was insufficient to protect the public health and did not comply with Kentucky's radiation regulations.

Ashland filed motions to dismiss the complaints asserting that appellants were precluded from seeking to set aside the settlement agreement because they had not tendered or offered to tender the money paid in consideration for the 1997 settlement agreement. The circuit court agreed and dismissed the complaints. Because of the facts, parties and issues are identical in the six appeals filed, the cases were consolidated for our review.

Ashland argues that appellants were required to tender or return the settlement proceeds prior to filing their 2007 complaints. It is the general rule that “[b]efore one can maintain an action to avoid a settlement and recover a larger

amount, he must return or tender a return of the sum received by him in the settlement.” *McGregor v. Mills*, 280 S.W.2d 161, 162-163 (Ky. 1955).

In *Kentucky Central Life & Accident Ins. Co. v. Burrs*, 256 Ky. 64, 75 S.W.2d 744, 745 (1934), it was emphasized that it is a widely accepted rule and one embedded in our jurisprudence:

There is a general rule prevailing in this and practically all other jurisdictions that one seeking to avoid or set aside a compromise settlement and to be remitted to his original rights must return or offer to return whatever he has received under the compromise settlement, and the party seeking such a rescission should allege the return or tender of return prior to or contemporaneous with the institution of the action. (Citations omitted).

Appellants do not deny that if they sought to set aside the agreement on grounds of fraud or any other ground, as a condition precedent to their claims they were required to tender or return the settlement proceeds. Their argument is that they do not seek to set aside the agreement. To distinguish the long line of cases cited by Ashland, appellants contend that they seek to enforce the agreement and claim additional damages as a result of the failure to remediate the radioactive waste on their property.

Unquestionably, a settlement agreement is a contract and its terms may be forced by an action subsequent to its execution. *Spot-A-Pot, Inc. v. State Resources Corp.*, 278 S.W.3d 158 (Ky.App. 2009). The factual incompatibility with appellants’ claims for specific performance of a provision obligating Ashland

to remediate the NORM on appellants' property is that the agreement does not impose the obligation upon Ashland. It only binds the appellants to the release of any claims arising from Ashland's participation in the Martha Reclamation Program.

Appellants counter that it was implied that Ashland's participation in the Martha Reclamation Program would be conducted in accordance with the proper scientific method and all radioactive material removed. The agreement disproves appellants' argument. Its terms unambiguously state that the remediation process would be exclusively subject to the supervision and approval of the Commonwealth and repeatedly states that appellants released any claims related to Ashland's participation in the Martha Reclamation Program. Thus, appellants' attempt to base their claims on an implied term of the agreement is negated by the agreement's unambiguous language and cannot serve as a basis for specific performance. *See Calhoun v. Everman*, 242 S.W.2d 100, 103 (Ky. 1951) (If specific relief is sought, the contract must be specific as to the term sought to be enforced).

Despite appellants' attempt to persuade this Court otherwise, the remedy they seek is for the 1997 settlement agreement to be set aside. Pursuant to its terms, appellants released any future claims as a result of Ashland's remediation of the property, thus the relief sought in the present action is precluded. Therefore, the only possible avenue for the relief now sought is to successfully set

aside the parties' 1997 agreement. Because appellants failed to tender or return the consideration given for the 1997 settlement agreement prior to commencing the present action, the trial court properly dismissed their complaints.

We briefly comment on appellants' contention that public policy dictates that the release provisions pertaining to Ashland's remediation of the property be deemed unenforceable. The remediation process and approval of Ashland's remediation was subject to the supervision and control of the Commonwealth. If, as appellants suggest, Ashland's compliance with the Martha Reclamation Program was insufficient to remedy the hazards on the property, appellants' complaints should be voiced to the appropriate agency. This Court is without power to grant relief.

Based on the foregoing, the order of the Johnson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Eugene Sisco
Pikeville, Kentucky

Kevin Thompson
Williamson, West Virginia

ORAL ARGUMENT FOR
APPELLANTS:

Kevin Thompson
Williamson, West Virginia

BRIEF FOR APPELLEES:

Anne A. Chesnut
Phillip D. Scott
John F. Billings
Lexington, Kentucky

Michael J. Schmitt
Paintsville, Kentucky

ORAL ARGUMENT FOR
APPELLEES:

Anne A. Chestnut
Lexington, Kentucky