

RENDERED: JULY 2, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2019-CA-000643-MR

JOHN HASKIELL

APPELLANT

v. APPEAL FROM ADAIR CIRCUIT COURT
HONORABLE JUDY VANCE MURPHY, JUDGE
ACTION NO. 14-CI-00168

JOYCE RELIFORD AND JIMMY
ANTHONY RELIFORD, CO-EXECUTORS OF
THE ESTATE OF JIMMY RELIFORD,
DECEASED; AND JOYCE RELIFORD,
INDIVIDUALLY

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: ACREE, CALDWELL, AND LAMBERT, JUDGES.

LAMBERT, JUDGE: In this appeal related to the enforcement of an oil lease agreement, John Haskiell seeks review of the Adair Circuit Court's March 1, 2019,

findings of fact, conclusions of law, and judgment, as well as of the March 26, 2019, order denying his motion to alter, amend, or vacate. We affirm.

On August 13, 2010, Haskiell and his wife, Peggy, entered into an oil and gas lease agreement with Jimmy Reliford Drilling Company (Reliford Drilling) whereby Haskiell and Peggy, as the landowners, leased a portion of their property in the Crocus Creek area of Adair County for the mining of oil and gas to the drilling company. The lease was for one-half of 87.5% of the lease; Haskiell and Peggy were retaining the other half of that portion of the lease. Pursuant to the language of the agreement, the lease was to remain in effect for one year from that date “and as long thereafter as oil or gas, or either of them, is produced from said land by the lessee.” The lease was to terminate if no well had commenced by August 13, 2011. The wells were permitted to and bonded to G & R Oil, LLC, which was a company wholly owned by Joyce Reliford, Jimmy’s wife. Drilling began immediately, and several wells produced oil.

Based upon a telephone conversation between Jimmy and Haskiell, Joyce claimed that Haskiell had agreed to pump or produce the wells on his property, meaning that Reliford Drilling’s normal pumper for that county would not be responsible for pumping the wells and ensuring that they were in working order. Jimmy passed away in early August 2013, and later that month, Haskiell and Peggy transferred their interests in the lease to PEGJO, LLC, a limited liability

company for which Peggy was its majority member. After Jimmy's death, Joyce obtained a restraining order against Haskiell that prevented him from contacting her. The wells continued to produce oil until February 2014, at which time production ceased for no apparent reason, according to Joyce. Haskiell would later claim that Joyce had failed to pay the bills related to the repairs of the wells after Jimmy died.

In September 2014, Joyce and Jimmy Anthony Reliford, as the co-executors of the Estate of Jimmy Reliford, and Joyce, individually, (collectively, the Relifords) filed a complaint against Haskiell in Adair Circuit Court seeking damages related to the production of oil, or lack of production, pursuant to the August 2010 oil lease. The wells at issue were in the Knox formation and had been consistently producing oil since August 2010. The Relifords alleged that Haskiell had agreed to pump the wells and produce them for the benefit of the leaseholders. Production continued until February 2014, when Haskiell either voluntarily stopped production or diverted the oil and the associated royalties from them. The Relifords alleged that Haskiell's action in voluntarily ceasing production or diverting the oil to another outlet constituted a breach of the duties he owed to them and was in violation of the standard of care he owed to the joint owners. The Relifords sought compensatory damages for the oil that had not been

produced or had been diverted, a strict accounting of the proceeds from the wells, and exemplary damages.

The Relifords encountered difficulties in serving Haskiell with the complaint. Haskiell did not answer the complaint for several months, and only did so after the Relifords had filed two motions for a default judgment and had a warning order attorney appointed. On March 20, 2015, Haskiell filed his answer as well as a counterclaim. In the counterclaim, Haskiell alleged that Joyce had abandoned the wells and ceased production and in doing so, she breached her duty to appropriately close and plug the wells pursuant to Kentucky Revised Statutes (KRS) 353.180, causing him to incur damages. He also alleged that the Relifords' right and interest to the wells was no longer in force. He sought dismissal of the Relifords' complaint and requested that a judgment be entered in his favor pursuant to the counterclaim. Haskiell also sought an order quieting title to the subject real estate pursuant to KRS 411.120. The Relifords denied the allegations in Haskiell's counterclaim. Discovery began, and the court scheduled a bench trial.

In their response to interrogatories filed May 4, 2015, the Relifords listed the individuals they expected to call as lay witnesses, including: Michael Barden, regarding the pumping of the wells; Brian Barrett, regarding his knowledge of the oil that came from the wells; Stephanie Phillips, the bookkeeper

for Reliford Drilling; and Joyce, who had “knowledge concerning the arrangement between the parties as to who was to pump the wells and take care of them,” knowledge of the books and records of Reliford Drilling, “knowledge concerning the damages that the Estate has sustained by reason of the Defendant either diverting the oil to another supplier or ceasing to pump said wells[,]” and knowledge of the records of the wells in the county clerk’s office. The Relifords did not know of any expert witnesses they intended to call when they filed this response.

As to the amount of damages they had incurred, the Relifords estimated, based upon records from August 23, 2010, through February 5, 2014, that the wells would have produced \$53,484.58 in revenue for their portion. They stated that “[t]his figure is arrived at by averaging the production from the period the year before and also averaging the price per barrel of oil produced during the period in question.” The Relifords also stated that Haskiell told them that he would take care of the wells and pumped them from the beginning. He pumped the wells continuously from August 2010 through February 2014, and he would call Barrett Oil when oil was ready to be picked up.

In their pre-trial compliance, the Relifords described the nature of their claim as “concerning the pumping of certain oil wells” and that “[b]y agreement of the parties, rather than Reliford’s long time and regular pumper

pumping these wells, John Haskiell stipulated and agreed that he would accept this responsibility.” The wells produced oil from 2010 through February 2014, when Haskiell either stopped production or diverted the oil to another source. The Relifords stated that they might call four witnesses, including Ms. Phillips, who was to “testify as to the calculation as to the loss to the Estate”; Joyce, who would testify about the pumping arrangement, the books and records of Reliford Drilling, and calculations concerning their losses; Mr. Barden, who generally pumped the Relifords’ wells; and Mr. Barrett, who would testify about the purchase of oil from these wells. Damages were in excess of \$53,484.00. They also included the documents they intended to introduce at trial, including three “Authority to Drill a Well” forms issued by the Department of Natural Resources to G & R Oil and listing Haskiell as the lessor.

In his pre-trial compliance, Haskiell raised the issue of whether the proper parties were before the court. Not named as parties were: G & R Oil, LLC, to which company the wells were permitted; Peggy Haskiell, one of the original lessors; and PEGJO, LLC, to which company Haskiell and Peggy transferred their interest. Haskiell also stated that no agreement had been presented to support the Relifords’ contention that he had agreed to accept responsibility for pumping and maintaining the wells. The lease provided that it was up to the lessee to do this, or

the lease term would end. Haskiell listed several witnesses that he might call at trial to testify.

In an updated pre-trial compliance, the Relifords increased the amount of damages they were seeking to \$88,686.61 based upon an updated calculation of damages they had sustained. Ms. Phillips would be testifying about those calculations at trial.

A bench trial was held on January 4, 2017. The Relifords planned to prove that they owned a 43.75% working interest in four wells on Haskiell's lease in the Crocus Creek area of the county. The lease was entered into in August 2010. The wells went into production that month and produced continually until Haskiell stopped producing oil or diverted the oil in February 2014. The Relifords wanted the court to declare that the lease was still in full force and effect and sought permission to enter the property to produce the wells. Haskiell agreed that a lease was executed in August 2010, but the operator of the well was G & R Oil. The parties disagreed about the interpretation of the lease, and Haskiell disputed the existence of an oral agreement between himself and Reliford Drilling that Haskiell would operate and produce the wells. Even if there had been an oral agreement, such agreements concerning the assignment of rights had to be in writing pursuant to the statute of frauds. There was no evidence that oil was diverted, but production stopped in February 2014.

Joyce Reliford testified first. She drills oil and gas wells through different companies she owns, including G & R Oil, which did permitting for the wells. She had worked in the industry for 40 years, and she said she had employed pumpers for the wells. Joyce explained that the pumpers check the wells every day to make sure they are producing and that there is not anything wrong with them. Mr. Barden was her normal pumper in 2010, and his job was to take care of all the wells in Adair County unless a well was already being pumped. She said that it was not uncommon for some landowners to want to pump on their land.

Joyce testified about the August 13, 2010, lease for Haskiell's property in Adair County. They immediately hit an oil well when they went in to drill on the property. Six permits to drill wells were obtained; three began to pump, and another one might have produced. The wells were in the Knox formation, meaning that they would consistently produce for years after their initial settlement.

Joyce went on to testify about a telephone conversation she heard at the Reliford Drilling office between Jimmy and Haskiell in September 2010, shortly after they had entered into the lease. Mr. Barden came in the office and had a conversation with Jimmy, after which Jimmy telephoned Haskiell. The telephone conversation was about pumping the wells on Haskiell's property, and Haskiell said that he preferred to pump the wells himself. There was no objection

to that, and Haskiell pumped the wells until February 2014. No one at Reliford Drilling had anything to do with pumping the wells or selling the oil. Between August 23, 2010, and February 5, 2014, records reflected that \$251,604.18 had been earned from the oil produced from the wells. This, Joyce said, was considered substantial production. Joyce testified that she did not know why the payments from Barrett Oil stopped or what was going on with the wells. Based upon her experience in the oil industry, there was no reason the Knox formation wells should no longer be producing. She wanted a ruling that the lease had not terminated, for permission to enter the property to pump the wells, and for damages in the amount that had not been produced that should have been produced.

Stephanie Phillips testified next. She had worked as a bookkeeper for Reliford Drilling since 1991 or 1992. She was familiar with payments made for oil sold to Barrett Oil Company and calculated what the company would have received had oil been continuously produced after February 2014. She said the company would receive a check approximately each month for oil shipped pursuant to the leases, which included a payout sheet detailing what amount was paid for each well. Ms. Phillips made a list of what Barrett Oil was paying per month per barrel in 2014 through 2016 and used the shipping dates and barrels sold for the oil from these wells in previous years to estimate what the wells should

have made. Based on her calculations, the Relifords should have received \$88,686.61 as their part.

Haskiell objected to the introduction of Ms. Phillips' calculations as speculative as to what the wells would have produced if they had been pumped and because there was no basis in her training that would permit her to predict what a well would produce. The amount Barrett Oil was paying per month for a barrel of oil was not speculative because Ms. Phillips had that information; she was speculating as to production amounts. However, because these wells were in the Knox formation, production would be consistent. Therefore, the court permitted the introduction of this information. Haskiell then suggested that the Relifords would need an expert to analyze production and the market. He questioned whether Ms. Phillips had the qualification and education necessary to predict that the wells would continue to produce at this rate to calculate damages pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). The court noted that it had Joyce's testimony that this was what she had done her entire adult life. Counsel for the Relifords argued that Ms. Phillips was testifying only as an expert as to the calculations. Joyce was testifying as an expert as to the oil industry and the production with Knox formation wells. The court again ruled that the documents of the calculations could be introduced.

Michael Barden testified next. He works in the oil industry, pumping wells for Reliford Drilling, himself, and other companies. He described pumping wells as servicing them, making sure the tanks are full, getting the oil in and out properly, and having a well repaired if it was down. He would also call the oil company to come get the oil. Mr. Barden set up the electrical system for the wells at issue, but he did not pump the wells. Rather, Haskiell and Jimmy made a deal that Haskiell was to pump the wells. He recalled the conversation at Jimmy's office with Haskiell in September 2010 about who was going to pump the wells. Jimmy told Haskiell that he could pump the wells, and he did so. Mr. Barden had also seen Haskiell performing his duties as a pumper when he was on the property to fix an electrical issue, and he saw Haskiell in a video in "Backyard Oil" with the Barrett Oil truck. Therefore, he believed that Haskiell was pumping the wells.

John Haskiell was called next to testify on cross-examination. He agreed that the wells were in the Knox formation and that one produced until February 2014. Haskiell said his wife would go down every other day to make sure the wells were pumping, and if not, they would call someone to fix it. He would call Barrett Oil to pick up the oil, after he called Jimmy to make sure he wanted to sell it. Haskiell said he stopped production on the wells because Joyce would not pay her bills after Jimmy died and because she told the state she was going to plug the wells. He said the wells had been sabotaged after he had fixed

them three times, and he denied that he had been selling the oil to anyone else. He thought Joyce had sabotaged the wells. Haskiell had made a claim against Jimmy's estate related to gold that Jimmy had been holding for him, and he had been mad at Joyce for stealing from him. Regarding the bills he claimed Joyce had not paid, Haskiell produced invoices to him from Burton Supply and Garmon's Oil Well Service dated in 2013 that he claimed he had asked Joyce's attorney to pay over the telephone. He was not allowed to contact Joyce after Jimmy passed away in August 2013, so he never presented the invoices to her. Joyce had accused him of trespass the morning Jimmy died when Haskiell went to see her.

Haskiell then testified about oil from the Kinky Knob wells, which were owned by the Relifords and were the subject of a separate lease. He said that his son, at his, Peggy's, and Jimmy's direction, had been hauling oil from the Kinky Knob wells, putting it in tanks on the Haskiell lease property, and selling it. He also said his son was the pumper on the Haskiell lease. Haskiell disagreed with what Joyce said about the Knox formation wells, and he said the oil would go down as fast as it would come up. He had been in the industry since 2010 when he and Jimmy got the first well. He said the 2010 lease was never modified in writing, and the terms of the lease did not require him to pump the wells; Reliford Drilling was the operator. Haskiell admitted that he would call someone to fix the wells if something was wrong, which was how he got the invoices.

Joyce was recalled to the stand. She said she had never been presented with the bills Haskiell claimed she had not paid. She would have paid them if they had been presented as it would have been more beneficial for her to have paid them. If she had been told the wells were down, she would have contacted a service company. Haskiell did not need to contact her directly; other people could have. Because there was a restraining order in place, Joyce did not go onto Haskiell's property after Jimmy's death. She maintained that there was an oral contract for Haskiell to be the pumper.

Haskiell moved for a directed verdict on liability and damages, arguing that any modification of a written lease must be in writing and that the telephone call did not require Haskiell to continue to pump the wells. The lease had terminated because the Relifords did not continue to operate the wells. In addition, there was no expert testimony to support the calculation of damages as to how much the wells would produce, and his interest had been assigned to an entity that had not been named in the lawsuit. In response, the Relifords argued the testimony was uncontroverted that Haskiell agreed to pump the wells, and he – or his son – pumped the wells. The agreement was executed based upon the actions of the parties. Haskiell claimed that Reliford Drilling had nothing to do with pumping these wells. Regarding damages, the calculation was based upon the expert testimony of Joyce concerning Knox formation wells and took into account

the fluctuating prices of oil. The Relifords argued that the only reason Haskiell stopped pumping the wells was to terminate the lease for non-use. In reply, Haskiell argued that “some gratuitous act” did not take this out of the statute of frauds and that the assignment of a lease must be in writing. After considering the parties’ arguments, the court denied the motion for a directed verdict.

Peggy Haskiell was the first witness to be called for the defense.

Peggy was familiar with the 2010 lease, and she testified that it has never been changed, either in writing or in any other way. Peggy deeded her interest in the lease to an LLC right after Jimmy died in 2013; Jimmy had given them the idea to put the property into an LLC because it was safer. She was not a party to the telephone call between Haskiell and Jimmy that Joyce overheard, and did not know anything about it. Peggy said the Relifords were the operators of the wells, and therefore they were the pumpers. As to the repair bills, they were to be split between them and the Relifords. She did not let Joyce know about the bills due to the court order in place to not have any association with her family. The Relifords did not do anything to repair the wells when they were not working and had not checked on the wells after Jimmy died. She said the wells were still broken and had not been fixed because the Relifords did not help pay the bills. She did not know if the Relifords had checked on the wells during the three-year period, and no oil had been produced in the last three years. She said Jimmy, before his death,

would come down for dinner and would look at the wells, but he did not tend to the wells. No one had shown any interest in the wells since Jimmy's death. While Peggy had not sent the bills to the Relifords, they should have figured out the wells were not working. She also said they had been hauling oil from the Kinky Knob wells to put with the other oil for more than a year. They would haul 100 barrels a month to put in the tanks. Peggy, Haskiell, and Jimmy would call Barrett Oil when there was oil to pick up. She said she would walk by and if one was not working, they would call for service. She said the pumps were on electric timers.

Adam Haskiell was the last witness to testify. Haskiell is his father. He said he was "barely" familiar with the wells on the Crocus Creek property. Adam said the operator was Jimmy before he died. In the Winter of 2013/2014, he recalled the wells broke down. His father got them fixed, and they broke down again. He did not know how many times they had broken down. He did not believe any oil had been produced or diverted from those wells since February 2014. He did not do anything to take care of the wells. He, his mother, and sometimes his sister would haul oil from the Kinky Knob wells and put it in the stock tanks. He did that many times and hauled thousands of barrels in 2011 and 2012 at Jimmy's direction.

At the conclusion of the testimony, Haskiell renewed his motion for a directed verdict for the reasons set forth earlier and pointed out that the Relifords

failed to seek an injunction during the course of the trial to obtain access to the property to check the wells. Haskiell requested the opportunity to brief the issues related to the statute of frauds, *Daubert*, and the duties under the lease.

Following the bench trial, the court permitted the parties to submit memoranda setting forth their respective arguments. In his memorandum, Haskiell argued that it was the Relifords' duty to produce oil from the wells or, after one year of non-production, the lease would end. As the last production occurred in February 2014 and the Relifords had not attempted to resume production, the lease expired in February 2015. He also argued that he had assigned his rights under the lease, and that the Relifords had knowledge and constructive notice of this, meaning that the claims against him should be dismissed. Finally, he argued that there was a failure of proof in relation to damages based upon the Relifords' failure to mitigate their damages and the unreliability of Joyce's testimony pursuant to *Daubert*.

The Relifords, in their memorandum, disputed Haskiell's arguments. Their complaint was only against Haskiell, as he was the individual who stopped the production. Haskiell also admitted that he operated the lease, and Joyce testified that she heard Haskiell and Jimmy make the agreement over the telephone that Haskiell would pump the wells. This represented an assignment of work, which could be agreed to orally, rather than a conveyance of an interest in real

property. The Relifords went on to discuss production levels when the wells were in production regarding the calculation of damages. Finally, they argued that Joyce was an expert in the field of the oil and gas business based upon her many years in the industry. In conclusion, the Relifords stated:

It is respectfully submitted that this case is the situation where the Defendant sought to take advantage of the death of Jimmy Reliford. These wells have been high producing wells from their inception. Haskiell assumed that since Jimmy had died and Ms. Reliford was now running the Company, that he could either start diverting the oil produced from these wells, or try to terminate this lease so that he could receive 100% of the oil produced from these wells.

The Relifords submitted that they were entitled to a judgment against Haskiell in the amount of \$88,686.61, a judgment declaring that the lease was in full force and effect, and a ruling that they could enter the property to protect their interests and activate the wells.

In his reply, Haskiell stated that he had not agreed to become the operator of the well, although he did agree that the Relifords had a valid lease on the property. However, that lease had expired because the Relifords abandoned it when production ceased. He also stated that there was no evidence that he had ever diverted oil away from the lease. Haskiell went on to dispute the production estimates based on testimony that oil from another lease had been commingled with the oil for this lease and the failure to identify the specific wells that the

estimates were based on. He again argued that Joyce had not been qualified as an expert in this matter pursuant to *Daubert*.

On March 1, 2019, the circuit court entered its findings of fact, conclusions of law, and judgment. It specifically found the following facts:

This case concerns an oil lease on the Defendant's property, and the oil that was produced from that lease. The Court finds that:

1. On August 13, 2010, John E. Haskiell and his wife, Peggy Haskiell executed and delivered a lease to Jimmy Reliford Drilling Company which lease was lodged of record in the Adair County Clerk's Office on August 13, 2010. A copy of this lease is filed as an exhibit which may be found in the record. Under the terms of the lease, the Estate of Jimmy Reliford and/or Joyce Reliford became the owners of a 43.75% working interest in the four wells located on the Haskiell property.

2. This property is located on Hwy. 704 in the Crocus Creek area of Adair County and was commonly referred to as the Crocus Creek, or Haskiell lease.

3. John Haskiell assumed the role of pumper and Barrett Oil Company was the purchaser of the oil produced by these wells.

4. The Defendant began to pump these wells immediately upon the execution of the lease and completion of the wells and continued to pump the wells until February 5, 2014 at which time he ceased pumping the wells in question.

5. From August 23, 2010 until February 5, 2014 the wells produced \$251,604.18.

6. As of that date, the Defendant Haskiell ceased production of these wells and/or diverted the same to some other source other than Barrett Oil Company. The Court finds that based upon the proof, the Defendant John Haskiell had no legitimate reason to terminate the production of these high production wells.

7. The Court finds that these wells had been in continuous production since they were drilled in August of 2010 and during that period of time up until the time that production ceased by reason of the wrongful actions of the Defendant on February 5, 2014, production remained relatively constant and fluctuated very little taking into account the difference in the price of oil.

8. The Court finds that based upon the exhibits entered in this case, the Plaintiffs' proof is that through September of 2016, based by reason of Haskiell's failing to continue to pump these wells, the Plaintiffs have been damaged in the amount of \$88,686.61.

Based upon these factual findings, the court concluded that the wrongful action on Haskiell's part did not operate to terminate the lease, which remained in full force and effect, and that the Relifords had sustained damages in the amount of \$88,686.61. The Relifords were the owners of a 43.75% working interest in the four wells on Haskiell's property and were therefore entitled to all other benefits of the 2010 lease. The court awarded 6% pre- and post-judgment interest, and ordered that the Relifords were to recover their costs.

Haskiell filed a Kentucky Rules of Civil Procedure (CR) 59.05 motion to alter, amend, or vacate the circuit court's judgment, stating that it was contrary to law and fact. The court permitted the parties to orally argue their positions.

Haskiell argued that Reliford Drilling was a necessary party as it was listed as the producer on the lease, and this duty had not been the subject of a written assignment. In addition, Joyce should not have been allowed to speculate about the estimated production of the Knox formation wells without any specialized knowledge. The Relifords objected to the motion, stating that it was time to put an end to the litigation. The court indicated that it had thoroughly reviewed the case and was comfortable and satisfied with its ruling. Therefore, the circuit court denied the motion in an order entered March 26, 2019. This appeal now follows.

Our appropriate standard of review is set forth in *Jones v. Sparks*, 297 S.W.3d 73, 76 (Ky. App. 2009):

Since this case was tried before the court without a jury, its factual findings “shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses” CR 52.01. *See also Lawson v. Loid*, 896 S.W.2d 1, 3 (Ky. 1995); *A & A Mechanical, Inc. v. Thermal Equipment Sales, Inc.*, 998 S.W.2d 505, 509 (Ky. App. 1999). A factual finding is not clearly erroneous if it is supported by substantial evidence. *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998); *Faulkner Drilling Co. v. Gross*, 943 S.W.2d 634, 638 (Ky. App. 1997); *Uninsured Employers’ Fund v. Garland*, 805 S.W.2d 116, 117 (Ky. 1991). However, a reviewing court is not bound by the trial court’s decision on questions of law. An appellate court reviews the application of the law to the facts, and the appropriate legal standard is *de novo*. [*A & A Mechanical, Inc.*, 998 S.W.2d at 509.]

With this in mind, we shall consider Haskiell’s arguments on appeal.

For his first argument, Haskiell contends that the Relifords failed to join all necessary parties to the lawsuit. They did not name Reliford Drilling, the company that was to produce the oil from the leased property, or introduce any recorded evidence that this duty had been assigned. He also asserted that the Relifords had not named PEGJO, the organization to which Haskiell and his wife had assigned their rights in August 2013, as a party.

CR 19.01 provides, in relevant part, as follows:

A person who is subject to service of process, either personal or constructive, shall be joined as a party in the action if (a) in his absence complete relief cannot be accorded among those already parties, or (b) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

We agree with the Relifords that this was a suit against Haskiell as an individual and there were no additional parties necessary for the adjudication of this claim.

The Relifords presented evidence that Haskiell was the pumper for the wells and continued to do so until February 2014, when he stopped pumping the wells without a valid reason. Furthermore, Haskiell failed to raise this as a defense in his answer, and he did not move the court to add PEGJO as a party.

Next, Haskiell argues that the rights of the parties are defined by the lease agreement, not by an alleged collateral agreement between Jimmy and Haskiell. He asserts that there was no written assignment of the duty to produce or pump the wells, which was necessary pursuant to the statute of frauds as the lease related to an interest in the mineral rights to land.

However, we again agree with the Relifords that this case involves the adjudication of rights under the agreement between Jimmy and Haskiell made during a telephone conversation in 2010. We hold that the Relifords provided sufficient evidence to establish the existence of this collateral agreement that Haskiell would pump the wells on his property, rather than the Relifords' normal pumper. Haskiell was actually performing these duties by keeping the wells pumping for close to four years, from August 2010 to February 2014, as evidenced by the regular receipt of checks for oil produced from the wells. Haskiell and Peggy both testified about the repair bills they had incurred when the wells needed to be serviced. It is apparent that Haskiell was performing these duties as pumper – or at least ensuring that these duties were performed – until he claimed that Joyce failed to pay repair bills after Jimmy passed away. However, Haskiell never presented these bills to Joyce for payment, meaning that his proffered reason failed to excuse his lack of action in continuing to ensure the wells were producing oil. Therefore, the circuit court's findings that Haskiell had assumed the role of pumper

and had no legitimate reason to stop production of the wells are not clearly erroneous.

As to his statute of frauds argument, Haskiell did not list this as an affirmative defense in his answer and is therefore precluded from making this argument. CR 8.03 lists affirmative defenses that must be listed in an answer:

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.

See also City of Whitesburg v. Bates, 320 S.W.2d 316, 316 (Ky. 1959) (“This defense should have been raised by answer. CR 8.03.”).

Next, Haskiell contests the calculation of damages. The gist of his argument is that Ms. Phillips’ calculation was flawed because it was based on Joyce’s testimony that these wells were in the Knox formation and would consistently produce oil for a number of years. Joyce, he asserts, did not have any type of specialized training that would permit her to testify as an expert on this subject. Therefore, her testimony, and in turn Ms. Phillips’ testimony, was inadmissible pursuant to *Daubert, supra*. We find no merit in this argument because Haskiell never filed a written objection to this testimony prior to trial when the Relifords included this information in an updated pre-trial compliance

filing and because he never requested a *Daubert* hearing. In addition, Haskiell did not choose to call a witness to rebut Joyce’s testimony. His own testimony was not credible. Furthermore, we find no merit in Haskiell’s assertion that commingled oil made Ms. Phillips’ calculation inaccurate.

Finally, Haskiell argues that the Relifords failed to mitigate their damages by attempting to reenter the property “to perform their duties under the lease” or by seeking injunctive relief from the circuit court. While it is true that a party has a duty to mitigate damages, *see Morgan v. Scott*, 291 S.W.3d 622, 640 (Ky. 2009), the record reflects that Haskiell’s actions delayed this matter on several occasions, including the several months it took to serve him with the complaint and the multiple continuances of the trial at Haskiell’s request. Therefore, we find no evidence that the Relifords failed to mitigate their damages in this case.

For the foregoing reasons, the judgment and order of the Adair Circuit Court are affirmed.

ALL CONCUR.

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