NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2012 CA 1043

MIDNIGHT DRILLING, LLC

VERSUS

CLAUDE ADAM TRICHE, ET AL

Judgment Rendered: JUN 1 9 2013

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On Appeal from the
Thirty-Second Judicial District Court
In and for the Parish of Terrebonne
State of Louisiana
Docket No. 160041

Honorable Randall L. Bethancourt, Judge

* * * * *

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* * * * *

BEFORE: GUIDRY, CRAIN, AND THERIOT, JJ.

GUIDRY, J.

In this concursus proceeding brought by the current operator of a unit well, one group of named defendants appeals the judgment finding that the mineral servitude that would otherwise entitle them to share in the production proceeds of the well was prescribed for nonuse. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

On February 17, 2009, Midnight Drilling, LLC spudded well MIO RA SUA; C Triche Et Ux #001 (formerly named Claude A Triche Et Ux #001). Subsequently, the Office of Conservation issued an order, effective August 18, 2009, establishing the well as a unit well with Midnight Drilling designated as the well operator.

As the designated well operator, Midnight Drilling executed leases and assignments of leases for production of the minerals contained in the well; however, a dispute arose among the various lessors regarding rights to the production. So on March 9, 2010, Midnight Drilling filed a concursus petition to determine who among the various lessors were entitled to royalty payments. By the time the matter proceeded to trial, most of the named defendants had settled their claims except for the following parties: Claude Adam and Debbie Himel Triche (the "Triches") and Julius Wilson Cole, Catherine Carmen Cole Petty,[1] Kimberly Ann Gill Mauer, Gill Petroleum Enterprises, Cathline S. Cole – Terrebonne, LLC,[2] Landowner's Interest, Inc., the Succession of Mary Elizabeth Hames Gill, Mary E. Gill Family, LLC and the Succession of Cathline Singleton Cole (collectively referred to as the "Cole group").

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[1] Ms. Petty was incorrectly identified as "Katherine Carmen Cole Teddy" in the concursus petition.

[2] Cathline S. Cole-Terrebonne, LLC was misidentified as "Catherine S. Cole-Terrebonne, LLC" in the concursus petition.

In their answer to the concursus petition, the Triches asserted that they were the owners of two tracts of land -- one lying north of the north right-of-way of the Intracoastal Waterway (North tract) and the second lying south of the Intracoastal Waterway (South tract). They acknowledged that the title to the minerals and the bed and bottom underlying the Intracoastal Waterway right-of-way were retained by the original seller of the land, Hallette Barrow Cole, wife of Dr. C. Grenes Cole, from whom the Cole group claims its rights. The Triches further asserted that because the Intracoastal Waterway separates the two tracts of land, the mineral reservation resulted in the creation of two separate mineral servitudes – one servitude for the minerals reserved under the tract lying north of the north right-of-way of the Intracoastal Waterway and a second servitude for the tract lying south of the Intracoastal Waterway. Finally, the Triches averred that:

> upon information sufficient to justify belief that a period of ten years has elapsed since creation of the original mineral servitudes … during which no operations for the benefit of the servitude Tract were conducted on, or production obtained therefrom, said servitude Tract being identified as the property lying North of the Intracoastal Waterway; and that as a result, the prescription of non-use has accrued in so far as said servitude reserved on the Tract lying North of the North Right-of-Way line of the Intracoastal Waterway is concerned.

Conversely, in their answer to the concursus petition, the Cole group asserted that both of the mineral servitudes have been preserved by production and/or drilling operations conducted at all times pertinent to the lawsuit. Specifically, the Cole group averred "that the drilling and production from the Cotton [Petroleum] Corporation Cole #2 well ["Cole #2 well"] and drilling and production from the Midnight Drilling, LLC #1 Triche Well constitute two such wells that have effectively prevented the running of liberative prescription of the minerals reserved by [the] Cole group" and further averred "that a well or wells have been drilled and produced from a surface location … which has effectively prevented the running of liberative prescription of the minerals, mineral rights and royalties reserved by [the] Cole group…."

Thus, the matter proceeded to trial on the issue of whether the Cole group's mineral servitude for the North tract had been extinguished pursuant to liberative prescription of nonuse. Following a two-day bench trial, the trial court decreed the following:

> [A]s a matter of fact and law ... the mineral servitude created by the reservation of minerals in [the] Act of Sale by Mrs. Hallette Barrow Cole, et al dated April 9, 1973...has been extinguished for lack of use for a consecutive ten year period immediately preceding the drilling of the Midnight Drilling, LLC C.A. Triche, et al No. 1 Well, in so far and only in so far as said servitude pertains to the following tract of land belonging to Claude Adam Triche and Debbie Himel Triche, to wit:
>
>> A certain tract of land containing 76.505 acres described as beginning at the [northeastern most] property corner of Main Iron Works, Inc., being on the southern line of a 100' Right of Way from Bayou Blue Road. Said point designated as the point of beginning.
>>
>> Thence, S 0° 04' 37" E for a distance of 1,275.49 feet to a point.
>> Thence, northwesterly along an arc for a distance of 3,001.33 feet (Radius – 5579.58 feet) to a point.
>> Thence, N 0° 02' 16" W for a distance of 682.49 feet to a point.
>> Thence, S 89° 29' 54" E for a distance 2,643.11 feet to a point.
>> Thence, S 0° 04' 37" W for a distance of 100 feet to a point.
>> Thence, S 89° 45' 40" E for a distance of 232.90 feet to the point of beginning.
>>
>> Said tract is bounded on the south by the Intracoastal Waterway; on the west by Delta Securities, or assigns,; on the north by Delta Securities, or assigns and a 100' Right of Way; on the east by Main Iron Works, Inc. All of the above is more fully shown on a map prepared by Charles L. McDonald, Land Surveyor, Inc., entitled "MAP SHOWING PROPERTY BELONGING TO HALLETTE BARROW COLE, ET AL, LOCATED IN SECTIONS 37 & 42, T17S-R18E, TERREBONNE PARISH, LOUISIANA" and dated 27 May 1993.

It is from this judgment that the Cole group now appeals.[3]

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[3] While the appeal was pending before this court, the Triches filed a motion to supplement the appellate record with certain exhibits; however, as legible and complete copies of the exhibits already exist in the record before us, the Triches' motion is denied.

ASSIGNMENTS OF ERROR

In this appeal, the Cole group alleges that the trial court erred in holding that no operations were conducted on the North tract so as to interrupt the accrual of prescription for nonuse. The Cole group further alleges that the trial court erred in failing to recognize that all production and operations of the Cole #2 well were conducted on a unit basis in connection with the R Sand and the lower P Sand.

DISCUSSION

We will commence our review of this matter by considering the Cole group's second assignment of error. In support of this assignment of error, the Cole group contends that a voluntary unit was established covering the area of the North tract such that any and all operations served to interrupt the running of prescription on their mineral servitude.

A mineral servitude can be extinguished by prescription resulting from nonuse of the servitude for an uninterrupted ten-year period. See La. R.S. 31:27(A)(1). The prescription of nonuse can be interrupted by good faith operations for the discovery and production of minerals. Such good faith operations are defined as being:

> (1) commenced with reasonable expectation of discovering and producing minerals in paying quantities at a particular point or depth,
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> (2) continued at the site chosen to that point or depth, and
>
> (3) conducted in such a manner that they constitute a single operation although actual drilling or mining is not conducted at all times.

La. R.S. 31:29. Moreover, operations or production within a "unit" can also interrupt the running of the prescription for nonuse as to a mineral servitude. See La. R.S. 31:33 and 37. A "unit" is defined in the Louisiana Mineral Code as:

> an area of land, deposit, or deposits of minerals, stratum or strata, or pool or pools, or a part or parts thereof, as to which parties with interests therein are bound to share minerals produced ***on a specified basis*** and as to which those having the right to conduct drilling or mining operations therein are bound to share investment and operating costs ***on a specified basis***. A unit may be formed by convention or by

order of an agency of the state or federal government empowered to do so. A unit formed by order of a governmental agency is termed a "compulsory unit." [Emphasis added.]

La. R.S. 31:213(6).

In this case, the Cole group alleges that a unit was formed that encompassed the land burdened by their mineral servitude because "the parties to the lease [of the Cole #2 well], namely the operators and lessors, acted in such a manner that the Cole #2 well was produced on a unit basis." The Cole group relies on a comment to La. R.S. 31:213 stating that the definition of "unit" contained in the statute "includes conventional units of all kinds, whether established by declaration under a pooling power, by a contract executed by all parties affected, ***or otherwise***," (emphasis added) as authority for its proposition that a unit can be formed based merely on the conduct of interested parties. We disagree.

Mineral interests are incorporeal immovables. La. C.C. art. 470; La. R.S. 31:18. A transfer of immovable property must be made by authentic act or by act under private signature. La. C.C. art. 1839. Operating agreements must be in writing to affect title to a real right such as land, a mineral servitude, or a mineral lease. See Guy E. Wall, Joint Oil and Gas Operations in Louisiana, 53 La. L. Rev. 79, 101 (Sept. 1992). Further, it has been held that parol evidence cannot be used to prove title to any mineral right *nor* to prove any claim for or interest in the revenues from a mineral right.[4] Hayes v. Muller, 245 La. 356, 158 So. 2d 191 (1963).

In Hayes, the court found that the plaintiffs were seeking to verbally prove a joint venture to establish their right to share in the profits from a mineral lease; however, the court held that "[t]he parol evidence rule has been applied by this court not only in cases involving contracts which directly affect title to realty but

[4] The Cole group further cites Banner v. Geo Consultants International, Inc., 593 So. 2d 934 (La. App. 4th Cir. 1992) in support of its argument; however, we observe that the court in Banner found that a unit was established in a written re-assignment of a lease, and not based merely on the conduct of interested parties. See Banner, 593 So. 2d at 935.

also in others where the litigants merely sought to derive benefits growing out of verbal agreements relating to the sales of immovable property." Hayes, 245 La. at 376, 158 So. 2d at 198. Thus, the court held that "applicable to the mineral leases and contracts is the same requirement of written testimonial proof that governs that transfer of immovable property. In other words the parol evidence rule applies to transactions involving mineral leases, just as it does to those affecting real estate." Hayes, 245 La. at 375-76, 158 So. 2d at 198.

Therefore, the court held that the plaintiffs had no cause of action to assert such a claim. Hayes, 245 La. at 385, 158 So. 2d at 201. Similarly, we find that to the extent the establishment of a "unit" affects the rights of parties to derive benefits from the operation and production of a mineral interest, parol evidence cannot be used to establish the existence of such a "unit," but instead, a writing must exist recognizing the parties' agreement to establish such a "unit."

Therefore, having determined that the trial court did not err in failing to find a unit was established for the operations and production of the Cole #2 well, such that activities within the unit would interrupt the running of prescription on the Cole group's mineral servitude for the North tract, we will now consider the Cole group's first assignment of error alleging that the trial court erred in holding that no operations occurred for an uninterrupted ten-year period to toll the running of prescription on their mineral servitude.

The record reveals that up until 1989, the Cole #2 well was operated as a compulsory unit well,[5] and thereafter, it was operated as a lease well. Thus, as a non-unit well, any operations and production that occurred had to occur on the actual land burdened with the servitude in order to interrupt the running of

[5] As a unit well, operations and production by the Cole #2 well interrupted prescription on the Cole group's mineral servitude for the North tract until 1998. However, the record establishes and the parties acknowledge that operations and production of the Cole #1 well interrupted prescription on the mineral servitude until 2003. Thus, at issue is whether any operations or production of the Cole #2 well occurred between 1999 (ten years prior to the spudding of the Midnight Drilling well) and 2003 (the end of the interruption resulting from the Cole #1 well) that interrupted the prescription of nonuse of the mineral servitude for the North tract.

prescription. The Cole #2 well was drilled as a directional well, meaning that the bottom of the well deviated from the point where drilling was commenced from the surface. In this case, it is undisputed that the surface location where drilling was commenced for the Cole #2 well was located on the North tract. However, given that the Cole #2 well is a directional well, the surface location is not determinative of whether the operations or production associated with the well constituted an exercise of the mineral servitude. Rather, the focus of the inquiry is the area that those operations were intended to develop by the "discovery and production of minerals." See La. R.S. 31:29.

As set forth in Article 29, good faith operations for the discovery and production of minerals must be "commenced with reasonable expectation of discovering and producing minerals in paying quantities *at a particular point or depth*" and must be continued "*at the site chosen to that point or depth.*" La. R.S. 31:29(1) and (2) (emphasis added). Similarly, La. R.S. 31:36, addressing the interruption of prescription by production, provides that prescription "is interrupted by the production of any mineral covered by the act creating the servitude." Although La. R.S. 31:30 sets forth that an interruption takes place on the date that actual drilling operations are "commenced on the land burdened by the servitude," that language must be construed *in pari materia* with Articles 29 and 36. La. C.C. art. 13. Construing the articles together, we find that good faith operations for the discovery and production of minerals *from the property that is encumbered by the mineral servitude* is necessary to interrupt the prescription of nonuse. Accordingly, drilling and production operations conducted at the surface of a well do not interrupt prescription of a mineral servitude encumbering the surface location if the operations are for the sole and exclusive purpose of discovering and producing minerals from other immovable property that is not subject to the servitude.

This interpretation is consistent with the rights retained by a reservation of a mineral servitude, which our supreme court has described as giving "the owner thereof the right of ingress and egress for the purpose of exploring for and reducing to possession the minerals under the property so burdened." Horn v. Skelly Oil Co., 224 La. 709, 719, 70 So. 2d 657, 660 (1954). See also La. R.S. 31:21(defining a mineral servitude as the "right of enjoyment of land belonging to another for the purpose of exploring for and producing minerals and reducing them to possession and ownership").

Esso Standard Oil Company v. Jones, 233 La. 915, 98 So. 2d 236 (1957) (on rehearing) involved a concursus proceeding to determine the rights to oil royalties from directional wells that had bottom holes in areas that had formerly been part of the bed of the Mississippi River. In determining to whom the royalties should be paid, the court specifically considered the location of the bottom holes of the respective wells to determine to whom the royalties were owed. Esso Standard Oil Company, 233 La. at 948-53, 98 So. 2d at 247-49. Thus, critical to the determination of whether production operations of the Cole #2 well as a lease well interrupted prescription on the Cole group's mineral servitude is identification of the bottom hole of this directional well.

At the concursus trial, the Triches presented the testimony of Eric G. Ryals, as an expert witness in registered land surveying. Mr. Ryals testified that the drilling activities for the Cole #2 well at depths of 11,606 to 11,610 feet in the P sands[6] resulted in bottom holes that were south of the north right-of-way of the Intracoastal Waterway and outside of the boundary of the North tract. The Cole group, on the other hand, presented the testimony of Michael J. Veazey, an expert witness in petroleum engineering, who opined that data was insufficient to

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[6] Because drilling activities in the Q and R sands ended in 1992, resulting in prescription being suspended until 2002, we are limiting our discussion to the drilling activities occurring in the P sands, which produced until 2001, and would result in a suspension of prescription until 2011, if applicable.

conclude where the bottom hole for the Cole #2 well was located for the drilling that was conducted in P sands. Instead, according to Mr. Veazey's report, which was admitted into evidence, the bottom holes could have been located anywhere from 150 feet south of the north right-of-way of the Intracoastal Waterway (outside the boundary of the North tract) to 70 feet north of the north right-of-way of the Intracoastal Waterway (inside the boundary of the North tract). In ruling in favor of the Triches, the trial court obviously credited the testimony of Mr. Ryals over that of Mr. Veazey.

In considering expert testimony, the trier of fact may accept or reject in whole or in part the opinion expressed by an expert. The effect and weight to be given expert testimony is within the broad discretion of the trier of fact. The trier of fact may accept or reject any expert's view, even to the point of substituting its own common sense and judgment for that of an expert witness where, in the trier of fact's opinion, such substitution appears warranted by the evidence as a whole. Morgan v. State Farm Fire and Casualty Company, Inc., 07-0334, pp. 8-9 (La. App. 1st Cir. 11/2/07), 978 So. 2d 941, 946. The law is well settled that where the testimony of expert witnesses differs, the trier of fact has great, even vast, discretion in determining the credibility of the evidence, and a finding of fact in this regard will not be overturned unless clearly wrong. Cotton v. State Farm Mutual Automobile Insurance Company, 10-1609, pp. 7-8 (La. App. 1st Cir. 5/6/11), 65 So. 3d 213, 220, writ denied, 11-1084 (La. 9/2/11), 68 So. 3d 522.

Based on the record before us, we cannot say that the trial court abused its discretion in crediting the testimony of Mr. Ryals over that of Mr. Veazey to find that the drilling activities for the Cole #2 well conducted in the P sands resulted in a bottom hole located south of the north right-of-way of the Intracoastal Waterway. As such, the trial court did not err in finding that there had been a lack of use of the

Cole group's mineral servitude for the North tract for a consecutive ten-year period such that the servitude was extinguished by prescription for nonuse.

CONCLUSION

Based on the foregoing review, we conclude that the trial court properly found that a voluntary unit was not established for the North tract nor were there production operations of the Cole #2 well after 1998 such that prescription was suspended from accruing on the Cole group's mineral servitude for the North tract. Accordingly, we affirm the judgment of the trial court and assess all costs of this appeal against the Cole group defendants, Julius Wilson Cole, Catherine Carmen Cole Petty, Kimberly Ann Gill Mauer, Gill Petroleum Enterprises, Cathline S. Cole – Terrebonne, LLC, Landowner's Interest, Inc., the Succession of Mary Elizabeth Hames Gill, Mary E. Gill Family, LLC and the Succession of Cathline Singleton Cole.

AFFIRMED.