STATE OF MICHIGAN

COURT OF APPEALS

HOBSON PETROLEUM CORPORATION, EVELYN ANNA SCHOMMER, MARY LOU PRUSIK, GEORGE PRUSIK, PATRICIA SCHOMMER, DENNIS L. SCHOMMER, BARBARA A. SCHOMMER, GERALD T. SCHOMMER, CYNTHIA SCHOMMER, LAWRENCE E. SCHOMMER, MARY SCHOMMER, RODNEY L. SCHOMMER, BETH ANN GARDISON, and KENNETH D. HARDISON,

Plaintiffs-Appellants,

v

STATE OF MICHIGAN, THE DEPARTMENT OF QUALITY CONTROL, SUPERVISOR OF WELLS, GORDEN E. GUYER, RUSSELL J. HARDING, ASSISTANT SUPERVISOR OF WELLS, HAROLD J. FITCH, THOMAS R. SEGALL, NATURAL RESOURCES COMMISSION,

Defendants-Appellees.

UNPUBLISHED
December 21, 2001

No. 222992
Court of Claims
LC No. 97-16541-CM

Before: K.F. Kelly, P.J., and Fitzgerald and Murphy, JJ.

PER CURIAM.

In this inverse condemnation action, plaintiffs appeal as of right from the Court of Claims decision granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). We affirm in part, reverse in part and remand for further proceedings consistent with this opinion.

I. Basic Facts and Procedural History

This case has a lengthy and detailed history. Hobson Petroleum Corporation (hereinafter "Hobson") is an oil and gas exploration and production company that acquired an oil and mineral lease from Plaintiff Evelyn Schommer, (hereinafter "Schommer"). Schommer owns an eighty acre parcel located within the Pigeon River Country State Forest (hereinafter "Pigeon River.").

The lease gave Hobson the right to explore for and develop oil and gas reserves underlying the Schommer property.

Pigeon River was dedicated on December 7, 1973, and the Natural Resources Commission adopted "A Concept of Management for the Pigeon River Country." The primary purpose for the dedication was to create a unified management plan to address the potential for disruption wrought by oil and gas development. After the dedication, the then Michigan Department of Natural Resources, (now Department of Environmental Quality), developed a formal plan to manage the hydrocarbon resources in the Pigeon River area in addition to creating a comprehensive environmental impact statement. Collectively, these documents recommended that any hydrocarbon development in the Pigeon River area be accomplished pursuant to a controlled, unitized operation. That is, allowing only one designated operator, with combined facilities, strict environmental controls, all within a limited area and for a limited period of time.

In 1976, these recommendations were incorporated into a consent order and unit agreement with the major oil companies which held the bulk of mineral rights leases within Pigeon River. One year after the consent agreement, litigation arose over drilling exploratory wells within Pigeon River, which culminated in the Michigan Supreme Court issuing a permanent injunction prohibiting drilling of the wells in that area. See *West Michigan Environmental Action Council v Natural Resources Comm*, 405 Mich 741, 760; 275 NW2d 538 (1979).

In 1980, negotiations between environmental groups, oil companies, and the State, resulted in a second consent order. The second consent order was similar to the 1976 order, again requiring development by one operator, use of combined facilities, strict environmental controls, limited areas of development, and a limited time frame.

Additionally, during this time, the Legislature passed an act[1] incorporating the plan outlined by the consent orders which delineated the framework for all hydrocarbon development within the Pigeon River area. The act incorporated the provisions of the 1980 consent order which included a "nondevelopment region" where no drilling could occur.

Schommer acquired her interest in the property 1972. Schommer's property is situated within the nondevelopment region thus prohibiting any drilling on her land. In 1984, four years after the Pigeon River Country State Forest Hydrocarbon Development Act, Hobson acquired mineral leases on the subject property by an assignment of a lease providing it with exclusive rights to explore for and develop the oil and gas reserves underneath the land. By virtue of individual assignments dated May 2, 1983, Shommer's children and their respective spouses, also plaintiffs in the action, own royalty interests in the oil, gas and other minerals underlying the subject property.

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[1] The Pigeon River Country State Forest Hydrocarbon Development Act, 1980 PA 316, as amended MCL 319.121 et seq., now Part 619 of the Natural Resources and Environmental Protection Act, MCL 324.61901.

After acquiring the lease in 1984, Hobson applied for a permit to drill on the Schommer property. Because Hobson's application did not address the requirements for drilling in the Pigeon River area imposed by the 1980 legislation, Hobson's application was denied.

Hobson filed a second Application For A Permit to Drill an oil and/or gas well on the Schommer property in February of 1986. Because the decision on the application was not forthcoming, Hobson filed an administrative appeal. By letter dated February 5, 1988, Hobson's application was denied, ostensibly because it would not agree to the conditions governing drilling in the Pigeon River area and also because a prudent and feasible alternative to the surface location proposed by Hobson existed south of the no-drill boundary line. This alternative would allow Hobson to access the minerals by "directionally drilling" from a surface location outside of the nondevelopment area. The unit operator for the relevant area was Shell Western E & P, Inc. (hereinafter "SWEPI") and as such, SWEPI had the sole authority to conduct oil and gas operations within the Pigeon River designation. Accordingly, SWEPI would have to *drill and operate* the well thus increasing Hobson's cost by thirty-two percent. After a full evidentiary hearing, the administrative law judge[2] held that directionally drilling from a surface location outside of the no-drill boundary was a feasible and prudent alternative. This determination was contained in the administrative law judge's comprehensive Proposal for Decision issued on January 11, 1992 which the Natural Resources Commission adopted as a final decision on August 13, 1992.

Hobson appealed the 1992 final decision of the Natural Resources Commission to the Ingham Circuit Court. The circuit court affirmed the Commission's decision. Hobson sought leave to this Court but this Court denied it's request for lack of merit. See *Hobson Petroleum v Supervisor of Wells*, unpublished order of the Court of Appeals, entered March 27, 1995 [Docket No. 179717.] Hobson then sought leave to appeal to the Michigan Supreme Court but that application was also denied. See *Hobson Petroleum Corp v Supervisor of Wells*, 450 Mich 994; ___ NW2d ___ (1996).

After the Supreme Court rejected Hobson's appeal from the 1986 denial, Hobson, along with Schommer as owner in fee simple of the subject property and her children and their spouses as owners of the royalty interests in the minerals underlying the property, filed an inverse condemnation claim alleging that the State's denial of Hobson's drilling permits constituted a taking for which just compensation is required. After discovery, by written Decision and Order, dated October 5, 1997, the Court of Claims granted the State's motion for summary disposition as to all plaintiffs pursuant to MCR 2.116(c)(7), (8), and (10). Hobson appeals as of right. We affirm in part, reverse in part and remand for further proceedings.

II. Overview on Taking Clause Jurisprudence

In the case at bar, the individually named plaintiffs argue that the State's regulations governing drilling within the Pigeon River designation effects a taking of their property for which they must be justly compensated. Additionally, Hobson contends that the State's denial of

[2] We acknowledge that the proper title for an administrative law judge is now "hearing referee." However, for purposes of clarity and in accord with the documentation presented in the case at bar, we use the former designation.

its application for a permit to drill on Ms. Schommer's property despite Hobson's efforts to comply with feasible and prudent alternatives, to wit: directionally drilling from an area outside of the no-drill region constitutes a taking for which the State must provide just compensation. Both our federal and state constitutions prohibit the taking of private property for public use without just compensation. See *U.S. Const., Am V and Const. 1963, art 10 §2*.

Few will dispute the government's authority to regulate private property for the good of the public. Indeed, "government regulation -- by definition -- involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property." *Andrus v Allard*, 444 US 51, 64; 100 S Ct 318; 62 L Ed 2d 210 (1979). Consequently, the government is not required to compensate for all regulations that impinge upon an owner's interests in private property as this "would effectively compel the government to regulate by *purchase*." *Id*. (Emphasis in original.)

The general rule stated by Justice Holmes seventy-nine years past remains the governing law to date, "while property may be regulated to a certain extent, if a regulation goes too far, it will be recognized as a taking." *Pennsylvania Coal Co v Mahon*, 260 US 393, 415; 43 S Ct 158; 67 L Ed 322 (1922). Whether a regulation goes "to far" necessarily turns on the facts of each individual case. *K & K Construction Inc., v Department of Natural Resources*, 456 Mich 570, 576; 575 NW2d 531 (1998).

Abundantly clear, however, is that a taking occurs "when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good [and thus] leave his property economically idle." *Lucas v South Carolina Costal Counsil*, 505 US 1003, 1019; 112 S Ct 2886; 120 L Ed 2d 798 (1991). Just as clear is that a taking does not obtain "where an owner possesses a `full bundle' of property rights [and suffers] the destruction of one `strand' of the bundle." *Andrus, supra* at 65-66.

Essentially, there are two situations where land use regulations will effect a taking: (1) where the regulation does not substantially advance a legitimate state interest, or (2) where the regulation denies an owner economically viable use of his land. *K & K, supra* at 576. The second category of government regulation is subdivided into: (a) a categorical taking which deprives the owner of `all economically beneficial or productive use of land,' (citing *Lucas, supra* at 1015), and (b) a taking pursuant to the balancing test established in *Penn Central*[3]. K *& K Construction, supra* at 576-577.

In a categorical taking situation, the owner automatically recovers for the taking. *Lucas, supra* at 1015. Conversely, the balancing test requires "an ad hoc factual inquiry" involving three factors: (1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations. *K & K Construction, supra* at 577, citing *Penn Central, supra* at 124. Incumbent upon plaintiff alleging a taking requiring just compensation is to establish that the regulation obliterates the value of the land or that because of the regulation, plaintiff cannot

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[3] *Penn Central Transportation Company, v New York* City, 438 US 104; 98 S CT 2646; 57 L Ed 2d 631 (1978).

make use of the property at issue. *Dowerk v Charter Township of Oxford*, 233 Mich App 62, 67; 592 NW2d 724 (1999). Indeed, plaintiff's burden is onerous considering that a mere disparity in value between potential uses is insufficient to establish a taking. *Id*. at 68. And, a taking does not obtain even where a particular regulation "deprives the owner of the most profitable use of his property . . . ." *Oceco Land Company v Department of Natural Resources*, 216 Mich App 310, 313; 548 NW2d 702 (1996). Bearing these governing principles in mind, we now consider the facts presented in the case at bar.

III. Summary Disposition

A. Standards of Review

This Court reviews de novo motions for summary disposition. A motion pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the claim itself to determine whether plaintiff's pleadings set forth a prima facie case. *Estate of Bradford v O'Connor Chiropractic Clinic*, 243 Mich App 524, 529; 624 NW2d 245 (2000). Conversely, a motion brought pursuant to MCR 2.116(C)(10) tests the factual support for the claim. A reviewing court considers all documentary evidence submitted to determine whether a genuine material factual issue exists upon which reasonable minds may differ. *Smith v Global Life Insurance Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

Similarly, in reviewing a motion under MCR 2.116(C)(7), the court must consider all affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted by the parties. Unlike a motion brought pursuant to (C)(10), however, a (C)(7) movant is not necessarily required to file any supportive material and the party opposing the motion need not respond in kind. *Maiden v Rozwood* 461 Mich 109, 119; 597 NW2d 817 (1999). Rather, the allegations contained in the complaint are accepted as true save for those allegations specifically contradicted by documentation submitted by the movant. *Id.* If the parties in fact submit documentary evidence, the court must consider the evidence submitted when deciding the motion. *Diehl, supra* at 123. The motion should not be granted unless no factual development could provide a basis for recovery. *Simmons v Apex Drug Stores, Inc*, 201 Mich App 250, 252; 506 NW2d 562 (1993).

B. Plaintiff Evelyn Schommer – Summary Disposition and Leave to Amend

For purposes of Taking Clause analysis, the Court of Claims distinguished Schommer's interest as a landowner in fee simple from the mineral and royalty interests retained by Hobson and the other individually named plaintiffs. As an owner in fee simple, the Court of Claims reasoned that Schommer had a separate and distinct ownership interest. Indeed, as owner in fee simple, Schommer owned *all* rights and interests in the subject property as opposed to only owning an interest in the minerals underlying the land. Based on this distinction, the Court of Claims ruled that Schommer could not claim a categorical taking because the economic value of her land divorced from the mineral rights there under were not affected by the government's regulations. Accordingly, the Court of Claims ruled that because Schommer only alleged that the government regulation prevented her from exploiting the *mineral rights* underneath her land, and otherwise failed to allege a destruction of other rights and interests inuring to her as owner in fee simple, Schommer failed to state a claim upon which relief may be granted. Accordingly, the

Court of Claims granted defendant's motion for summary disposition as to Schommer pursuant to MCR 2.116(c)(8) and (c)(10).

A bedrock principle underlying Taking Clause jurisprudence is the "nonsegmentation principle" which provides that when considering the effect of a regulation on a particular piece of property, the subject property must be considered as a whole and must not be divided into discrete segments to discern a taking. *K & K Construction, supra* at 578. Indeed, "[c]ourts should not `divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.' Rather, we must examine the effect of the regulation on the entire parcel, not just the affected portion of that parcel." *Id*. at 578-79 (quoting *Penn Central, supra* at 130.)

There is no doubt that the State's regulation prohibiting drilling on Schommer's property deprives her of *a* valuable use. In fact, developing the underlying minerals may be the *most* profitable use of that particular property. However, a mere deprivation of even the most profitable use of property is not necessarily a "taking" requiring just compensation. See *Oceco Land Company, supra* at 313. Indeed, according to the standard enunciated in *Lucas*, to establish a taking, a landowner must initially allege that the regulation at issue is so pervasive as to require that property owner to sacrifice "*all* economically beneficial uses in the name of the common good [leaving] his property economically idle." *Lucas, supra* at 1019. (Emphasis in original.)

Plaintiffs' complaint does not contain this vital allegation rendering it legally deficient as to Schommer. The Court of Claims, however, in accord with MCR 2.116(I)(5) should have permitted plaintiffs the opportunity to amend their complaint to allege that the State's regulations rendered the property entirely worthless and economically idle. *K & K Construction, supra* at 587; see also *Dowerk, supra* at 67, thus establishing a taking for which just compensation must be forthcoming. Accordingly, we reverse the Court of Claims' grant of summary disposition as to Schommer and remand to permit plaintiffs to amend the complaint in that regard. In light of our ruling, the Court of Claims' grant of defendant's motion pursuant to MCR 2.116(C)(10) is therefore premature at this juncture.

C. Hobson and Other Individually Named Plaintiffs

The Court of Claims granted defendant's motion for summary disposition finding that Hobson and the other plaintiffs could not have "reasonable investment-backed expectations" in the subject property. The Court of Claims noted that aside from Schommer, all of the other individually named plaintiffs acquired their mineral rights in the subject property in 1983 and 1984. And, considering the turmoil surrounding hydrocarbon development within the Pigeon River designation, three or four years preceding the time that plaintiffs acquired their respective interests, plaintiffs must have appreciated the possibility that developing oil and gas on land within the Pigeon River designation may be significantly curtailed. Despite the drilling occurring in that region, the Court of Claims nevertheless held that the subject land is located in the "nondevelopment" area or "no-drill" region and the 1980 legislation was "unambiguous notice" that drilling directly on the land overlying their mineral rights was prohibited. Accordingly, the Court of Claims held that the plaintiffs could not have had reasonable investment-backed expectations sufficient to constitute a taking and that defendants were thus entitled to summary disposition.

In addition, the Court of Claims found unpersuasive the "self-serving" affidavit submitted by Charles Hobson, president of Hobson Petroleum Corporation, attempting to establish that by virtue of a "joint venture," Hobson actually acquired its mineral rights in 1980 for exploring and developing minerals in the Pigeon River area well before all of the controversy arose. Finding no genuine factual issue, the Court of Claims granted summary disposition in accord with MCR 2.116(C)(10). We find that the Court of Claims erred in this regard.

It is axiomatic that a Court of Claims may not assess credibility or otherwise determine facts when considering motions for summary disposition. *Oade v Jackson National Life Insurance Company of Michigan*, 465 Mich 244, 265; 632 NW2d 126 (2001). The Court of Claims' designation of Charles Hobson's affidavit as "self-serving" necessarily involves a determination as to his credibility. Although the testimony provided by Charles Hobson during the administrative hearing directly conflicts with the statement contained in his affidavit, that does not give the Court of Claims a basis to invade the ultimate province of the finder of fact and make a definitive finding as regards Charles Hobson's credibility sufficient to render judgment as a matter of law.

Indeed, the finder of fact should be permitted to assess Charles Hobson's credibility within the context of an adversarial proceeding and make that determination part and parcel of its ultimate verdict. No matter how saturated with self-interest the representations contained in Charles Hobson's affidavit, they are nevertheless sufficient to, at the very least, create a genuine factual issue to withstand a motion for judgment as a matter of law. See *Franzel v Kerr Manufacturing Co*, 234 Mich App 600, 622; 600 NW2d 66 (1999) (recognizing that "the jury is the sole arbiter of witness credibility.")

Because our review de novo of the record reveals that a genuine factual issue exists pertaining to when Hobson obtained its oil and gas interests in the subject property, and to what extent drilling within the designation by other companies affected the individually named plaintiffs' reasonable investment backed expectations, there are therefore factual issues raised concerning the extent to which the state's regulations interfered with these expectations. See *K & K Construction, supra* at 577. Accordingly, we find that the Court of Claims committed error requiring reversal by granting summary disposition in this regard.

V. Collateral Estoppel

Next, Hobson argues that the lower court erred by determining that the doctrine of collateral estoppel applied and thus precluded it's ability to relitigate issues previously raised, litigated and determined within the context of the administrative hearing and subsequent determination denying it's 1986 application finding that feasible and prudent alternatives existed. The Court of Claims held that summary disposition in accord with MCR 2.116(C)(7) and (C)(10) was therefore appropriate for lack of a genuine factual issue that Hobson failed to avail itself of these feasible and prudent alternatives before the administrative hearing on the denial of its 1986 application. Accordingly, the Court of Claims held that plaintiffs damages did not result from the State's actions, but rather, obtained from Hobson's decision not to pursue these feasible and prudent alternatives. We agree.

The doctrine of collateral estoppel operates to bar relitigation of issues already litigated and determined where the same parties previously had a "full and fair opportunity to adjudicate

their claims." *Nummer v Treasury Dep't*, 448 Mich 534, 541; 533 NW2d 250 (1995). Where a party seeks to preclude relitigation pursuant to an administrative decision, that party must establish that: 1) the administrative determination was adjudicatory in nature; 2) there was a right to an appeal; and 3) the Legislature must have intended that the decision rendered be final absent an appeal. See *Id*. at 542.

A review of the record in the case at bar reveals that after a full hearing in a contested case, the administrative law judge made a factual determination that Hobson would not have been an appropriate operator in the Pigeon River designation and *was unwilling to comply with reasonable restrictions that would have permitted development of oil and gas underlying the property*, and that Hobson had a reasonable, feasible and prudent alternative consisting of directional drilling from outside of the no-drill boundary. (Emphasis added.) The administrative law judge's determinations contained in the Proposal for Decision became the final decision of the Natural Resources Commission and subsequently upheld in an appeal to the circuit court[4].

Although Hobson argues on appeal that "there was never any determination made that [it] refused or failed to take steps to drill at that feasible and prudent alternate location," a review of the record belies Hobson's position. Indeed, the administrative law judge found that Hobson refused to comply with reasonable restrictions imposed upon drilling within the Pigeon River designation; compliance with which would have permitted Hobson to develop the oil and gas underlying the subject property. Accordingly, the administrative law judge made a determination that Hobson, because of its refusal to comply with certain reasonable restrictions, failed to avail itself of a feasible and prudent alternative thus resulting in the denial of its 1986 application for permit. The Court of Claims upheld this determination finding that the doctrine of collateral estoppel bars relitigation of these very same issues.

A review of the record reveals that the administrative law judge rendered its determination after a full hearing on a contested case which was an adjudicatory proceeding, the issues raised concerning the denial of Hobson's 1986 permit were actually litigated and determined, and Hobson had a full and fair opportunity to litigate these issues. Consequently, we find that the Court of Claims did not commit error requiring reversal when it determined that the doctrine of collateral estoppel bars relitigation of these factual issues and granted defendant's motion in accord with 2.116(C)(7) and (C)(10) respectively. Ergo, insofar as plaintiffs relied on the denial of the 1986 permit as a basis for its taking claim, we find that the Court of Claims did not err by determining that plaintiffs' damages in that regard flowed not from State action, but rather, from Hobson's failure to comply with reasonable restrictions imposed on drilling within the Pigeon River designation thus rendering summary disposition in accord with MCR 2.116(C)(10) appropriate.

VI. Denial of 1992 Application

In 1992, shortly after the Michigan Supreme Court denied Hobson's application for leave, Hobson filed another permit to drill seeking to use the alternate location containing

[4] As previously noted, this Court and the Michigan Supreme Court both denied Hobson's application for leave to appeal the decision rendered in the Ingham Circuit Court affirming the Commission's final decision.

SWEPI's facilities. Hobson contends that after pursuing the identified feasible and prudent alternatives, its application was nevertheless denied. Conversely, defendants contend that Hobson's 1992 application was denied because Hobson failed to properly pursue the feasible and prudent alternatives because Hobson was seeking permission for it to drill and operate the proposed well which was prohibited by the regulatory scheme governing drilling within the Pigeon River designation. Accordingly, in May of 1994, Hobson's application was denied. Hobson never sought an appeal pertaining to the denial of the 1992 application.

The Court of Claims held that material factual issues remain with regard to whether the denial of Hobson's 1992 application constituted a regulatory taking for which the State must provide just compensation. We agree.

A review of the documentary evidence submitted reveals a flurry of correspondence after Hobson filed its 1992 application for a permit establishing that Hobson attempted to pursue the feasible and prudent alternatives identified but to no avail. Antithetically, defendants argue that Hobson never proceeded properly as regards the available alternatives. Accordingly, a review of the record reveals genuine factual issues concerning whether the ultimate denial resulted from Hobson's failure to comply with all applicable restrictions imposed on drilling within the Pigeon River designation or whether the State's restrictions are so burdensome as to effect a taking of property for which the State must provide just compensation. Because genuine factual issues exist in this regard, the Court of Claims' decision denying defendant's motion for summary disposition relative to the 1992 application did not constitute error requiring reversal.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

/s/ Kirsten Frank Kelly
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald