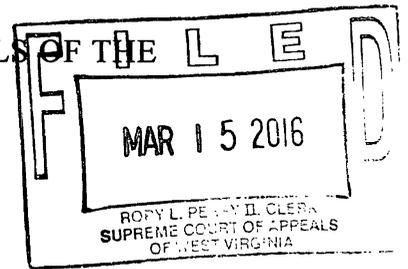


BEFORE THE SUPREME COURT OF APPEALS  
STATE OF WEST VIRGINIA



Cheryl Wilhelm,

Plaintiff Below, Petitioner

vs.) No. 15-0768

Jay-Bee Production Company,

Defendant Below, Respondent

Petitioner's Reply Brief

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## TABLE OF AUTHORITIES

1. Bethlehem Steel Corp. v. Shonk Land Co., 288 S.E.2d 139 (1982), pg. 2
2. Continental Coal Co. v. Connellsville Byproduct Coal Co., 104 W.Va. 44, 138 S.E. 737 (1927), pg. 1
3. Engel v. Eastern Oil Co., 100 W.Va. 301, 130 S.E. 491, pg. 3
4. McCartney v. Campbell, 114 W.Va. 332, 171 S.E. 821 (1933), pg. 1
5. West Virginia Code §55-3A-1, pg. 3

## ARGUMENT

The Respondent's arguments essentially boil down to 3 arguments:

1. That forfeiture under McCartney v. Campbell, 114 W.Va. 332 (1933) is disfavored;
2. That the payment of royalty exempts it from the lease being voided, and;
3. Disagreement over construction of a contractual clause or right.

To start with, the last argument must fail. There was no contractual clause for a division order in the lease and even if there was, the Petitioner did not object to a division order, but rather made it clear she objected to the division order with the additional terms she found objectionable.

This is not a question of law, but pure fact that the Respondent withholding the money due under the lease until ordered to pay by the court is hardly a disagreement over the issue of a division order or not. So, this argument must fail. (Petitioner's Brief exhibits A, B, and C) Continental Coal Co. v. Connellsville Byproduct Coal Co., 104 W.Va. 44, 138 S.E. 737 (1927)

As to the Respondent's argument that payment of royalty exempts it from voiding the lease, the Respondent did not pay the lease royalty until ordered to do so by the trial court. The Petitioner, in her Summary of Argument, clearly states she seeks payment for all gas produced since the serving of her Notice of Default and voiding the lease on February 15, 2013. This is further stated in the Petitioner's Affidavit and in her brief to the trial court dated July 10, 2014.

Finally, as to the Respondent's argument under McCartney that equity favors payment, it ignores the facts in McCartney that the party breaching had a dispute over whether the payments were made, that its breach was in good faith and was not willful or intentional. It further held that as a *general*(emphasis added) rule, interest is sufficient but that the failure to pay must not be willful (which it clearly was, not having paid for almost 2 years until ordered to do so by the court). The delay in payment, unreasonably long 23 months from when the well was drilled and 18 months from when she served the Notice the lease was null and void. But more importantly that the Respondent's non-payment was not intentional – How can someone with a straight face argue that its non-payment was not intentional when it refused to pay unless the Petitioner acquiesced to new terms and did not pay until ordered to do so by the court.

Bethlehem Steel Corp. v. Shonk Land Co., 288 S.E.2d 139 (1982), held where a penalty or a forfeiture is inserted in a contract merely to secure performance as the principal intent, the penalty is deemed only as accessory. The right to forfeit must be clearly stipulated in or else it does not exist. Another principle to be observed is that, insofar as a covenant is relied upon to sustain a claim of forfeiture, it is always strictly construed in respect of that claim. The instrument must give the right of forfeiture in terms so clear and explicit as to leave no room for any other construction, or it does not exist. When the right has been clearly and unequivocally secured by the terms of the contract, it does not accrue unless nor until there has been an equally clear and unequivocal breach of the condition.

A forfeiture clause may be ignored, but it is only when such a clause is inserted to secure performance does the court utilize equity. The lease paragraph here deals with the

Respondent's obligation to commencing the drilling of the wells and is not an accessory clause, and is the only paragraph voiding the lease utilizable by the lessor. Whereas there are several paragraphs allowing the Respondent to void the lease.

Engel v. Eastern Oil Co., 100 W.Va. 301, 130 S.E. 491, stated "Equity will generally relieve from a forfeiture, claimed for failure to pay rent, when the default was not willful, and application for relief is seasonably made...unless (emphasis added) by his inequitable conduct he has debarred himself from the remedial right or unless the remedy is prohibited under the special circumstances of the case by some other controlling doctrine of equity".

Additionally, the lessor must act on the underlying breach rather than lull the lessee into a feeling of security and throw him off his guard. In the case at bar, the Respondent probably would not have paid the Petitioner had she not either acquiesced to the division order with the modified terms or the court ordered it to do so. So, clearly was willful and as stated earlier, relief was not made seasonably.

Finally, the Respondent, in citing McCartney, fails to point out that ordinarily payment is adequate, but the court leaves exceptions.

The Petitioner, in her case was denied the \$67,981.12 owed her under the lease for about 23 months. To say that this is not a significant, irreparable injury and one only needs to pay the monies owed after suit is filed and judgment entered over a breach of contract is absurd. Mere money cannot make the client whole. The deprivation of the funds she was entitled to and the attorney fees she has incurred. For example, West Virginia law clearly provides for eviction for non-payment of a lease under the Summary Petition for Relief, which allows the landlord merely to prove the tenant is in monetary default to void a lease and evict a tenant. This law does not

say if the tenant comes up with the arrears that they can hold onto the lease. It says it is void and is a forfeiture. (West Virginia Code §55-3A-1) The injury under this statute is not nearly as irreparable to compensate as what the Petitioner suffered.

CONCLUSION

For this and other reasons as may appear to the court, the Petitioner prays that this court void the lease and award her all gas proceeds since February 15, 2013 to now and in the future.



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CERTIFICATE OF SERVICE

I, D. Conrad Gall, acting as counsel for the Petitioner, Cheryl Wilhelm, do hereby certify that, by first-class mail, a true copy of the foregoing Petitioner's Reply Brief, was served upon Respondent's counsel, Michael Taylor, of Bailey & Wyant, whose mailing address is P. O. Box 3710, Charleston, WV 25337-3710, on this, the 14<sup>th</sup> day of March, 2016.

A handwritten signature in black ink, appearing to read 'D. Conrad Gall', written over a horizontal line.

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