

IN THE SUPREME COURT OF OHIO

ORIGINAL

State of Ohio ex rel. Claugus Family Farm,
L.P.,

Case No. 2014-0423

Relator,

IN MANDAMUS AND PROHIBITION

v.

Seventh District Court of Appeals, et al.,

Respondents.

RELATOR'S RESPONSE TO INTERVENING RESPONDENT BECK ENERGY CORPORATION'S NOTICE OF MOOTNESS AND MOTION FOR STAY

Daniel H. Plumly (S.Ct. #0016936)
(Counsel of Record)
Andrew P. Lycans (S.Ct. #0077230)
Critchfield, Critchfield & Johnston, Ltd.
225 North Market Street, P. O. Box 599
Wooster, Ohio 44691
(330) 264-4444
Fax No. (330) 263-9278
plumly@ccj.com

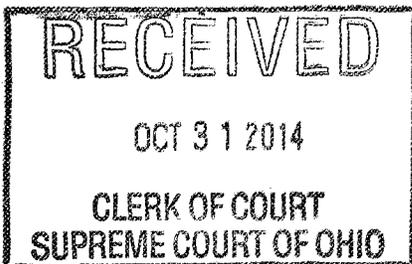
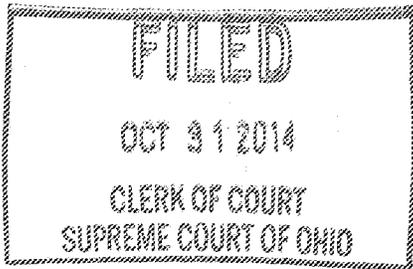
*Counsel for Relator
The Claugus Family Farm, LP*

Michael DeWine (S.Ct. #0009181)
Ohio Attorney General
Sarah Pierce (S.Ct. #008799)
Tiffany Carwile (S.Ct. #0082522)
Assistant Attorneys General
Constitutional Offices Section
30 East Broad Street, 16th Floor
Columbus, OH 43215
(614) 466-2862; Fax No. (614) 728-7592
sarah.pierce@ohioattorneygeneral.gov
tiffany.carwile@ohioattorneygeneral.gov

*Counsel for Respondents The Seventh District
Court of Appeals, Judge Gene Donofrio, Judge
Joseph J. Vukovich, and Judge Mary DeGenaro*

Scott M. Zurakowski (S.Ct. #0069040)
William G. Williams (S.Ct. #0013107)
Gregory W. Watts (S.Ct. #0082127)
Aletha M. Carver (S.Ct. #0059157)
Krugliak, Wilkins, Griffiths & Dougherty
Co., LPA
4775 Munson Street, N.W.
P. O. Box 36963
Canton, OH 44735
(330) 497-0700; Fax No. (330) 497-4020
szurakowski@kwgd.com;
bwilliams@kwgd.com; gwatts@kwgd.com;
acarver@kwgd.com

*Counsel for Intervening Respondent, Beck
Energy Corporation*



IN THE SUPREME COURT OF OHIO

State of Ohio ex rel. Claugus Family Farm, L.P.,)	
)	Case No. 2014-0423
)	
Relator,)	IN MANDAMUS AND PROHIBITION
)	
v.)	
)	
Seventh District Court of Appeals, et al.,)	
)	
Respondents.)	

RELATOR’S RESPONSE TO INTERVENING RESPONDENT BECK ENERGY CORPORATION’S NOTICE OF MOOTNESS AND MOTION FOR STAY

Now comes Relator, by and through undersigned counsel, to respond to *Intervening Respondent Beck Energy Corporation’s Notice of Mootness and Motion for Stay*. As set forth below, the contention that this action has been rendered moot by the Seventh District’s decision in *Hupp v. Beck Energy Corp.*, 2014-Ohio-4255 (7th Dist.) profoundly misconstrues both the arguments raised in Relator’s Complaint and disregards the constitutional relief sought from this Court. The request by Beck Energy to stay this action also ignores the fact that plaintiffs in *Hupp* have yet to file an appeal with this Court and that any such appeal could not address the issues raised in this action. The “notice of mootness” and the motion to stay should be rejected and denied, respectively.

I. FACTS

On July 12, 2012, the Monroe County Court of Common Pleas granted summary judgment to four individual plaintiffs, holding that the Form G&T (83) oil and gas leases that they had signed with Beck Energy constituted leases in perpetuity in violation of Ohio public policy and were, therefore, void *ab initio*. On February 8, 2013, seven months after granting

summary judgment, the Common Pleas Court granted a motion to certify a class pursuant to Civil Rule 23(B)(2) comprised of approximately 700 landowners across the state who had also signed Form G&T (83) leases with Beck Energy. On June 10, 2013, the Common Pleas Court held that its entry granting summary judgment would apply to all proposed members of the class as of September 29, 2011, when the complaint was first amended to assert claims on behalf of a class of landowners.

Beck Energy first filed a motion to toll the leases of the named plaintiffs only on October 1, 2012. On July 16, 2013, more than nine months later, Beck Energy filed a motion asking the trial court to toll the leases of the unnamed class members as well. The trial court agreed to toll the leases of the named plaintiffs only, thereby refusing to toll the leases of the absent class members. Beck Energy then filed a motion with the Seventh District asking it to toll the leases of the absent class members, despite the fact that the trial court had not provided notice of the lawsuit or given proposed class members an opportunity to opt out. On September 26, 2013, the Seventh District issued a Tolling Order, which modified the trial court's tolling order as follows:

The lease terms are also tolled as to the proposed defined class members. The tolling period for all leases shall commence on October 1, 2012, the date Beck Energy first filed a motion in the trial court to toll the terms of the oil and gas leases. The tolling period shall continue during the pendency of all appeals in this Court, and in the event of a timely notice of appeal to the Ohio Supreme Court, until the Ohio Supreme Court accepts or declines jurisdiction. At the expiration of the tolling period, Beck Energy, and any such successors and/or assigns shall have as much time to meet any and all obligations under the oil and gas lease(s) as they had as of October 1, 2012.

This order abruptly and retroactively awarded equitable relief against parties who were only constructively before the court by tolling their leases. The Seventh District made no effort to inform those affected by the order that their leases had been tolled or even that a lawsuit had

been filed which could affect their rights. Absent the tolling order the lease between Relator and Beck Energy would have expired on February 4, 2014.

On March 16, 2014, the Claugus Family filed its Complaint in Prohibition and Mandamus with this Court. The Complaint asserts that the Seventh District violated fundamental due process rights of the Claugus Family by granting equitable relief against it and in favor of Beck Energy (the *defendant* in a Civil Rule 23(B)(2) class), having never provided notice to the absent class members —against whom relief was awarded—that a lawsuit had been filed, that they could opt out of the class, that the Tolling Order had issued, or that their leases would not expire as set forth in the leases themselves. This Court granted an alternative writ on September 3, 2014, setting forth deadlines to submit evidence and briefs.

On September 26, 2014, exactly one year after issuing the Tolling Order, the Seventh District ruled on the various appeals filed by Beck Energy. The Court held that the trial court erred in determining that the Form G&T (83) leases were void *ab initio* as against public policy. *Hupp*, 2014-Ohio-4255, ¶104. The Court further rejected Beck Energy’s argument that the class had been improperly certified pursuant to Rule 23(B)(2), which was premised upon summary judgment being granted prior to the decision on class certification. *Id.* ¶¶45-59. The Seventh District reasoned that, since it was not giving the absent class members an opportunity to opt out of the lawsuit (or even giving them notice of the lawsuit), the one-way intervention rule did not apply. *Id.* at ¶¶53-54. The Tolling Order was left in effect. The net result was to create a class of hundreds of landowners whose leases would be extended by at least two years (from a period preceding the certification of the class), without compensation and without any notice whatsoever, all because of the failed attempt of four individuals and their counsel to have the Beck Energy Form G&T (83) lease declared globally invalid.

II. THE *HUPP* DECISION DOES NOT IN ANY WAY RENDER THIS ACTION MOOT

“In determining whether a case is moot, the duty of this court...is to decide actual controversies by a judgment which can be carried into effect, and not to...declare principles or rules of law which cannot affect the matter in issue in the case before it.” *State ex rel. Eliza Jennings, Inc. v. Noble*, 49 Ohio St. 3d 71, 74, 551 N.E.2d 128 (1990) (quotation omitted). This action is not moot because an actual controversy still remains for this Court’s resolution.

Beck Energy’s argument that Seventh District’s affirmation of class certification pursuant to Rule 23(B)(2) renders this appeal moot misses the entire point of the action. Relator’s argument is that awarding relief **against** absent class members in a Rule 23(B)(2) who have not been provided with notice or other due process protections is a constitutional violation, regardless of what the Ohio Rules of Civil Procedure might countenance. The Seventh District cannot deprive the Claugus Family and other absent class members of property rights worth millions of dollars without providing due process, including notice that the lawsuit had been filed, an opportunity to be heard, and an opportunity to opt out. *See Holmes v. Cont’l Can Co.*, 706 F.2d 1144, 1160 (11th Cir.1983) (noting that “class actions must comport with constitutional due process” in addition to the civil rules). The Ohio Rules of Civil Procedure do not trump either the United States Constitution or the Ohio Constitution. *See Hoston v. U.S. Gypsum Co.*, 67 F.R.D. 650, 657 (E.D.La.1975) (“23(d)(2) is, to the extent it leaves notice to the discretion of the court, deceptive; notice may be required as a matter of due process of law, no matter what Rule 23 seems to countenance”).

Upholding the decision to certify the class under Rule 23(B)(2) does not constitute a determination that notice and other due process protections were not necessary. Rule 23(D)(2) specifically recognizes that notice may be necessary “for the protection of the members of the

class or otherwise for the fair conduct of the action.” The argument that certifying a class under Rule 23(B)(2) conclusively establishes that notice to the absent class members will never be necessary ignores both the language of the rule and constitutional requirements. It also ignores the actual arguments made to the Seventh District and the issues it decided. Beck Energy contended below that the trial court’s decision to certify the class after granting summary judgment violated *its* rights, because this procedure would allow absent class members to opt out in the event that Beck Energy prevailed. Neither Beck Energy nor class counsel argued that due process required notice to the absent class members or that the constitutional rights of absent class members had been violated. Thus, the Seventh District’s decision simply did not address the constitutional issues raised in this action.

In fact, while Relator believes the class was improperly certified in the first place by the trial court,¹ the constitutional arguments raised in this action primarily address due process violations inflicted upon the absent class members by the Seventh District itself when it issued a Tolling Order against a class of plaintiffs without providing notice or an opportunity to opt out. The appeal to the Seventh District addressed perceived flaws in the trial court’s orders—not the constitutional infirmities of the Seventh District’s own order.

Finally, the contention that this action seeking to vacate the Tolling Order or prohibit its enforcement is moot is perplexing given that the Tolling Order remains in place and will operate to extend the Claugus Family’s lease with Beck Energy for years to come. If the *Hupp* decision had vacated the Tolling Order and admitted that the due process rights enshrined in the United

¹ As to that issue, the Seventh District simply noted (without analysis) that monetary damages were not requested. As the Claugus Family has pointed out, the relevant question is whether such damages should have been requested given the claims, or whether class counsel omitted such claims to increase the chances of class certification under Rule 23(B)(2). See *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S.Ct. 2541, 2559 (2011); *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 976 (5th Cir.2000).

States and Ohio Constitutions prohibited it from tolling the leases of absent class members without providing due process, then this action would have become moot. The Seventh District did not do that—it instead left the Tolling Order in place, thereby adding years on to the Claugus Family’s lease. The act which the Complaint seeks to prohibit is therefore ongoing. *See State ex rel. Sylvester v. Neal*, 2014-Ohio-2926, 140 Ohio St. 3d 47, 14 N.E.3d 1024, ¶13 (“the case is not moot, because the issue ... is an ongoing one”); *State ex rel. Brady v. Pianka*, 2005-Ohio-4105, 106 Ohio St. 3d 147, 832 N.E.2d 1202, ¶8 (prohibition will lie both to prevent the future unauthorized acts and to correct the results of previous unauthorized actions).

While notice may not “normally” or “generally” be required when a class is certified pursuant to Rule 23(B)(2), the mere fact that a class was certified pursuant to Rule 23(B)(2) does not mean that the United States and Ohio constitutions would not require that notice be provided. In fact, Rule 23(D)(2) provides a constitutional safety valve to avoid due process violations where notice is necessary for the protection of absent class members. The constitutional issues raised in this action were neither presented to the Seventh District nor were they decided by that court. The Tolling Order remains in effect, is still tolling the Claugus Family’s lease, and will do so for years to come absent action by this Court. There is an actual controversy concerning the constitutionality of the Tolling Order and prohibiting the enforcement of that order or ordering that it be vacated can be carried into effect and will affect the parties. Therefore, the *Hupp* decision does not render this action moot in any way.

III. THE COURT SHOULD NOT STAY THIS ACTION PENDING THE RESOLUTION OF ANY APPEAL REGARDING THE VALIDITY OF THE FORM G&T (83) LEASE

In considering whether to issue a stay, courts assess (1) whether the appellant has shown a substantial likelihood of success on the merits; (2) whether irreparable injury will result absent

a stay; (3) whether the issuance of a stay will cause harm to others; and (4) whether the public interest would be served by granting a stay. *See Bob Krihwan Pontiac-GMC Truck, Inc. v. Gen. Motors Corp.*, 141 Ohio App. 3d 777, 783, 753 N.E.2d 864 (10th Dist. 2001).

First, class counsel in the *Hupp* case has yet to even file an appeal, thus it seems premature to evaluate whether they have demonstrated a strong likelihood of success on the merits. After decades of litigating oil and gas issues, however, Relator's counsel sees little chance of this Court holding the Form G&T (83) leases void *ab initio* because they violate Ohio public policy. (Beck Energy has indicated that it does not plan to appeal the decision to certify the class. And why would it—that decision ultimately enabled it to extend hundreds of leases for years at no cost to it.) The surprise in this case was **not** the Seventh District's decision to overturn the trial court's determination that the leases were void *ab initio*. Rather, the surprise was that the trial court determined that the leases were leases in perpetuity in the first place, despite the inclusion of a ten year primary term and a secondary term dependent upon the production of gas and oil in paying quantities. Finally, Relator cannot help but note the irony of Beck Energy arguing that the *Hupp* plaintiffs have demonstrated a strong likelihood of obtaining review by this Court and ultimately overturning the Seventh District's decision in Beck Energy's favor. Relator imagines that Beck Energy's memorandum opposing jurisdiction and any brief on the merits are unlikely to concede this issue so readily.²

Second, Beck Energy will not suffer irreparable injury absent a stay. The only reason to issue a stay is because this Court is considering holding that the Form G&T (83) leases are void *ab initio*. If the Court were to so hold, the Tolling Order itself would become moot, because a

² Beck Energy at every turn attempts to have Relator's claims dismissed, stayed or in some manner be caught up in the flotsam and jetsam of the *Hupp* litigation shipwreck. The issues raised by Relator are not part or parcel of that litigation but are independent and separate constitutional claims not adjudicated by the lower courts.

lease which is void *ab initio* could not be equitably tolled. *Cf. Feisley Farms Family, L.P. v. Hess Ohio Res., LLC*, Case S.D.Ohio No. 2:14-CV-146, 2014 WL 4206487, at *4 (Aug. 25, 2014) (courts may extend lease periods by equitable tolling only after concluding that the leases in question are valid and enforceable). Thus, proceeding with this action will not prejudice Beck Energy in any way. If the Court determines that the Seventh District should be prohibited from enforcing (or that it must vacate) the Tolling Order as to the Claugus Family, then the Claugus Family's lease will have expired. If the Court determines that the leases are void *ab initio*, then Beck Energy would not be able to enforce the lease against the Claugus Family. If the Court declines to hear the appeal or accepts the appeal and affirms the Seventh District on the issue of lease validity, that will still leave the constitutional issues concerning the class certification and the issuance of a Tolling Order against absent plaintiffs case unaddressed. Thus, the stay will not benefit Beck Energy in any way.

Third, the issuance of a stay would gravely harm the Claugus Family. As set forth in Relator's Brief on the Merits, the window for the Claugus Family to lease its property to another producer (or to secure a well on the property) is closing. Certainly, the opportunity to block this property with other land owned by the Claugus Family will soon pass. The same applies to the hundreds of other landowners across the state. Success by the Claugus Family, however, should allow payments to be made to landowners and would significantly mitigate the grinding poverty of one of the most depressed areas in Ohio.

Beck Energy argues that the Claugus Family should not receive special treatment as compared to other absent class members. Our constitutions do not foster special treatment. In fact, if this Court holds that the Tolling Order violates the due process rights of absent class members such as the Claugus Family, Relator would hope and expect that Beck Energy would

not ignore the significance of such a holding by asserting the same Tolling Order against other landowners; thus, all landowners would benefit. If Beck Energy did ignore the holding, the lower courts would presumably take this Court's opinion as to the constitutionality of the Tolling Order into account in deciding how to proceed. Vindicating the due process rights of absent class members is in no way "unfair" to the other absent class members in the *Hupp* litigation.³

Fourth, a stay would not be in the public interest. To the contrary, the public will be harmed if the unconstitutional Tolling Order is allowed to stand. Beck Energy's filings emphasize how many people it employs and that it is a business, the implicit theme being that the rights of businesses which generate jobs should be favored over individuals. In our system, the courts ensure that all citizens' rights are protected and not just those with deep pockets. Beck Energy seems to believe that, by continually drawing this Court's attention to irrelevant facts, it can convince the Court to trample the constitutional rights of ordinary citizens who lack means in order to accommodate its economic interests. Dispelling any such notion by proceeding to determine the merits of this action would be in the public's interest.

The case should not be stayed based upon a potential appeal that has yet to be filed. Further, the Claugus Family should not have to rely upon class counsel to raise constitutional issues about class counsel's own deficiencies and potential conflicts of interests. Based upon the factors ordinarily considered by courts when deciding whether to issue a stay, there is no basis for staying this action.

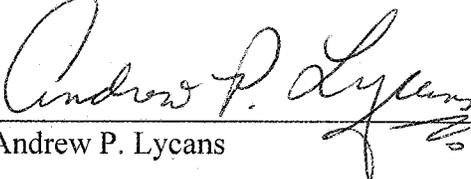
³ At most, the decision may be "unfair" to class counsel, who apparently hoped to represent absent class members in negotiations with producers once the Form G&T (83) leases were invalidated. To the extent class counsel might be prejudiced, that merely demonstrates that the interest of class counsel is not aligned with the interest of absent class members.

IV. CONCLUSION

Rather than being moot, the constitutional issues raised by the Complaint are now more important than ever following the *Hupp* decision. The Seventh District apparently affirmed class certification for the sole purpose of allowing the absent class members' leases to be equitably tolled, even though the absent class members had no notice of the proceedings, no opportunity to defend against the award of equitable relief against them, and no opportunity to opt out of the train wreck that is the *Hupp* case. This is the second attempt of Beck Energy to have the Court deny the requested writs without actually considering the merits.⁴ Since the Court can still correct the constitutional violations by issuing the requested writs, the "notice" of mootness is baseless, as is the request to stay the action. The motion to stay should be denied and the "notice of mootness" rejected.

Respectfully submitted,

Daniel H. Plumly, Counsel of Record


Andrew P. Lycans

COUNSEL FOR RELATOR,
CLAUGUS FAMILY FARM, L.P.

⁴ Beck Energy also filed a motion to dismiss which raised many of the same arguments raised in the notice of mootness. Both rely upon the contention that Relator has already received all the due process to which it is entitled—none.

CERTIFICATE OF SERVICE

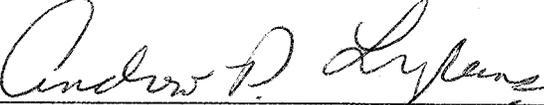
I hereby certify that I served the above *Relator's Response to Intervening Respondent Beck Energy Corporation's Notice of Mootness and Motion for Stay* to the following by regular U.S. Mail this 30th day of October, 2014:

Sarah Pierce
Tiffany L. Carwile
Assistant Attorneys General
Constitutional Offices Section
30 East Broad Street, 16th Floor
Columbus, OH 43215

*Counsel for Respondents
The Seventh District Court of Appeals, Judge
Gene Donofrio, Judge Joseph J. Vukovich, and
Judge Mary DeGenaro*

Scott M. Zurakowski
William G. Williams
Gregory W. Watts
Aletha M. Carver
Krugliak, Wilkins, Griffiths & Dougherty Co.,
L.P.A.
4775 Munson Street, N.W.
P. O. Box 36963
Canton, OH 44735

*Counsel for Intervening Respondent Beck
Energy Corporation*



Andrew P. Lycans