

IN THE SUPREME COURT OF OHIO

CLYDE A. HUPP, et al.,

Plaintiffs/Appellants,

vs.

BECK ENERGY CORPORATION,

Defendant/Appellee.

CASE NO. 14-1933

On Appeal from the Monroe County
Court of Appeals, Seventh Appellate
District

Court of Appeals Case Nos. 12 MO 6
13 MO 2
13 MO 3
13 MO 11

**APPELLEE BECK ENERGY CORPORATION'S RESPONSE TO
APPELLANTS CLYDE A. HUPP, ET AL.'S SECOND REVISED MOTION
TO STRIKE AND TO CORRECT THE RECORD**

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**RESPONSE TO APPELLANTS' SECOND REVISED MOTION TO STRIKE
AND TO CORRECT THE RECORD**

The waiver doctrine has a devastating impact on Appellants, Clyde A. Hupp, et al.'s ("Appellants") proposition of law number three. In an attempt to avoid its application, Appellants ask the Court to strike certain portions of Appellant Beck Energy's ("Beck Energy") Memorandum in Response to Jurisdiction that reference and support the conclusion that Appellants waived any challenge to the Tolling Order as applied to the Civ.R. 23(B)(2) class members. Beck Energy's waiver argument is based on Appellants own actions, specifically, a pleading Appellants filed in the Monroe County Court of Common Pleas on October 9, 2012, in response to Beck Energy's Motion to Toll all Terms of the Oil and Gas Leases Entered into Between Plaintiffs and Defendant, Beck Energy.

Beck Energy admittedly did not address tolling, as applied to the proposed Civ.R. 23(B)(2) class members, in its motion to toll filed on October 1, 2012 because the trial court had not yet certified a class action. However, Appellants expanded the tolling discussion and addressed tolling as applied to the proposed Civ.R. 23(B)(2) class members. This was most likely based on the fact that only days after the Monroe County Court of Common Pleas granted summary judgment in Appellants' favor finding Beck Energy's GT83 Lease void ab initio, Appellants moved to certify a class action. Appellants' expanded response indicates they anticipated Beck Energy would ask to toll the proposed class members' leases if the trial court certified a class action.

Appellants never argued in their response that tolling should not apply to the proposed Civ.R. 23(B)(2) class members. Rather, Appellants maintained tolling of the class members' leases was not appropriate "unless and until such time as the Court certifies the case as

a class.” This language demonstrates Appellants never objected to tolling the named Plaintiffs’ and proposed class members’ leases and therefore, waived this issue.

A party waives an issue for appeal by consenting to the action at the trial court level. For example, in *Deutsche Bank Natl. Trust Co. Americas v. Weber*, 12th Dist. Butler No. CA2009-10-264, 2010-Ohio-1630, the court found Deutsche Bank voluntarily consented to the language and terms of the agreed entry and therefore, was precluded from asserting error with regard to priority. Further, Deutsche Bank did not reserve the right to appeal the issue of priority and waived its right to appeal the priority decision. *Id.* at ¶19. *See also In re: J.L. H.L. T.M. T.M.*, 8th Dist. Cuyahoga Nos. 85668, 85669, 85670, 2005-Ohio-6125, ¶39, where the court of appeals held, “the father in the case at bar waived his right to appeal this issue when he and all the parties expressly agreed to have the case heard by a visiting judge and signed a form stating so.”

Appellants’ concern for the proposed Civ.R. 23(B)(2) class members focused on the “timing” of tolling (i.e., from what date should the leases be tolled) and not with tolling itself. In fact, the third caveat Appellants reference in their response would not have been necessary had Appellants truly objected to tolling as they now claim they did. The third caveat asked that “Beck be prohibited from drilling or including the parcels at issue in a drilling unit during the period of tolling.” Having agreed to tolling, including tolling for the proposed Civ.R. 23(B)(2) class members’ leases, Appellants’ third caveat sought assurances that Beck Energy would not attempt to develop the named Plaintiffs’ or the class members’ property during the tolling period. This caveat would not have been necessary had Appellants objected to tolling or claimed tolling was improper.

Finally, Appellants challenge the fact that Beck Energy did not move to toll the leases of the Civ.R. 23(B)(2) class members until July 16, 2013. Appellants claim that by waiting until this date, Beck Energy deprived the trial court of the ability to consider tolling when it made its class certification decision following remand from the court of appeals to further define the class. (*See* Second Revised Motion to Strike, and to Correct Record, Jan. 16, 2015, p. 3.) This argument overlooks the fact that Beck Energy had no basis to move for tolling of the class members' leases until the trial court conclusively defined class membership, which it did in a judgment entry filed on June 10, 2013.

Shortly thereafter, on July 16, 2013, Beck Energy moved to toll the class members' leases. The trial court was not deprived of its right to consider tolling when it further defined the class. The court arguably knew that Beck Energy would move to toll the proposed class members' leases once the Civ.R. 23(B)(2) class was defined, just as it had done back in October 2012 when it moved to toll the named Plaintiffs' leases. Also, Appellants had already notified the trial court that the only aspect of tolling they were concerned with, as to the proposed Civ.R. 23(B)(2) class members' leases, was the timing of the tolling order.

CONCLUSION

In their October 9, 2010 pleading, Appellants did not oppose tolling the proposed Civ.R. 23(B)(2) class members' leases and agreed to tolling with only two limitations: (1) tolling would not be appropriate "unless and until" the trial court certified a class action; and (2) tolling would commence from the date of class certification. These two facts establish Appellants conceded to tolling their leases if the trial court certified the matter as a class action. Having waived any challenges to tolling the class members' leases, Appellants should not be

permitted to raise this issue as a proposition of law in support of jurisdiction. Beck Energy asks the Court to deny Appellants' Second Revised Motion to Strike and to Correct the Record.

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PROOF OF SERVICE

I hereby certify that a copy of the foregoing was served by Ordinary U.S. Mail

this 23rd day of January 2015 upon:

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