

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE

**FILED**  
  
October 14, 1998  
  
Cecil W. Crowson  
Appellate Court Clerk

KENDLE DAVIDSON, d/b/a )  
DAVIDSON OIL AND GAS )  
AND ERIK B. DAVIDSON, )  
 )  
Plaintiffs/Appellants, )  
 )  
VS. )  
 )  
NCM FINANCIAL CORPORATION, )  
d/b/a NCM ENERGY, )  
 )  
Defendant/Appellee. )

Appeal No.  
01-A-01-9712-CH-00743  
  
Pickett Chancery  
No. 1868

APPEALED FROM THE CHANCERY COURT OF PICKETT COUNTY  
AT BYRDSTOWN, TENNESSEE

THE HONORABLE VERNON NEAL, CHANCELLOR

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AFFIRMED AND REMANDED

BEN H. CANTRELL, JUDGE

CONCUR:  
KOCH, J.  
CAIN, J.

## **MEMORANDUM OPINION**<sup>1</sup>

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The plaintiffs filed this action to rescind a contract or in the alternative to recover damages for its breach. The Chancery Court of Pickett County dismissed the complaint and awarded the defendant a judgment on its counterclaim. We affirm.

The plaintiff acquired a lease on two oil wells in Pickett County, The wells had previously been drilled to a certain depth but neither had been completed. Desiring to drill the wells to the Knox formation if necessary to obtain commercial production, the plaintiff entered into an agreement with the defendant for that purpose. The agreement granted the defendant an interest in both wells in return for defendant's promise to drill each well to the Knox formation if oil in commercial quantities was not obtained at a lesser depth. The defendant was given the right to decide what constituted a commercially producing well.

The defendant drilled one well to the Knox formation but did not find oil in commercial quantities. The defendant then prepared to deepen the second well and prepaid a driller to drill to the Knox formation. When the well was opened, however, oil flowed from the well in large quantities and prevented the driller from drilling the well any deeper.

The defendant completed the well, put it on a pump, and provided storage tanks. The well produced thirty eight barrels a day for nineteen days and then fell off to a level of approximately one and one half barrels a day.

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<sup>1</sup>Rule 10(b) of the Rules of the Court of Appeals reads as follows:

The Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in a subsequent unrelated case.

The plaintiff sued the defendant seeking to have their agreement set aside for a failure of consideration or, in the alternative, to collect damages for the breach of the agreement. The chancellor in an excellent memorandum opinion found that the second well was producing oil in paying quantities -- even considering the cost that would have been incurred in drilling to the Knox formation. Therefore, the defendant had not been arbitrary or unreasonable in exercising its judgment as to what constituted a commercially producing well. Since the agreement gave the defendant that right, the chancellor found that there had been no material breaches of the agreement. The chancellor also found that the presence of oil in the second well made it impossible to drill the hole any deeper.

We concur in the chancellor's findings and conclusions. The contract plainly says that the well will be deepened if commercial production is not obtained at a lesser depth -- and the defendant was given the power to make the decision when that occurred.

We affirm the judgment of the lower court and remand this cause to the Chancery Court of Pickett County for any further proceedings necessary. Tax the costs on appeal to the appellant.

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BEN H. CANTRELL, JUDGE

CONCUR:

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WILLIAM C. KOCH, JR., JUDGE

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WILLIAM B. CAIN, JUDGE

