SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CONNIE MACK DOUGLAS AND WIFE,
CHARLENE DOUGLAS — APPELLANTS

VS. — CASE NO. 2010-CA-00369

DENBURY ONSHORE, LLC — APPELLEE

BRIEF OF THE APPELLEE, DENBURY ONSHORE, LLC

ON APPEAL FROM THE CHANCERY COURT OF LINCOLN COUNTY, MISSISSIPPI

ORAL ARGUMENT IS NOT REQUESTED

SUBMITTED BY:

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VS. — **CASE NO. 2010-CA-00369**

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

Honorable Edward E. Patten, Lincoln County Chancery Judge
Connie Mack Douglas, Appellant
Charlene Douglas, Appellant
Bill Waller, Sr., Attorney for Appellant
Denbury Onshore, LLC, Appellee
William F. Blair, Attorney for Appellee
Troy Farrell Odom, Attorney for Appellee

SO CERTIFIED, this the 9th day of September, 2010.

Troy Farrell Odom (MSB No [redacted])
Attorney of Record for Appellee,
Denbury Onshore, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF THE ISSUES

1. Whether ownership of an underground plugged and abandoned wellbore, which has no value except as an entrance to the mineral estate, is vested in the severed mineral estate, thereby giving the mineral lessee the right to use said wellbore, and all improvements located therein, for oil and gas development without any payment to the severed surface owner.

2. Whether, regardless of the ownership of an underground plugged and abandoned wellbore, the severed mineral lessee and/or unit operator has the right to use such wellbores for all purposes reasonably necessary for development of the mineral estate without any payment to the severed surface owner.

3. Whether the Orders of the Mississippi State Oil and Gas Board approving the Plan of Unitization of the East Mallalieu Field Unit empowered Denbury to use underground plugged and abandoned wellbores within the Unit for reasonable purposes related to oil and gas development.

4. Whether the Appellees are collaterally estopped from attacking the Orders of the Mississippi State Oil and Gas Board approving and implementing the Plan of Unitization of the East Mallalieu Field Unit, and specifically providing Denbury the authority to reenter underground plugged and abandoned wellbores within the Unit without payment.

STATEMENT OF THE CASE

A. Nature of the Case

This matter concerns the corporeal, possessory interest in real property maintained by the severed mineral estate and its attributes of ownership. This matter further concerns authority conferred by the Compulsory Unitization Act, *Miss. Code Ann.* § 53-3-101 *et seq.*, and the sovereignty of administrative orders issued by the Mississippi State Oil and Gas Board.

B. Course of Proceedings and Disposition in the Court Below

On March 12, 2009, the Appellants, Connie Mack Douglas and wife, Charlene T. Douglas (collectively "Plaintiffs"), filed their Complaint against Denbury Resources, Inc., which was later amended to substitute Denbury Onshore, LLC ("Denbury"). Plaintiffs sought actual and punitive damages for Denbury's use of an underground plugged and abandoned wellbore located under the Plaintiffs' surface estate and for Denbury's use of a roadway and well site. On April 27, 2009, Denbury filed its Answer and Counterclaim denying the claims.

On August 11, 2009, Plaintiffs filed their motion for summary judgment. On December 15, 2009, Denbury filed its own motions for summary judgment on all issues. Both parties admit that no material issues of fact exist.

On January 15, 2010, the Lincoln County Chancery Court held oral argument on all pending motions for summary judgment. Following extensive oral argument, the Court granted Denbury's Motion and dictated its opinion into the record following all argument. On February 22, 2010, the Court executed its Findings of Facts and Conclusions of Law.

On January 18, 2010, Plaintiffs filed their Notice of Appeal. On February 25, Plaintiffs filed their Amended Notice of Appeal, whereby the Plaintiffs appealed both the January 15, 2010, bench opinion, and February 22, 2010, Findings of Fact and Conclusions of Law.

C. Statement of Facts

On October 28, 1937, Plaintiff Connie Mack Douglas' grandparents, M. R. Douglas and wife, Conie Douglas, executed an oil, gas and mineral lease ("the Douglas Lease") to R. P. Brewer, Jr.,[1] covering the following described land located in Lincoln County, Mississippi:

TOWNSHIP 6 NORTH, RANGE 8 EAST

Section 11: The SW¼ of the NW¼; the SE¼ of the SW¼ and the W½ of the SW¼, less and except 5 acres off the West side of the NW¼ of the SW¼ and 15 acres off the West side of the SW¼ of the SW¼.

(R. 249; R.E. 1)[2]

At that time, M. R. Douglas *et ux.* owned the property in fee simple.

The Douglas Lease granted Chevron the right to explore for oil and gas on the described property. *Id.* The Douglas Lease contained a ten year primary term and a secondary term for as long thereafter as production or operations continued. *Id.* The Douglas Lease provides that, "Lessee shall have the right at any time **during, or after the expiration of the lease**, to remove all property and fixtures placed by Lessee on said land, including the right to draw and remove all casing, whether from producing or non-producing wells." *Id.*

On December 2, 1937, Book 197, Page 481, M. R. Douglas *et ux.* executed a Mineral Deed unto J. C. Vaughan, Jr., conveying an undivided one-half mineral interest in the SW¼ of the SW¼ of Section 11, Township 6 North, Range 8 East, Lincoln County, Mississippi, less and

[1] R. P. Brewer, Jr., assigned the Douglas Lease to California Corporation which later became Chevron Corporation ("Chevron"). For convenience, we will simply refer to those entities as Chevron.

[2] When citing to a specific page of the Record, the abbreviation "R." is used; when citing to the Record Excerpts, the abbreviation "R.E." is used.

except fifteen acres off the West side,[3] and other lands. (R. 251; R.E. 2) The deed describes the rights and interests conveyed to include:

> TO HAVE AND TO HOLD the said undivided interest in all of the said oil, gas and other minerals in, on, and under said land, **together with all and singular rights and appurtenances** thereto in any wise belonging, with the right of ingress and egress, **and possession** at all times for the purpose of mining, drilling and operating for said minerals and the maintenance of facilities and means necessary or convenient for producing, treating and transporting such minerals and for housing and boarding employes [sic], **unto said grantee, his heirs, successors and assigns, forever**; and Grantor herein for himself and his heirs, executors, and administrators hereby agrees to warrant and forever defend all and singular the said interest in said minerals, unto the said Grantee, his, heirs, successors and assigns . . . .

Id. (emphasis added).

On March 6, 1940, Book 217, Page 559, M. R. Douglas *et ux.* executed a Mineral Deed unto Hugh V. Murray, conveying an undivided one-quarter mineral interest in the Land. (R. 252; R.E. 3) The deed conveyed similar rights including "the right to remove from said land all of Grantee's property and improvements". *Id.*

On January 5, 1945, Chevron obtained a permit to drill the M. R. Douglas Unit 2 No. 1 Well ("the Well") from the Mississippi State Oil & Gas Board ("the Board"). (R. 255) Later, Chevron drilled and completed the Well as a producing oil well in the Mallalieu Field.

On October 29, 1954, M. R. Douglas *et ux.* executed a Warranty Deed unto Jewel Douglas and wife, Hollice Douglas, conveying the surface estate of the Land. (R. 256; R.E. 4) The grantors reserved "all mineral and royalty interest of every kind and character in the oil, gas and other minerals and royalty now owned by the undersigned grantors in a producing oil well

[3] This is the land that is the subject matter of this litigation and will be hereinafter referred to as "the Land".

located on the SW¼ of the SW¼". *Id.* Jewel and Hollice Douglas are Plaintiff Connie Mack Douglas' parents. The reference is to the Well.

On October 29, 1954, M. R. Douglas *et ux.* executed a Warranty Deed unto their daughter, Mrs. Will Ann Douglas Smith, conveying "the following described **personal and real property, together with all improvements** located thereon":

> all mineral and royalty interest of every kind and character in and to the oil, gas and other minerals and royalty now owned by the undersigned grantors **in a producing oil well** located on the SW¼ of the SW¼, less fifteen acres in the West side, Section 11, Township 6 North, Range 8 East, Lincoln County, Mississippi, which mineral and royalty interest was reserved by the undersigned grantors in a deed of even date herewith to Jewel Douglass and his wife, Ms. Hollis Douglass [sic].

(R. 258; R.E. 5) (emphasis added). Again, the reference is to the Well.

Jewel and Hollice Douglas conveyed their surface interest in the Land to the Plaintiffs in two separate conveyances. (R. 260, 265) Those deeds were subject to all prior mineral reservations. *Id.* As a result, the Plaintiffs own the surface estate of the Land, but no mineral interest thereunder. (R. 193) However, the Plaintiffs own unleased minerals in other tracts within the Unit and have been paid over $300,000.00 by Denbury.

Chevron produced the Well from 1947 until 1967. On April 9, 1968, Chevron plugged the Well. (R. 277; R.E. 6) When the Well was initially drilled, Chevron installed and cemented into the wellbore 10,549 feet of 7-inch production casing, 1,828 feet of 10 ¾ inch surface casing, and 212 feet of conductor pipe. When it plugged the Well, Chevron cut off and removed the top 1,815 feet of production casing. *Id.* Chevron left the conductor pipe, the surface casing, and the bottom 8,734 feet of production casing in the Well. *Id.* The surface casing and conductor pipe are cemented from the bottom of each to the surface. Chevron then set a plug between the

depths of 10,375 feet and 10,225 feet, and between the depths of 1,978 feet and 1,678 feet. *Id.* Chevron cut the surface casing and conductor pipe below ground level, placed a cement plug on top, and covered the cemented wellbore with dirt. *Id.* It sat undisturbed for thirty-seven years.

Beginning in 2001, Denbury obtained oil and gas leases from the mineral owners in the Land and other nearby lands. (R. 283-301) Some mineral owners did not sign oil and gas leases, but, instead, participated as working interest owners.

On July 14, 2003, Denbury filed a Petition at the Board and issued a Public Notice to form a Compulsory Fieldwide Unit for the East Mallalieu Field Unit ("the Unit"). (R. 302, 312) A compulsory unit is a statutory unit by which all owners may be forced into the unit if the Board and a sufficient number of owners approve the Plan of Unitization. See MISS. CODE ANN. § 53-3-101 *et seq.* (attached as an Appendix hereto). Because the Plaintiffs owned a mineral interest in other lands in the Unit, Denbury sent the Petition and Public Notice, along with the Plan of Unitization,[4] in a pre-packaged and labeled envelope, for the Board to mail to the Plaintiffs and all other owners. Plaintiffs acknowledge they received the Plan of Unitization. In addition, Denbury published the statutory Public Notice. (R. 49, 350; R.E. 9) Denbury also sent the Plaintiffs a letter dated July 17, 2003, with an enclosed Unit Ratification. (R. 351; R.E. 10) The letter explained that the Plan of Unitization would be considered at the August 20, 2003 Board hearing. *Id.* The Plaintiffs acknowledged receipt of these materials. The Plaintiffs failed to attend the Board hearing or file any contest or protest. On August 20, 2003, the Board considered Denbury's Petition and, on September 17, 2003, entered its Order approving the Plan of Unitization. (R. 356; R.E. 11) Plaintiffs did not appeal that Order.

[4] The Plan of Unitization consists of the Unit Operating Agreement and the Unit Agreement. The Unit Operating Agreement is R.E. 7; the Unit Agreement is R.E. 8.

In order for compulsory unitization to become effective, the Board must first approve the Plan of Unitization. Then, more than 75% of the Unit owners, both royalty and working interest, must ratify or sign the Plan of Unitization. That normally requires two Board Petitions.

In September 2003, Denbury filed a second Petition at the Board to implement the Unit. Proper notice was issued for this second Board hearing. (R. 438, 439) Once again, Plaintiffs failed to appear to contest the implementation of the Plan of Unitization. On November 6, 2003, the Board granted Denbury's Petition implementing the Unit. (R. 440; R.E. 12) The Plaintiffs did not appeal the Board's Order. The Unit became effective November 1, 2003. *Id.*

As set forth above, Will Ann Douglas Smith owned the remaining Douglas family mineral interest in the Well and the Land. Mrs. Smith granted Denbury a mineral lease on that mineral interest. (R. 443; R.E.13) Mrs. Smith also ratified the Plan of Unitization. (R. 445; R.E. 14)

The Land is completely within the Unit boundaries and is subject to the Plan of Unitization. The Plaintiffs own the surface of the Land, but not the mineral interest. The Plaintiffs own unleased mineral interest in other tracts and are working interest owners under the Plan of Unitization subject to the Plan of Unitization.

Beginning in April of 2005, Denbury contacted the Plaintiffs seeking permission to locate the Well since it was completely underground and covered in dirt on their surface estate. (R. 446; R.E. 15) On April 26, 2005, Denbury submitted a proposed mineral lease and surface use agreement to the Plaintiffs; however, the Plaintiffs declined to lease their mineral interest or execute the surface use agreement. *Id.* The documents contained language regarding the right to use plugged and abandoned wellbores, but the proposed lease did not cover the tract in question because the Plaintiffs owned no interest in those minerals. *Id.*

On July 7, 2005, Denbury surveyed the Plaintiffs' Property for the location of the Well site and access road location. (R. 450) The Well site totaled 0.5 acre. The easement ran along an existing lease road totaling 0.4 acre. Denbury supplemented the survey, adding ten more feet for a pipeline. (R. 451; R.E. 16). All property identified within the Survey is totally within the Unit.

On November 23, 2005, Denbury obtained a permit from the Board to re-enter the Well as an oil well. (R. 452; R.E. 17) The Plaintiffs did not contest the permit. Denbury completed the Well as an oil well. (R. 454) Later, the Board granted Denbury an Amended Permit to convert the Well to a CO_2 injection well (R. 456; R.E. 18), and it remains in use today.

On March 12, 2009, Plaintiffs filed their Complaint claiming ownership of the underground wellbore, alleging Denbury reentered the Well without Plaintiffs' permission. Plaintiffs further alleged Denbury wrongfully used property for the Well site, access road and pipeline to the Well. Plaintiffs sought damages for the use of the Well, the location, and access road alleging nuisance and personal injuries.

There is no allegation in the Complaint, nor did the Plaintiffs provide any evidence in response to the pending motions for summary judgment, that Denbury used more of the surface than was reasonably necessary to exercise its rights within the Unit. (R. 647) Further, the Plaintiffs do not make any allegation that Denbury used the Plaintiffs' property for an unreasonable purpose. *Id.*

SUMMARY OF THE ARGUMENT

The facts in this case are undisputed. The right-of-way, the well site, and the hole[5] are all inside the boundaries of the compulsory Unit created by the Board. The Plaintiffs do not claim that Denbury, the Unit operator, used unreasonable amounts of their surface estate or negligently preformed its work. Denbury re-entered the hole and performed its Unit operations pursuant to a valid, legal permit granted by the Board.

Plaintiffs sued Denbury for using the old casing and the "hole" plugged by the previous operator. The casing is sixty-one years old. It was cemented in the ground in various stages from the bottom of the "hole" to the top of the "hole". In 1969, Chevron plugged the Well. Chevron placed three cement plugs inside the casing stopping all movement up and down the "hole", cut off the top five feet of all casings,[6] then, covered it in cement, dirt, and an underground steel plate. It is not a fixture, it is an underground "hole". It is nothing more than a passageway to the mineral estate.

Denbury's right to access and use the Well site are not disputable. Numerous Mississippi cases allow the mineral owner access to its mineral rights. The Plaintiffs' predecessors granted perpetual "ingress and egress" to the current mineral owners. Denbury acquired oil and gas leases from those mineral owners.

All parties agree, and the trial court expressly found, that the hole has no value except for mineral exploration. The casing cannot be removed. The casing is so affixed that it became part of the earth. The trial court ultimately held the Plaintiffs do not own the underground wellbore

[5] This will be explained in the Argument. This case does not involve fixtures. It is the "hole" that is in issue.

[6] Chevron also removed the top 1,815 feet of the production casing.

or hole in any respect. Furthermore, the dominant mineral estate gave Denbury the right to re-enter and use the underground wellbore without compensation.

When the compulsory unitization occurred, the Plan of Unitization addressed this exact situation. Those Board approved and implemented agreements which explicitly provided Denbury the right to re-enter and use the hole without paying compensation to either surface, mineral, or mineral lease owners. The same applies to the roadway and the Well site.

Further, there is no allegation of unreasonable or unnecessary surface use. Accordingly, the Complaint for nuisance must also be dismissed. Although the trial court declined to rule on that issue, the facts clearly will not support a claim.

ARGUMENT

A. Denbury Has the Right to Use the Subsurface Hole and the Surface Without Payment to the Surface Owner.

1. The Dominant Mineral Estate Provides for Use Without Payment

On December 2, 1937, Plaintiff Connie Mack Douglas' grandparents severed the mineral estate underlying the Well from the surface. That severance created two distinct estates, each with their own unsubtle attributes of ownership:

> "After the owner of the general title makes a severance by conveying the fee to all or a part of the minerals, the estate in the surface and the estate in the minerals must be and are regarded as separate and distinct estates, **each being a fee simple estate in lands with all the incidents and attributes of such an estate.**

Neal v. Teat, 126 So. 2d 124, 127 (Miss. 1961) (emphasis added).

On October 29, 1954, Connie Mack Douglas' grandparents conveyed the minerals, the royalty, the Well and all improvements to Mrs. Will Ann Douglas Smith. The Deed to Mrs. Smith specifically referenced the Well, "together with all improvements". Before that conveyance, M. R. Douglas had conveyed most of his mineral interest to others. Those mineral

conveyances expressly included all "appurtenances", "improvements" and "personal and real property".

In Mississippi, the severed mineral estate is regarded as a corporeal, possessory interest in the minerals. *Chevron U.S.A., Inc. v. State*, 578 So. 2d 644, 664 (Miss. 1991); *Lloyd's Estate v. Mullen Tractor & Equip. Co.*, 4 So. 2d 282, 288 (Miss. 1941); *Stokely v. State*, 115 So. 563, 566 (Miss. 1928). "Corporeal" is defined as having "an objective, material existence; perceptible by the senses of sight and touch; possessing a real body." BLACK'S LAW DICTIONARY at 343 (6th ed. 1990).

Upon execution by Douglas' grandparents, the Douglas Lease further provided Chevron a fee simple determinable in the mineral estate. See *Koenig v. Calcote*, 25 So. 2d 763, 765-66 (Miss. 1946). As a fee simple determinable, the leased fee reverted **to the mineral owner** in fee simple absolute upon termination. *Id.* That would have been Mrs. Smith and the other mineral grantees, not the Plaintiffs.

The mineral lessee, as owner of the dominant estate, has the right to use as much of the surface and subsurface as is reasonably necessary to explore and extract his mineral estate. *EOG Resources, Inc. v. Turner*, 908 So. 2d 848, 854 (Miss. Ct. App. 2005); *Reynolds v. Amerada Hess Corp.*, 778 So. 2d 759, 762 (Miss. 2000). In *Reynolds*, the Supreme Court held:

> Long-established law in Mississippi provides that the severed mineral owner or lessee has the right to use the surface of the lands for all reasonable purposes to explore and drill for oil and gas and may use as much of the surface as is reasonably necessary to exercise its rights, but it cannot intentionally or negligently damage or use more of the land surface than is reasonably necessary in its mining operation.

Reynolds, 778 So. 2d at 762.

An oil and gas lease grants to the lessee the dominant right to use the lands, and it may do so without any compensation to the surface owner. *See Turner*, 908 So. 2d at 854-55, 856; *Lewis*

v. Ada Oil Co., 279 So. 2d 622, 624-25 (Miss. 1973) (holding not necessary to reserve specific right to enter upon land to develop minerals since that right is "necessarily implied from the reservation itself"); *Union Prod. Co. v. Pittman,* 146 So. 2d 553, 555 (Miss. 1962) (finding grant of reservation of minerals gives mineral owner incidental right of making such use of surface lands as is reasonably necessary to explore, mine, remove and market minerals); *Westmoreland v. Calif. Co.*, 128 So. 2d 113, 113 (Miss. 1961) (holding drilling may be done anywhere on land within limitations of lease). In *Pace v. State* ex rel. *Rice,* 4 So. 2d 270, 275 (Miss. 1941), the Supreme Court, in one of its earliest decisions regarding the relationship between the mineral estate and a severed surface estate, held that "**a right of access to the lower strata of the earth's crust is a property right**" which is transferred to the mineral estate by means of a mineral grant or reservation. *Pace,* 4 So. 2d at 275 (emphasis added).

The policy underlying the dominance of the mineral estate is well stated in Justice Lee's dissenting opinion in *Chevron U.S.A., Inc. v. State, supra*:

> The mineral estate . . . does not depend on a surface lease or permit from the surface owner for its utilization. "The conveyance . . . of the minerals creates a separate and distinct estate." When the mineral estate is severed from the surface estate, . . . it is evident that the mineral estate is the dominant estate, because of the nature of the rights conveyed. **"The oil and gas lease gives the owner of same the dominant estate."** . . . To do so, he must go upon the land. . . . He has the right to do this and is not, in the absence of a statute or contractual provisions, liable for damage therefor, so long as he does no more damage than is reasonably necessary. This is because of the physical realities of the two estates. The mineral owner has a right to explore and produce, and to do so he must have at least limited use of the surface. **He does not need a surface lease under any circumstances.**

Chevron, 578 So. 2d at 666 (citations and footnote omitted) (emphasis added).

In Texas, which Mississippi often follows for unresolved mineral questions, the dominant mineral estate also includes other rights necessary or incidental to the enjoyment of those rights.

For example, even though water, unsevered by express conveyance or reservation, has been held to be part of the surface estate, Texas courts have found that a mineral lessee has the right to use water as a part of its operations. *Sun Oil Co. v. Whitaker,* 483 S.W.2d 808, 811 (Tex. 1972). Texas courts have found that a mineral deed, by implication, includes "a grant of the way, surface, soil, water, gas and like essential to the enjoyment of the actual grant". *Guffey v. Stroud,* 16 S.W.2d 527, 528 (Tex. Comm'n App. 1929). In fact, the Texas Supreme Court held that to require a mineral lessee to purchase water from a surface owner to be used in the secondary recovery project would unreasonably limit the dominant mineral estate. *Sun Oil,* 483 S.W.2d at 812.

The dominant mineral estate includes the right to enter a plugged and abandoned wellbore to the same extent as if was simply part of the earth. Denbury's reentry of the underground wellbore for Unit operations was proper. The hole has no use except for mineral exploration. That right of access to the minerals is a property right owned solely by the mineral estate. *Pace,* 4 So. 2d at 275.

2. <u>The Mineral Estate Owns the Hole</u>

It is important for the Court to understand the issues presented by this case. Likewise, it is important for the Court to understand what is not an issue. That is, this case is not about who owns a fixture, above ground personal property, or similar matters. Instead, it is about who owns or has the right to control a hole under the ground.

The Plaintiffs' experts agree. Marcial D. Forester, Sr., testified:

> Q. So you're saying that the well in question is worth how much?
>
> A. $705,550.

Q. And you don't have any other opinions you're going to give in this case other than that; is that correct?

A. That's correct.

Q. Now, how much of that value is the hole?

A. All of it.

(R. 461-62)

Similarly, the Plaintiffs' second expert, Harold Mayer, testified as follows:

Q. You do agree that part of what you valued is the physical fact that there is a hole in the ground?

A. Yes.

Q. And some of it is for the steel itself; is that right? Some of the value you've given is for the steel itself, is that correct?

A. No.

Q. No? It's all for the hole in the ground?

A. No. We didn't – I didn't give value to the – the steel that's in the hole now.

(R. 481)

It is clear from the testimony that this case is limited to the property right associated with the right of access to the lower strata of the mineral rights. It is nothing more than the entrance and path to the mineral estate. Although the hole was full of cement plugs, earth and other debris, it is clear that it is only the hole that has value. That value is solely to explore for oil and gas.

The hole is the property of the mineral estate owners. M. R. Douglas *et ux.* conveyed the Well, the minerals, the royalty they owned, and all improvements to Mrs. Will Ann Douglas Smith. Before that conveyance, M. R. Douglas had conveyed most of his mineral interest to

others. Those mineral conveyances expressly included all "rights and appurtenances", "improvements" "ingress and egress", and "personal and real property". The deed to Mrs. Smith specifically referenced the Well "together with all improvements." (R. 258; R.E. 5) The Plaintiffs' own experts testified that the casing had no value at the surface. (R. 461, 480) Instead, it was solely the intangible cost to drill the old "hole" which the Plaintiffs claim as their "damages". In fact, they calculated those alleged damages based upon a "saving" between re-entering the old "hole" and drilling a new "hole".

The severed surface interest owner possesses no right to drill an oil well. That authority belongs to the mineral estate. *See Pace,* 4 So. 2d at 275. In the present case, the Board granted Chevron a permit to drill the Well. Chevron drilled the hole. When Chevron's rights to the hole terminated, those rights reverted to the mineral owners, not the severed surface estate.

The distinction between an ordinary property lease and the estate granted by an oil and gas lease is important. The leases acquired by Denbury conveyed to it a fee simple estate entitling it to the **exclusive** use of so much of the surface and subsurface as it deemed to be reasonably necessary to explore for oil and gas. It includes a "right of passage" to the earth's crust. *Id.* at 276. The Plaintiffs, and their expert witnesses, all testified that the wellbore's only value was for mineral exploration at the spot it was located.[7] Marcial Forester, Sr., one of the Plaintiffs' experts, testified:

> Q. And I believe you already testified that everything we're talking about today is now affixed to the earth and can't be removed. That would be the casing, the conductor pipe, the surface casing, the drilling mud, the cements, those kind of things. All of those items that we're talking about in this well are now permanently affixed to the land, aren't they?

[7] It is important to note that the hole is completely underground. Chevron left no personal property above ground.

A. As far as I know.

• • •

Q. And there is no other use, other than some way to use it in oil and gas exploration or development, correct?

A. I suppose so, yes.

(R. 463)

Harold Mayer, the other expert designated by the Plaintiffs, testified:

Q. And isn't it true that that well, where it sits right now, is – the only thing that that well is good for or has practical use is for oil and gas operations?

A. Yes.

(R. 480)

The Well has no value other than for mineral exploration. It was paid for by Chevron. It was placed under the ground by authority of the mineral interest owner. Upon termination of the fee simple determinable created by the Douglas Lease, the wellbore, and all appurtenances and improvements reverted to the mineral interest owners, not the surface owner. The mineral estate alone has the power and authority to grant permission to reenter the hole. That permission was granted to Denbury when it obtained mineral leases from the mineral interest owners.

A similar case was decided by the United States Court of Appeals for the Tenth Circuit in *Gutierrez v. Davis,* 618 F.2d 700 (10th Cir. 1980). In *Gutierrez,* the owner of the fee simple in both the surface and mineral estates executed a standard form oil and gas lease which contained no restrictions on exploration and drilling except that a well could not be drilled within 200 feet of a house or barn. *Gutierrez,* 618 F.2d at 701. A few months later, the mineral lessee notified the mineral owner that he intended to re-enter an old well drilled by a prior lessee which had been plugged and abandoned with the casing cemented in the ground. *Id.*

The mineral owner protested and told the lessee they would consider re-entry operations a conversion. *Id.* at 701-02. The lessee proceeded to drill through the cement plug and casing and commenced operations. *Id.* at 702. The re-entry was unsuccessful, and the lessee replugged the well. *Id.* The landowners subsequently filed suit for conversion. *Id.*

The court began its analysis by noting that oil casings in active wells are classified as trade fixtures and can be removed by the lessee within a reasonable time after termination of the lease. *Id.* However, if not removed within a reasonable time, they become part of the realty. *Id.* As part of the realty, the operator had the right, through the mineral lease, to drill through any part of the realty so long as it was reasonable. *Id.*

In the present case, the lower court correctly found that no jurisdiction has addressed this precise issue of severed mineral and surface estates. However, the lower court held a strong analogy can be made to coal mining cases involving ownership of abandoned mine tunnels. In *Lillibridge v. Lackawanna Coal Co.*, 22 A. 1035 (Pa. 1891),[8] the Supreme Court of Pennsylvania rejected a surface owner's argument that upon exhaustion of an underlying coal seam, the tunnel, 200 feet below the surface, reverted to the surface owner. The Court emphasized the mineral estate is a corporeal estate, separate and distinct from the surface estate. *Lillibridge*, 22 A. at 1036.

The Pennsylvania Court then found use of the tunnels necessary to remove minerals solely owned by the mineral estate. "[H]ow is it possible to conceive of such a thing as the ownership of the space independently of the coal?" *Id.* at 1037. To further its point, the Court

[8] Plaintiffs make much about the fact the *Lillibridge* case, though relied upon by the Chancery Court in its bench opinion, was not included in the Findings of Facts and Conclusions of Law. However, its absence is mere inadvertence. The Chancery Court clearly relied on the *Lillibridge* case and its holding in ruling abandoned wells are owned by the mineral estate. See Trial Court's Bench Opinion, Appellant's R.E. 26, 33.

noted that the surface owners could not use the tunnel and that the surface disturbance was negligible. *Id.* It only had value to the mineral owner. *Id.* As a result, the tunnel belonged to the mineral estate. *Id.* at 1039.

The Plaintiffs argue that abandoned wells belong to the surface owner. No reported case has ever held that the severed surface owner owns subsurface abandoned wellbores.

The Plaintiffs cite *Garr-Woolley v. Martin,* 579 P.2d 206 (Ok. Ct. App. 1978). In that case, the mineral and surface estates **were not severed**. The Oklahoma appellate court classified casing and equipment left after the expiration of a lease as fixtures. Those fixtures, if left on the property "for an unreasonable length of time after the termination of the lease will become the landowner's property." *Id.* at 209.

Two important facts make this case inapplicable: First, Oklahoma – unlike Mississippi and Texas – does not treat ownership of the mineral estate as a corporeal hereditament; rather Oklahoma follows the theory of *profit á prendre* ownership or, an **incorporeal** hereditament, in the same category as an easement. *Hinds v. Phillips Petroleum Co.,* 591 P.2d 697, 698 (Ok. 1979). In the *profit á prendre* theory, mineral estate owners have no corporeal rights in oil and gas until they are produced and reduced to possession. Instead of possession, mineral estate owners own simply a **right**. Second, the landowner in *Garr-Woolley* owned both the surface and mineral estates, and the issue of whether the casing reverted to the mineral owner as opposed to the surface owner was not before the Court.

Other cases cited by the *Garr-Woolley* court all dealt with non-severed property. See, e.g., *Pratt v. Gerstner,* 360 P.2d 1101 (Kan. 1961); *Davis v. Howard,* 276 S.W.2d 460 (Ky. 1955); *Wilson v. Wilson,* 133 S.W.2d 722 (Ky. 1939); *Bain v. Graber,* 112 S.W.2d 66 (Ky.

1937); *Michaels v. Pontius,* 137 N.E. 579 (Ind. 1922); *Spies v. DeMayo,* 72 N.E.2d 316 (Ill. 1922).

In Mississippi, the attributes of the mineral estate are identical to the surface estate. It is considered a tangible, touchable thing, not simply a right. It is a corporeal estate, capable of being possessed, capable of being adversely possessed. It is dominant over the servient surface estate.

The two Mississippi cases relied upon by Plaintiffs are inapplicable because they do not deal with severed mineral estates. *Simmons v. Bank of Mississippi,* 593 So. 2d 40 (Miss. 1992), concerned a bank branch building and whether it could be removed by the lessee bank following its attachment to the leased realty. *Id.* at 41. *Simmons,* stands for the proposition that the general rule – "whatever is affixed to the land becomes a part of the realty" – is relaxed in favor of the lessee in a leasehold situation. *Id.* at 42 (citing *Waldauer v. Parks,* 106 So. 881, 882 (Miss. 1926)). *Wright v. Rub-A-Dub Car Wash, Inc.,* 740 So. 2d 891 (Miss. 1999), stands for the same.

Denbury agrees with the legal precedent of both cases. However, instead of a bank branch building and convenience store fixtures, all of which were placed on the property by the lessee of the surface estate, the present case concerns a hole in the ground placed upon the property by the lessee of the mineral estate. At the time Denbury commenced its work, the hole did not even reach the surface. The authority to drill the hole came from the mineral owner. Plaintiffs and their experts admit that the hole has no use other than for mineral exploration. Plaintiffs and their experts admit that it is only the "hole" that has value. It is nothing more than the entrance to the mineral estate. The hole's only use is for mineral development. Plaintiffs' predecessor granted all rights in the Well to Plaintiffs' aunt, Will Ann Douglas Smith, and others. The mineral owners executed mineral leases to Denbury and ratified the Unit.

Under these facts, the hole belongs to the mineral estate owner, not the Plaintiffs. Denbury obtained the authority to re-enter the Well upon acquiring oil leases from the mineral owners and unitizing the Unit pursuant to the Compulsory Unitization Act. Plaintiffs admitted that Denbury had the right to drill a brand new well one foot away. **It is incredulous to argue that a mineral lessee has the right to drill a brand new well, causing extensive and unnecessary surface disturbance, but not re-enter an existing, abandoned well one foot away.**

The Plaintiffs stipulated that the underground hole became part of the realty:

Deposition of Marcial Forester, Sr.

> Mr. Waller: Just a minute. There's no issue in this lawsuit about removing the equipment. Why are you dealing – why are you dealing with that?
>
> Mr. Blair: Your whole Motion for Summary Judgment, Governor Waller, is on the fact that this is a trade fixture that can be removed, and I'm establishing that that's not correct.
>
> Mr. Waller: That's not a trade fixture. We don't – it's part of the land. **35 years of abandonment it became part of the land;** it's not a trade fixture.
>
> Mr. Blair: We agree with that.

(R. 464)

Chevron salvaged all the uncemented casing that could be removed from the hole. It is not possible to retrieve the remaining casing. The Plaintiffs' own experts testified to this fact:

Marcial Forester, Sr.:

> Q. Have you been asked or have you given any opinions of the value of the materials in the well if they were to be removed from the ground?
>
> A. No, because it's almost impossible to remove them.

(R. 461)

Harold Mayer:

> Q. And isn't it true that that casing in the ground is cemented in the ground and would be difficult, if not impossible, to remove from the ground?
>
> A. Very impossible.

(R. 480)

Inextricably, Plaintiffs further attempt to favorably use the Texas appellate court case, *Browning v. Mellon Exploration Co.,* 636 S.W.2d 536 (Tex. Ct. App. 1982). However, that case actually favors Denbury. In *Browning,* at one time, M. E. Gary owned both the surface and mineral estates. *Id.* at 537. The land contained an abandoned oil well. *Id.* Gary conveyed the surface but reserved the mineral estate. *Id.* A dispute arose between the surface owner and a new mineral lessee who wanted to re-enter the abandoned well. *Id.* While the appellate court declined to rule on the merits, it did find that the mineral lessee showed a probable right to use the wellbore. *Id.* at 538-39.

In another Texas case, *Mapco Inc. v. Carter*, 808 S.W.2d 262 (Tex. Ct. App. 1991), the appellate court considered whether a cavern created by one of the parties within an underground naturally occurring salt dome constitute a part of the mineral estate. *Id.* at 264. The Court held that the artificially created storage facility belonged to the mineral estate, not the surface estate. *Id.* at 270. Once abandoned as a storage facility, the Court found that it "reverted back to the original mineral owners in accordance with their respective ownership interest". *Id.* The Texas appellate court similarly emphasized the power and corporeal real existence of the mineral estate:

> Texas adopted the view that interest in minerals, such as oil, gas, salt and other minerals, are susceptible of ownership in place in the ground prior to production of the minerals at or on the surface. The Texas rule is that this interest in minerals is an interest in real property. Thus, the fee mineral owners retain a property ownership, right and interest after the underground storage facility -- here a cavern -- had been created. These same fee mineral owners are vested with ownership rights, including, of course, entitlement to compensation for the use of the cavern.
>
> . . .
>
> **The chancellor was then eminently correct in finding as a fact and concluding as a law point that the walls of the underground storage cavern belonged to the fee mineral interest owners.**

Id. at 274 (emphasis added).

As this Court is aware, Mississippi generally follows Texas case law on oil and gas matters of first impression. *Williamson v. Elf Aquitaine, Inc.* 138 F.3d 546, 551 (5th Cir. 1998).

All of the old underground casing is permanently affixed to the earth. It is no different than Denbury simply drilling through the earth itself. The dominant mineral estate granted to Denbury the right to use so much of the surface and subsurface as is reasonably necessary for oil and gas exploration. See *Turner,* 908 So. 2d at 854-55. Under any scenario, whether it belongs to the surface or mineral owner, Denbury has the right to re-enter the hole without payment to the Plaintiffs.

3. The Lower Court Correctly Found That the Board Approved Plan of Unitization Provides Denbury the Right to Use the Well.

In 1964, Mississippi adopted the Compulsory Unitization Act, which provides for compulsory pooling of oil and gas interests. MISS. CODE ANN. § 53-3-101 *et seq.* (attached hereto as the Appendix). This procedure is referred to as "compulsory unitization" because the various owners, tracts, units, and wells in the entirety of the unit area are forced into the unit by

operation of the statute and are subject to the Unit even if they do not voluntarily join. *Id.* § 53-3-107; see *Palmer Expl., Inc. v. Dennis,* 730 F. Supp. 734, 736 (S.D. Miss. 1989) (recognizing utility and history of Mississippi's Compulsory Unitization Act). Two requirements exist: first, the Board must approve the plan of unitization; second, 75% of the working interest and royalty owners must approve the plan of unitization. MISS. CODE ANN. § 53-3-107.

The Compulsory Unitization Act requires that operators seeking to use this statute must provide notice by issuing a Public Notice by publication. *Id.* § 53-3-115. The Board is required to mail notice to all persons owning interests within the unit area; however, failure to do so does not invalidate the proceeding or any order issued therefrom. *Id.*

These statutes have specific items that must be contained in the plan of unitization which is commonly found in two documents, one for both royalty and working interest owners known as the unit agreement, and another for working interest owners, known as the unit operating agreement.[9] The plan of unitization must contain a provision for adjustment among the owners of the unit area of their respective interest in wells, tanks, pumps, machinery, materials, and equipment attributable to the unit operations. *Id.* § 53-3-105(d). This is generally referred to in the industry as investment equalization. Investment equalization is determined by the working interest owners of the unit. *Id.*

In this case, Denbury petitioned the Board to adopt a compulsory unit and submitted the Plan of Unitization containing both a Unit Agreement and Unit Operating Agreement. Denbury timely published the public notice. The Board secretary mailed a package to be sent to all owners, including the Plaintiffs, containing a copy of the Petition, Public Notice, Unit

[9] Working interest owners include both oil and gas lessees and unleased mineral interest owners. The Plaintiffs are the latter category.

Agreement, and Unit Operating Agreement. Denbury also sent a letter directly to the Plaintiffs notifying them of the hearing and asking for their support for the Petition.

Despite receiving these notices, the Plaintiffs failed to file any contest of the petition to approve the Plan of Unitization, failed to attend the public hearing, and failed to otherwise contest the Plan of Unitization. By Order dated September 17, 2003, the Board approved the Plan of Unitization. The Plaintiffs did not appeal that Order.

Thereafter, Denbury secured the statutory 75% approval of royalty and working interest owners and filed a second Petition and Public Notice, this time to implement the Plan of Unitization. Denbury published a second public notice. Once again, the Plaintiffs failed to appear or contest this petition. The Board approved the second petition and the Unit became effective on November 1, 2003, and the Plan of Unitization went into full force and effect.

Regardless of ownership, the Plan of Unitization controls all issues raised herein by very specific language. Paragraph 3.1 of the Unit Agreement provides:

> **Oil and Gas Rights Unitized**. All Oil and Gas Rights of Royalty Owners in and to the Tracts identified in Exhibit "A" and shown on Exhibit "B" and all Oil and Gas Rights of Working Interest Owners in and to said lands, are hereby unitized insofar as the respective Oil and Gas Rights pertain to the Unitized Formations, so that Unit Operations may be conducted with respect to the Unitized Formations as if the Unit Area had been included in a single lease executed by all Royalty Owners, as lessors, in favor of all Working Interest Owners, as lessees, and **as if the lease contained all of the provisions of this Agreement.**

(R. 366; R.E. 8) (emphasis added).

Paragraph 3.8 of the Unit Agreement provides:

> Working Interest Owners shall have the right to place, maintain and operate an injection well or wells for such purposes at a location or locations on the Unit Area to be chosen by Working Interest Owners. **Royalty Owners**

> **also grant unto Working Interest Owners the right to use and convert producing wells, abandoned oil or gas wells and dry holes**, and to drill new wells on the Unit Area for said purposes and for the purpose of producing water or salt water for injection into the Unitized formations underlying the Unit Area and underlying other lands in the vicinity of the Unit Area.

(R.367; R.E. 8) (emphasis added).

Paragraph 10.1 of the Unit Agreement provides:

> **Grant of Easements**. Working Interest Owners shall have the right to use as much of the surface of the land and/or subsurface of the land within the Unit Area as may be reasonably necessary for Unit Operations and the removal of Unitized Substances from the Unit Area and the disposal of produced fluids from the Unit Area.

(R. 372; R.E. 8).

Paragraph 10.3.1 of the Unit Agreement provides:

> **Working Interest owners have the right to use without compensation** any machinery, **wells, equipment or fixtures** located on the Unit Area which may be useful to Unit Operations, **including but not limited to any shut-in wells, temporarily abandoned wells, plugged wells, and pipelines, whether above or below ground.**

Id. (emphasis added).

The Unit Operating Agreement provides:

> 10.1 Property Taken Over. Upon the Effective date hereof, Working Interest Owners shall deliver to Unit Operator the following:
>
> 10.1.1 Well s. All Wells completed in the Unit Pool, including but not limited to all shut-in wells, **temporarily abandoned wells and plugged wells**.
>
> 10.1.2 Equipmen t. **The casing** and tubing in each such well, the wellhead connections thereon, and all other lease and operating equipment that is used in the operation of such wells and processing of hydrocarbons which Working

> Interest Owners determine is necessary or desirable for conducting Unit Operations.

(R. 393; R.E. 7). While the casing is to be inventoried, it is not assigned any value. *Id.*

Plaintiffs own unleased mineral interests in the Unit. They are working interest owners subject to the Plan of Unitization. The Board properly created and implemented the Unit. Even if this Court finds the Well belongs to the Plaintiffs, Denbury obtained the right to use the hole without payment by virtue of the Board orders and Plan of Unitization.

4. Plaintiffs are Barred by the Doctrines of Collateral Estoppel and *Res Judicata* from Attacking the Board Orders.

The Board carefully considered the Plan of Unitization. Denbury carefully executed each statutory step to have the Unit and Plan of Unitization approved. The Board approved and adopted the Plan of Unitization and placed it into effect. Those orders and contracts govern the rights among the royalty and working interest owners. At no point did the Plaintiffs object to the Plan of Unitization, the formation of the Unit or its implementation.

Mississippi Code section 53-3-119 provided the Plaintiffs thirty days from September 17, 2003 to appeal the Order of the Board adopting and approving the Plan of Unitization. The Plaintiffs also had thirty days from November 6, 2003 to appeal the Order implementing the Plan of Unitization. The Plaintiffs failed to appeal. The Board's Orders are final and conclusive. The Plaintiffs cannot collaterally attack the provisions of the Plan of Unitization by bypassing the statutory appeal process. See *Frost v. Gulf Oil Corp.*, 119 So. 2d 759, 764-65 (Miss. 1960); *Biloxi-Pascagoula Real Estate Bd., Inc. v. Miss. Regional Housing Auth. No. VIII*, 94 So. 2d 793, 794 (Miss. 1957).

The Plaintiffs' lawsuit attempts to bypass the Board's orders and the express terms of the Plan of Unitization by claiming Denbury has no right to re-enter and workover the Well without

paying compensation. See Pltfs' Brief at IV, IX, and 12. However, Articles 3.1, 3.8, 10.1, and 10.3.1 of the Unit Agreement and Articles 10.1, 10.1.1, and 10.1.2 of the Unit Operating Agreement specifically provide Denbury with the right to re-enter and workover the Well without payment. Plaintiffs' contradictory assertions constitute an untimely collateral attack on the Board's orders.

In *Frost v. Gulf Oil Corp., supra,* certain mineral owners sued the operator claiming their mineral rights at a certain depth were not subject to an order of the Board establishing unit operations, providing for production allowables, and fixing the mineral owners royalty interest at a much lower interest than they claimed they were entitled. *Frost,* 119 So. 2d at 764. Although due notice was given, the mineral owners "made no appearance before the Board at the hearing resulting in the order . . . . They cannot now make a collateral attack on that order." *Id.* at 765 (emphasis added).

The doctrines of *res judicata* and collateral estoppel similarly apply to the Board's Orders. In *Smith v. University of Mississippi,* 797 So. 2d 956 (Miss. 2001), the Supreme Court held:

> Under Mississippi law, res judicata or collateral estoppel precludes relitigation of administrative decision. . . . Further, this Court has held that "[o]nce an agency decision is final and the decision remains unappealed beyond the time to appeal, it is barred by administrative res judicata or collateral estoppel." *Zimmerman v. Three Rivers Planning & Dev. Dist.*, 747 So. 2d 853, 861 (Miss. App. 1999). The holding in [*Hood v. Miss. Dep't of Wildlife Conservation,* 571, So.2d 263 (Miss. 1990)] dictates that the doctrine of res judicata precludes not only further litigation of claims that were actually raised in prior proceeding, but also any claim that could have been raised in the earlier suit. *Hood*, 571 So. 2d at 267-69. Smith's claims are likewise barred by res judicata because he did not properly appeal the [administrative agency's] decision.

Smith, 797 So. 2d at 963.

Res judicata requires four identities: (1) identity of the subject matter of the action; (2) identity of the cause of action; (3) identity of the parties; and (4) identity of the quality or character of the person against whom the claim is made. *Davis v. Biloxi Pub. Sch. Dist.*, ____ So. 3d. ___, ___, 2009 WL 3588956, *1 (Miss. Ct. App. Nov. 3, 2009). *Res judicata* bars all matters asserted, or that could have been asserted, by the Plaintiffs before the Board. *Smith*, 797 So. 2d at 963.

In *Hood v. Mississippi Department of Wildlife Conservation*, 571 So. 2d 263 (Miss. 1990),[10] the plaintiff filed suit in civil court rather than properly following the statutory administrative appeals process that was designed to address his claims that he was wrongfully discharged for employment. *Hood*, 571 So. 2d at 267. After the administrative agency's decision was made, the plaintiff had thirty days to appeal the agency's order to the circuit court. *Id.* The plaintiff did not appeal. Instead, the plaintiff sued in chancery court, seeking reinstatement and making civil rights claims. *Id.* In holding that the plaintiff was barred by the doctrine of *res judicata* from maintaining his claims in chancery court, the Court found that the plaintiff was bringing claims that could have been brought during the administrative hearing. *Id.* "Absent statute to the contrary, a chancery court is precluded by [the doctrines of *res judicata* or collateral estoppel] once an administrative agency, acting in a fact-finding capacity, enters its ruling. As such, the chancery court is precluded from entertaining the claim Hood now asserts." *Id.* at 268 n.5.

[10] *Hood* was reversed in part by *East Mississippi State Hospital v. Callens*, 892 So. 2d 800 (Miss. 2004) as to its holding that failure to exhaust administrative appeals precluded the plaintiff from bringing a constitutional civil rights claim against public official in their individual capacitates under 42 U.S.C. § 1982. See *Callens*, 892 So. 2d at 812. The Plaintiffs have not alleged a violation of their civil rights.

Collateral estoppel and *res judicata* bar the Plaintiffs from relitigating issues decided by the Board. The Board found that the Plan of Unitization was fair and reasonable. The Board adopted, approved, and placed the Agreements in effect to all Unit owners. Those orders require the Plaintiffs' claims to be dismissed.

5. <u>The Plaintiffs Have No Viable Nuisance Claims</u>

In the Court's bench opinion, the lower Court dismissed all of the Plaintiffs' claims including, but not limited to, the nuisance claims stating:

> It seems to me, you know, that the case law is very clear; that surface owners are not entitled to compensation for the mineral owner's use of the surface so long as it's reasonably necessary for exploration, drilling and production and that it is not negligent. . . .
>
> But I will say this, though. Even if the operations are lawful and carried out without negligence, if the operations cause an unreasonable interference with the peaceful use and enjoyment of adjacent landowners, the operator can be held liable on the basis of nuisance, and that's a circuit court matter, and that is not a matter for chancery court. And if there is a nuisance claim out there, the grant of this summary judgment that I am granting would not in any way prohibit or constitute a prejudice for a nuisance claim in the proper court of jurisdiction.
>
> The Court finds that there is ample basis under the criteria for summary judgment for the Court to rule that the well bore and the casing belongs to the mineral estate; that there's been no claim of an unreasonable use of the surface or a negligent use of the surface, and therefore the summary judgment on those issues is granted.

Trial Court's Bench Opinion at 66-67.

In its Conclusions of Law, the Chancery Court held, "the pleadings contain no allegation that Denbury used more of the surface than was reasonably necessary in its operations. Further, there is no allegation that Denbury's operations were conducted in a negligent manner." The Chancery Court properly dismissed Plaintiffs' claims.

No dispute exists that Denbury is the mineral lessee underlying the Well. No dispute exists that Denbury is the Unit operator. No dispute exists that the Plaintiffs' property lies completely within the Unit boundary. As the Chancery Court found, Plaintiffs made no allegation Denbury conducted its operations in a negligent or unreasonable manner.

The Mississippi Supreme Court made clear in *Reed v. Cook Construction Co.*, 336 So. 2d 724 (Miss. 1976) that a lawful business, conducting its operations reasonably within a particular locale, is not a nuisance and nearby landowners are not entitled to receive damages. *Reed,* 336 So. 2d at 725 (citing *Reber v. Ill. Cent. R. Co.*, 138 So. 574, 576 (Miss. 1932)). It is the reasonableness of the usage that is determinative. In a case directly on point, *Westmoreland v. Calif. Co.*, 128 So. 2d 113 (Miss. 1961), the Mississippi Supreme Court held that as long as lawful oil and gas operations are not negligently performed, those operations cannot constitute a nuisance. *Id.* at 113. Generally speaking, the nuisance theory only applies to adjoining landowners. See generally *Blue v. Charles F. Hayes & Assocs., Inc.*, 215 So. 2d 426 (Miss. 1968).

Plaintiffs admit Denbury conducted its operations reasonably. Plaintiffs admit Denbury did not use more of the surface than was reasonably necessary for operations. (R. 345) Plaintiffs further admitted Denbury had the right to drill a new well one foot away from the existing well if they so chose. (R. 311) Denbury significantly reduced the amount of surface disturbance, noise, and breadth of operation by re-entering the existing hole. Denbury could have drilled a brand new well and been completely within its rights. The Chancery Court properly dismissed the nuisance count. It has no merit.

B. Public Policy Supports the Lower Court's Decision

Oil and gas are important natural resources in this State. The Mississippi Legislature adopted an express public policy to "foster, encourage and promote the development, production and utilization of the natural resources of oil and gas in the State of Mississippi." MISS. CODE ANN. § 53-1-1 (Supp. 2002); *McGowan v. Miss. State Oil & Gas Bd.*, 604 So. 2d 312, 322 (Miss. 1992); *Stacy v. Tomlinson Interests, Inc.*, 405 So. 2d 93, 95 (Miss. 1981).

Thousands of plugged and abandoned oil and gas wells exist in Mississippi. Like Denbury's operations in this case, most oil and gas exploration in Mississippi seeks to produce remaining reserves of oil and gas in old fields from abandoned oil wells. The only utility for these wells is for mineral exploration. By re-entering previously drilled wells, the operator may establish production from these partially depleted reserves without incurring the high cost of drilling new wells. In many cases, the cost to drill new wells exceeds the economic return.

Denbury re-entered the hole instead of drilling a new well, and its re-entry operations created much less disturbance to the Plaintiff's surface, took fewer days to recomplete, and was used to create production from partially depleted oil reserves in the Unit that had been left behind by a prior operator. Every witness for the Plaintiffs testified that the re-entry severely reduced the amount of surface disturbance to the Plaintiffs' Lands. (R. 340-41, 465, 484) The Mississippi Legislature has defined "waste" to include drilling wells "causing or tending to cause excessive surface loss." MISS. CODE ANN. § 53-1-1(e)(ii).

Given this strong public policy that unnecessary surface destruction must be avoided, it is inconceivable that an operator would be required to drill a new well, without payment to the surface owner—which would require extensive surface destruction—when an old hole exists that

can be re-entered with little surface disruption. Public policy supports Denbury's right to re-enter and use the Well for Unit operations, without payment to the surface owner.

CONCLUSION

The Plaintiffs seek to require the mineral estate to pay them to use a sixty-one year old underground hole that was plugged in 1968 by a prior operator, then dug up and re-entered in 2005. Plaintiffs sought the difference between what a hypothetical brand new well would cost and what they claim is a reasonable cost to re-enter the hole.

It is undisputed that the Plaintiffs own no mineral interest under the Land. The Plaintiffs only own the surface over the subsurface hole. The Plaintiffs own a mineral interest in surrounding tracts completely within the confines of the East Mallalieu Fieldwide Unit. Judge Patten found three items clearly controlled and were undisputed. First, the wellbore and casing were completely subsurface. Second, they had no use other than for mineral development. Finally, the surface owner had no ability to utilize the wellbore and casing for any surface use. In fact, to quote the Honorable Judge Patten, "I mean, they can't use it for a flower pot or cow trough. They can't use it for anything. The only potential use for the wellbore and casing has is for exploration, production and recovery of oil and gas and minerals of like, kind and nature". See Trial Court's Bench Opinion, Appellant's R.E. 33.

The hole simply became part of the dominant mineral estate. It is nothing more than the entrance to that estate. It matters not whether this Court decides that the mineral estate actually owns the walls of the hole since it is not removable, or simply has the right to use it without compensation. The result is the same. Finally, when the compulsory unitization occurred, the Plan of Unitization, as required by statute, addressed and covered this exact situation. Those

CERTIFICATE OF SERVICE

I, Troy Farrell Odom, the undersigned counsel of record for the Appellee, does hereby certify that I have this day mailed a true and correct copy of the above and foregoing Appellee's Brief via United States mail, postage prepaid, to the following:

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I have further this day filed the original and three copies of the Brief upon the Clerk of the Mississippi Supreme Court and Court of Appeals at the following address:

Kathy Gillis, Clerk
P.O. Box 249
Jackson, MS 39205-0249

So certified this the 9th day of September, 2010.

Troy Farrell Odom