[J-21-2010]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

T.W. PHILLIPS GAS AND OIL CO. AND PC EXPLORATION, INC.,	: No. 19 WAP 2009
Appellees	: Appeal from the Order of the Superior Court entered December 29, 2008 at No. 1918 WDA 2007, affirming the Order of the Court of Common Pleas of Indiana County, entered October 19, 2007 at No. 10362 CD 2005.
v.	
ANN JEDLICKA,	: 964 A.2d 13 (Pa. Super. 2008)
Appellant	: ARGUED: April 13, 2010

CONCURRING OPINION

MR. JUSTICE EAKIN **DECIDED: MARCH 26, 2012**

I join the majority in affirming the Superior Court's order. I write separately, however, to expand upon and note my disagreement with portions of the majority's opinion.

Appellant reads Young v. Forest Oil Co., 45 A. 121 (Pa. 1899) to require an objective test for determining if a well is producing in "paying quantities." Appellant's vision for this objective test would require a mathematical calculation of the well's profits, such that if during any 12-month period the well sustains a loss, the lease could be terminated. As the majority correctly determines, "the test for determining in paying quantities could never be purely objective, absent picking an arbitrary time period." Majority Slip Op., at 19-21 (emphasis in original). That is because profitability is not measured (under the lease, much less elsewhere) on a calendar year. If Ford loses a billion dollars one year and makes two billion the next, it has sold cars in "paying

quantities." Scouring the 80-year history of a well and finding a 12-month period where expenses were greater than revenue is false accounting for lease purposes and cannot be rewarded.

Regarding the term "paying quantities" in the lease habendum clause, the majority properly characterizes it as either a shield or a sword, depending on who is wielding it. At the time the lease was written, this clause was used to release the driller from the lease when the well was no longer profitable. The landowner, on the other hand, typically wanted the lease to remain intact so as to obtain rent from an otherwise unprofitable well. Here, it is Appellant who is the party attempting to terminate the relationship, even though she has received payments and gas throughout the life of the lease. Therefore, this is not a case where a driller, desiring to get out of a lease, slows production in bad faith and causes the well to not produce in "paying quantities." Accordingly, I do not believe a review of whether Appellees acted in good faith is necessary for the disposition of this issue. Similarly, I would refrain from discussing Clifton v. Koontz, 325 S.W.2d 684 (Tex. 1959) and its subjective productivity analysis, as it is equally inapposite to this lease; these are questions better left for another day when we are given advocacy on the considerations relevant thereto.