[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 November 26, 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,	:	
Appellant	:	ARGUED: April 13, 2010

DISSENTING OPINION

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

I differ with the majority's formulation of the "paying quantities" test, as set forth in Young v. Forest Oil Co., 194 Pa. 243, 45 A. 121 (1899). In my view, Young provides a two-part, hybrid standard for ascertaining if a well is producing in "paying quantities." The objective and threshold element is that profits must exceed operating expenses, i.e., that the well must be at least marginally profitable. If profits exceed operating expenses, then the subjective component -- the lessee's good-faith judgment -- comes into play. In those instances, it should be presumed that the lessee is operating the lease in good faith, and unless the lessor rebuts this presumption, the lease is said to be producing in "paying quantities." My reasoning is as follows.

I. Background

At the outset, this appeal is set amid the backdrop of a contract dispute. Briefly, and as noted by the majority, Appellant's predecessors in title and Appellee T.W. Phillips Gas and Oil Company executed an oil-and-gas lease in 1928. In relevant part, the lease states that it remains in effect after the primary term so long as "oil or gas is produced in paying quantities, or operations for oil or gas are being conducted thereon." Majority Opinion, slip op. at 2 (emphasis added; citation omitted). Although the lease does not define the phrase "paying quantities," Appellant and Appellees are in agreement that the original parties to the contract incorporated the meaning of the term supplied by the Court's 1899 ruling in Young. See, e.g., Brief for Appellant at 11; Brief for Appellees at 12.

Rather than providing a straightforward definition of the phrase, Young sets forth a series of principles to determine when a well is producing in "paying quantities." According to the Court, the phrase means paying quantities to the lessee, not the lessor; a "stipulated condition for the termination of the lease" occurs if either "oil has not been found, and the prospects are not such that the lessee is willing to incur the expense of a well (or second or subsequent well as the case may be)" or "oil has been found but no longer pays the expenses of production"; and a well is producing in "paying quantities" if it pays a profit over operating expenses, even if it never repays its "cost,"[1]

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[1] Most courts and commentators have construed "cost," in this sense, to refer to the expenditures associated with drilling, completing, or equipping the well. See, e.g., OWEN L. ANDERSON ET. AL., HEMINGWAY OIL AND GAS LAW AND TAXATION 253 (4th ed. Thompson West 2004). Operating or "lifting" expenses, in contrast, have generally been understood to include: "labor costs of pumpers and others operating equipment on the lease; day-to-day power and supplies; severance taxes; ad valorem taxes; license and permit fees; replacement and repair of producing equipment, maintenance and repairs of roads, entrances, and gates; and electricity and telephone costs." Id. at 258 (footnotes omitted).

and the operation as a whole results in a loss. Young, 194 Pa. at 250, 45 A. at 122-23. The Young Court summed up its judicially-crafted (but apparently industry-accepted) definition of the term along these lines: "The phrase, 'paying quantities,' therefore is to be construed with reference to the operator, and by his judgment when exercised in good faith." Id. at 251, 45 A. at 123. The Court, however, did not define "good faith" or explain its function for purposes of this inquiry.

II. Marginal Profitability

The majority initially holds that, under Young, operating expenses can exceed profits, and yet, a well can still be producing in "paying quantities." See Majority Opinion, slip op. at 22-23. In reaching this conclusion, the majority does not rely on the text of Young, but rather, on how other courts have interpreted the phrase, finding the rulings in Clifton v. Koontz, 325 S.W.2d 684 (Tex. 1959), and Pack v. Sante Fe Minerals, 869 P.2d 323 (Okla. 1994), particularly instructive on this issue. See Majority Opinion, slip op. at 15-18. These decisions, posits the majority, are consistent with Young, and thus, inform this Court's judgment as to the issue on appeal. See id. at 15-16 & n.12.

While arguably reflecting a more modern view of "paying quantities," these cases are in conflict with the plain terms of Young, which impose a threshold, marginal profitability requirement. Young clearly states that, "if oil has been found but no longer pays the expenses of production," a "stipulated condition for the termination of the lease has occurred." Young, 194 Pa. at 250, 45 A. at 122. Despite the fact that the Court did not specifically indicate that such a well is not producing in "paying quantities," it is obvious from the context that such failure is the stipulated condition for terminating the lease. See Barnsdall v. Boley, 119 F. 191, 198 (N.D. W. Va. 1902) (finding that Young

expressly held that, "where oil has been found, but no longer pays the expenses of production, that it is not producing in paying quantities").

In this regard, Young reflects the prevailing view among courts at that time. Historically, "paying quantities" had to include "an element of profit to the lessee." ANDERSON, OIL AND GAS LAW at 252; see Douglas Hale Gross, Meaning of "Paying Quantities" in Oil and Gas Lease, 43 A.L.R.3d 8, §2[a] (1972) ("[T]he requirement that there be a profit is the core around which the meaning of paying quantities is built." (footnote omitted)). The rationale for this rule is perhaps best summarized by the Texas Supreme Court in Garcia v. King, 164 S.W.2d 509 (Tex. 1942). There, the Court rejected the argument that, if a well produces any amount of oil or gas that is capable of division, it is producing in "paying quantities," opting instead to adopt the approach followed by the majority of courts that, "'[i]f a well pays a profit, even small, over operating expenses, it produces in paying quantities[.]'" Id. at 511-12 (quoting Gypsy Oil Co. v. Marsh, 248 P. 329, 334 (Okla. 1926), in turn, quoting, inter alia, Young, 194 Pa. at 250, 45 A. at 122-23).

The Garcia Court explained its ruling, in relevant part, as follows:

> The object of the contract was to secure development of the property for the mutual benefit of the parties. It was contemplated that this would be done during the primary period of the contract. So far as the lessees were concerned, the object in providing for a continuation of the lease for an indefinite time after the expiration of the primary period was to allow the lessees to reap the full fruits of the investments made by them in developing the property. Obviously, if the lease could no longer be operated at a profit, there were no fruits for them to reap. The lessors should not be required to suffer a continuation of the lease after the expiration of the primary period merely for speculation purposes on the part of the lessees. Since the lease was no longer yielding a profit to the lessees at the termination of the primary period, the object sought to be accomplished by the continuation thereof had ceased, and the lease had terminated.

Id. at 512-13.[2] Thus, as originally conceived and reflected in Young, a well had to be marginally profitable to be producing in "paying quantities."

Beginning with the decision in Henry v. Clay, 274 P.2d 545 (Okla. 1954), however, some courts started construing "paying quantities" so that unprofitable wells could achieve this designation. See ANDERSON, OIL AND GAS LAW at 254-57 & accompanying footnotes. These approaches apparently developed as a response to the difficulties associated with applying the traditional understanding of "paying quantities" to marginal wells -- i.e., wells operating at a loss -- because that standard did not account for "the problems of cyclical production or the period over which the well should be tested to determine whether production is profitable." Id. at 254. Notably, while implementing a more lenient threshold, these tribunals did not elaborate on the original formulation of the "paying quantities" test, as the majority appears to suggest;

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[2] One commentator has similarly set forth the reasoning behind the marginal profitability requirement, stating that:

> [R]equiring the value of production to exceed only the operating expenses is another way of saying that the lessee might sustain an overall loss on the leased premises and still maintain the lease in full force. The object of providing for a continuation of the lease for an indefinite time during the secondary term after the expiration of the primary term is to allow the lessee to reap the full fruits of the investments made by him in developing the property. This objective is met, in regard to the habendum clause, by defining paying quantities so as to allow a lessee who is making a profit over the actual cash which must be expended to produce the lease (and who is thus reaping rather than speculating) to continue operating in order to recover at least some of the expenses of drilling and equipping, although he may never make a profit on the overall operation. Thus the definition serves to minimize loss.

Gross, Meaning of "Paying Quantities", 43 A.L.R.3d 8 at §4[b] (footnote omitted).

instead, they effectively displaced that standard where well production was marginal or sporadic.

In Clay, for example, the Oklahoma Supreme Court initially recited the traditional definition of "paying quantities," stating that "[i]f the well pays a profit even though small, over operating expenses, it produces in paying quantities, though it may never repay its costs, and the operation as a whole may prove unprofitable." Clay, 274 P.2d at 546 (citations omitted). The Court then devised a rule in which a lease would not terminate if profits did not surpass lifting expenses, see id. at 548,[3] thus supplanting the original understanding of "paying quantities" in the case of marginal wells.[4]

The Texas Supreme Court subsequently followed suit in Koontz. Like the Clay Court, the Koontz Court began by noting that "[t]he generally accepted definition of 'production in paying quantities' is . . . '[i]f a well pays a profit, even small, over operating expenses, it produces in paying quantities, though it may never repay its costs, and the enterprise as a whole may prove unprofitable.'" Koontz, 325 S.W.2d at 690-91 (quoting

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[3] See Clay, 274 P.2d at 548 ("Having held that the operator is under a duty to continue production if by the exercise of reasonable skill and diligence the well could be made to produce sufficient oil and gas to justify a reasonable and prudent operator in continuing the operation thereof, we believe the operator should have the right to continue production under the same circumstances.").

[4] In later cases, such as Pack, the Oklahoma Supreme Court summarized this principle as follows:

> In short, the lease continues in existence so long as the interruption of production in paying quantities does not extend for a period longer than reasonable or justifiable in light of the circumstances involved. But under no circumstances will cessation of production in paying quantities ipso facto deprive the lessee of his extended-term estate.

Pack, 869 P.2d at 327 (emphasis in original).

Garcia, 164 S.W.2d at 511). The Koontz Court proceeded to create an exception to this rule similar to the one in Clay, concluding that:

> In the case of a marginal well, such as we have here, the standard by which paying quantities is determined is whether or not under all the relevant circumstances a reasonably prudent operator would, for the purpose of making a profit and not merely for speculation, continue to operate a well in the manner in which the well in question was operated.

Id. at 691. In so holding, the Court relegated the Garcia test of marginal profitability -- the standard patterned after the one in Young -- to one of the elements a reasonably prudent operator would consider in determining whether to continue to operate the lease. See ANDERSON, OIL AND GAS LAW at 256.

Therefore, as illustrated above, neither scheme is consistent with the one outlined in Young, since Young expressly requires profits to exceed operating expenses for a well to be producing in "paying quantities," see Young, 194 Pa. at 250, 45 A. at 122-23, whereas Clay and Koontz allow for unprofitable wells to attain that designation. See Clay, 274 P.2d at 548; Koontz, 325 S.W.2d at 691. I thus am unable to support the majority's assertion that those rulings inform this Court's judgment regarding Young. Moreover, by relying on such contradictory authority, it appears that the majority is overruling that decision.

I appreciate that more recent developments in this area of the law, at some point, may warrant this Court's consideration of the continued viability of Young. Notably, while initially being at the forefront of this field, this Court's jurisprudence has remained largely stagnant for the last 100 years. See, e.g., Ross H. Pifer, Drake Meets Marcellus: A Review of Pennsylvania Case Law Upon the Sesquicentennial of the United States Oil and Gas Industry, 6 TEX. J. OIL GAS & ENERGY J. 47, 48 (2010-11). As such, in comparison to other oil and gas producing states, this Court's caselaw is rather

antiquated, and thus, the majority opinion could be read as an attempt to modernize Pennsylvania law.

Nevertheless, in the present case, this Court granted allocatur limited to whether the Superior Court misinterpreted Young. See T.W. Phillips Gas & Oil Co. v. Jedlicka, 602 Pa. 154, 978 A.2d 347 (2009) ("Did the Superior Court misapply the decision of this Court in [Young] by holding that Pennsylvania employs a purely subjective test to determine whether an oil or gas lease has produced 'in paying quantities[?]'"). Furthermore, neither party is advocating for this Court to overrule that decision; instead, both contend that Young supplies the definition of "paying quantities" for purposes of this contract dispute. See, e.g., Brief for Appellant at 11; Brief for Appellees at 12. Indeed, Appellees maintain that, "even if this Court were to decide that the Young test is undesirable in every way and should no longer be the controlling law of Pennsylvania, it would still be the only proper test to apply here because the parties contracted on its basis." Brief for Appellees at 17.

I agree with Appellees' position on this point. The majority's decision, in effect, to overrule Young is particularly troublesome, not only on account of its sua sponte character, see generally Danville Area Sch. Dist. v. Danville Area Educ. Ass'n, 562 Pa. 238, 247, 754 A.2d 1255, 1259 (2000) (explaining that "[s]ua sponte consideration of issues disturbs the process of orderly judicial decision making"), but also because the parties incorporated Young's definition of "paying quantities" into their contract. See, e.g., Lesko v. Frankford Hosp.-Bucks County, ___ Pa. ___, ___, 15 A.3d 337, 342 (2011) ("The fundamental rule in contract interpretation is to ascertain the intent of the contracting parties[.]" (citation and quotation marks omitted)).[5]

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[5] See generally 17A AM. JUR. 2D Contracts §358 (2011) ("Words and phrases as used in particular contracts are to be interpreted in accordance with the meaning with which (continued . . .)

III. The Lessee's Good-Faith Judgment

The majority also concludes that the good-faith judgment of the lessee need only be considered where profits do not exceed operating expenses. See Majority Opinion, slip op. at 22. Thus, according to the majority, if profits surpass lifting expenses, a well is producing in "paying quantities." See id. Neither position is in agreement with Young, however.

First, as explained above, that decision expressly imposes a threshold, marginal profitability requirement. See Young, 194 Pa. at 250, 45 A. at 122-23. Consequently, even though the exact meaning of the lessee's good-faith judgment is not apparent from Young, it stands to reason that a court must first determine that profits exceed operating expenses before evaluating the lessee's opinion. Stated otherwise, the lessee's good-faith judgment is only assessed once profits have been found to surpass lifting expenses, and therefore, the lessee's opinion, even if held in good faith, cannot save an otherwise unprofitable well, as the majority argues.

Presumably, then, this understanding of "paying quantities" led the original parties to the contract to include the operations provision (i.e., "or operations for oil or gas are being conducted thereon") in the habendum clause of the lease. Since it acts independently of the "paying quantities" phraseology, the operations provision appears to provide the lessee with a means to preserve the lease in the event that profits do not exceed operating expenses, that is, where a lease is not producing in "paying quantities." Cf. Lisa S. McCalmont, Vanishing Rights of the Mineral Lessor: The Pack v.

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they have been invested by the parties. When, at the time of formation, the parties attach the same meaning to a contract term and each party is aware of the other's intended meaning, or has reason to be so aware, the contract is enforceable in accordance with that meaning." (footnote omitted)).

Sante Fe Minerals Ruling, 30 TULSA L.J. 695, 699 (1995). The flexibility afforded to the operations provision further suggests against the over-liberalization of the term "paying quantities."

Moreover, to the extent that the majority suggests that Young embodies a purely objective standard where profits exceed operating expenses, I question the majority's reading of that case, as Young makes clear that the lessee's good-faith judgment must be evaluated when ascertaining if a well is producing in "paying quantities." See Young, 194 Pa. at 251, 45 A. at 123 ("The phrase, 'paying quantities,' therefore is to be construed with reference to the operator, and by his judgment when exercised in good faith." (emphasis added)). Additionally, while the Court has not revisited that ruling in over a century, a number of other tribunals have applied its reasoning in the interim, concluding that Young places a central focus on the good-faith judgment of the lessee.[6]

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[6] See, e.g., Manhattan Oil Co. v. Carrell, 73 N.E. 1084, 1086-87 (Ind. 1905) (holding that an operator is not required to drill additional wells merely because the profits from the first or test well exceeded the operating expenses; rather, under those circumstances, "whether or not oil is found in paying quantities [so as to mandate further drilling] is . . . exclusively to be determined by the operator, acting in good faith and upon his honest judgment") (citing, inter alia, Young, 194 Pa. at 243, 45 A. at 121); Barbour, Stedman & Co. v. Tompkins, 93 S.E. 1038, 1040 (W. Va. 1917) ("The grantor of a right to explore his land for oil and gas cannot forfeit the lese merely because he thinks the quantity of gas discovered therein was not sufficient to constitute a paying well, where the lessee claims it is such a well and is willing to pay the rent stipulated thereto. It is for [the lessee] to say, when acting in good faith, whether the gas is produced in paying quantities." (citing, among other cases, Young, 194 Pa. at 243, 45 A. at 121)); Tex. Pac. Coal & Oil Co. v. Bruce, 233 S.W. 535, 538-39 (Tex. Civ. App. 1921) ("If the well pays a profit, even small, over operating expenses, it produces in paying quantity, though it may never repay its cost, and the operation as a whole may result in a loss. The phrase 'paying quantities,' therefore, is to be construed with reference to the operator, and by his judgment, when exercised in good faith." (quotation marks omitted; citing, inter alia, Young, 194 Pa. at 243, 45 A. at 121)); Gypsy Oil Co., 248 P. at 334 ("If a well pays a profit, even small, over operating expenses, it produces in paying quantities, though it may never repay its costs, and the enterprise as a whole may prove unprofitable. Ordinarily, the phrase ['paying quantities'] is to be (continued . . .)

The majority further concludes that the reasonably prudent operator standard "necessarily implicates the issue of whether a lessee has exercised his judgment in good faith." Majority Opinion, slip op. at 17. In this regard, the majority evidently believes that the lessee's good-faith judgment test is a component of (or perhaps subsumed within) the reasonably prudent operator standard. See id. at 21-23 & n.18. Although the majority makes no attempt to reconcile the reasonably prudent operator standard at large with Young, it nonetheless reasons that, to establish good faith under Young, a court must consider "the reasonableness of the time period during which the operator has continued his operation of the well in an effort to reestablish the well's profitability," id. at 23, one of the inquiries traditionally associated with that standard. See, e.g., Koontz, 325 S.W.2d at 691.

Preliminarily, it bears noting that the lessee's good-faith judgment test and the reasonably prudent operator standard are two distinct concepts.[7] Chief among their differences is the fact that the former is a subjective test, see, e.g., Brewster v. Lanyon Zinc Co., 140 F. 801, 813-15 (8th Cir. 1905), whereas the latter is an objective standard.

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construed with reference to the operator, and by his judgment when exercised in good faith." (citing, among other cases, Young, 194 Pa. at 243, 45 A. at 121)).

[7] See, e.g., Gross, Meaning of "Paying Quantities", 43 A.L.R.3d 8 at §§10-11 (distinguishing between the lessee's good-faith judgment test and the reasonably prudent operator standard); Gary B. Conine, The Prudent Operator Standard: Applications Beyond the Oil and Gas Lease, 41 NAT. RESOURCES J. 23, 31 (2001) (same); Jacqueline Lang Weaver, When Express Clauses Bar Implied Covenants, Especially in Natural Gas Marketing Scenarios, 37 NAT. RESOURCES J. 491, 500 (1997) (same); Bruce M. Kramer, The Interaction Between the Common Law Implied Covenants to Prevent Drainage and Market and the Federal Oil and Gas Lease, 15 J. ENERGY NAT. RESOURCES & ENVTL. L. 1, 6 (1995) (same); Stuart C. Hollimon & Robert E. Vinson, Jr., Oil, Gas and Mineral Law, 46 SMU L. REV. 1591, 1600 (1993) (same).

See, e.g., Jared Hall, Both Eyes Open or One Eye Closed: Does the Reasonable and Prudent Operator Standard Handicap Mineral Lessees in the Prevention of Drainage, 7 TEX. TECH ADMIN. L.J. 179, 197 (2006).[8] Indeed, a number of courts and observers have understood the reasonably prudent operator standard as a rejection of the lessee's good-faith judgment test,[9] since the former does not afford considerable deference to the knowledge and judgment of the lessee, which is the central feature of the latter. See, e.g., Conine, The Prudent Operator Standard: Applications Beyond the

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[8] Unfortunately, some commentators have referred to the reasonably prudent operator standard as a "subjective approach," see, e.g., ANDERSON, OIL AND GAS LAW at 255, and the majority repeats that language here. See Majority Opinion, slip op. at 19. Couching the reasonably prudent operator standard in such terms, however, is misleading, if not wholly inaccurate, since courts have almost universally viewed that inquiry as an objective one. See e.g., George A. Bibikos & Jeffrey C. King, A Primer on Oil and Gas Law in the Marcellus Shale States, 4 TEX. J. OIL, GAS, & ENERGY L. 155, 161-62 (2008-09) ("The great majority of oil and gas jurisdictions apply the prudent-operator standard . . .. The standard is an objective one[.]"). See generally Kathleen Cooper Lake, The Prudent Operator Standard and FERC Authority, 57 TEX. L. REV. 661, 662 n.8 (1979) (analogizing the prudent operator standard to the reasonable man standard in tort law).

Even so, it does not appear that these observers intended to depart from the traditional meaning of the reasonably prudent operator standard, that is, as a set of non-exclusive, objective criteria to assess if a marginal well is producing in "paying quantities"; rather, by denoting it as a "subjective approach," it seems that they sought to distinguish it from the test (as manifested in Young) where the main focus of a paying-quantities inquiry is whether the well's profits exceeded its operating expenses. See ANDERSON, OIL AND GAS LAW at 255 (positing that Koontz established a "subjective approach" which "allow[ed] a marginal well to continue a lease even where it is produced at a loss" (emphasis added)). As such, I do not view this authority as undermining the common understanding of the reasonably prudent operator standard.

[9] At least one commentator has posited that Koontz provides a ready example of this perspective. See Gross, Meaning of "Paying Quantities", 43 A.L.R.3d 8 at §11 (explaining that that ruling did not elaborate on the lessee's good-faith judgment test, but instead, apparently jettisoned it in favor of the reasonably prudent operator standard).

Oil and Gas Lease, 41 NAT. RESOURCES J. at 32 & n.32; Gary B. Conine, Speculation, Prudent Operation, and the Economics of Oil and Gas Law, 33 WASHBURN L.J. 670, 679 (1994). Therefore, I differ with the majority insofar as it views the lessee's good-faith judgment test and the reasonably prudent operator standard as harmonious approaches.

Nor do I agree with the majority that, under Young, the lessee's good-faith judgment entails a subjective, as well as an objective, component. See Majority Opinion, slip op. at 21 ("[U]nless it can be established that [the operator] is not acting in good faith on his business judgment, . . . he does not forfeit his rights under the lease based on a difference in such judgment"); id. at 22-23 ("In assessing whether an operator has exercised his judgment in good faith . . ., a court must consider the reasonableness of the time period during which the operator has continued his operation of the well in an effort to reestablish the well's profitability."). Rather, I believe it involves a purely subjective inquiry, which is consistent with how a companion case construed the term.

As noted by the majority, in Colgan v. Forest Oil Co., 194 Pa. 234, 45 A. 119 (1899), a dispute arose between the lessor and lessee with respect to the former's drilling operations, namely, the lessee's decision to put down wells on the eastern half of the lessor's farm, but not the western half. The lessor filed suit for, inter alia, specific performance. The trial court found that the western half of the farm would furnish at least one paying well, and thus, directed the lessee to put down a well in that region.

On appeal, the Court reversed, concluding that there was no evidence to support the trial court's finding. See id. at 241-42, 45 A. at 121. In addition, and of particular importance here, the Colgan Court held that, absent a showing of bad faith, a court will

not interfere with the lessee's business judgment with respect to drilling operations. See id. at 242, 45 A. at 121. Specifically, the Court reasoned that:

> So long as the lessee is acting in good faith, on business judgment, he is not bound to take any other party's, but may stand on his own. Every man who invests his money and labor in a business does it on the confidence he has in being able to conduct it in his own way. No court has any power to impose a different judgment on him, however erroneous it may deem his to be. Its right to interfere does not arise until it has been shown clearly that he is not acting in good faith on his business judgment, but fraudulently, with intent to obtain a dishonest advantage over the other party to the contract.

Id.

As explained earlier, Young did not elaborate on the role of the lessee's good-faith judgment for purposes of its "paying quantities" test, even though the Court held that the lessee's opinion must be considered when performing this inquiry. See Young, 194 Pa. at 251, 45 A. at 123. It appears that the Court intended for the term to have a similar meaning in Young as it did in Colgan, since both decisions were issued on the same day, both involved matters relating to wells producing in "paying quantities," and both discussed the good-faith judgment of the lessee in connection with this finding.

Therefore, when reading Young in conjunction with Colgan, as some courts have done, see Manhattan Oil Co., 73 N.E. at 1086-87; Tex. Pac. Coal & Oil Co., 233 S.W. at 539; Warfield Natural Gas Co. v. Allen, 59 S.W.2d 534, 537 (Ky. Ct. App. 1933), it stands to reason that the lessee's good-faith judgment is assessed on purely subjective terms for purposes of Young's "paying quantities" test. Under this view, it should be presumed that the lessee is operating the lease in good faith where profits exceed operating expenses. Absent a showing of bad faith on the part of the lessee to rebut the presumption, the lease is deemed to be producing in "paying quantities." See Young, 194 Pa. at 250-51, 45 A. at 122-23; Colgan, 194 Pa. at 242, 45 A. at 121. While

such an interpretation does not supply a strong, independent basis to terminate a lease, given the fact that it allows a lessee to conduct his or her drilling operations up to the limits of bad faith, ostensibly, this is because it acts in concert with the threshold, marginal profitability requirement. In short, Young's good-faith inquiry, as explain more fully in Colgan, merely acts a final check on the lessee's judgment in those instances where the well's profits have been found to exceed its operating expenses.[10]

The majority, however, is not of the opinion that Colgan confirms the meaning of "good faith" under Young. Instead, it plumbs the reasonably prudent operator standard to announce a more objective good-faith inquiry. See Majority Opinion, slip op. at 21-23 ("In assessing whether an operator has exercised his judgment in good faith . . ., a court must consider the reasonableness of the time period during which the operator has continued his operation of the well in an effort to reestablish the well's profitability."). The many difficulties with this approach include the failure to account for: the stark departure from Colgan's subjectivity, manifested in a presumption of good faith in the absence of actual fraud; the need for selective recourse to the prudent-operator factors, since reasonable-time-under-the-circumstances is but one of those factors, see Koontz, 325 S.W.2d at 691; and the fundamental disharmony between the reasonably prudent operator standard and the two-part objective/subjective inquiry of Young and Colgan, as previously discussed.

Further, although there is a rational dispute as to whether, given its cryptic nature, Young provides for a two-part, as opposed to a one-part, inquiry (i.e., whether it requires an objective profitability/subjective good-faith analysis or simply a subjective

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[10] Perhaps one of the most troubling aspects of the majority opinion is the removal of this check upon a mere finding of marginal profitability. See Majority Opinion, slip op. at 22 ("[I]f a well consistently pays a profit, however small, over operating expenses, it will be deemed to have produced in paying quantities.").

good-faith examination),[11] to my knowledge, no court or commentator has gleaned a reasonably prudent operator standard from the four corners of Young. Finally, since assessment over a reasonable time period is necessary to the objectively-based inquiry into marginal profitability required under Young, it is unclear why it should be overlaid -- redundantly -- onto the separately stated good-faith inquiry.

Here, the Superior Court panel interpreted Young as providing a purely subjective test for ascertaining if a lease is producing in "paying quantities," reasoning, in relevant part, that, "while the lease operated at a loss in 1959, [Appellant] has not established any evidence that [Appellees] acted in bad faith." T.W. Phillips Gas & Oil Co. v. Jedlicka, 964 A.2d 13, 19 (Pa. Super. 2008). Thus, the panel determined that Appellant failed to carry her burden, under Young, of demonstrating a lack of good faith on the part of Appellees. See id. Given that Young delineates a two-part, hybrid test, as outlined above, I would conclude that the Superior Court erred in this regard.

Finally, although I realize it is not squarely implicated in the present case, it is my considered view that Pennsylvania may be well served to move, prospectively, to the reasonably prudent operator standard in situations in which the parties employ the paying quantities rubric without making their intentions clearer on the face of their lease agreements, in recognition of the cyclical nature of the industry. Again, I emphasize

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[11] Compare, e.g., Tex. Pac. Coal & Oil Co., 233 S.W. at 538-39, with, e.g., Zeller v. Book, 1905 WL 1178, at *2 (Ohio Ct. App. Apr. 29, 1905) ("It is presumed of course that he will operate in his own interest, and so long as he is acting in good faith and making an effort to get some production out of the well, he has a right to go forward and decide for himself." (citing Young, 194 Pa. at 243, 45 A. at 121)); 2 SUMMERS OIL & GAS §14:14 & n.1 (3d. ed. 2010) (finding that Young is one of the many courts that have expressed the view that whether a well is producing in "paying quantities" "depends solely upon the good-faith judgment of the lessee"); Gross, Meaning of "Paying Quantities", 43 A.L.R.3d 8 at §10 & n.12 (same).

that my position here is predicated upon the fact that Young was incorporated into the salient 1928 oil-and-gas lease.

IV. Conclusion

Accordingly, with regard to the limited issue upon which this Court granted allocatur, I would hold that Superior Court erred by concluding that Young sets forth a purely subjective test for determining whether an oil or gas lease has produced in "paying quantities." I would thus remand.

In such a remand, the Superior Court might find it appropriate to return the matter to the trial court for additional development. For one, the lease is silent as to the relevant time period to determine if the lease is producing in "paying quantities," and it is not clear from the trial court's opinion what, if any, period it used to perform this analysis. See T.W. Phillips Gas & Oil Co. v. Jedlicka, No. 10362 CD 2005, slip op. at 5-6 (C.P. Indiana, July 16, 2007). The nature of the loss suffered by the lease in 1959 is also not apparent from that decision. See id. at 5.

Moreover, the remand would allow the trial court to address a number of other subsidiary issues raised by the parties, including whether an accounting loss taken by the lessee is a part of a "paying quantities" calculation, and whether the lease continued in existence under the operations provision of the habendum clause.