UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-4053
Summary Calendar

IVEY HUGH RUTHERFORD, ET AL.,

Plaintiffs-Appellants,

versus

EXXON COMPANY, U.S.A.,

Defendant-Appellee.

Appeal from the United States District Court
For the Eastern District of Texas
(6:85-CV-462)

(June 17, 1993)

Before POLITZ, Chief Judge, JOLLY and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

Ivey Hugh Rutherford and several of his relatives (jointly referred to herein as the Rutherfords), are owners-lessors in the Hawkins Field Unit in Wood County, Texas. They sued Exxon Company, U.S.A., their lessee, for failure to pay royalties on surface

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

casing gas and for termination of gas supplied to their leasehold residences. The district court granted a directed verdict in favor of Exxon at the close of the Rutherford's case-in-chief. The Rutherfords appeal. Finding no error, we affirm.

In approximately 1974 Exxon began transporting to its plant gas that was exerting pressure on the surface casing in several wells. Exxon paid the Rutherfords their pro rata share of royalties as parties to the Unit Agreement under which the field operated. The Rutherfords, however, claim that this gas originated in a field that was not unitized, entitling them to greater royalties. Assuming that the Rutherfords had not received the requisite royalties, the district court found insufficient evidence of the quantity of such gas for the jury to determine damages. We agree. The wells were not metered. The Rutherfords relied entirely on the testimony of a petroleum engineer employed by Exxon in the Hawkins Field in the mid-1970s. He testified that Exxon decided to take gas from wells that tested at an output level of at least 5 MCF a day. There was no evidence, however, that this flow continued at 5 MCF, or any other level, on a daily basis until 1988 when the program was discontinued. The engineer testified that Exxon decided to make the connections in 1974 because it believed that the flow would continue but he provided no facts to support or give meaningful definition to that conclusionary statement. An assessment of damages based on such evidence would be nothing more

than speculation and conjecture. Texas law requires more.[1]

The directed verdict on the complaint about termination of the gas supply to lessors' homes also was proper. The lease entitled the lessor to use surplus gas for domestic purposes at the principal dwelling on the leasehold. The uncontroverted evidence established that until 1984 Exxon supplied gas not only to the principal dwelling but also to other dwellings.[2] In 1984 Exxon shut down the gas residue system from which the surplus was taken. Even then, Exxon offered those family members who owned a principal dwelling the opportunity to obtain gas from its wells. Exxon satisfied its obligations under the lease. A fair-minded jury could not have found otherwise. The trial judge correctly granted judgment to Exxon as a matter of law.

AFFIRMED.

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[1] **Richter, S.A. v. Bank of America Nat'l Trust & Savs. Ass'n**, 939 F.2d 1176 (5th Cir. 1991); cf. **Schoenberg v. Forrest**, 253 S.W.2d 331, 335 (Tex.Civ.App. 1952) (the fatal defect in the proof is "the failure to establish facts from which it could reasonably be inferred that profits over the contractual period of twenty years would be realized"); **Geo Viking, Inc. v. Tex-Lee Operating Co.**, 817 S.W.2d 357 (Tex.App. 1991) (although loss from an improperly completed well is difficult to quantify, a plaintiff must prove with reasonable certainty the damages he suffered; he can satisfy this burden by evidence of initial and continued production of wells drilled on the lands in controversy or in the immediate area), writ denied, 839 S.W.2d 797 (Tex. 1992).

[2] The Rutherfords contend that each residence became a principal dwelling when the surface land was divided among the siblings upon their father's death. The lease is not subject to that interpretation.