

STATE OF OHIO)
) ss:
COUNTY OF MEDINA)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO, ex rel.)
ANTHONY J. CELEBREZZE, JR.)
Attorney General of Ohio)

C.A. NO. 1920

Plaintiff-Appellee)

v.)

NOVA A. CHRISTMAN)

Defendant-Appellant)

APPEAL FROM JUDGMENT
ENTERED IN THE
COMMON PLEAS COURT
COUNTY OF MEDINA, OHIO
CASE NO. 88 CIV 0675

DECISION AND JOURNAL ENTRY

Dated: February 20, 1991

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

CACIOPPO, J. Dr. Nova Christman appeals from the judgment of the Medina County Court of Common Pleas finding that he violated an order of the Chief of the Division of Oil and Gas and imposing a civil penalty pursuant to R.C. 1509.33.

In 1972, Dr. Christman purchased oil and gas production and water injection wells. Shortly, thereafter, the pump for the injection wells blew up and Christman stopped injecting water into the injection wells.

On May 23, 1986, the Chief of the Division of Oil and Gas issued Chief's Order No. 86-212 under the authority of R.C. 1509.03. The Chief found that eighteen wells owned by

Christman were incapable of producing oil and gas in commercial quantities and ordered Christman to properly plug and abandon the wells within thirty days.

Christman filed a timely appeal from the order to the Oil and Gas Board of Review. On April 10, 1987, the parties entered into a settlement agreement in which: 1) Christman withdrew the appeal; 2) the Chief agreed to amend Order No. 86-212; and, 3) Christman waived his right to appeal the amended order.

On April 13, 1987, the Chief issued the amendment to the Order which ordered Christman to either plug and abandon or place into production the wells by September 30, 1987.

The Attorney General filed an amended complaint against Christman on June 21, 1988. The amended complaint alleged that Christman failed to plug and abandon wells No. 10, 11, 12, 19, 20, 22, 27 and 5-3485-5.

The state filed a motion for summary judgment which was denied. The counts related to wells 22, 27 and 5-3485-5 were voluntarily dismissed by the state.

The case proceeded to trial. At the outset, the court granted the state's motion in limine, over objection, which excluded evidence regarding the producing or non-producing status of the wells and future intent to produce the wells. The state and defense presented the testimony of witnesses. Over objection, the trial court admitted state's exhibits 29 through 35.

The trial court announced a decision from the bench finding that Christman had violated the amendment to Chief's Order No. 86-212. The parties submitted briefs on the issue of civil penalties. On June 5, 1990, the trial court rendered judgment against Christman for civil penalties and costs of \$105,579.39.

Christman filed a timely appeal.

Assignment of Error II

"The trial court erred as an abuse of discretion in granting Christman's motion in limine excluding all evidence relative to the producing status, non-producing status and future intent to produce the wells and by refusing to construe the meaning of the phrase 'place into production' as it relates to this case."

Christman argues that the trial court abused its discretion by granting the state's motion in limine precluding him from introducing any evidence of the producing or non-producing status of the wells and his future intent to produce the wells.

Trial courts have great discretion in admitting evidence into proceedings. Leichtamer v. American Motors Corp. (1981), 67 Ohio St. 2d 456, 473. Absent an abuse of discretion, rulings on the admissibility of evidence will not be disturbed on appeal. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. Ruwe v. Bd. of Springfield Twp. Trustees (1987), 29 Ohio St. 3d 59, 61.

The granting of a motion in limine is a preliminary interlocutory order precluding questions being asked in a certain way until the court can determine from the total circumstances of the case whether the evidence would be admissible. Riverside Methodist Hosp. Assn. v. Guthrie (1982), 3 Ohio App. 3d 308, 310. When granted, a motion in limine requires a two-step analysis. Id. The court must first consider whether any reference to the subject in question should be precluded until admissibility can be ascertained during trial. Id. Then, at the time when the party desires to introduce the evidence covered by the motion in limine, the court must determine the admissibility of the evidence from the circumstances and evidence adduced at trial and the issues raised by the evidence. Id. The purpose of a motion in limine is to avoid the injection into a trial of a potentially prejudicial matter which is not relevant and is inadmissible. Rinehart v. Toledo Blade Co. (1985), 21 Ohio App. 3d 274, 278.

Evidence of, or reference to, the intent of Christman to produce the injection wells would not tend to make the existence of any facts related to whether the wells were plugged or placed into production more probable or less probable. The trial court properly determined Christman's intent to produce to be irrelevant.

As to the producing or non-producing status of the wells, the trial court admitted testimony, including that of Christman, on the issue. Given the introduction of this

evidence, we cannot say that the granting of the motion in limine was unreasonable, arbitrary or unconscionable under the circumstances presented in this case. The second assignment of error is overruled.

Assignment of Error IV

"The trial court erred as a matter of law in refusing to properly consider and construe evidence pertaining to the producing status of the wells and the phrase 'place into production'."

Christman asserts that the trial court erred as a matter of law by refusing to consider and construe evidence of the wells' producing status.

A review of the record persuades us that the court did consider and construe evidence of the wells' producing status. Thomas Thomastik and Rick Louittit, employees of the State of Ohio, Department of Natural Resources, Division of Oil and Gas, testified that they had inspected the injection wells and found them to be idle, and not in use. Thomastik further testified that the wells were incapable of being operated because some of the fittings had been disconnected at the surface and others were so corroded that they were incapable of injecting fluid. Dr. Christman testified at trial that during his deposition he had stated that no fluid has been injected into the injection wells since 1973.

There is ample evidence to support a finding that the wells were not injecting fluid. The fourth assignment of error is overruled.

Assignment of Error III

"The trial court erred in making a finding of fact on an issue for which the court refused to allow evidence to be presented."

Christman claims that the trial court erred in finding that he had not put the wells into production when the motion in limine excluded such evidence.

As addressed in the preceeding assignment of error, evidence was admitted concerning the wells producing status. The evidence adduced showed that the wells were not injecting fluid. The third assignment of error is overruled.

Assignment of Error I

"The trial court erred as a matter of law in refusing to grant Christman's motion to dismiss and in finding that Christman was not in compliance with Chief's amended Order No. 86-212 where the state failed to plead or prove that Christman did not 'place into production' the injection wells and where the court refused to consider the question."

Christman contends that the trial court erred in finding that he failed to place the wells into production since the issue was not raised by the pleadings and subject to the motion in limine.

Civ. R. 15(B) provides in part:

"(B) Amendments to conform to the evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment. Failure to amend as provided herein does not affect the result of the trial of these issues.***."

Under this rule, failure to amend does not affect the result of the trial on these issues. Deyling v. Flowers (1983), 10 Ohio App. 3d 19, 22. Cases are to be decided on the issues actually litigated at trial. State, ex rel. Evans v. Bainbridge Twp. Trustees (1983), 5 Ohio St. 3d 41, 44. Under Civ. R. 15 (B), implied consent is not established merely because evidence bearing directly on the unpleaded issue was introduced without objection; it must appear that the parties understood the evidence was aimed at the unpleaded issue. State, ex rel. Evans, supra, at paragraph two of the syllabus. Where a party is substantially prejudiced, an implied amendment of the pleadings will not be permitted. Id. at paragraph one of the syllabus. Factors to be considered in determining whether the parties impliedly consented to litigate an issue include: whether they recognized that an unpleaded issue entered the case; whether the opposing party had a fair opportunity to address the tendered issue or would offer additional evidence if the case were to be tried on a different theory; and, whether the witnesses were subject to extensive cross-examination on the issue. Id. It is within the trial court's discretion to determine whether an unpleaded issue is tried by implied consent and such a finding will not be disturbed absent an abuse of discretion. Id. at paragraph three of the syllabus.

In the case before us, the parties realized from the outset that the issue of whether Christman had failed to place the wells into production was an element of the case.

The state and Christman presented testimony on whether the wells were injecting and both parties had ample opportunity to cross-examine the witnesses.

Christman cannot raise a lack of implied consent as a bar as he contested the issue of the wells production at trial, through both direct and cross-examination. See Deyling v. Flowers, supra.

Under these circumstances we find no abuse of discretion. The first assignment of error is overruled.

Assignment of Error VI

"The trial court's finding that no mitigating circumstances existed is against the manifest weight of the evidence and the court further abused its discretion by assessing civil penalties which were excessive and punitive under the circumstances of the case."

Christman asserts that the trial court abused its discretion in assessing damages and finding no mitigating circumstances.

R.C. 1509.33(A) provides:

"(A) Whoever violates sections 1509.01 to 1509.31 of the Revised Code, or any rules adopted or orders or terms or conditions of a permit or registration certificate issued pursuant to these sections for which no specific penalty of not more than four thousand dollars for each offense."

In the case sub judice, the trial court found that Christman violated the amendment to the order for three hundred and forty four days. It concluded that the appropriate penalty was \$50 a day for each well and imposed a penalty of \$103,200 plus extraordinary and unnecessary expenses of the state. The Code provides for a penalty not

to exceed \$4,000 for each offense. Each day that Christman failed to plug or produce the wells constituted a separate offense. R.C. 1509.12. The trial court could have assessed the penalty at \$4,000 a day rather than \$50 a day per well.

On the trial of a case, either civil or criminal, the weight to be given the evidence and the credibility of witnesses are primarily for the trier of facts. State v DeHass (1967), 10 Ohio St. 2d 23, paragraph one of the syllabus. The trial court heard the evidence and assessed a civil penalty well below the penalty allowed. The sixth assignment of error is overruled.

Assignment of Error V

"The trial court erred as a matter of law in admitting state's exhibits 29-35 where there was no proper foundation laid, no proper identification and no opportunity to cross-examine."

Christman argues that the trial court erred as a matter of law in admitting state's exhibits 29, 30, 31, 32, 33, 34 and 35.

Exhibit 32 is a certified copy of Christman's deceased spouse's probate estate records.

Evid. R. 902 reads as follows:

"Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

"(1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any State, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and signature purporting to be an attestation of execution.

"(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any law of a jurisdiction, state or federal, or rule prescribed by the Supreme Court of Ohio."

The probate estate records meet the standard set out in Evid. R. 902 and no evidence other than the documents themselves is needed for authentication.

Evid. R. 1005 reads as follows:

"The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902, Civ. R. 44, Crim. R. 27 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given."

A copy of a public record may be used to prove contents of the original where the copy is certified as correct in accordance with Evid. R. 902, Civ. R. 44, Crim. R. 27, or authenticated as correct by testimony from a witness who has compared the copy with the original. Evid. R. 1005. Exhibit 32 was properly admitted into evidence.

Exhibit 31 is comprised of copies of Christman's real estate assessments and income tax returns. The copies were not certified nor did a witness testify concerning the copies. Exhibit 31 was not properly admitted.

Christman argues that Exhibits 33 and 35 are hearsay. Exhibit 33 is the affidavit of Craig Cotsamire, approximating the cost to plug the injection wells. Exhibit 35 is the affidavit of Nancy Moore, identifying the state's expenses in enforcing this action. Cotsamire and Moore are both employees of the Ohio Department of Natural Resources.

Evid. R. 803 reads as follows:

"The following are not excluded by the hearsay rule even though the declarant is available as a witness:

"***

"(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, unless offered by defendant, unless the sources of information or other circumstances indicate lack of trustworthiness.***."

These exhibits are an exception to the hearsay rule.

Exhibit 29 are copies of opinions issued by the Ohio Supreme Court and Montgomery County Court of Appeals in State of Ohio, William J. Brown, v. Dayton Malleable, Inc.

Exhibit 30 is a copy of a judgment rendered by Washington County Common Pleas Court in State of Ohio, Anthony J. Celebreeze, Jr. v. Athens Energy Corporation, et al.

Exhibit 34 are copies of pages from a Presidential Economic Report. Although these documents might be persuasive authority, they were not properly offered as exhibits and should have been excluded.

In summary, state's exhibits 29, 30, 31 and 34 were improperly admitted as evidence. In a civil case, a harmless error is one which does not affect the substantial rights of the parties. Civ. R. 61; Leichtamer, supra, at 475. An appellate court will not reverse a judgment on the basis of any error that is harmless. Id.

In the case before us, Christman argues that admission of exhibit 31 was prejudicial because the court relied on it to find that he had substantial real estate holdings.

Evidence at trial established that Christman owned a substantial amount of real estate and oil and gas wells. Therefore, exhibit 31 is merely cumulative. Christman does not argue that he was prejudiced by the admission of exhibits 29, 30 and 34, so we need not address them. Having found the admission of this evidence to be harmless error, we overrule the fifth assignment of error.

The judgment of the trial court is affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the County of Medina Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be

file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellant.

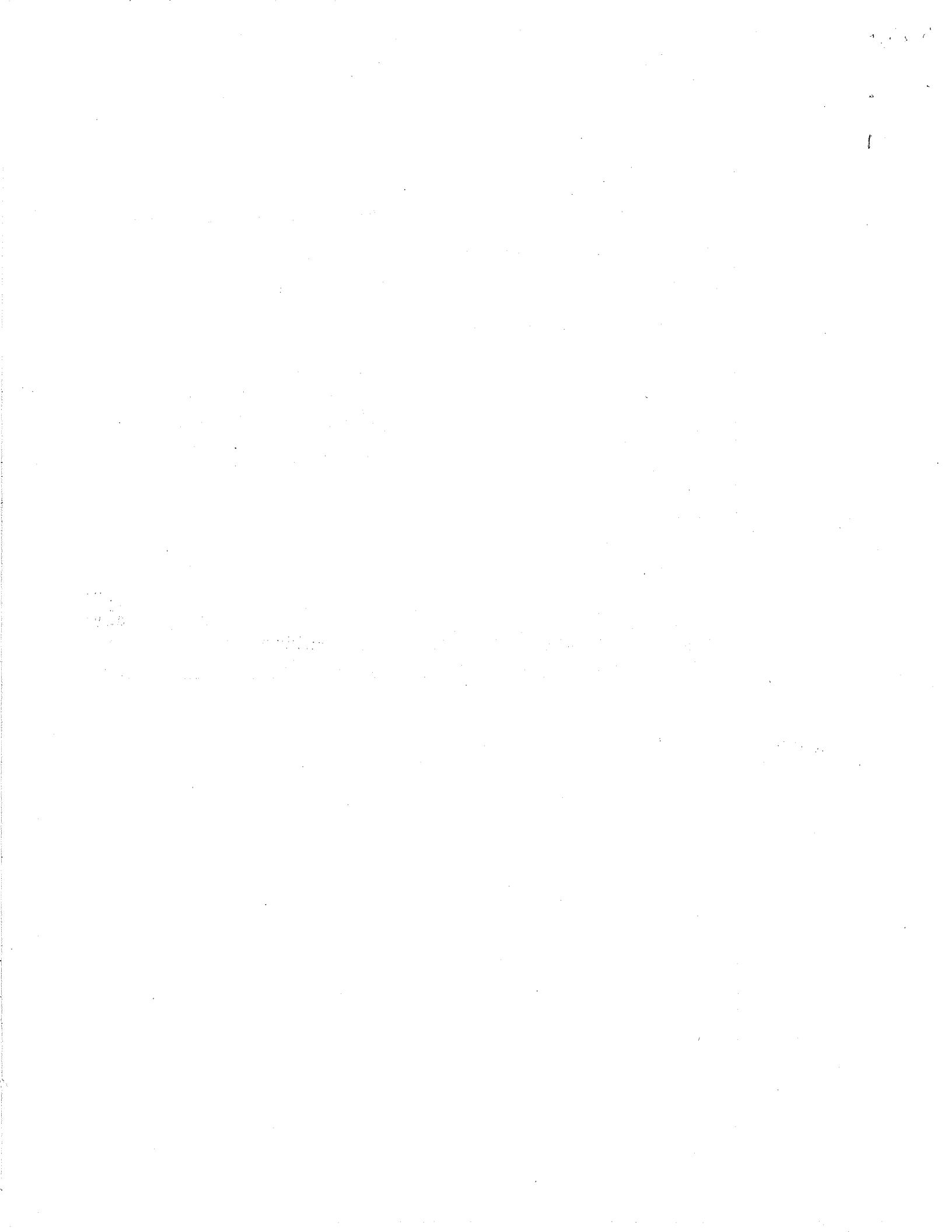
Exceptions.


MARY CACIOPPO
FOR THE COURT

QUILLIN, P. J.
BAIRD, J.
CONCUR

APPEARANCES:

LAURA J. STEFFEE, Asst. Attorney General, 4435 Fountain Square Dr., Bldg. A, Columbus, OH 43224 for Plaintiff.
BONNIE C. DRUSHAL, Attorney at Law, 225 N. Market St., P. O. Box 488, Wooster, OH 44691 for Defendant.






Attorney General
Lee Fisher

MEMORANDUM

TO: All EES Attorneys and Lyndia Jennings

FROM: Laura J. Steffee  Assistant Attorney General,
Division of Oil and Gas

DATE: February 26, 1991

RE: State, ex rel. Celebrezze, v. Christman (February 20, 1991), Case No. 1920, Ninth District Court of Appeals.

I have attached with this memo a copy of the Ninth District's recent decision with respect to the above-captioned oil and gas case. The Ninth District affirmed the June 5, 1990 decision of the Medina County Court of Common Pleas which found Christman liable for his refusal to plug six idle brine injection wells in accordance with an Amended Chief's Order and his own settlement agreement. (The June 5, 1990 opinion was circulated at that time.) The trial court assessed a \$105,579.39 civil penalty against Christman that was also upheld by the Ninth District on appeal.

The primary issue on appeal related to the trial court's granting of the State's Motion in Limine. In overruling Christman's assignment of error, the Ninth District discusses, in great detail, the application of motions in limine and the broad discretion trial courts enjoy in considering evidence.

The Court's discussion of Assignment of Error No. 1 on Page 6 may be of special interest as it discusses Civ.R. 15(B) and whether pleadings can be deemed to conform to the evidence where an unpleaded issue was tried by implied consent of the parties. Page 8 begins the civil penalty discussion.

The Ninth District found a few minor, evidentiary errors in the proceedings; however, in upholding the decision of the trial court, held that these errors were merely harmless.

I hope this is of help in your cases.

LJS:ac

Att.

