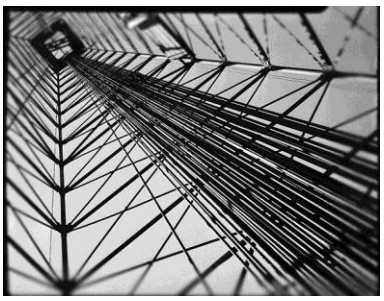

Ohio Oil and Gas Driller Successfully Fights Off Nuisance Suit From Neighboring Homeowner

CASE LAW UPDATE: OIL & GAS DRILLING

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Although the Bureau has not yet decided how they will handle the result of this decision, it is painfully obvious that Ohio's state-funded employers may have to now pay the Bureau the full amount of their premium as it relates to the first half of calendar year 1999. The court's decision does not address the other periods that the Bureau authorized and/or issued premium dividends or credits. However, it would certainly appear that this decision could be interpreted as effecting the other periods as well.

An Ohio Court of Appeals affirmed summary judgment for an oil and gas company sued by a neighboring homeowner for nuisance due to its drilling operations. In *Natale v. Everflow Eastern, Inc.*, 195 Ohio App.3d 270 (Court of Appeals of Ohio, 11th District, August 26, 2011), the homeowner alleged that the company's operation of an oil and gas well and storage tanks on neighboring property constituted a nuisance. The lawsuit concerned a residence and neighboring property located in the city of Warren in Trumbull County, Ohio. The homeowner alleged four claims: nuisance; injunction; violation of local zoning ordinances; and intentional misconduct in order to annoy, harass and retaliate against the homeowner. The company, Everflow Eastern, Inc. ("Everflow"), filed for summary judgment and the trial court ruled in favor of Everflow on all claims. On appeal, the appellate court affirmed.

In support of his claims, the homeowner alleged that the oil and gas well and storage tanks installed by Everflow created an offensive smell, sight and noise that deprived him of the enjoyment of his property. In addition, he alleged that the level of flood water on his property had increased and that the tanks were located too close to his property, preventing him from building structures on it. The homeowner also alleged that the pump shaft was squeaky and screeching and occasionally woke him up at night. Finally, he alleged that the well and storage tanks were placed close to his property boundary in retaliation for his refusal to grant Everflow an easement.

On appeal, the homeowner presented several assignments of error, all of which the court overruled. First, the homeowner argued that the trial court improperly weighed the credibility of the evidence rather than assuming all averments of the non-moving party, the homeowner, to be true. The appellate court found no error holding that the trial court's reference to a lack of "credible" evidence by the homeowner was harmless in light of the fact that the homeowner submitted an affidavit that was contradicted by prior deposition testimony. The appellate court held that when an affidavit is contradicted by prior testimony, the affidavit's allegations cannot raise an issue of fact.[1]

The homeowner also alleged that his claim for nuisance should not have been dismissed because he had a nuisance claim based upon negligence per se. The appellate court disagreed, holding that the city of Warren ordinance at issue was written in general terms and could not give rise to a negligence per se claim. Ordinance § 731.06 provides that "no oil or gas wells may be operated in such a way as to 'be injurious, noxious, offensive or dangerous to the health, safety, welfare, comfort or property of individuals.'" The court

[1] In dissent, Judge Grendel noted that the deposition testimony was given four years prior to the affidavit and was not contradictory but misinterpreted by the court.

explained that when an ordinance is "general or abstract … liability must be determined by the application of the test of due care ... and negligence per se has no application."

The homeowner also argued that his affidavit presented sufficient facts to allege the qualified nuisance. The court again disagreed and held that the homeowner's allegation that "Everflow's activities result in noise that occasionally disturbs his sleep and an odor of oil is no different from any other oil-well operation." The court also held that the homeowner failed to show that the well was operating in an unreasonable manner or outside the normal limits allowed by state law. [2] Therefore, the homeowner's evidence was insufficient to constitute a qualified nuisance claim.

The appellate court also affirmed the trial court's decision that the local ordinance conflicted with state law and was preempted. City of Warren Ordinance § 731.04(i) provides that storage tanks used in connection with any producing well may not be located within 200 feet of a residence while state law requires 100 feet of setback. The court held the ordinance is preempted by Ohio Revised Code § 1509.02 which provides that "[t]he division of [mineral resources management] has sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells and production operations with the state." The court explained that a conflicting local ordinance must yield to state law when a state agency has sole authority to regulate the activity. In short, none of the homeowner's claims survived on appeal and the lower court's decision in favor of Everflow was affirmed.

On Jan. 18, 2012, the Ohio Supreme Court declined to exercise jurisdiction over the appeal, stating that the case did not involve a substantial constitutional question.

[2] In dissent, Judge Grendel reasoned that "[t]he fact that noise and odor are inherent in drilling operations is not a valid basis for dismissing a claim of qualified nuisance." Judge Grendel explained that the homeowner "does not allege that Everflow's operation of the well was negligent or careless; rather, it is the location of Everflow's operation that was negligent in that it has unreasonably interfered with [the homeowner's] enjoyment of his property."