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SOUTHEASTERN PIPE LINE V. TICHACEK

PANNILL: The question in this case is, Can you breach a contract by following it? The CA said, Yes, you can. Surprisingly enough. The CA said, That Southeastern, as the lessee in an oil and gas lease, owed a duty to its royalty owners to cooperate with them by offering to amend the lease to make the units that the royalty owners thought we should have formed valid instead of void.

O'NEILL: How was that different from that duty to seek voluntary unitization?

PANNILL: Leases vary in a lot of different ways. Some leases actually have provisions in them in which you can go about unitizing the lease. Some provide for that. If the lease doesn't provide for unitization, it would be necessary to write a unit agreement which would cover all of the landowners in the field.

O'NEILL: Which could, if you wrote a unit agreement in effect amend and often does by its own terms amend express lease terms?

PANNILL: You could conceivably amend the express leases. And there is a duty sometimes to seek voluntary unitization. The court distinguished in the *Amoco v. Alexander* case between pooling, which they said protects against local drainage, and unitization. And they are really different concepts. Pooling almost invariably takes the form of a lease provision, which allows the producer to go and put his unit together with neighboring lands to form essentially a drilling unit in protecting its local drainage. Unitization is a much more complex process. It involves dozens, hundreds, sometimes thousands of leases. It takes a long time to negotiate and they are just not the same thing.

HANKINSON: Voluntary unitization requires the cooperation of a lessor?

PANNILL: It requires the cooperation of the lessor at the inception of the lease. At the beginning of the lease, the lessor has got to sign a lease that contains a pooling clause, and at the end of that period, the pooling clause is automatic. What the CA wants to do is shift that process from the beginning of the lease when the bargain is made to force us to retrade the deal and make a new bargain at the point at which we have achieved production.

HANKINSON: All the CA did was suggest that the lessee must attempt to obtain the cooperation of the lessor. Isn't that all the opinion says?

PANNILL: The CA in effect found that we had obtained the cooperation of the lessor, because the CA held that these units - this lead unit was the unit that we formed that the jury said was valid. The CA treated these purple units as though they were valid. So the CA held that we in

effect had cooperated and had amended our lease, which we didn't do. And as a result of that, the court treated these two units as valid units.

HANKINSON: But what I'm trying to understand is how is the cooperation that the CA talked about in this case inconsistent with the various duties recognized in the *Amoco* case by this court, that required cooperation. Where is the inconsistency between *Amoco* and what the CA said in this case?

PANNILL: In the first place, the *Amoco* case was a case involved that field(?) wide unitization rather than pooling. And the court made that distinction. In the second place, we already have a contract here, and the question is, Do we have to amend our contract? Do we have to recognize these two units or can we simply ignore them? In the *Amoco* case, the court said, You may have a duty to seek that, but you don't necessarily have to agree on voluntary unitization.

HANKINSON: Isn't that what the CA said here, was that all you to do is attempt to seek it, the cooperation?

PANNILL: They said that it has a duty under the *Amoco* case. And then the CA proceeded to recognize these purple units. And our argument is, that that's backwards. If this blue unit is valid, these purple units don't prove anything at all if we haven't agreed to them. And if we have a duty to attempt to cooperate with the landowners, that's an entirely different thing from saying that we have these two purple units up here, which then essentially - the map shows that we have two purple units stacked on top of our existing valid blue unit, and that's completely inconsistent with..

ABBOTT: Assuming that *Amoco* duties did apply, how did you fulfil them?

PANNILL: We sought and obtained voluntary unitization in this case by going to the landowner, Ms. Leveridge, who had a no pooling clause in her lease, and it's a lease that's recorded. Everybody knew about the no pooling clause. There are actually two leases, both of them are recorded. And we said to her starting in 1991 or 1992 the record shows, We would like to pool your lease with these northern leases. And she refused for about two years. And ultimately we prevailed on her to change her lease so that we could essentially amend and include these northern leases in here. And by doing that, we protected against local ground _____.

OWEN: Prior to the time that the unit was created, what did you do to protect your northern lessors from drainage?

PANNILL: We conducted seismic operations. There was a seismic line through here. The evidence shows that when in 500 feet of this seismic line, all the wells that had been drilled were dry.

OWEN: But wasn't there evidence that there was drainage prior to the unitization?

PANNILL: There is evidence that before the unitization took place, according to the plaintiff's experts, the plaintiff's leases were drained. There is no evidence that this blue unit was drained. They never addressed that question. That was simply not part of the plaintiff's case.

OWEN: Didn't you violate your obligation to the northern lessors by not drilling a well to protect them from drainage?

PANNILL: I don't believe we did. What the lease says is, and it's a pretty standard pooling clause, A producer may pool at anytime and from time to time whether before or after production is obtained from a unit and whether the well is on the leases unit or off the leases, which in this case the number 5 well is off the leases. So under our contract, under the agreement we have made with the landowners, we could do exactly what we did, which was, we essentially investigated their land to see if there was a possibility that we could drill on the land. And then we ascertained and weren't able to really make the decision, the leases were expiring, we pooled at anytime which was at the end of the lease, period. And when we completed that pooling, we had pooled with a well off the lease and we exactly fulfilled the terms of our leases.

OWEN: But how did that protect them from pre-unitization drainage? How did that make up for it?

PANNILL: Mr. Woods testified that, he would protect them against if there wasn't any drainage. He said only about 15 to 20 acres of this land at most was productive. And he had protected them against any - he compensated them for any past drainage by giving them almost half of this unit. There are a couple of leases up here that weren't on both _____. He had given them almost half of this unit and he said that compensated them for any drainage that was taking place in 1991 and 1993.

ABBOTT: Was there any other evidence to the contrary that the other lessors were not compensated and were not protected from drainage prior to the pooling?

PANNILL: The plaintiff's case was entirely one of saying, that this blue unit was void. It was invalid because it was formed in bad faith. And as a result, all you could look to were these leases and the three wells that were draining vertically from these leases. And they say if you ignore this blue unit and look at these three wells, there is evidence that drainage occurred.

ABBOTT: So based upon what you're saying now, are you saying that question No. 3 to the jury concerning drainage concern only post-pooling drainage?

PANNILL: No. I think question No. 3 concerns all drainage from the lease at all time. But what I am attempting to suggest to the court is, that when the jury found that this blue unit was valid well No. 5 can no longer be a draining well as a matter of law. So had there been any drainage before the pooling took place, well No. 5 could not have drained it. And the only opinion in the

record was, that well no. 5, 4 and 6 drained these leases. In fact, the case the plaintiffs should have proved was that wells no. 4 and 6 carried out horizontal drainage on well no. 5. That's not in the record as proof.

OWEN: There's an issue 4b and it divides damages for drainage for the past and future. What was the evidence offered by the plaintiff to support the findings under past drainage damages?

PANNILL: The evidence offered by the plaintiffs was, that this unit was invalid, and therefore, these 3 wells had drained beginning in 1991 all of these plaintiff's leases.

HANKINSON: Wasn't there evidence from the plaintiff's experts that before this unit was set up, that 4, 5 and 6 were draining the northern leases?

PANNILL: That was their evidence. If you look at it beginning in 1991, there was vertical drainage.

HANKINSON: And this unit was created in Dec. 1993?

PANNILL: Yes.

HANKINSON: And there was testimony that between 1991 and 1993 when this unit was formed, that wells 4, 5 and 6 were in fact draining the northern leases?

PANNILL: That's correct.

HANKINSON: So there was evidence of pre-pooling draining then in this record?

PANNILL: There's some evidence of pre-pooling drainage in the record. We also have jury finding no. 1, which was in the defendant's favor, which said, that we had pooled this lease validly. And in support of that, Mr. Wood's testified, I took care of pre-pooling drainage because I gave them...

HANKINSON: Apparently the jury didn't agree with Mr. Wood?

PANNILL: My response to that is the jury answered the wrong question. Question No. 3 did not direct itself, Is there horizontal drainage? Question No. 3 said, Was there drainage from 1991 till the end of time by these three wells from these leases? And that didn't occur.

HANKINSON: The question on substantial drainage did not have a time period limit on it. It just asked whether or not there was substantial drainage. Correct?

PANNILL: That's right.

HANKINSON: And so there's nothing wrong with that particular jury question. The place where it could have been limited for the time period was in the damage question?

PANNILL: No, I don't agree with that, because what question no. 3 said was, Was there drainage from the subject leases? And the subject leases weren't a proper source of inquiry certainly beginning in 1993 at all.

HANKINSON: So your challenge is really to the damage question. There's really nothing wrong with the liability finding on substantial drainage because there is evidence of drainage of the northern leases before the pre-pooling?

PANNILL: No, I don't agree with that either.

ENOCH: You've confused me. You keep referring to this Leveridge No. 5 as a pool unit, but it wasn't pooled until 1993?

PANNILL: That's correct.

ENOCH: You are now in 1991, and not in 1993. Do you agree that that pooled lease does not exist?

PANNILL: It doesn't exist in 1991.

ENOCH: Do you agree or not agree that we are now in 1991, there is no such thing as pool lease. Did the plaintiff have some evidence that drainage was occurring?

PANNILL: The plaintiff's experts actually didn't say anything about compensating for drainage even in 1991. They said they would have drilled a well in Jan. 1992. There is some evidence that there is drainage occurring. But the question which Justice Hankinson asked, I have to respond, No, because from 1991 until 1993 the question was and for all times, Was there drainage from the subject leases? There may have been some drainage from the subject leases in the first two years. There is no evidence. There is no liability question that goes to the first two years, and the damages' evidence as submitted on the first two years does not segregate itself by the period 1991 to 1993. It goes from 1991 to 1995.

ENOCH: Your point is, not that there is no evidence of drainage in 1991 to before the the pooling. Your statement is, because they submitted the wrong questions, you conclude that there is no evidence of damages of drainage in this case because they asked the wrong question of the jury?

PANNILL: The way the case should have been submitted is, In 1991 to 1993 was there evidence of drainage from the subject leases? If the Leveridge no. 5 unit is valid from 1993 forward

is there evidence of drainage horizontally from the Leveridge unit by these two wells? that question wasn't asked. That question wasn't pled. There was no evidence to support that question. There is no opinion in 438 pages of testimony.

ABBOTT: Did you object to question 4B?

PANNILL: We objected that there was no evidence after the case was over. I cannot remember precisely the objections to question 4b. I think at one point, we objected that damages should not be addressed until we had solved the question of unit drainage.

ABBOTT: Did you object to question 4b on the basis that it didn't segregate between the time period pre-pooling and post-pooling?

PANNILL: I don't believe we did, but I don't think we needed to because there is no finding of liability for the period pre-pooling and post-pooling.

HANKINSON: Did you object to the instruction that was part of question 4b as being an improper definition of the way the...

PANNILL: I would have to look to the record. I just don't recall.

Our point simply is that there are two independent grounds of recovery in this case: 1) One of them is drainage from the leases; and 2) the other is drainage from the unit. Vertical/Horizontal. Horizontal drainage wasn't submitted. It wasn't pled. There was no evidence. It just never appeared in the case. As a result, under rule 278 and 279 of the civil rules, it was the plaintiff's burden to prove that and to submit the question. When they didn't, they waived this question. We didn't waive. The question never was in the case. We couldn't have submitted a question about unit drainage because there was no evidence of unit drainage.

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RESPONDENT

WOOD: I want to try to get two points clarified at the outset. First, with respect to duty, we are squarely within the contours that this court has already mapped out in *Amoco* and *Shell Oil v. Dansbury*.

O'NEILL: I'm having a hard time seeing this as a duty case as opposed to a damage model case.

WOOD: And I don't disagree with you. I think we are rock solid on the duty. I think the general duty is well established, so the question is...

O'NEILL: Well that's not what I said. I'm having a hard time reaching that issue because it seems to me to be a damage model case. So help me if you will. I'm having a hard time reaching that issue. And let me tell you why I'm having a hard time reaching it. It seems to me that your hypothetical units were based upon the presumption that the pooling was done in bad faith. Is that right?

WOOD: I don't agree with you on that.

O'NEILL: I'm trying to determine the effect of the finding of no bad faith pooling. If there was no bad faith pooling, then don't you have to take pooling into account in calculating damages?

WOOD: You do, and it was. I think the key to sorting out the confusion that Southeastern has tried to create with respect to pooling and bad faith lies in this fact. If Southeastern had drilled the well that our experts say it should have drilled in Jan. 1992, then the 1993 Leveridge unit no. 5 never comes into existence.

O'NEILL: Well that goes back to my question. You're trying to ignore the fact that it never came into existence?

WOOD: No, we're not. And the way we're not is that the way the damages model is set up and the way question no. 4b is structured it says, What would be the royalties the Tichacek's would have recovered if you assume that the Jan. 1992 drainage protection well had been drilled when it should have been? And you take those out into the future. And then question 4b deals with the historical fact that that meant that 1992 well wasn't drilled, the 1993 unit was formed, so we've got to account for that. We've got to do something about that. And the way question 4b addresses that is, it deducts the lesser amount of royalties that the Tichaceks received by virtue of the 1993 unit from the greater amount of royalties that they would have received if the Jan. 1992 drainage protection well had been drilled. And so what it accomplishes is, is it treats the 1993 unit for what it is. It's a mitigation issue. It is not a pooling verses drainage issue. It's a mitigation issue.

ENOCH: But isn't pooling one of the methods that an operator can employ to meet its duty to avoid drainage?

WOOD: Under certain circumstances and under facts other than those present in this case, that may well be. But understand the circumstances where this arises. From 1992 when the drainage protection well should have been drilled until the end of 1993, Southeastern could not pool with the Leveridge land because Aunt Zella would not allow them because she would not amend her leases. So the chronology that was the focus of some of the questioning at the beginning of Mr. Pannill's discussion comes to the front here. Between the 1992 to the end of 1993 period, you've got no pooling, because Aunt Zella won't allow them to do it, you've got nothing going on on our leases, and you've got drainage according to our expert testimony, which the jury believed going on starting

40 days after the no. 4 well was drilled in 1991 and thereafter.

OWEN: Let's assume that we don't agree with you about the duty. We don't agree that you have an obligation to amend your leases. It seems to me that your hypothetical wells might have protected the Divin lease and the Kubena leases from drainage. What about the other plaintiffs?

WOOD: I believe that the way that the wells were structured and the units that Mr. Garza had set up were encompassed...

OWEN: But those units would have required the lessee to modify its leases. Let's assume we say there is no duty to do that and the obligation to protect it against drainage, but not to amend your leases.

WOOD: And I'll accept that hypothetical for purposes of the question, but I don't want the court to misunderstand, I do not agree with that, and would like to come back to that in a moment. But your question is, then, if there isn't a hypothetical unit around the drainage protection well, then does that protect the people who otherwise would be included in the unit, is that your question?

OWEN: My question is, What evidence is in the record that the lessee could have done to protect all of these individual lessor's from drainage assuming that they were not obligated to pool or try to unitize or amend those leases so they could create your hypothetical units?

WOOD: There was other evidence to the effect that Southeastern's options during this 2 year block of time when nothing is going on on our leases is to drill the well...

OWEN: But that would protect one lease. What about the other leases?

WOOD: Another option that the experts Hilty and Garza testified to is that Southeastern could drop the leases, could allow them to expire and that way the Tichaceks, the Divins, the Kubenas can go out and get _____ or anybody else who they can get interested in it to come out and drill. And that's really the crux of what went on here, because Southeastern didn't want to drill, but it didn't want to drop. It didn't want to let us out of or allow the leases to expire and that was the problem that came up at the end of 1993 in the terrible box that Southeastern put itself into. Because it couldn't pool, Aunt Zella wouldn't allow them to pool with her land, it didn't want to drop and it didn't want to drill us a well. And the land just set there with no development going on.

Justice Owen, I don't want you to misunderstand that I accept the assumption that somehow a new duty was created. Because I would strongly urge the court that the CA's opinion is squarely within the four corners, not only of *Amoco* but also of *Shell Oil v. Stansbury*...

OWEN: Why do you need that duty? Let's assume they had the right to unitize up until the day the leases expired, which they did. Wouldn't you still have a cause of action to the preunitization drainage?

WOOD: Yes.

OWEN: So why do you need a new duty?

WOOD: We don't need a new duty.

OWEN: Why do you need this other duty?

WOOD: There is no other duty. The duty here is the same one that was established and discussed in *Stansbury* and in *Amoco*. But I think the answer to your question is, Yes, there was drainage before the 1993 Leveridge unit was formed, and we had a cause of action for that, which we sued on, and which we submitted to the jury for the drainage of those individual leases.

ENOCH: If you're saying there is no new duty even though that's what the CA said, it must be that you're arguing that the only duty here is to avoid drainage and they have an option: they either drill a well, or drop the lease, or they pool. You attempted to get bad faith pooling because you really want them to drop the lease and you lost on the bad faith pooling. But if this is a drainage issue, then your claim is they didn't pool soon enough and so there is some drainage that occurred on this property by the failure to dill that other well the two years before?

WOOD: That is correct.

ENOCH: But what you want us to do in that light is to treat the later pooling as simply a mitigation as opposed to a satisfaction of the duty. The issues in this case really - do we say if you pool too late in honoring your obligation to drainage, then it becomes merely mitigation of the damages that you suffered by failing to pool earlier, or we measured against the royalties that you would have earned if you had drilled on the lease as opposed to the royalties you now earn because of pooling. Isn't that really the box you are putting us into? If you say this is no new duty, this is simply the duty to avoid drainage aren't you putting us in the box of treating ultimately the option of pooling as being simply a mitigation of the damages because drainage really requires you to build a well?

WOOD: I think that the answer to your question is, that if there is any box established in this case it's established by the facts and the circumstances that Southeastern put itself into with respect to being a common lessee. And more importantly, a common lessee that couldn't pool with Aunt Zella's land until the end of 1993. Under those kinds of circumstances where it did not have the option to pool with Aunt Zella which it now tries to rely on as some kind of a retroactive cure all from 2 years of uncompensated drainage, when Southeastern puts itself in that box and it's got the common lessee problem and a no pooling clause on the south side of the fence, then it's got to

do something. And our expert testimony was, that what it should have done is drill the drainage protection well in Jan. 1992.

HANKINSON: So your argument is not only that the pooling was too late, it was that even when it was done it was not enough to satisfy the duty?

WOOD: That is correct.

HANKINSON: Even if it was good faith pooling, it still didn't satisfy the duty to protect the leasehold from drainage?

WOOD: That is correct, because if you drill the well in Jan. 1992, you never get to the 1993 Leveridge pooling.

OWEN: This is where I have the disconnect, because you lost on that. The jury said, that's a valid unit. And so you don't get any drainage after 1993 under the jury's finding because the unit is valid. Why aren't we just looking at pre-1993 damages?

WOOD: Because of this point, the validity of the 1993 unit under the jury's finding is respected in the jury charge and in the judgment, because it is used as mitigation. The 1993 unit is there. We can't ignore it. We didn't want it, but we can't ignore it. It was done. But again, the way to think about the damages model is to say, If Southeastern had done what it should have done in Jan. 1992, we would have had the royalties from the drainage protection well, which under the numbers as run by our experts are X. You've got royalties that indisputably we're going to get from the 1993 Leveridge unit, which are less than X.

OWEN: Let's assume they had drilled the 1992 well, and then they had created the unit in 1993, then they decide that that's not the best way to develop the property, that's an unequal situation. So they shut in the 1992 well and just pump from the no. 5 well in this unit. How can you complain about that if that unit is valid?

WOOD: Where I part company with you is the notion that after the 1992 well had been drilled, that they would have formed the 1993 unit. Because the only reason under the facts of this case that the 1993 unit was formed was to hold on to our leases.

OWEN: You're trying to in your damage model just ignore the creation of the unit and you lost on that.

WOOD: No, we are not ignoring the creation of the unit because we are allowing the royalties that we received from the unit into the future to be deducted from the damages.

OWEN: But if the unit's valid, why are you entitled to any more royalties than you

would be entitled to from the unit?

WOOD: If the unit is invalid the way it would have shaken out under the way that the charge is set up, if the 1993 unit had been invalid...

OWEN: I'm saying if it's valid, why are you entitled to any more royalties than you've gotten since 1993?

WOOD: Because if the 1992 well had been drilled there never would have been a 1993 unit. And in order to both give effect to the finding that a well should have been drilled in 1992, and to simultaneously give effect to the fact that even though they didn't want it, the unit was formed in 1993, the way to do that is to treat it as a mitigation issue in the way that the damages are structured.

O'NEILL: Do you agree that there was no evidence of drainage from the unit after it was formed?

WOOD: I disagree with that, because we had evidence of drainage from our individual leases, which individual leases were within the WC Leveridge no. 5 unit. There was not a model that was specifically established to show drainage from the unit as a whole. But there is some evidence of drainage from the unit, because there is some evidence of drainage from our individual leases which were in the unit.

O'NEILL: I thought that once you pooled, it was all part of one unit, and, therefore, you don't look at the individual leases anymore, you look at the unit?

WOOD: As between the drainage within this unit under facts other than what we have here, that may be a valid point. But my point is, again, if you had drilled us the well that you were supposed to...

O'NEILL: But if the unit was validly formed, which is what the jury found, then isn't it just a matter blank letter law that there can be no drainage from the individual leases?

WOOD: Again, I think what you need to do is look at the way that the questions are structured to account for the chronology. And I keep coming back to this point, because I think it's the key point here. We have a situation where a well should have been drilled and it wasn't drilled, and we've got this unit. We've got to do something about the royalties that come from the unit.

ENOCH: You're putting us in the position of saying that the only option is the well must have been drilled. But that's not true. To avoid drainage, the option of pooling was available?

WOOD: It was not available to Southeastern until the end of 1993.

ENOCH: On because one of the leases they wanted to pool wasn't giving their permission. But that was their option. If they had gotten the permission in 1991 and had pooled, this case would be over with, right?

WOOD: Of course, the disconnect here is that Southeastern is simultaneously relying on the fact that they got a lease amendment from Aunt Zella as a defense to our claim against them, and simultaneously saying, that's improper to get a lease amendment.

ENOCH: So going back to the beginning, the duty to avoid drainage is not necessarily to drill a well?

WOOD: There are other options in addition to drilling a well.

ENOCH: Your argument is that, because they delayed meeting their duty to avoid drainage, you had damages for drainage?

WOOD: Correct.

ENOCH: Now, the measure of damages isn't necessarily the drilling of a well. You argue that because of the unique facts of this case, because pooling wasn't an option, then your damages are the failure to drill a well?

WOOD: Correct. Because pooling falls aside by virtue of Aunt Zella's unwillingness to amend her lease, that cuts down Southeastern's options to two under the expert testimony before the jury. Drop us or drill us.

ENOCH: But your damages are only for the period of time you're suffering drainage. And your drainage is for the period of time until they respond to stopping the drainage. Your damages are either until they drill a well, or until they pool.

WOOD: I'm going to come back to the point I've tried to make before, which is, the way that question no. 4b deals with that circumstance is to treat it as an issue of mitigation. And this allows me to address the question regarding preservation. Even if you assume that Southeastern's attempts to establish this tension between pooling and drainage have some validity, and I certainly don't buy into that assumption, but even if you do, then what their real complaint is, I think Mr. Pannill said it, The jury charge asks the wrong questions. There is no preservation in this record with respect specifically to question no. 4b, in the way that it structures this issue as a mitigation issue. And I would direct the court's attention to pages 2317, and 2318 of the statement of facts dealing with charge objections to 4b. And I also want to draw the point here that I've attached it as a tab to the brief, and I hope that it jumps out to the court as much as it jumps out to me. At the same time that Southeastern is saying, we asked the wrong question and that we should have asked about drainage from the unit not drainage from the individual leases, Southeastern tendered to the TC, got

endorsed refused and dated a question asking about drainage from the individual leases. And, I say to the court, not very likely, because I spend a fair amount of my life worrying about jury charges and wavier of charge error if there is any charge error in this case, I don't think there is, it surely was not preserved on this record where Southeastern tenders a question in the exact form that it now says was erroneous.

OWEN: What was their no evidence objection after the jury's verdict?

WOOD: They object to no evidence from drainage from the unit. I think you're talking about the post-trial motion to disregard. I would submit to the court that after the fact, no evidence objection in a post-trial motion is not enough to preserve error. This discussion was recently undertaken by the court with respect to expert testimony. You can't come in after the fact and say, I've got a magic no evidence challenge now that cures my failure to raise objections during trial. So it is in this case.

OWEN: What if the issue was right, but they just don't agree with your damage model. Did they bring that up to the TC saying, There is no evidence of the kind of damages that you are seeking? In other words, did they preserve the error that - if we disagree with you and say, Your only damage is for the unitization, did they preserve that?

WOOD: No, they did not.

O'NEILL: I have plaintiff's proposed jury charge, and it poses a question saying the proper issue would be: Do you find that any of the landowner's lease has suffered substantial drainage between their effective date and Dec. 15, 1993 when the unit was formed? Would that not preserve their error?

WOOD: I would submit to the court that it would not. I think that may be a proposed jury charge prior to the charge conference. I'm looking specifically at page 1800, which was the tendered and refused question. I would submit to the court that discussion drafts of jury charges prior to trial do not preserve error. And, more specifically, the one that was tendered is the one that's attached behind Tab G, of our brief. And it pretty clearly sets out that Southeastern bought in to the way that this charge was structured and it cannot now come before this court and say that the TC erred in setting it up that way.

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REBUTTAL

PANNILL: I want to answer the question Justice Owen and Justice Enoch both asked about what you do if you have a problem with drainage. Counsel said that you can drill a well or you can drop the leases. And what we should have done was we should have dropped the leases if we didn't think we should drill a well at this point. That's not what the expert said. Their own experts,

Garza and Hilty said, You have 3 choices: 1) you drill; 2) you drop; or 3) you pool. And that's exactly what Stanley Woods did. He went out and pooled his lease with the Leveridge lease. It took him over 1 year to do it. It probably took close to 2 years to get the permission of Ms. Leveridge. How long do you think it would take to get a voluntary unitization unit? He did go get a voluntary unitization agreement, he got this landowner to agree to pool her acreage with the acreage to the North.

A suggestion was made that question 4b provides for some sort of mitigation of damages. Question 4b, didn't mitigate any damages. The reason these purple units are in here, is because this grosses up the damages. You have to exclude all of this and you have to put these purple units in because this way all of these landowners are represented. Justice Owen asked the question, What happens if you just drilled this well without a unit? You'd leave out _____, Kubena, Rabius and _____ out of here. If you drilled this one, you keep in some of Kubena's acreage but you leave out the other landowners. So you have to form the units. And they formed the units. These units give them 100% of their royalty. This is why they had these units in the case.

If you go to the blue unit, they don't get 100% of the royalty. They get their fair share of the royalty, which is less than half. For example, if you have a ⅛ royalty up here, you get a full ⅛ out of these units. But if you take the damages out of this, you get less than 1/16 royalty. That's not mitigation.

HANKINSON: Just a question under the law. If drainage is occurring and a lessee pools in an effort to fulfil its duty to protect the lease holder, does that always as a matter of law fulfill the duty for pooling?

PANNILL: If there's a pooling clause which says you can pool at anytime and from time to time before or after production is established on this acreage or on acreage that you pooled it with, I think that fulfills the duty. But contract is the law between the parties, and that's the agreement that we made.

HANKINSON: But as a matter of law then, for example, as I understand part of the complaint in this case is that the pooling occurred with the number 5 well?

PANNILL: Yes.

HANKINSON: And they are also complaining about the no. 4 and no. 6, who are there, which they say still would be draining off their leases. And I know they lost that jury issue. So I'm just asking you the general legal question. If pooling is allowed under the terms of the various documents, then pooling is a matter of law satisfies the duty to protect the leaseholder?

PANNILL: I believe that's correct.

HANKINSON: And there can be no complaint on the part of the lessee that the pooling didn't get there because drainage is still occurring and I'm not getting all the credit I need to be getting?

PANNILL: You can't complain about these leases anymore once the pooling has taken place.

HANKINSON: But you could complain about the unit?

PANNILL: You can say, Well wait a minute, even though this well is no longer draining me, but these two wells are draining me, and then you have a different case, and you present that case, and they didn't present that case. That's not the case that we've got in front of us.

OWEN: What was your no evidence objections specifically, or objections?

PANNILL: We objected that there was no evidence for a suit.

OWEN: Providing 4b?

PANNILL: First of all, question 4b is not a liability question. And if question 3 isn't any good, it doesn't make any difference what they find in question 4b.

OWEN: Assume we think question b is okay, what objections do you make to 4b - either pre or post-judgment?

PANNILL: We objected post-judgment - I can't tell you exactly the sequence of objections during the charge conference. There were objections that we shouldn't even have 4b in the record. But after the judgment, we filed a series of objections. The objections said, There was no evidence to support 4b, because there's no evidence to support question no. 3. Neither one of those should have been submitted to the jury because there is no evidence.

There was a question about how can you approach this unit once - well the question which is put is, If in 1991, this is the hypothetical, do you simply ignore this unit that's formed later and does the formation of these units make this unit superfluous? I think, as in all parts of this case, we have the question backwards. The question is, If I do what I am validly entitled to do and if I have a good faith pooling right under this lease, then don't these two purple units become superfluous, because the blue unit has been held to be valid? And can you superimpose invalid units that I never agreed to to...

BAKER: Agreeing with your premise that pooling could be done at anytime under the terms of the lease, because you pooled in 1993 does that just wipe out any drainage that occurred before that date between 1991 and 1993? What happens to what's already happened even though you pooled, does it disappear is that your viewpoint? Just because you pool you're free?

PANNILL: The evidence in this record shows that Mr. Wood believed he was compensating for drainage. But I think the question is, and the real case that was involved here was, a good faith pooling case. And I think what you do is, to make the case that these plaintiffs tried to make, you first have to resolve this unit. And if this unit is formed in good faith, then I think you've lived up to your contractual obligations of the royalty owner. Pooling between 1991 and 1993, if they could show that it wasn't compensated, if they had another bite at the apple, they went back and said, Well we had 2 years of pooling in here and what you did didn't really compensate for it, then possibly they could recover damages.

OWEN: Was their any evidence that the unit as formed did not compensate then for 1991 and 1992 drainage?

PANNILL: No, because there was no discussion by the plaintiff's experts of the effect of the unit. The plaintiff's expert said: 1) The unit is invalid; they said that again and again and again; it's formed in bad faith; 2) since it's formed in bad faith these 3 wells drained all these leases. They got it backwards. The unit's formed in good faith, so these two wells didn't drain this unit.

O'NEILL: I want to get back to my original problem with seeing this as a duty case. Do you understand why I am having trouble as seeing it as a duty case? We don't even reach the duty question. If they had improperly ignored the pooled unit, then why do we address duty? Don't we just address the damages based on the pooled unit that they didn't properly submit the damage question? The only way the duty issue comes into play is if you accept the hypothetical units?

PANNILL: What I am attempting to argue and possibly I'm not just making myself clear, is that the whole case is tried backwards.

O'NEILL: I understand that. If we say they improperly ignored the pooled unit, we don't address their hypothetical units?

PANNILL: That's right.

O'NEILL: And if we don't address the hypothetical units duty never comes into question?

PANNILL: And there's no damages. Because all they did to attempt to prove damages was say, you have to form these purple units. Well if the blue unit wipes out the purple units, then there's no damages.

O'NEILL: That's what I am saying. It seems like a damage's question and not a duty question. The only way it becomes a duty question is if you accept their hypothetical well scenario.

PANNILL: I agree with that, but at the same time, the time it becomes a duty question is that in essence, the CA in order to sidestep the problem of unit drainage and the problem of these

hypothetical units not existing, the CA said, Well of course they exist because they were under the duty to go out and amend their valid lease with these royalty owners to bring them into existence. And I say there is no duty on our part to ever recognize in Texas even in the *Amoco* case or in any other case to go out and amend an existing contract. You may have a duty to pursue voluntary unitization as you pointed out early on and our client did that, and he got voluntary unitization and the jury blessed it. So, perhaps it's not a duty case. I'm essentially trying to answer the place at which the CA tried to save the case for the plaintiffs. But it seems to me that you are also correct that the essence of the case is if this unit is valid, these two units can't be valid. If these two units can't be valid, there is no liability and there are no damages, and the case should be rendered. It wasn't really a drainage case. It's a pooling case.

OWEN: I would like both parties to submit briefs on what evidence there was of drainage damages, the drainage prior to the unitization? What evidence was there in the record of drainage prior to the unitization of damages?