

NO. 15-0187

ORIGINAL

---

**IN THE SUPREME COURT OF OHIO**

APPEAL FROM THE COURT OF APPEALS  
FOURTH APPELLATE DISTRICT  
COUNTY, OHIO  
CASE NO. 14 CA 13

RONALD BOHLEN, *et al.*,  
Plaintiffs-Appellants

v.

ANADARKO E & P ONSHORE LLC, *et al.*,  
Defendants-Appellees

---

**APPELLANTS' MEMORANDUM IN SUPPORT OF JURISDICTION**

---

**Ethan Vessels** (0076277)  
FIELDS, DEHMLOW & VESSELS, LLC  
309 Second St.  
Marietta, OH 45750  
Tel. (740) 374-5346  
Fax (740) 374-5349  
ethan@fieldsdehmlow.com

Attorney for Plaintiffs-Appellants

**Erik Schramm** (0071690)  
HANLON, ESTADT, MCCORMICK & SCHRAMM,  
46457 National Road West  
St. Clairsville, Ohio 43950  
Tel. (740) 695-1563

Attorney for Defendant-Appellee Alliance  
Petroleum Corporation

**John P. Brody, Esq.** (0012215)  
KEGLER BROWN HILL & RITTER CO., L.P.A.  
65 East State Street, Suite 1800  
Columbus, Ohio 43215  
Tel. (614) 462-5456

Attorney for Defendant-Appellee Anadarko  
E&P Onshore LLC

**RECEIVED**  
FEB 03 2015  
CLERK OF COURT  
SUPREME COURT OF OHIO

**FILED**  
FEB 03 2015  
CLERK OF COURT  
SUPREME COURT OF OHIO

**TABLE OF CONTENTS**

<b>I.</b>	<b>STATEMENT OF WHY THIS CASE IS ONE OF PUBLIC AND GREAT GENERAL INTEREST</b> .....	1
<b>II.</b>	<b>STATEMENT OF THE CASE AND FACTS</b> .....	3
<b>III.</b>	<b>ARGUMENT</b> .....	6
	<b>Propositions of Law</b>	
	<b>1. An oil and gas lease should be enforced as written, using the words and phrases employed by the parties, including provisions regarding the termination of the lease</b> .....	6
	<b>2. “Delay rental” clauses are the functional equivalent of “minimum advance royalty” clauses and will be construed as written, using the language employed by the parties to the agreement</b> .....	6
	<b>3. “Delay rental” clauses are not necessarily limited to the primary term of an oil and gas lease but, instead, will be applied as written, using the language employed by the parties to the agreement</b> .....	6
	<b>4. If an oil and gas lease is ambiguous, it must be construed against the lessee</b> .....	12
	<b>5. An oil and gas lease may not indefinitely forestall production by payment of rentals</b> .....	13
<b>IV.</b>	<b>CONCLUSION</b> .....	14
	<b><u>APPENDIX</u></b>	
		<b>Appx. Pg.</b>
	Decision and Judgment Entry, Fourth District Court of Appeals (December 22, 2014).....	1-24

**I. STATEMENT OF WHY THIS CASE IS ONE OF PUBLIC AND GREAT GENERAL INTEREST**

This case presents a matter of public and great general interest because the Fourth District Court of Appeals' decision alters a party's fundamental right to contract with another party with the expectation that the words chosen by the parties' will be interpreted and enforced, as written.

Separately, and of equal importance, this case presents issues very nearly the same as in *Hupp v. Beck Energy Corp.*, which this Court has accepted for review. 2015-Ohio-239. This case should be considered along with the *Hupp* case.

This Court has determined that “[w]hat the terms and stipulations of a contract shall be is [a] matter to be determined by the contracting parties, and the right has not been delegated to, nor is it within the power of the general assembly, by mandatory laws to prescribe the terms and provisions that shall be inserted in contracts that may be made between persons legally competent to contract.” *Cleveland v. Clements Bros. Constr. Co.* (1902), 67 Ohio St. 197, 218.

The Court continued:

The privilege of making and entering into contracts is more than a mere license or liberty. It is a property right. It is an essential incident to the acquisition and protection of property, and is such right as the legislature may not arbitrarily and without sufficient cause either abridge or take away. *Id.*, at 219.

The Court of Appeals' decision jeopardizes a party's basic right to contract by re-interpreting the terms of an oil and gas lease to mean the opposite of the explicit language that the parties chose to employ.

The terms of the oil and gas lease at issue here required the Lessee to supplement the annual production royalties with a rental amount that would equal \$5,500.00—or the lease would terminate. It was undisputed that the Lessee failed to pay the required annual amount for many years. The trial court enforced the lease as it was written: it terminated the lease. Yet, the Fourth

District Court of Appeals reversed and supplanted its interpretation of the parties' "intent." The Court concluded the termination provision did not apply to the annual supplemental payment required under the Addendum—even though termination of the lease was explicitly contemplated and mandated by the parties. The Court of Appeals has created important (and wrong) precedent that permits, indeed mandates, that trial courts supplant the explicit terms of an oil and gas lease.

The Court of Appeals based its decision on what is "generally" done in the oil and gas industry as opposed to what the parties agreed to *in this particular lease*. Prior legal precedent and industry practices can be instructive when interpreting a lease and can provide insight into the parties' intent—if the agreement is otherwise silent or ambiguous on an issue. However, absent any ambiguity, courts should determine the intent using the language that the parties have chosen.

This lease was not ambiguous. Yet, the Court of Appeals apparently created an ambiguity and resolved that perceived ambiguity in favor of the Lessee. Long-standing interpretation principles require the opposite; that all ambiguities be resolved against the drafter of the document, the lessee. *Doe v. Ronan*, 127 Ohio St.3d 188, 2010-Ohio-5072, 937 N.E.2d 556, ¶49; *Mead Corp. V. ABB Power Generation, Inc.* 319 F.3d 790, 798 (6th Cir. 2003). In fact, a Pennsylvania federal court considering a similar issue reasoned as follows:

In light of the speculative nature of the property conveyed by an oil and gas lease and the traditional understanding that lessees are far better accustomed to dealing with such property, it is appropriate to construe any ambiguity in such instruments in favor of the lessor. [Internal citations omitted.] *Jacobs v. CNG Transmission Corp.*, 332 F.Supp.2d 759, 773 (W.D. Pa. 2004).

In short, the Court of Appeals did not simply misinterpret the lease, it established a new interpretation process for oil and gas leases. The Court of Appeals whittled away

at the right to contract and choose the terms contained therein that is guaranteed to the Ohio public. Namely, it created a blanket rule regarding the applications of “rental” provisions that this Court has never adopted (nor has been adopted anywhere).

Also, as in *Hupp v. Beck Energy Corp.*, this case also presents a situation in which a lessee can indefinitely forestall development by paying rentals to the lessor. (Even more so than in *Hupp*, as will be explained.) The Fourth District ignored this Court’s holding in *Ionno v. Glen-Gery Corp.*, 2 Ohio St.3d 131, that mineral leases that indefinitely postpone development are void as against public policy.

## **II. STATEMENT OF THE CASE AND FACTS**

The Bohlens’ Property is comprised of six, noncontiguous tracts totaling approximately 500 acres located in Lawrence Township, Washington County, Ohio. On February 15, 2006, the Bohlens entered into an Oil and Gas Lease for the Property with Alliance Petroleum Corporation.

Paragraph 2 of the lease, the habendum clause, provided for a one-year primary term and a secondary term which extended the lease beyond the primary term as long as “oil or gas or their constituents are produced or are capable of being produced on the premises in paying quantities, in the sole judgment of the Lessee or as the premises shall be operated by the Lessee in the search for oil or gas and as provided in Paragraph 7 following.”

On September 5, 2006, Alliance commenced the drilling of the first well, Well No. 1CM, on the 51.31-acre parcel located in Section 26. Well No. 1CM was completed on September 18, 2006. Shortly thereafter, Alliance drilled a second well, Well No. 2CM, on the 86.5-acre parcel located in Section 25. Well No. 2CM was completed on October 1, 2006. No other well was drilled on the Property.

Defendants reported minimal production from the two wells. Well No. 1CM produced 76 MCFs of gas in 2007 and never produced oil. Aside from the nominal amount of gas in 2007, no gas has been produced from Well No. 1CM for the years 2008 through the present. The second well only produced nominal amounts of gas in the six-year time frame from 2007 to 2012. Of significance, Alliance admitted that no oil or gas has been produced from the remaining, undrilled acreage located in Sections 7, 31, or 32.

Three additional terms in the lease are the heart of this case. Paragraph 3 of the lease contained a delay rental provision which states:

This lease, however, shall become null and void and all rights of either party hereunder shall cease and terminate, unless, the Lessee shall thereafter pay a delay rental of \$5,500.00 Dollars each year, payments to be made yearly, but in no event not less than yearly, for the privilege of deferring the commencement of a well.

Then, in Paragraph 1 of the Addendum to the lease, the parties also guaranteed another rental payment of \$5,500.00:

In the event that during any calendar year the total royalties paid from production of the leased premises, shall be less than the annual rental of \$5,500.00, Lessee shall tender to Lessor such sum that will equal to the \$5,500.00 annual rental payment.

Finally, Paragraph 13 of the lease provided that “[f]ailure of payment of rental or royalty on any part of this lease shall not void or have any effect on this lease or in any other part.” *Alliance and the Bohlers crossed through this provision—negating its effect.* The obvious intent was that failure to pay rent, or royalties, would void the lease.

Alliance only paid the Bohlers an annual rental of \$5,500.00 in 2006 and 2007. Alliance never paid the full annual rental payment for the years 2008 through 2013 even though the total annual royalties in each year were below \$5,500.00, which was admitted. Alliance itself calculated the total shortage due to Plaintiffs for annual delay rentals as \$3,949.23.

On September 28, 2011, Alliance assigned a portion of the lease to Anadarko E&P Onshore, LLC.

The Bohlens filed a Complaint seeking declaratory judgment that the lease had expired under its own terms as to the unproduced acreage. All parties affirmatively moved for summary judgment. The Bohlens argued, in part, that the lease expired under its own terms because the Lessee failed to pay the rental amount required under the addendum. They separately argued that the lease violated public policy because it allowed the Lessee to indefinitely postpone further development with the payment of rentals. The trial court granted summary judgment in favor of the Bohlens on both issues.

Anadarko and Alliance appealed the trial court's decision to the Fourth District Court of Appeals. On December 23, 2014, the Court of Appeals issued its decision and reversed the trial court.

### III. ARGUMENT

**Proposition of Law No. 1: An oil and gas lease should be enforced, as written, using the words and phrases employed by the parties, including provisions regarding the termination of the lease.**

**Proposition of Law No. 2: “Delay rental” clauses are the functional equivalent of “minimum advance royalty” clauses and will be construed as written, using the language employed by the parties to the agreement.**

**Proposition of Law No. 3: “Delay rental” clauses are not necessarily limited to the primary term of an oil and gas lease, but instead will be applied as written, using the language employed by the parties to the agreement.**

Appellants’ first three propositions of law are premised upon the same long-standing principles that govern contracts under Ohio law. An oil and gas lease is a contract. “Such leases are contracts, and the terms of the contract with the law applicable to such terms must govern the rights and remedies of the parties.” *Swallie v. Rousenberg*, 2010-Ohio-4573, 190 Ohio App. 3d 473, ¶61 (7th Dist. 2010). An interpreting court is charged with the obligation of ascertaining and giving effect to the intent of the parties as expressed in the written document. *Cooper v. Chateau Estate Homes, LLC*, 2010-Ohio-5186, ¶ 12 (Ohio App. 12<sup>th</sup> Dist.). The contractual language used, unless ambiguous, should be given its plain and ordinary meaning. *Id.*, citing *Aultman Hosp. Assn. v. Community Mut. Ins. Co.* (1989), 46 Ohio St.3d 51, 544 N.E.2d 920, syllabus. In addition to the words utilized in the agreement, attention must be paid to “the actual placement or typography of the words in the printed contract, as well as the structure and punctuation used in drafting the contract.” *Id.*, at ¶ 15, quoting *Farrell v. Deuble*, 175 Ohio App.3d 646, 888 N.E.2d 514, 2008-Ohio-1124, ¶ 21 (citations omitted).

In this case, the trial court concluded that the termination provision in the delay rental clause applied to circumstances where production royalties were less than \$5,500, and the Lessee admittedly failed to make the sufficient annual payment. The Court of Appeals disagreed with

the trial court and found that the termination provision did not apply to the payment discussed in Paragraph 1 of the Addendum because the termination of the contract was not explicitly mentioned in the addendum. (Appx., p. 15).

The Court only supported its conclusion with a brief mention of “established precedent that generally limits the application of the delay rental provision to the primary term of the lease.” (Appx., p. 16, citing *Hupp*, 2014-Ohio-4255, ¶ 99; and Ohio Real Estate Law at Section 47:9).

This is the heart of the case. Despite mentioning “established precedent,” the Court of Appeals cited none. With one sentence, the Court held that delay rental provisions must apply *only* during the primary term of a lease. (Even though the Court itself conceded this only to be “generally” the case.)

There has never been any case in Ohio holding that “delay rentals” or “rentals” must only apply during the primary term. In fact, case law establishes otherwise. “Rentals” can apply after the primary term—if that is how the parties drafted the lease.

The parties agreed and intended to ensure that the Bohlens received a minimum payment of \$5,500 annually, whether in delay rentals, royalties, or supplemental payments from the Lessee. The parties were forestalling the drilling of additional wells by making payments—which is “rent” any way that one looks at it. And the lease itself only used the word “rental.”

Further, the delay rental provision in the original lease and in the addendum both stated the same rental amount: \$5,500.00. The two provisions were to be read together.

The parties further agreed that the lease would terminate if Lessee failed to make those payments in exchange for the benefit of delaying the commencement of a well—or the delaying

of additional wells. *They purposefully crossed through the “non-termination” language of the lease.*

The Court of Appeals appeared to have placed great importance on the “classification” of the payment as a “delay rental” applicable only to the initial term of the lease. (Appx., p. 16). The focus should not rest on the “classification” of the payment, but instead on the intended purpose of the payment. “The intention of the parties as revealed by the provisions of a specific lease is of great importance in describing the attributes and the nature of a payment. *Morriss v. First Nat’l Bank*, 249 S.W.2d 269, 279. As the Fourth District stated in *Harding v. Viking International Resources Co., Inc.*, 1 N.E.3d 872, 2013 -Ohio- 5236, ¶12 (4th Dist. 2013):

Words and phrases must be given their natural and commonly accepted meaning, where they possess such meaning, to the end that a reasonable interpretation of the contract is consistent with the apparent object and plain intent of the parties may be determined.

The Seventh District Court of Appeals decision in *Price v. K. A. Brown Oil & Gas, LLC*, 2014-Ohio-2298 (Ohio App. 7 Dist.) is instructive. There, the Seventh District held that if a lease requires the lessee to perform a specific function by a specified time, and the lease provides that it will terminate if not performed, indeed the lease does terminate.

In *Price*, the lease required production in paying quantities of two existing wells. The lessee was required to place the first well in production within the first six months of the lease and place the second well in production in the six months that followed. If the lessee failed to adhere to this schedule, the lease specifically stated that the lessee had to release the lease or pay shut-in royalties. Although the lessee placed the first well into production in accordance with the schedule, the second well was not placed into production until 1995. At the same time, the lessee failed to pay the required shut-in royalties. Given the lessee’s failure to comply with its

unambiguous contractual obligations, the Court of Appeals held that the lease had terminated under its own terms.

The U.S. District Court for the Eastern District of Kentucky confronted a similar situation in *Clay v. K. Petroleum*, 2008 WL 2308118 (E.D.Ky.), in 2008. In *Clay*, the lessor and lessee included an explicit “minimal royalty” clause, which stated that the lease would terminate if the minimum royalties were not paid. The lessee failed to make the minimum payments and the court granted summary judgment for the lessors, terminating the lease. The court specifically held that “KP’s unremedied failure to pay the required minimum royalty works a forfeiture[.]” *Id.*

In order to avoid the results in *Price* and *Clay*, Alliance argued that the annual rental under Paragraph 1 of the Addendum to the Lease was a “minimum royalty” clause. This is inconsistent with the language of Paragraph 1 of the Addendum which *specifically referenced the payment as equivalent to an annual rental*. The parties chose the language in the lease, and they used the phrase “annual rental,” which has a clear meaning in Paragraph 3 of the Lease. (The words “minimum royalty” were never used in the lease or in the addendum.) The fact that Alliance and the Bohlens specified \$5,500.00 as the threshold in Paragraph 1 of the Addendum—the exact “delay rental” amount specified in Paragraph 3 of the Lease—was not a coincidence.

Regardless, “rent” and “minimum royalties” are interchangeable terms. In *Ionno v. Glen-Gery Corp.* (1983), 2 Ohio St.3d 131, in the initial recitation of facts, this Court phrased the payments as “minimum rent or royalty.” As stated by the U.S. District Court for the Western District of Pennsylvania:

...[D]elay rentals have long been used in the industry and have a settled meaning. It is customary for parties to an oil and gas lease to agree that a *minimum advance*

*royalty* shall be paid for the lessee's right to forego immediate development of the leasehold for production. *Jacobs*, 332 F.Supp.2d at 785.

In the end, it makes no difference whether construed as a "rental" or "minimum royalty." Again, Alliance struck through paragraph 13, which provided that "[f]ailure of payment of *rental or royalty* on any part of this lease shall not void or have any effect on this lease or in any other part." Whether "rent" or "royalty"—both parties agreed that failure to pay the annual sum would end the lease. They went out of their way to make this clear.

The intent of the parties, as shown by the language they used in the lease, was not to limit the payment required under the addendum as a "delay rental" as that term is often used in the oil and gas industry, i.e., a payment made to delay the drilling of a well. Indeed, perhaps most lessors and lessees do use "delay rentals" to apply only during the primary term.

In this case, however, because of the significant non-contiguous acreage, the parties intended to create multiple primary terms. The intent was to obtain maximum production from all of the available tracts. The Bohlen and Alliance created the addendum so that Alliance could pay rental payments of \$5,500 (less any production royalties) to delay of obtaining production from remaining acreage. They identified it as a "sum" to be paid equal to the "\$5,500.00 annual rental payment." (Appx., p. 5, quoting the addendum). It was clearly a "rental" both in its effect and by its explicit description.

Regardless of how one "classifies" the payment, neither the contract nor the law limit the payment to the initial term of the contract. To be precise, there is nothing contained within the "delay rental" provision of Paragraph 3 of the Lease that limits the "annual delay rentals" to the primary term or to the commencement of the *first* well on the leased property. (Indeed, the very purpose was to obtain multiple wells.) Rather, Paragraph 3 stated that the "annual delay rental" payment is made by the lessor in exchange for the privilege of deferring the commencement of

“a well.” Note, the Lease does not state: “for the privilege of deferring the commencement of [the first well]” on the leased property, but rather “a well” which could refer to any well that is contemplated under the Lease. In fact, *the parties also crossed-out the language of Paragraph 3* of the Lease which required a well to be commenced within a specific period of time or before the end of the primary term.

The United States District Court for the Northern District of Ohio recently addressed this precise issue in *Beaverkettle Farms, Ltd. v. Chesapeake Appalachia, LLC*, 2013 WL 4679950 (N.D. Ohio). The court phrased the issue as follows: whether a lease which extends past its primary term is still void because the lessee failed to timely pay delay rentals to the lessor after expiration of the primary term. *Id.*, \*2. Finding that Ohio has never adopted a blanket rule on this issue, the Court declined to hold that “delay rental” payments apply only to the primary term. *Id.*, \*12. Instead, the court examined the lease and determined that it did not expressly restrict the payment of “delay rentals” to the primary term or excuse the lessee from paying delay rentals for undrilled acreage in the secondary term for the privilege of holding the Lease as to the entire acreage. *Id.*, \*13

Here, the Lease never limited “annual delay rentals” to the primary term. This, combined with the language of Paragraph 1 of the Addendum wherein “annual rentals” apply “*during any calendar year*” where there is insufficient production and the parties decision to strike the language that indicated the “[f]ailure of payment of rental or royalty on any part of this lease shall not void or have any effect on this lease or in any other part,” made it clear that the parties intended for “annual delay rentals” to continue past the primary term of the Lease.

The Fourth District’s decision, if permitted to stand, creates precedent that trial courts can re-interpret “rental” provisions in oil and gas leases. The Fourth District has pronounced that

“delay rentals” can apply only during the primary term of a lease. This Court has never reviewed this issue.

**Proposition of Law No. 4:**

**If a provision in an oil and gas lease is ambiguous, it must be construed against the lessee.**

Ohio courts, including this Court, have long held that any ambiguities in a contract should be resolved against the drafter of the document. *Doe*, 2010-Ohio-5072, ¶49; *Mead Corp.*, 319 F.3d at 798. Regarding oil and gas leases, our Pennsylvania neighbors reasoned that any ambiguities should be resolved against the lessees because, not only are they the ones typically drafting the oil and gas leases, they are “far better accustomed” to dealing with the “speculative nature of the property conveyed by an oil and gas lease.” *Jacobs*, 332 F.Supp.2d at 773. The purpose of interpretation should be to ascertain the parties’ intent when choosing the language used. And, the drafter of the agreement should never “benefit from an ambiguity of [its] own creation.” *Copelin-Mohn, Inc. v. Buckeye Union Cas. Co.* (1939), 135 Ohio St. 287, 291, 20 N.E.2d 713.

The Bohlens contend, and the trial court agreed, that the lease was not ambiguous. Yet, the Court of Appeals obviously found the termination provision in the delay rental cause and its application to the payment under the addendum was ambiguous. Then, the Court went on to resolve the ambiguity in the Lessees’ favor. This contradicts a long-recognized principle under Ohio law, and it erodes the rights afforded to lessors when engaging in these complicated transactions with sophisticated businesses.

**Proposition of Law No. 5:**

**An oil and gas lease may not indefinitely forestall production by payment of rentals.**

Irrespective of the clear lease termination for failure to pay the agreed annual rentals, the lease itself provided the lessee the ability to indefinitely forestall the drilling and production of the remaining acreage by payment of rentals.

The trial court agreed and separately held that the lease was void as against public policy. The Court of Appeals disagreed, citing and quoting extensively (and exclusively) from the recent Seventh District decision in the case of *Hupp v. Beck Energy Corp.*, which this Court has agreed to hear. 2015-Ohio-239. This Court has accepted these propositions of law:

1. An oil and gas lease which can be maintained indefinitely without development is a perpetual lease that is void against public policy. That a lease purports to establish a fixed term is of no consequence if the duration of that term can be fixed without development.
2. Where the express terms of an oil and gas lease effectively allow the lessee to postpone development indefinitely, and any stated time limits can be unilaterally extended by the lessee in perpetuity without any development, the lease is subject to an implied covenant of reasonable development notwithstanding a general disclaimer of all implied covenants.

This case should be considered along with the *Hupp* case (and the *Claugus Family Farm* case) because the same issue arises. The lease and addendum in this case would allow Alliance to postpone further development forever by the payment of rentals.

There is a single significant factual difference in this case compared to the *Hupp* case, which should warrant this case's consideration in conjunction with the *Hupp* case. In *Hupp*, the lease *actually did have a 10-year primary term* in which rentals could be paid. A long term for sure, but a definite period in which drilling and production could be postponed.

In this case, the lease and addendum were drafted to ensure the drilling of multiple wells on multiple tracts. *The rental provision allowed Alliance to postpone the drilling and*

*development on the undrilled acreage forever—simply by paying an annual rental.* It was indefinite.

This Court held in *Ionno v. Glen-Gery Corp.*, 2 Ohio St.3d 131, that long-term leases under which there is no development inhibit the exploitation of mineral resources and are void as against public policy. This Court explained that “the only material inducement which influences a lessor to grant a lessee the power to exercise extensive rights upon his land is his expectation of receiving...royalties based on the amount of minerals derived from the land.” *Id.* at 131.

The fact that lessees have continued to make annual rental payments for a period of over eighteen years does not alter their responsibility to develop the land within a reasonable time. The questions of working diligently and of paying rent or royalties cannot be viewed as a substitute for timely development. To hold otherwise would be to reward mere speculation without development, effort, or expenditure on the part of the lessees. It would allow a lessee to encumber a lessor’s property in perpetuity merely by paying an annual sum. Such long-term leases under which there is no development impede the mining of mineral lands and are thus against public policy. *Id.* at 134

The Court of Appeals simply parroted the Seventh District’s decision in *Hupp* without acknowledging that the lease in this case truly does allow the indefinite postponement of development. It did not follow this Court’s holding in *Ionno*.

This Court should consider this case along with the *Hupp* case.

#### **IV. CONCLUSION**

For the foregoing reasons, this case is one of public or great general interest and this Court should exercise its jurisdiction in this case.

Respectfully submitted,

  
\_\_\_\_\_  
**Ethan Vessels (0076277)**  
**FIELDS, DEHMLOW & VESSELS**  
A LIMITED LIABILITY COMPANY  
309 Second Street  
Marietta, Ohio 45750  
ethan@fieldsdehmlow.com  
(740) 374-5346  
(740) 374-5349 (facsimile)  
Attorney for Appellants

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **Memorandum in Support of Jurisdiction of Appellants** has been served this 2 day of February, 2015, by U.S. Mail, postage prepaid, upon the following:

Erik Schramm  
HANLON, ESTADT, MCCORMICK & SCHRAMM,  
46457 National Road West  
St. Clairsville, Ohio 43950  
Tel. (740) 695-1563

John P. Brody, Esq.  
KEGLER BROWN HILL & RITTER CO., L.P.A.  
65 East State Street, Suite 1800  
Columbus, Ohio 43215  
Tel. (614) 462-5456

  
\_\_\_\_\_  
Ethan Vessels

# APPENDIX

FOURTH DISTRICT  
COURT OF APPEALS  
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
WASHINGTON COUNTY

2014 DEC 22 AM 10:08

WASHINGTON CO. OHIO

RONALD AND BARBARA BOHLEN,

Plaintiffs-Appellees,

vs.

ANADARKO E&P ONSHORE, LLC,  
ET AL.,

Defendants-Appellants.

Case No. 14CA13

DECISION AND JUDGMENT ENTRY

---

APPEARANCES:

COUNSEL FOR APPELLANTS: John P. Brody, Kevin L. Sykes, and  
Margeaux Kimbrough, Kegler, Brown, Hill  
& Ritter Co., L.P.A., 65 East State St.,  
Suite 1800, Columbus, Ohio 43215

Scott D. Eickelberger, William J.  
Taylor, Ryan H. Linn, and David J.  
Tarbert, Kincaid, Taylor & Geyer, 50  
North Fourth St., P.O. Box 1030,  
Zanesville, Ohio 43702

COUNSEL FOR APPELLEES: Ethan Vessels, Fields, Dehmlow &  
Vessels, L.L.C., 309 Second St.,  
Marietta, Ohio 45750.

---

CIVIL APPEAL FROM COMMON PLEAS COURT

DATE JOURNALIZED:

ABELE, P.J.

This is an appeal by Anadarko E&P Onshore, LLC (Anadarko) and Alliance Petroleum Corporation (Alliance), defendants-appellants, from a Washington County Common Pleas Court judgment that (1) granted the motion for summary judgment of Ronald and Barbara Bohlen, plaintiffs-appellees, (2) denied appellants' motion for summary judgment, and (3) declared that an oil and gas

lease between the parties was void ab initio. The trial court concluded that the lease is a no-term, perpetual lease that violates public policy and the lease had terminated under its own terms because, for several years, appellants had not paid the full annual rental payment due under the lease and had failed to produce sufficient oil or gas from wells. Consequently, the trial court ordered the forfeiture of the lease.

Appellants assign the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE COMMON PLEAS COURT ERRED IN HOLDING THAT THE OIL AND GAS LEASE IS A PERPETUAL, NO-TERM LEASE WHICH SERIOUSLY OFFENDS PUBLIC POLICY, AND THEREFORE, IS VOID *ab initio*."

SECOND ASSIGNMENT OF ERROR:

"THE COMMON PLEAS COURT ERRED IN HOLDING THAT THE OIL AND GAS LEASE TERMINATED BY IT OWN TERMS AS A RESULT OF DEFENDANT'S FAILURE TO MAKE ANNUAL RENTAL PAYMENTS."

THIRD ASSIGNMENT OF ERROR:

"THE COMMON PLEAS COURT ERRED IN RULING THAT PRODUCTION ON THE PREMISES WAS NOT IN PAYING QUANTITIES; THUS, THE OIL AND GAS LEASE EXPIRED BY ITS OWN TERMS."

FOURTH ASSIGNMENT OF ERROR:

"THE COMMON PLEAS COURT ERRED IN RULING THAT FORFEITURE OF THE OIL AND GAS LEASE WAS AN APPROPRIATE REMEDY IN THIS CASE."

FIFTH ASSIGNMENT OF ERROR:

"THE COMMON PLEAS COURT ERRED IN HOLDING THAT THE DISCLAIMER OF COVENANTS CONTAINED IN THE OIL AND GAS LEASE DID NOT EXPRESSLY DISCLAIM

THE IMPLIED COVENANT TO REASONABLY DEVELOP  
THE LAND."

SIXTH ASSIGNMENT OF ERROR:

"THE COMMON PLEAS COURT ERRED IN HOLDING THAT  
THE DOCTRINES OF ESTOPPEL AND WAIVER ARE  
INAPPLICABLE AND DO NOT PREVENT PLAINTIFFS  
FROM DENYING THE VALIDITY OF THE OIL AND GAS  
LEASE."

SEVENTH ASSIGNMENT OF ERROR:

"THE COMMON PLEAS COURT ERRED IN HOLDING THAT  
PLAINTIFF'S CLAIMS WERE BARRED AS A RESULT OF  
THEIR FAILURE TO PROVIDE NOTICE OF BREACH  
UNDER THE OIL AND GAS LEASE."

FACTS

The Bohlens own approximately 500 acres of land and includes six, noncontiguous tracts. On February 15, 2006, the Bohlens and Alliance executed an oil and gas lease. The Bohlens granted Alliance the exclusive right to the property "for the purpose of exploring, drilling, operating for, producing and removing oil and gas and all the constituents thereof." The lease contained a habendum clause that provides a primary term of one year, and a secondary term of indefinite duration that follows the expiration of the primary term:

This Lease shall continue in force and the rights granted hereunder be quietly enjoyed by the Lessee for a term of One (1) years and so much longer thereafter as oil or gas or their constituents are produced or are capable of being produced on the premises in paying quantities, in the sole judgment of the Lessee, or as

the premises shall be operated by the Lessee in the search for oil or gas and as provided in Paragraph 7 following.

(Id.)

The lease also contained a delay rental provision, which provided that the lease would terminate unless Alliance paid the Bohlers \$5,500 each year to defer commencement of a well on the leased premises:

This lease, however, shall become null and void and all rights of either party hereunder shall cease and terminate, \* \* \* unless the lessee shall thereafter pay a delay rental of \$5,500.00 Dollars each year, payments to be made yearly, but in no event not less than yearly, for the privilege of deferring the commencement of a well. A well shall be deemed commenced *when drilling operations have commenced on leased premises.*

(Emphasis sic.) (Id.)

In sections 9 and 19 of the lease, the parties disclaimed implied covenants, including those related to production of oil and gas:

\* \* \* The parties hereto hereby expressly disclaim any and all implied covenants, whether at law or at equity, regarding production, continuing production or future production.

\* \* \* It is mutually agreed that this instrument contains and expresses all of the agreements and understandings of the parties in regard to the subject matter thereof, and no implied covenant, agreement or obligation shall be read into this agreement or imposed upon the parties or either of them.

The lease also included a notice requirement as a condition precedent for a party to file an action based on a breach by the lessee:

In the event Lessor considers that Lessee has not complied with any of its obligations hereunder, Lessor shall notify Lessee in writing setting out specifically in what respects Lessee has breached this contract. Lessee shall then have thirty (30) days after receipt of said notice within which to meet or commence to meet all or any part of the breaches alleged by Lessor. The service of said notice shall be a condition precedent to the bringing of any action by Lessor on said lease for any cause, and no such action shall be brought until the lapse of thirty (30) days after service of said notice on Lessee. \* \* \*

(Id.)

An addendum to the lease included an annual payment to the Bohlers of \$5,500 if total royalties paid is less than that amount:

In the event that during any calendar year the total royalties paid from production of the leased premises, shall be less than the annual rental of \$5,500.00, Lessee shall tender to Lessor such sum that will equal to the \$5,500.00 annual rental payment.

(Id.)

In September 2006, during the primary term of the lease, Alliance drilled and completed Well Nos. 1CM and 2CM on two of the parcels. Well No. 1CM produced 76 MCFs of gas in 2007, but produced no gas after that year. Well No. 1CM never produced any oil, and the well is on a plug list. Well No. 2CM has produced over 4,000 MCF of gas from 2007 through 2012, with the total production declining to 582 MCF by 2011. Alliance continues to operate Well No. 2CM, which has yielded gas production sufficient to yield profits on an annual basis since it began production, and has tendered royalty payments to the Bohlers each year. Well

No. 2CM has not produced any oil. No oil or gas has been produced from the remaining, undrilled portion of the leased premises.

After the lease date, Alliance issued to the Bohlens royalties in the following amounts on the specified dates: \$5,500 (March 2007); \$4,284.83 (January 2008); \$4,172.47 (January 2009); \$4,757.22 (January 2010); \$5,448.51 (January 2011); \$5,141.84 (January 2012); \$5,245.90 (January 2013); and \$5,500 (December 2013). The Bohlens cashed all of the royalty payment checks, except for the last two payments. Alliance failed to make the \$5,500 annual payments specified in the lease addendum, instead coming up short by \$3,949.23 by not making up the difference between the annual royalties and the specified annual payments. In September 2011, Alliance assigned a partial interest in the lease to Anadarko.

In May 2013, the Bohlens filed a complaint against Alliance and Anadarko. The Bohlens sought a declaratory judgment that the oil and gas lease had expired under its own terms, and requested an order for the forfeiture of the lease. Appellants answered, and, following discovery, the Bohlens filed a motion for summary judgment. In their motion, the Bohlens claimed that: (1) the lease is void as a matter of public policy; (2) the lease had terminated because Alliance had failed to pay the annual delay rental payment; and (3) the lease was forfeited for the entire

property due to the lack of oil and gas production, or, in the alternative, forfeited for the portion of the property that did not produce oil or gas.

Alliance and Anadarko filed a joint motion for summary judgment and claimed that: (1) all the leased property is held by the production of gas in Well No. 2CM; (2) the Bohlens waived the right to deny the lease's validity because they continued to accept and cash the royalty checks; (3) forfeiture of the lease is not an appropriate remedy; and (4) the Bohlens failed to comply with the lease's notice requirement.

In April 2014, the trial court granted the Bohlens' motion for summary judgment and denied appellants' motion for summary judgment. The trial court declared that the oil and gas lease was void ab initio because it constituted a no-term, perpetual lease that is against public policy. The trial court further declared that the lease had terminated by its own terms because (1) Alliance had failed to pay the annual rental of \$5,500 when its royalty payments did not completely offset that amount, and (2) Alliance and Anadarko had violated the express and implied terms of the lease by failing to produce sufficient oil or gas from the wells. Thus, the trial court ordered the forfeiture of the lease. This appeal followed.

## STANDARD OF REVIEW

Appellate review of summary judgment decisions is de novo, governed by the standards of Civ.R. 56. *Vacha v. N. Ridgeville*, 136 Ohio St.3d 199, 2013-Ohio-3020, 992 N.E.2d 1126, ¶ 19; *Chase Home Finance, LLC v. Dunlap*, 4th Dist. Ross No. 13CA3409, 2014-Ohio-3484, ¶ 26. Summary judgment is appropriate if the party moving for summary judgment establishes that (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, which is adverse to the party against whom the motion is made. Civ.R. 56(C); *New Destiny Treatment Ctr., Inc. v. Wheeler*, 129 Ohio St.3d 39, 2011-Ohio-2266, 950 N.E.2d 157, ¶ 24; *Settlers Bank v. Burton*, 4th Dist. Washington Nos. 12CA36 and 12CA38, 2014-Ohio-335, ¶ 20.

The moving party has the initial burden, by pointing to summary judgment evidence, of informing the trial court of the basis for the motion and identifying the parts of the record that demonstrate the absence of a genuine issue of material fact on the pertinent claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). Once the moving party meets this initial burden, the non-moving party has the reciprocal burden under Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial. *Id.*; *Chase Home Finance* at ¶ 27.

In addition, this case involves the interpretation of a written contract, which is a matter of law that we review de novo. *Arnott v. Arnott*, 132 Ohio St.3d 401, 2012-Ohio-3208, 972 N.E.2d 586, ¶ 14, quoting *Saunders v. Mortensen*, 101 Ohio St.3d 86, 2004-Ohio-24, 801 N.E.2d 452, ¶ (“ ‘[t]he construction of a written contract is a matter of law that we review de novo’ ”). “Our role is to ascertain and give effect to the intent of the parties, which is presumed to lie in the contract language.” *Boone Coleman Constr., Inc. v. Piketon*, 2014-Ohio-2377, 13 N.E.2d 1190, ¶ 18 (4th Dist.), citing *Arnott* at ¶ 14. “Common words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument.” *Alexander v. Buckeye Pipe Line Co.*, 54 Ohio St.2d 241, 374 N.E.2d 146 (1978), paragraph two of the syllabus, superseded by statute on other grounds; *Harding v. Viking Internat'l. Resources Co., Inc.*, 2013-Ohio-5236, 1 N.E.3d 872, ¶ 12 (4th Dist.).

More specifically, “[t]he rights and remedies of the parties to an oil or gas lease must be determined by the terms of the written instrument” and “[s]uch leases are contracts, and the terms of the contract with the law applicable to such terms must govern the rights and remedies of the parties.” *Harris v. Ohio Oil Co.*, 57 Ohio St. 118, 129, 48 N.E. 502 (1897); *Harding* at ¶

11.

NO-TERM, PERPETUAL LEASE

In their first assignment of error, appellants assert that the trial court erred by holding that the parties' oil and gas lease is a no-term, perpetual lease that offends public policy and is void ab initio.

"The freedom to contract is a deep-seated right that is given deference by the courts." *Cincinnati City School Dist. Bd. of Edn. v. Conners*, 132 Ohio St.3d 468, 2012-Ohio-2447, 974 N.E.2d 78, ¶ 15. However, this deference is not absolute; rather, it is subject to a public-policy exception. *Id.* Under this exception, contracts that bring about results that the law seeks to prevent are unenforceable as being against public policy. *Id.* at ¶ 17. This exception must be narrowly construed because the General Assembly is the ultimate arbiter of public policy. *Id.* citing *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 21.

"It is the public policy of the state of Ohio to encourage oil and gas production when the extraction of those resources can be accomplished without undue threat to the health, safety and welfare of the citizens of Ohio." *Newbury Twp. Bd. of Twp. Trustees v. Lomak Petroleum (Ohio), Inc.*, 62 Ohio St.3d 387, 389, 583 N.E.2d 302 (1992); *Northampton Bldg. Co. v. Sharon Twp. Bd. of Zoning Appeals*, 109 Ohio App.3d 193, 198, 671 N.E.2d 1309 (9th

Dist.1996). In *Ionno v. Glen-Gery Corp.*, 2 Ohio St.3d 131, 443 N.E.2d 504 (1983), at paragraph one of the syllabus, the Supreme Court held that "[a]n annual advance payment which is credited against future royalties under the terms of a mineral lease does not relieve the lessee of his obligation to reasonably develop the land." In so holding, the court observed that long-term leases under which there is no development are contrary to public policy:

The fact that the lessees have continued to make annual payments for a period of over eighteen years does not alter their responsibility to develop the land within a reasonable time. The questions of working diligently and of paying rent or royalties are entirely separate matters. An annual advance payment which is credited against future royalties cannot be viewed as a substitute for timely development. To hold otherwise would be to reward mere speculation without development, effort, or expenditure on the part of the lessees. It would allow a lessee to encumber a lessor's property in perpetuity merely by paying an annual sum. Such long-term leases under which there is no development impede the mining of mineral lands and are against public policy.

*Id.* at 134.

In the case sub judice, the trial court determined that the parties' lease is a no-term, perpetual lease because (1) its habendum clause gave Alliance the unilateral right to extend the term of the lease by merely exercising its judgment about whether the premises can produce oil and gas without any time restriction on actually developing the land, (2) it authorized Alliance to pay the annual delay rental indefinitely in order to hold the

lease without ever developing the land, and (3) it gave Alliance the unfettered right to terminate the lease by surrender.

We, however, believe that the trial court erred for the following reasons. First, although the law disfavors perpetual leases, courts have not found them to be per se illegal or void ab initio. See *Hupp v. Beck Energy Corp.*, 2014-Ohio-4255, \_\_\_ N.E.3d \_\_\_, ¶ 82 (7th Dist.), citing *Myers v. East Ohio Gas*, 51 Ohio St.2d 121, 364 N.E.2d 1369 (1977), *Hallock v. Kintzler*, 142 Ohio St. 287, 51 N.E.2d 905 (1943), and *Central Ohio Natural Gas & Fuel Co. v. Eckert*, 70 Ohio St. 127, 71 N.E. 281 (1904); see also *Regency Plaza, L.L.C. v. Morantz*, 10th Dist. Franklin No. 06AP-837, ¶ 24, citing *President & Trustees of Ohio Univ. v. The Athens Livestock Sales, Inc.*, 115 Ohio App. 21, 179 N.E. 382 (4th Dist.1961) ("although perpetual leases are not favored, the Supreme Court recognized in *Hallock* that a clear intention to create a perpetuity is enforceable").

Second, the parties' oil and gas lease in the case at bar is not a no-term lease. The habendum clause of the lease contains a primary term of one year and a secondary term of indefinite duration as long as "oil or gas \* \* \* are produced or are capable of being produced on the premises in paying quantities, in the sole judgment of the Lessee \* \* \*." *Hupp* at ¶ 86-90; see also *Kuehnle and Levey, Ohio Real Estate Law*, Section 47:6 (2013) (the duration of an oil and gas lease is determined by the habendum

clause, which includes a primary term of definite duration and a secondary term of indefinite duration). The presence of a primary term distinguishes the lease in this case from the no-term *Ionno* lease that included no primary term during which major actions, like the commencement of a well, were required. *Hupp* at ¶ 115.

Third, notwithstanding the trial court's contrary conclusion, the parties' lease did not permit Alliance to extend the lease in perpetuity by paying a delay rental fee. "Under established case law, once the primary term of the Lease expires, the delay rental provision is no longer applicable." *Hupp* at ¶ 99; see also *Northwestern Ohio Natural Gas Co. v. Tiffin*, 59 Ohio St. 420, 54 N.E. 77 (1899); *Brown v. Fowler*, 65 Ohio St. 507, 63 N.E. 76 (1902); *Ohio Real Estate Law* at Section 47:9

("Traditional oil and gas leases in Ohio contain a 'drill or pay clause," which is also known as a delay rental provision. This provision allows the lessee to defer drilling a well during the primary term of an oil and gas lease by compensating the lessor for the delay").

Fourth, the trial court found that the addition of the language "in the sole judgment of the Lessee" in the secondary term of the habendum clause gave Alliance the unilateral right to extend the term of lease by merely exercising its judgment; whether the premises was capable of production without actually

developing the land. However, as the Seventh District Court of Appeals held:

[T]he trial court incorrectly reasoned that the addition of the language "in the judgment of Lessee" to the secondary term of the habendum clause, permits the Lease to continue in perpetuity at Beck's sole discretion. The full portion of the habendum clause reads: "are produced or are capable of being produced on the premises in paying quantities, in the judgment of the Lessee." The Landowners and the trial court over-parsed the phrase. The phrase does leave it to the judgment of the Lessee to determine whether a well is in fact or capable of *producing in paying quantities*. It would be contrary to the joint economic interest of both a landowner and the lessee to continue drilling if it was no longer financially feasible. Under these conditions, the lease would end and the lessee's interest in the mineral rights would expire; it would not continue in perpetuity. Further, clauses dealing with paying quantities have not been invalidated or read as making an entire lease void ab initio. They do not necessarily allow the lessee to arbitrarily determine whether a well is capable of production.

Rather, courts generally impose a good faith standard on the paying quantities requirement, with or without this lease language. See, e.g., *T.W. Phillips Gas and Oil Co. v. Jedlicka*, 615 Pa. 199, 216-224, 42 A.3d 261, fn. 15 (2012); *Cotton v. Upham Gas Co.*, 5th Dist. No. 86CA20, 1987 WL 8741, \*1 (Mar. 6, 1987) ("As between lessor and lessee, the construction of the phrase 'paying quantities' must be from the standpoint of the lessee and his 'good faith judgment' that production is in paying quantities must prevail."); *Weisant v. Follett*, 17 Ohio App. 371 (7th Dist. 1922) (reviewing cases in various states for propositions such as: "The lessee, acting in good faith and upon his honest judgment, not an arbitrary judgment"; "His judgment, when bona fide, is entitled to great weight in determining whether the gas is in fact produced in paying quantities"; "the lessee is the sole judge on this question, and as long as he can make a profit therefrom, he will be permitted to do so"; and "largely left to his good judgment").

*Hupp*, 2014-Ohio-4255, \_\_\_ N.E.2d \_\_\_, ¶ 102-103 (emphasis sic).

Therefore, we conclude that the trial court erred by holding that the parties' oil and gas lease is a no-term, perpetual lease that is contrary to public policy and void ab initio. Accordingly, we hereby sustain appellants' first assignment of error.

TERMINATION OF LEASE BY ITS OWN TERMS  
FOR FAILURE TO MAKE ANNUAL PAYMENTS

In their second assignment of error, appellants assert that the trial court erred by holding that the oil and gas lease terminated by its own terms as a result of their failure to make annual rental payments. The trial court determined that the addendum to the lease "expands the annual delay rental payment beyond the commencement of a well; but also to circumstances where insufficient production results in annual royalties below the annual delay rental of \$5,500," which resulted in "automatic grounds for termination of the Lease" when Alliance was short on its annual payments by \$3,949.23.

We, however, believe that the lease's plain language does not make the addendum part of the delay rental provision. The delay rental provision specifies that the lease becomes "null and void" and the parties' rights thereunder "shall cease and terminate" unless the lessee pays a delay rental of \$5,500 each year "for the privilege of deferring the commencement of a well." It further states that a well is deemed commenced, for purposes of the delay rental provision, "when drilling operations have commenced on the lease premises."

By contrast, the addendum requires that if, during any year, the amount of total royalties paid from production of the leased premises is less than the annual rental amount of \$5,500, Alliance would pay to the Bohlers the sum that would make up the deficit. The addendum does not provide that a failure to comply with the payment provision would result in the lease being void or terminated. To us, it appears that the trial court conflated these two provisions when neither the lease language nor the summary-judgment evidence supported that interpretation. As we noted previously, our construction of the lease is consistent with established precedent that generally limits the application of the delay rental provision to the primary term of the lease. See *Hupp*, 2014-Ohio-4255, \_\_\_ N.E.3d \_\_\_, ¶ 99; *Ohio Real Estate Law* at Section 47:9.

We also believe that the Bohlers' reliance on *Price v. K.A. Brown Oil and Gas, LLC*, 7th Dist. Monroe No. 13 MO 13, 2014-Ohio-2298, and *Beaverkettle Farms, Ltd. v. Chesapeake Appalachia, LLC*, N.D. Ohio No. 4:11CV02631, 2013 WL 4679950, to assert that the addendum provision extended the delay rental provision beyond the primary term of the lease, is misplaced. These cases involved lease termination provisions that are not comparable to those at issue here. *Price* involved an oil and gas lease that provided that the lease terminated if two existing wells were not put into production by a specified date. *Beaverkettle* involved an oil and

gas lease that required the lessee to pay delay rentals for undrilled acreages without limitation. Neither of these holdings controls the lease here.

Instead, we believe that in the case at bar the delay-rental provision was limited by the unambiguous terms of the lease until drilling operations had commenced on the premises. Because Alliance began drilling its wells in 2007, the termination provision never became effective. Nothing in the addendum altered the limited impact of this provision. Therefore, we conclude that the trial court erred by holding that the parties' oil and gas lease terminated under its own terms when Alliance failed to pay the full \$5,500 annual amount due under the addendum to the lease. Accordingly, we hereby sustain appellants' second assignment of error.

EXPIRATION OF LEASE ON ITS OWN TERMS  
FOR FAILURE TO PRODUCE OIL OR GAS IN PAYING QUANTITIES  
AND FAILURE TO REASONABLY DEVELOP THE PROPERTY

In their third assignment of error, appellants argue that the trial court erred by ruling that the production was not in paying quantities. In their fifth assignment of error, appellants contend that the trial court erred by holding that the lease provisions that disclaimed implied covenants did not disclaim the implied covenant to reasonably develop the land.

The trial court concluded that (1) the oil and gas lease expired by its own terms because appellants failed to produce

sufficient quantities of oil or gas during the secondary term of the lease, and (2) appellants had breached the implied covenant of reasonable development. Under the secondary term of the habendum clause of the lease, after the first one-year term, the lease continued as long "as oil or gas \* \* \* are produced or are capable of being produced or are capable of being produced on the premises in paying quantities, in the sole judgment of the Lessee." "The term 'paying quantities,' when used in the habendum clause of an oil and gas lease, has been construed by the weight of authority to mean 'quantities of oil or gas sufficient to yield a profit, even small, to the lessee over operating expenses, even though the drilling costs, or equipping costs, are not recovered, and even though the undertaking as a whole may thus result in a loss.'" *Blausey v. Stein*, 61 Ohio St.2d 264, 265-266, 400 N.E.2d 408 (1980), quoting Annotation; *Gardner v. Oxford Oil*, 2013-Ohio-5885, 7 N.E.3d 510, ¶ 37 (7th Dist.). We have previously held that "[s]uch language indicates it is for lessee to determine if a profit is being generated above the amount of operating expenses. The amount of royalties paid has no relevancy as to whether a well is actually 'producing in a paying quantity.'" " *Siley v. Remmele*, 4th Dist. Washington No. 86 CA 6, 1987 WL 7585, \*3. As the parties' lease emphasizes, " 'the construction of the phrase 'paying quantities' must be from the standpoint of the lessee and [its] 'good faith judgment'

that production is in paying quantities must prevail.' " *Hupp*, 2014-Ohio-4255, at ¶ 103, quoting *Cotton*, 1987 WL 8741, at \*1; see also *Litton v. Geisler*, 80 Ohio App. 491, 496, 76 N.E.2d 741 (4th Dist.1945) ("The prevailing rule seems to be that the phrase 'paying quantities' is to be construed from the standpoint of the lessee, and by his judgment if exercised in good faith").

Here, the summary judgment evidence established that Well No. 2CM has continued, during the secondary term of the lease, to produce gas in paying quantities that have yielded profits to Alliance and resulted in royalty payments to the Bohlers. Further, we find nothing to indicate that appellants' determination that the lease premises continues to produce gas in paying quantities was not made in good faith.

The trial court relied on *Moore v. Adams*, 5th Dist. Tuscarawas No. 2007AP090066, 2008-Ohio-5953, and *Tedrow v. Shaffer*, 23 Ohio App. 343, 155 N.E. 510 (4th Dist.1926), to reach a contrary conclusion. In *Moore*, there had been no production of gas for over six years. In *Tedrow*, the day that the lease expired a few gallons of oil were produced for the first time in over seven years. Here, however, appellants produced gas in paying quantities every year that the lease has been in effect.

The trial court next held that, assuming that appellants complied with the express terms of the habendum clause by producing gas, they breached the implied covenant to reasonably

develop the property by not producing sufficient amounts of oil or gas. Under an oil and gas lease that is silent about the number of wells to be drilled, an implied covenant exists that the lessee shall reasonably develop the land by drilling and operating the number of wells as would ordinarily be required for the production of oil or gas. *Harris*, 57 Ohio St. at 127, 48 N.E. 502; *Ohio Real Estate Law* at Section 47:18.

Nevertheless, "[w]hile gas and oil leases contain an implied covenant requiring the lessee to reasonably develop the leased property, Ohio courts have consistently enforced express provisions in such leases that disclaim the implied covenant." "*Bilbaran Farm, Inc. v. Bakerwell, Inc.*, 2013-Ohio-2487, 993 N.E.2d 795, ¶ 18, quoting *Bushman v. MFC Drilling Inc.*, 9th Dist. Medina No. 2403-M, 1995 WL 434409, \*2; see also *Taylor v. MFC Drilling, Inc.*, 4th Dist. Hocking No. 94CA14, 1995 WL 89710.

"[A]n implied covenant can only be construed in a lease if there are no express provisions to the contrary," and "[w]here the lease specifies that no implied covenant shall be read into the agreement, an implied covenant to develop \* \* \* cannot be imposed." See *Hupp*, 2014-Ohio-4255, at ¶ 115, and cases cited therein. Thus, even a general provision disclaiming implied covenants is sufficient to disclaim an implied covenant to develop the property.

Here, the lease contained both a general provision that disclaimed all implied covenants as well as a more specific provision that disclaimed all implied covenants relating to production. Thus, based on the applicable precedent, the parties disclaimed the implied covenant to reasonably develop the land. *Hupp* at ¶ 122; *Bilbaran Farm* at ¶ 21; *Bushman* at \*2.

Moreover, the Bohlens' alternative argument that the production of paying quantities of gas from Well No. 2CM is insufficient to preclude the forfeiture of the remaining, undeveloped 413 acres of leased property also lacks merit. This argument is based on the erroneous claim that appellants breached the implied covenant to reasonably develop the property. See *Beer v. Griffith*, 61 Ohio St.2d 119, 399 N.E.2d 1227 (1980), paragraph four of the syllabus ("Where remedies are inadequate, forfeiture or cancellation of an oil and gas lease, in whole or in part, is an appropriate remedy for a lessee's violation of an implied covenant"). Additionally, this case does not involve a violation of an express lease term to drill "a sufficient number of wells to fully develop" the land. See *Coffinberry v. Sun Oil Co.*, 68 Ohio St. 488, 67 N.E. 1069 (1903). Here, the parties' lease did not require that Alliance drill on each noncontiguous tract of land. Consequently, we believe that the Bohlens' citation of these cases to support their claim for partial forfeiture is misplaced.

Therefore, we conclude that the trial court erred by holding that the parties' oil and gas lease expired because of appellants' failure to produce oil or gas in paying quantities or to reasonably develop property. Accordingly, we hereby sustain appellants' third and fifth assignments of error.

FORFEITURE AND FAILURE TO  
PROVIDE NOTICE OF BREACH

In their fourth assignment of error, appellants assert that the trial court erred by ruling that forfeiture of the lease is an appropriate remedy. In their seventh assignment of error, the appellants argue that the trial court erred by holding that the Bohlers' claims are barred as a result of their failure to provide notice of breach.

Because the trial court's decisions on these matters were premised on its rationale that the lease is void and had either terminated or expired under its own terms, we hereby sustain these assignments of error for the reasons previously discussed.

REMAINING CLAIM

In their sixth assignment of error, appellants assert that the trial court erred by holding that the doctrines of estoppel and waiver are inapplicable and did not prevent the Bohlers from denying the validity of the lease.

Because we have held that the trial court's summary judgment in favor of the Bohlens' declaratory judgment action and request for forfeiture of the lease is erroneous, we need not address this issue because it has been rendered moot. See App.R. 12(A)(1)(c).

CONCLUSION

Therefore, having sustained appellants' first, second, third, fourth, fifth, and seventh assignments of error, we hereby reverse the trial court's judgment and remand the cause for further proceedings consistent with this opinion.

JUDGMENT REVERSED AND  
CAUSE REMANDED FOR  
PROCEEDINGS CONSISTENT  
WITH THIS OPINION.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS REVERSED and that the CAUSE IS REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. Appellees shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

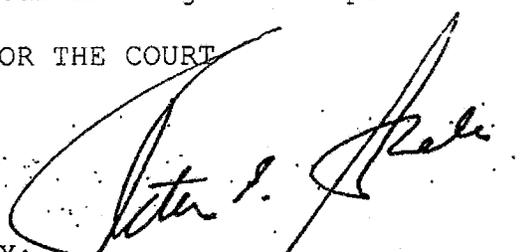
It is ordered that a special mandate issue out of this Court directing the Washington County Court of Common Pleas to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

McFarland, J. & Hoover, J.: Concur in Judgment & Opinion

FOR THE COURT

BY: 

Peter B. Abele  
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.