

ORIGINAL

IN THE SUPREME COURT OF OHIO

RONALD BOHLEN, *et al.*,

Plaintiffs-Appellants,

v.

ANADARKO E&P ONSHORE LLC, *et al.*,

Defendants-Appellees.

Case No. 2015-0187

On Appeal from the Fourth District Court of Appeals, Washington County

Court of Appeals Case No. 14CA13

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MEMORANDUM IN RESPONSE TO JURISDICTION OF APPELLEES ARTEX ENERGY GROUP LLC, SUCCESSOR IN INTEREST TO ANADARKO E&P ONSHORE LLC, AND, ALLIANCE PETROLEUM CORPORATION

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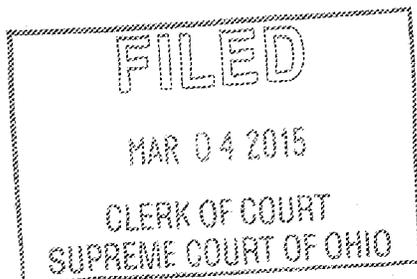
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**I. THE FOURTH DISTRICT COURT OF APPEALS DECISION APPLIES LONGSTANDING PRECEDENT TO UNAMBIGUOUS LANGUAGE IN AN OIL AND GAS LEASE, AND THUS THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST.**

The first sentence of Appellants Ronald and Barbara Bohlen's ("Appellants") Memorandum in Support of Jurisdiction ("Appellants' Memo") asks this court to uphold the fundamental rule of law that a contract be "interpreted and enforced, as written." (Appellants' Memo, p. 1). There is, and can be, no disagreement on that principle.

Indeed, the Decision and Judgment Entry of the Fourth District Court of Appeals ("Decision") embraced this principle and does not, by any stretch of the imagination, disturb or detract from Ohio's law of contract. (The Decision is included in the Appendix to Appellants' Memo). The Decision is well within Ohio's jurisprudence. It cited to and applied sound precedent of this court. The Fourth District found the oil and gas lease before it to be "unambiguous." Decision, at 17. The Fourth District did precisely what Appellants say it must: the court enforced the "plain language" of the lease as written. *See Id.* at 15. In an odd twist, it is the Appellants who undermine these very principles in an effort to avoid enforcement of the contract they made and the explicit language contained therein.

The sum and substance of Appellants' Memo on propositions one through four is that this court should find that the Court of Appeals made an error in "re-interpreting the terms of an oil and gas lease . . ." (Appellants' Memo, p. 1). The Ohio Constitution provides that this court may exercise jurisdiction over civil cases involving public or great general interest. Article IV, Section 2(B)(2)(e). The onus is on Appellants to demonstrate that the case is of public or great general interest. S.Ct.Prac.R. 7.02(C)(2). Whether a court of appeals enforced a contract as written, or made an error in interpreting language, is hardly the nature of a discretionary grant of

jurisdiction. And, there is no need for this court to accept jurisdiction of this case to reiterate that a contract should be enforced as written.

Going to the merits, it is Appellants, not the Fourth District, who are in error. From the inception of this litigation, and in order to re-write the contract, Appellants have conflated the following two provisions contained in the oil and gas lease and an addendum thereto (together, the "Lease"): (1) Section 3, which provides for automatic termination of the Lease *prior to the end of the primary term* upon the lessee's failure to pay an annual "delay rental" of \$5,500.00, *or*, commence a well (the "delay rental provision"); and (2) Paragraph 1 of the Addendum, which requires lessee to pay an amount equal to the "annual rental" of \$5,500.00 if the annual royalty from ongoing oil and gas production is less than \$5,500.00 (what Appellants refer to as the "annual rental provision"). Having improperly conflated these provisions, Appellants build upon their error by invoking the automatic lease termination that applies only to the first, but not the second, of the provisions. By improperly construing the two provisions, Appellants attempt to re-write and re-interpret the contract in order to expand the applicability of the automatic termination provision.

The Fourth District Court of Appeals did not accept this inappropriate interpretation of the Lease. The court rightly found the plain language of the Lease to be "unambiguous" and determined that the delay rental provision (and related automatic termination provision) applied solely to the primary term of the Lease. Further, the court found that the minimum royalty provision applied solely to the secondary term of the Lease. Decision, at 15-17. The Fourth District, thus, correctly concluded that automatic termination of the Lease would not result from a failure to pay the amount required in the secondary term under Paragraph 1 of the Addendum.

By enforcing the “plain language” of the contract, the Court of Appeals reversed a trial court decision that had accepted Appellants’ inaccurate interpretation, misconstrued the Lease and ignored longstanding Ohio law. In its carefully reasoned Decision, the Fourth District also upheld over 100 years of Ohio oil and gas law precedent. So, the Fourth District’s Decision does not reach novel or unsettled issues. Rather, the application of longstanding precedent to enforce “unambiguous” language of an oil and gas lease is an exemplary performance by the Fourth District, and each of the first four propositions do not rise to the level of public and great general interest.

Turning to their fifth proposition, Appellants make another misinterpretation. Appellants argue that the facts of this case are similar to the wholly distinguishable facts found in *Hupp v. Beck Energy Corp.*, Monroe C.P. No. 2011-345, 2012 Ohio Misc. LEXIS 245 (Sept. 28, 2012), *rev’d*, 7<sup>th</sup> Dist. Nos. 12 MO 6, 13 MO 2, 13 MO 3, 13 MO 11, 2014-Ohio-4255 (Sept. 26, 2014). The conflation formed the basis for the trial court to decide, wrongly, that the facts of this case fell within the trial court’s earlier decision in *Hupp v. Beck*. The conflation had its intended effect, and that resulted in a wrong decision on the wrong facts and wrong law.

The Court of Appeals recognized the facts are substantially different, and specifically noted the oil and gas lease here “is not a no term lease.” Decision, at 12. Given that the facts here are markedly different than those in *Hupp v. Beck*, the case at bar necessarily falls outside the two propositions of law accepted by this court in *Hupp v. Beck*. Both propositions concern an extension of a lease where there has been no development of oil and gas, thereby resulting in a claim of a “no term lease.” *Hupp*, 2014-Ohio-4255, at ¶11, ¶81. Those are not the facts in the case at bar. Here, development in fact occurred, and oil and gas is being produced. Substantial funds were spent, oil and gas wells were drilled, and production of oil and gas continues in

paying quantities. Decision, at 5. The facts here present the normal and customary circumstances found in the operation of an oil and gas lease during the *secondary* term where the lease continues by virtue of production, *i.e.* the lease is held by ongoing production of oil and gas in paying quantities. *Id.* at 19.

Appellants ignore these clear factual distinctions drawn by the Fourth District and continue to promote their own re-write of the contract. However, facts are stubborn things. That wells were drilled and oil and gas production is ongoing stands in marked contrast to circumstances where no wells have been drilled and no production has occurred. Appellants' conflation does not change the facts. Simply put, Appellants cannot base their claim to jurisdiction on a case which is wholly distinguishable.

Accordingly, Appellees Artex Energy Group LLC, successor in interest to Anadarko E&P Onshore LLC<sup>1</sup>, and Alliance Petroleum Corporation (collectively "Appellees"), respectfully ask that the court decline jurisdiction.

## II. ARGUMENT

### A. **Response to 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.**

Appellees agree that an oil and gas lease should be enforced as written. That is precisely what the Fourth District Court of Appeals did in its Decision.

The subject Lease, and every typical oil and gas lease, contains a habendum clause that establishes the term of the lease:

The habendum clause in the oil and gas lease is two tiered. The first tier, or primary term, is of definite duration . . . The second tier is of indefinite duration

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<sup>1</sup> In late 2014, Anadarko E&P Onshore LLC conveyed 100% of its right, title and interest in the oil and gas lease and addendum at issue in this litigation to Artex Energy Group LLC, who assumed all rights, responsibilities and obligations Anadarko previously had under the lease.

and operates to extend the lessee's rights under the lease so long as the conditions of the secondary term are met. *American Energy Services, Inc. v. Lekan*, 75 Ohio App. 3d 205, 212, 598 N.E.2d 1319 (5th Dist. 1992).

See also *Moore v. Adams*, 5th Dist. No. 2007AP090066, 2008-Ohio-5953, ¶ 26. As explained by this court in its 1902 decision in *Brown v. Fowler*, "by the aid given by the habendum clause to the granting clause, the length of the term of the lease is settled and definitely fixed." 65 Ohio St. 507, 521-522, 63 N.E. 76, 78 (1902).

Section 2 of the Lease contains the habendum clause, which establishes the duration of both the primary and secondary terms:

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.

The "primary term" is the stated length of time (one year) for a well to be drilled. The "secondary term" is the length of time, after a well has been drilled, that oil and gas is produced in paying quantities.

Often, as does the Lease here, an oil and gas lease also contains a "delay rental" provision, which is concerned with maintaining the lease in effect during the *primary* term. See Williams & Meyers, *Oil & Gas Law, Terms* (2014) (defining "delay rental payment" as "a sum of money payable to the lessor by the lessee for the privilege of deferring the commencement of drilling operations or the commencement of production during the primary term of the lease."). The delay rental provision (often referred to as a "drill or pay clause") operates to terminate the lease before the end of the *primary* term, unless the lessee either: (1) pays a stipulated delay rental, or (2) commences a well. Williams & Meyers, §605. Unless an oil and gas lease

explicitly provides otherwise, a delay rental provision is not applicable during the secondary term.

The delay rental provision contained in the Lease provides:

This lease, however, shall become null and void and all rights of either party hereunder shall cease and terminate unless, 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 lease premises . . . (Section 3).

Finding the plain language of these provisions to be “unambiguous,” the Fourth District Court of Appeals rightly concluded that the delay rental provision, and its automatic termination provision, were limited to the right to defer commencement of a well during the *primary* term and had nothing to do with the separate and distinct annual payment of a minimum additional amount during the *secondary* term if production did not reach a royalty of \$5,500. Decision, at 17.

**B. Response to 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.**

The delay rental provision of this Lease has a very specific purpose—to terminate the lease *prior to the end of the primary term*, unless certain conditions are being met. The operation of a delay rental provision is not a new concept. In 1902, this court considered the operation of a delay rental provision that read as follows:

In case no well shall be drilled on said premises within twelve months from the date thereof, this lease shall become null and void, unless the lessee shall pay for the further delay at the rate of one dollar per acre at or before the end of each year thereafter until a well shall be drilled. *Fowler*, 65 Ohio St. at 522, 63 N.E. 76.

The court’s construction of this provision, which is comparable to the delay rental provision of the Lease, was as clear and unequivocal as its construction of the habendum clause of the Lease:

*This clause clearly means that the lease may be made to terminate in less time*

*than two years, that is at the end of twelve months, by a failure to drill a well on the premises within the twelve months; but that the lessee may prevent such termination of the lease at the end of twelve months by paying for further delay at the rate of one dollar per acre, at or before the end of each year thereafter, until a well shall be drilled. That is, the payment must be made at or before the end of the second year of the lease, and the further delay cannot be beyond the term of two years fixed as the lifetime of the lease. And the words "until a well shall be drilled," mean until a well shall be drilled within the two years, the term of the lease. So that this clause cannot have the effect in any event to extend the lease beyond the two years definitely and certainly fixed in the habendum clause. (Emphasis added). Id. at 522-523.*

Further, this court, in *Van Etten v. Kelly*, considered a delay rental provision with the following language:

*In case no well is completed within thirty days from this date, then this grant shall become null and void, unless second party shall pay to said first party thirty dollars each and every month in advance while such completion is delayed. 66 Ohio St. 605, 609-610, 64 N.E. 560 (1902).*

This court opined:

*The full force and effect of this "unless" clause, taken by itself, is, to give the lessee the option by making such payment to continue the lease in force to the end of the term without completing the first well, or upon failure to make such payment, allow the lease to become null and void at the end of the thirty days after the date of the lease. (Emphasis added). Id. at 610, citing Folwer at 507.*

The "annual rental" provision contained in Paragraph 1 of the Addendum, on the other hand, operates in a totally different way. Paragraph 1 of the Addendum provides:

*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. (Emphasis added).*

This language does not provide for an extension of the time for *drilling* within the *primary* term or relate to a basis for termination as a result of failing to *drill* within the *primary* term. This language creates an obligation to pay a minimum amount of royalties to the lessor "[i]n 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." *Id.*

While it is indisputable that the amount of the minimum payment specified in Paragraph 1 of the Addendum is the same amount as the *delay* rental specified in Section 3 of the Lease, it is equally clear that the amount referred to in the Addendum is payable *only if*, “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.*” Although the words “minimum royalty” are admittedly not employed, the language chosen by the parties clearly described a minimum royalty payment, which requires the minimum payment of \$5,500.00 per annum, in such case as the actual royalties from production are less than that amount.

Part of the confusion at the trial court level appears to have resulted from Appellants’ continual assertion that Paragraph 1 of the Addendum contained the phrase “annual *delay* rental,” which it clearly does not. The Fourth District Court of Appeals recognized the plain meaning of the language setting forth the minimum annual rental and corrected the error of the trial court. Decision, at 5, 13.

**C. Response to 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 have relied primarily upon the United States District Court for the Northern District of Ohio’s decision in *Beaverkettle Farms, Ltd. v. Chesapeake Appalachia, LLC*, for the contention that delay rentals may not necessarily apply to the primary term and that the Lease language should be construed in such a way that delay rentals were required to be paid past the primary term. N.D. Ohio No. 4:11CV02631, 2013 U.S. Dist. LEXIS 124509 (Aug. 30, 2013). In doing so, Appellants misapply the law.

In *Beaverkettle Farms*, the District Court determined that it could not grant summary judgment on the matter because there was a genuine issue of material fact to be resolved at trial as to the parties’ understanding of the term “delay rental” as used in the lease in question and

whether such payments were required during the secondary term. *Id.* at \*51. The requirement to pay delay rentals was clearly an issue open to interpretation in *Beaverkettle*, as the lease at issue: (1) required a delay rental of \$10 per acre be paid for each acre not contained in an approved drilling plat; and (2) provided that lessee would be “entitled to maintain all undrilled acreage under [the] Lease by paying delay rentals . . .” once a well was drilled. *Id.* at \*36. In this case, unlike in *Beaverkettle*, there are no terms contained in the Lease that would support any contention that the Lease was intended to be divisible, or that delay rentals were required to be paid after the primary term.

The Lease at issue in this case provided that it would terminate unless lessee paid an annual delay rental of \$5,500.00 each year “for the privilege of deferring the commencement of a well.” Pursuant to the terms of the Lease, “a well shall be deemed commenced **when drilling operations have commenced on lease premises.**” Once Alliance commenced drilling the first well on the Appellants’ property, delay rental payments were no longer required to be paid and the Lease continued into its secondary term. Once in its *secondary* term, the “minimum royalty” provision contained in Paragraph 1 of the Addendum applied, and lessee was required to pay \$5,500 annually to lessors only if the production royalties for that year amounted to less than \$5,500. The failure to pay that amount, however, does not mean that the parties then look back to the delay rental provision regarding the *primary* term in order to determine whether the Lease terminated.

The Fourth District Court of Appeals correctly maintained the distinction between the provisions and the primary and secondary terms. A straightforward reading of the plain language of the Lease results in a conclusion that failure to make payments in connection with Paragraph 1 of the Addendum does not result in automatic termination of the Lease.

Further, contrary to Appellants' assertion, the Lease was *not* drafted to ensure the drilling of multiple wells on multiple tracts. The Lease provides lessee the exclusive right to "the following described lands ("subject property/lands," "leased premises," *etc.*) for the purpose of exploring, drilling, operating for, producing and removing oil and gas and all the constituents thereof . . ." The "subject property/lands," "leased premises," *etc.* is described in Section 1 of the Lease as:

Being all that certain tract of land situated in Section No. 7-25-26-31-32 of Lawrence Township, Washington County, Ohio bounded substantially as follows:

North by lands of fully described in the deeds referenced below  
East by lands of and Washington County Auditor's tax records  
South by lands of \_\_\_\_\_  
West by lands of \_\_\_\_\_

Parcels Nos. 18-64896.000, 18-64900.000, 18-63940.005, 18-94704.000, 18-64708.000, 18-64712.000, 18-64716.000, 18-64720.000, 18-64724.000, 18-64904.000, 18-64908.000, and 18-66676.000

Being all the property owned by Lessor or to which Lessor may have any rights in Section/Lot/District or adjoining Sections/Lot/Districts, containing 500 acres, more or less, and being the property described in the following deeds: Deed Volume 552, Page 217; Deed Volume 586, Page 525; Deed Volume 713, Page 140; Deed Volume 713, Page 440; Official Records Volume 276, Page 543; and Official Records Volume 293, Page 658.

(Blanks in original; hereinafter referred to as "the Property"). With the exception of Section 1 where the Property is described, no other provisions contained in the Lease refer to the parcels or tracts of land as distinct from one another or expressly imposes an obligation to drill more than one well.

**D. Response to Proposition of Law No. 4: If a provision in an oil and gas lease is ambiguous, it must be construed against the lessee.**

Appellants' fourth proposition of law has no basis in law or fact. First, the court of Appeals did not find any ambiguity in the Lease or the Addendum. Accordingly, Appellants have no basis to submit this argument as a proposition of law before this court.

Second, the law in Ohio regarding contract interpretation is clear: “A court must construe a contract against the party who drew it.” *Graham v. Drydock Coal Co.*, 76 Ohio St. 3d 311, 313, 667 N.E.2d 949 (1996), citing *Central Realty Co. v. Clutter*, 62 Ohio St. 2d 411, 406 N.E.2d 515 (1980). Appellants acknowledge this. Appellants’ Memo, p. 12. Furthermore, the record below indicates that Appellants, not Alliance, drafted Paragraph 1 of the Addendum. Appellants have presented no cognizable basis for this court to depart from such precedent.

**E. Response to Proposition of Law No.5: An oil and gas lease may not indefinitely forestall production by payment of rentals.**

Appellants characterize the facts of this case as analogous to those of *Hupp v. Beck* in hopes that this court will likewise accept jurisdiction. Appellants contend that “the lease and addendum in this case would allow Alliance to postpone further development by the payment of rentals.” Memo, p. 13. This is just not the case. Appellants distort the scope and reach of the facts of this case and the habendum clause of this Lease.

Under its habendum clause, the Lease had a *primary* term of one year. By making payment of the stipulated delay rental, Alliance could have deferred commencement of drilling for another year within the *primary* term. Had Alliance failed either to commence the drilling of a well or to pay the stipulated delay rental, the Lease would have terminated automatically, by operation of law and the terms of the Lease itself, at the end of the one-year primary term.

This did not and, under the clear and unambiguous terms of the Lease, *could* not, happen because Alliance more than fully satisfied its contractual obligations by *both* paying the stipulated delay rental *and* commenced drilling two wells. Alliance commenced drilling within the *primary* term and the delay rental clause was never invoked. The *secondary* term of the Lease began due to production in paying quantities. And, the secondary term continues in force

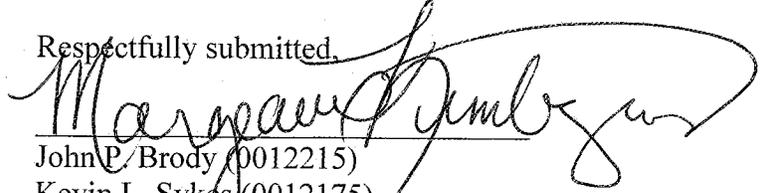
due to the ongoing oil and gas production in paying quantities. There is no similarity with *Hupp v. Beck*.

Finally, there is no rational basis to support Appellants' contention that the lessee under this Lease could hypothetically postpone development in perpetuity. Of course, this is a hypothetical consideration because Appellee Alliance Petroleum Corporation did commence drilling within the primary term. Even in a hypothetical world where no drilling occurred, Appellants' argument fails because the Fourth District's straightforward reading of the plain and unambiguous language of the Lease fits within the rule of construction that directs courts to construe a lease in a manner that *avoids* a finding of perpetual duration. *President & Trustees of Ohio Univ. v. Athens Livestock Sales*, 115 Ohio App. 21, 22-23, 179 N.E.2d 382, 384 (4th Dist. 1961); *see also Regency Plaza, LLC v. Morantz*, 10th Dist. No. 06AP-837, 2007-Ohio-2594, ¶ 19, *discretionary appeal not allowed*, 2007-Ohio-5567, 2007 Ohio LEXIS 2621; *Phillips Exploration, Inc. v. Reitz*, S.D. Ohio No. 2:11-cv-920, 2012 U.S. Dist. LEXIS 178644, 16-17 (Dec. 18, 2012). Under this time-honored precedent, the plain language of the unambiguous habendum and delay rental provisions of the Lease inescapably lead to the finding made by the Fourth District—this Lease is not a “no term” lease. Decision, at 12.

### III. CONCLUSION

Appellants' proposed propositions of law are not of public or great general interest as to meet the standard necessary for this court to accept jurisdiction.

Respectfully submitted,



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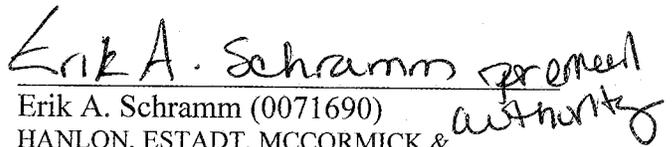
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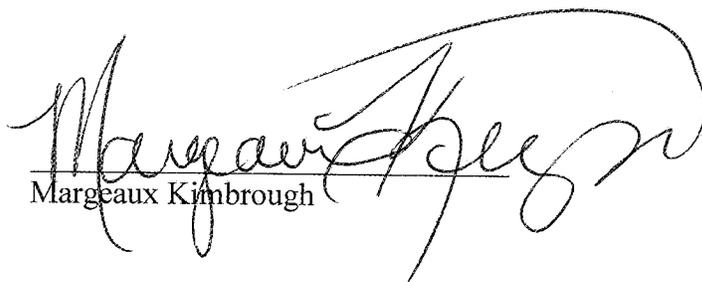
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**CERTIFICATE OF SERVICE**

This certifies that a copy of the foregoing *Memorandum of Appellees in Response to Jurisdiction* has been served via electronic and U.S. ordinary mail, on this 4<sup>th</sup> day of March, 2015, upon the following:

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