ORIGINAL

NO. 2015-0187

IN THE SUPREME COURT OF OHIO

ON APPEAL FROM THE WASHINGTON COUNTY COURT OF APPEALS
FOURTH APPELLATE DISTRICT

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

v.

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

MERIT BRIEF OF APPELLANTS RONALD AND BARBARA BOHLEN

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii

I. STATEMENT OF FACTS.....1

II. ARGUMENT.....6

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.....6

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.....6

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.....6

Proposition of Law No. 4: An oil and gas lease may not indefinitely forestall production by payment of rentals.....15

III. CONCLUSION.....16

CERTIFICATE OF SERVICE.....18

APPENDICES **Appx. Pg.**

Appendix A: Notice of Appeal of Appellants Ronald and Barbara Bohlen (February 3, 2015).....1-4

Appendix B: Decision and Judgment Entry, Fourth District Court of Appeals (December 22, 2014).....5-29

Appendix C: Decision, Washington County Court of Common Pleas (March 27, 2014).....31-44

Appendix D: Entry and Order Granting Summary Judgment and Ordering the Forfeiture And Voidance of Oil & Gas Lease (April 3, 2014).....46-48

TABLE OF AUTHORITIES

CASES:

Beaverkettle Farms, Ltd. v. Chesapeake Appalachia, LLC,
N.D.Ohio No. 4:11CV02631, 2013 WL 4679950 (Aug. 30, 2013).....11, 12, 14

Brown v. Fowler,
65 Ohio St. 507, 63 N.E. 76 (1902).....13, 14

Clay v. K. Petroleum,
E.D.Ky. No. 07-113-REW, 2008 WL 2308118 (June 2, 2008).....8, 9

Cooper v. Chateau Estate Homes, LLC,
12th Dist. Warren No. CA2010-07-061, 2010-Ohio-5186, ¶ 12.....6

Dana Partners, LLC v. Koivisto Constructors & Erectors, Inc.,
11th Dist. Trumbull No. 2011-T-0029, 2012-Ohio-6294, ¶ 25.....11

Harding v. Viking International Resources Co., Inc.,
2013 -Ohio- 5236, 1 N.E.3d 872, ¶12 (4th Dist.).....8

Hupp v. Beck Energy Corp.,
2014-Ohio-4255, 20 N.E.3d 732 (7th Dist.).....13, 15, 16

Ionno v. Glen-Gery Corp.,
2 Ohio St.3d 131, 443 N.E.2d 504 (1983).....9, 16

Jacobs v. CNG Transmission Corp.,
332 F.Supp.2d 759, 785 (W.D. Pa. 2004).....9

Morriss v. First Nat'l Bank,
249 S.W.2d 269, 279 (Tx. Ct. App. 1952).....8

Price v. K. A. Brown Oil & Gas, LLC,
7th Dist. Monroe No. 13MO13, 2014-Ohio-2298.....8, 9

Sims v. Anderson,
2015-Ohio-2727, 38 N.E.3d 1123 (4th Dist).....14, 15

State ex rel. Claugus Family Farm, L.P. v. Seventh District Court of Appeals,
145 Ohio St. 3d 180, 2016-Ohio-178, 47 N.E.3d 836, ¶ 25 (2016).....12, 13, 15, 16

Swallie v. Rousenberg,
190 Ohio App. 3d 473, 2010-Ohio-4573, 942 N.E.2d 1109 , ¶61 (7th Dist.).....6

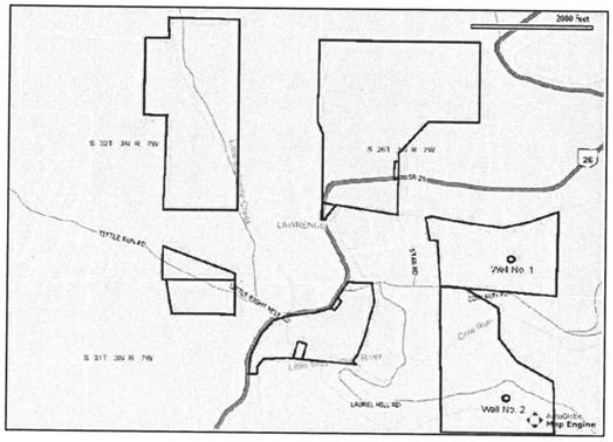
SECONDARY SOURCES

92 Ohio Jurisprudence.3d, Usages and Customs; Courses of Dealing, Section 32 (2013).....11

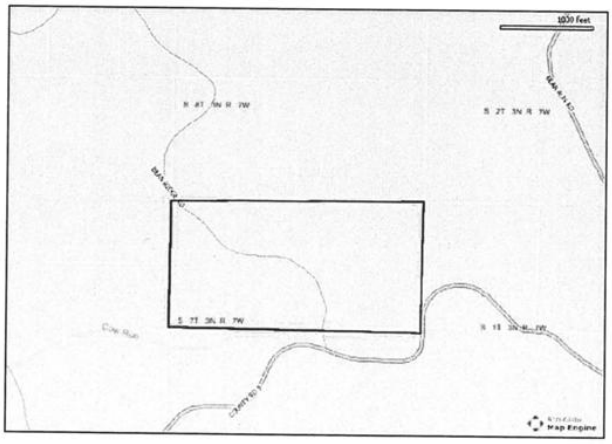
I. STATEMENT OF FACTS

Ronald and Barbara Bohlen own 500 acres in Lawrence Township of Washington County. The property includes six, noncontiguous tracts totaling 500 acres located in Sections 7, 25, 26, 31, and 32 of Lawrence Township. (Bohlen Affidavit, attached as Tab 1 to Plaintiffs' Motion for Summary Judgment ("Plaintiffs' Motion"), Common Pleas Index Item #18.)

Map 1-1: The Property in Sections 25, 26, 31, and 32 of Lawrence Township



Map 1-2: The Property in Section 7 of Lawrence Township



The Bohlens entered into the subject Lease with Alliance on February 15, 2006. ("Oil and Gas Lease," attached as Tab 2 to Plaintiffs' Motion). The primary term of the Lease was one

year, which ended on February 15, 2007. *Id.* Paragraph 2 of the Lease contains a secondary term, which extended the term of 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." *Id.*

On September 5, 2006, Alliance began drilling the first well, Well No. 1CM, on the 51.31-acre parcel located in Section 26. (Bohlen Affidavit, ¶ 5 and Ohio Well Completions Report attached thereto, Tab 1 to Plaintiffs' Motion). Well No. 1CM was completed on September 18, 2006. *Id.* Shortly thereafter, Alliance began drilling the second well, Well No. 2CM, on the 86.5-acre parcel located in Section 25. (Bohlen Affidavit, ¶ 6 and Ohio Well Completions Report attached thereto, Tab 1 to Plaintiffs' Motion). Well No. 2CM was completed on October 1, 2006. *Id.* No other well was drilled on the Property. (Alliance's discovery responses, Answer to Interrogatory No. 7, attached as Tab 4 to Plaintiffs' Motion; and Anadarko's discovery responses, Answer to Interrogatory No. 7, attached as Tab 5 to Plaintiffs' Motion).

Well No. 1CM produced 76 MCFs of gas in 2007. (Bohlen Affidavit, ¶ 5 and Ohio Wells Completion Report attached thereto, Tab 1 to Plaintiffs' Motion; Tabs 4 and 5 to Plaintiffs' Motion, Interrogatory Nos. 14-15, Requests for Admission, Nos. 3-4.) No oil was ever produced from Well No. 1CM, and other than the nominal amount of gas in 2007, no gas was produced from Well No. 1CM for the years 2008 through the present. *Id.* In fact, Well No. 1CM was on a plug list. (Tab 4 to Plaintiffs' Motion, Requests for Admission, No. 4.)

As for the second well, Alliance admitted that no oil was ever produced, and only nominal amounts of gas were produced. (Bohlen Affidavit, ¶ 6 and Ohio Well Completions

Report attached thereto, Tab 1 to Plaintiffs' Motion; Tabs 4 and 5 to Plaintiffs' Motion, Interrogatory Nos. 14-15.) Specifically, in the six years from 2007 to 2012, the total cumulative gas production from Well No. 2CM was 4,472 MCF. (Bohlen Affidavit, ¶ 6 and Ohio Well Completions Report attached thereto, Tab 1 to Plaintiffs' Motion). Gas production significantly declined from 1,168 MCFs in 2007 to less than half, or 500 MCF, by 2012. *Id.* Alliance and Anadarko further admitted that no oil or gas was produced from the remaining, undrilled acreage in Sections 7, 31, or 32. (Tabs 4 and 5 to Plaintiffs' Motion, Requests for Admission Nos. 1, 6 and 8.)

In addition to the other terms, Paragraph 3 of the Lease contained a delay rental provision which stated:

> 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. (Lease, Ex. 2 to Plaintiffs' Motion).

Importantly, the parties also included an Addendum to the Lease, which should control the outcome of this case. In Paragraph 1 of the Addendum, the parties guaranteed the rental payment of $5,500.00 in the event of minimal production:

> 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.*

Put simply, Alliance had to make up any royalty shortfall below $5,500 per year, by paying the difference as a rental. If Alliance failed to do that, the Lease terminated.

Alliance admitted that *it 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. (Tab 6 of Plaintiffs' Motion, Interrogatory Nos. 1-3 and Ex. 1 to Tab 6). Alliance knew of its obligation

to make the full annual rental payment as shown by the Check Request forms produced which expressly stated the "Special Handling Requirements" that "[i]f royalty on Form 1099 do not equal $5,500.00 difference must be paid." *Id.* Alliance itself calculated the total shortage due to the Bohlens for annual rentals as $3,949.23. *Id.*

Again, the Lease itself stated that if rental payments of $5,500 were not paid, the Lease "shall become null and void and all rights of either party hereunder shall cease and terminate." (Tab 2 to Plaintiffs' Motion). In fact, the parties made it certain that the lease would terminate for failure to pay rentals because *they intentionally deleted* the section of the Lease, in Paragraph 13, which read: "[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." *Id.* This section was struck out—clearly intending termination as the result of nonpayment of *rent* or *royalties. Id.*

On September 28, 2011, Alliance assigned a portion of the Lease to Anadarko. (Compl. ¶ 3, Common Pleas Index Item #1; Alliance Answer, ¶ 3, Common Pleas Index Item #13; Anadarko Answer, ¶ 3, Common Pleas Index Item #7; Partial Assignment of Oil and Gas Leases, attached as Tab 7 to Plaintiffs' Motion). The Bohlens filed suit on May 15, 2013. After conducting discovery, both sides moved for summary judgment. In their Motion, the Bohlens argued that: (1) the lease terminated under its own terms because of Alliance's failure to make the required annual payments, and (2) regardless, the Lease itself constituted an indefinite lease, which violated public policy, making the lease void *ab initio*. The trial court issued its decision on March 27, 2014, granting the Bohlens' Motion for Summary Judgment and denying Alliance and Anadarko's Motions for Summary Judgment. (Appx. 31-44). The trial court entered its final judgment won April 3, 2014. (Appx. 45-48). Anadarko and Alliance appealed.

The Fourth District Court of Appeals reversed. (Appx. 5-29). The Court held that the lease and the addendum did not make the addendum part of the original lease's delay rental provision. (Appx. B, p. 20; (15)). According to the Court of Appeals, the trial court "conflated these two provisions" regarding the forfeiture and non-payment of the annual rental. *Id.*, p. 21; (16). The Court reasoned that this was because "established precedent…generally limits the application of the delay rental provision to the primary term of the lease." *Id.* The Court did not actually cite any such precedent, nor did the Court address the facts that the parties clearly had intended to make the forfeiture clause apply to the failure to make the annual $5,500 rental payments. The Court completely ignored that fact that the parties intentionally struck through Paragraph 13 regarding the "failure of payment of rental or royalty…."

As to the indefinite nature of the rental payments, the Court reasoned that the lease was not indefinite because the habendum clause contained a one-year primary term, with a secondary term. (Appx. B, p. 17; (12)). The Court also did not accept that the lease's indefinite payment of rentals was actually a "delay rental." *Id.*, p. 18; (13). The Court did not address the undisputed fact that whatever term Alliance uses, the "rentals" or "minimum royalty" payments indefinitely postponed development of the undrilled tracts.

The Fourth District's opinion goes beyond interpretation of the written instrument. Instead, by ignoring the clear expression of the parties' intent, the Court re-wrote the agreement. It created new law that delay rentals *must* only apply to the primary term of a lease—even if the parties make clear that they intend otherwise. This contradicts this Court's admonishment that the terms of an oil and gas lease, including termination provisions, are to be governed by the actual language chosen by the parties to the agreement.

II. 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,* 190 Ohio App. 3d 473, 2010-Ohio-4573, 942 N.E.2d 1109, ¶61 (7th Dist.). 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,* 12th Dist. Warren No. CA2010-07-061, 2010-Ohio-5186, ¶ 12. The contractual language used, unless ambiguous, should be given its plain and ordinary meaning. *Id.*, citing *Aultman Hosp. Assn. v. Community Mut. Ins. Co.* 46 Ohio St.3d 51, 544 N.E.2d 920 (1989), syllabus. In addition to the words used in the agreement, courts must honor "'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, 2008-Ohio-1124, 888 N.E.2d 514, ¶ 21(9th Dist.).

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 agreed annual rental payment. The Court of Appeals disagreed

with the trial court and found that the termination provision did not apply to these payments because the termination of the contract was not explicitly mentioned in the addendum. The Court supported its conclusion with a brief mention that "established precedent that generally limits the application of the delay rental provision to the primary term of the lease."

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.)

"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 specified as 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 used 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 the lessee failed to make those payments in exchange for the benefit of delaying the commencement of a well—or delaying 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. 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 (Tx. Ct. App. 1952). As the Fourth District stated in *Harding v. Viking International Resources Co., Inc.,* 2013 -Ohio- 5236, 1 N.E.3d 872, ¶12 (4th Dist.):

> 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 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,* 7th Dist. Monroe No. 13MO13, 2014-Ohio-2298, 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,* E.D.Ky. No. 07-113-REW, 2008 WL 2308118 (June 2, 2008), 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 has 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 nor in the addendum.) The fact that Alliance and the Bohlens specified $5,500.00 as the threshold in Paragraph 1 of the Addendum—the same "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.,* 2 Ohio St.3d 131, 443 N.E.2d 504 (1983), this Court phrased the payments as "minimum rent or royalty" in the initial recitation of facts. 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.

[Emphasis added.] *Jacobs v. CNG Transmission Corp.,* 332 F.Supp.2d 759, 785 (W.D. Pa. 2004). In the end, it makes no difference whether construed as a "rental" or "minimum royalty." To reiterate, Alliance struck through paragraph 13, which stated 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 and

intended that failure to pay the annual sum would terminate the lease. They went out of their way to make this explicit.

The intent of the parties, as shown by the language they selected 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 intend "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 Bohlens and Alliance created the addendum so that Alliance could pay rental payments of $5,500 (less any production royalties) to delay obtaining production from remaining acreage. They identified it as a "sum" to be paid equal to the "$5,500.00 annual rental payment." 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 primary 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 <u>not</u> 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 Fourth District seems to have rested its reasoning on the proposition that delay rentals "generally" apply only during the primary term. But, "Evidence of trade usage can be admitted for the purposes of *clarifying* an indefinite contractual term, a doubtful term, or a term with a technical meaning." 92 Ohio Jurisprudence.3d, Usages and Customs; Courses of Dealing, Section 32 (2013). See also *Dana Partners, LLC v. Koivisto Constructors & Erectors, Inc.,* 11th Dist. Trumbull No. 2011-T-0029, 2012-Ohio-6294, ¶ 25. Any concepts of "trade usage" should *only* be applied "if each party knows or has reason to know of the usage and neither party knows or has reason to know that the other party has an intention inconsistent with the usage." *Id.* at ¶ 27.

If Alliance ever did have any belief that its annual $5,500.00 payment was not actually a "delay rental" as used in the industry (despite using the actual word "rental") and that the forfeiture provision of the delay rental clause would not apply, Alliance certainly had to know that the Bohlens believed otherwise because the parties crossed through ¶13 which would have prevented forfeiture. Accordingly, this is not a case of "clarifying" intent by resorting to "industry usage" of terms.

The United States District Court for the Northern District of Ohio recently addressed this precise issue in *Beaverkettle Farms, Ltd. v. Chesapeake Appalachia, LLC,* N.D.Ohio No. 4:11CV02631, 2013 WL 4679950 (Aug. 30, 2013). Per the court:

> The issue before the Court may be summarized as follows: Does the law impose a specific meaning for "delay rentals"—namely, that it is an obligation incurred only during the primary term of an oil and gas lease—even though the lease itself does not explicitly set forth such a definition or requirement? The authorities presented by Chesapeake do not establish that it does. True, the cases cited by Chesapeake recognize that delay rentals have traditionally been understood to apply during the

> primary term....It would be erroneous however, for the Court to go so far as to conclude that the term must therefore, as a matter of law, be defined in the manner urged by Chesapeake. Ohio has never made such a sweeping pronouncement. Furthermore, that an esoteric lease term has traditionally been understood one way does not, pursuant to the law of contracts, necessarily bind every oil and gas lease to that same understanding....Were the Court to accept Chesapeake's blanket rule, the Court would be in derogation of its duty to examine the particular contract before it, and the specific language and provisions contained therein, to ascertain the intention of the parties. *Id.* at *12 and *13. [internal citations omitted and emphasis in original]

As in the Bohlen's case, the rentals in the *Beaverkettle* case were intended to perpetuate the lease on "undrilled acreage" and the lease would terminate for failure to pay the rentals. The court also specifically rejected the "trade usage" argument regarding delay rentals.

> This Court will not, at Chesapeake's urging, foist an esoteric definition of a contract term, though known to members of a trade, upon a non-member when the latter had no reason to know of that definition and when, indeed, the contract actually suggests a contrary meaning. To do so would be to violate basic principles of contract law and to open the door for abuse. *Id.* at *16.

In the Bohlens' case, there is more than a mere suggestion of a contrary meaning: the contrary meaning was written. 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 coupled with 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 rentals" to continue past the primary term of the Lease.

Unfortunately for the Bohlens, this Court recently commented, "Delay-rental provisions have been interpreted to apply only during the primary term of a lease." *State ex rel. Claugus Family Farm, L.P. v. Seventh District Court of Appeals,* 145 Ohio St. 3d 180, 2016-Ohio-178, 47 N.E.3d 836, ¶ 25 (2016), citing *Brown v. Fowler*, 65 Ohio St. 507, 63 N.E. 76 (1902).

At the risk of arguing with the Court that the Appellants are attempting to persuade, this statement was dicta. There was no argument made in the *Hupp* or *Claugus* cases to suggest that delay rentals were to be paid at any time other than during the primary term. It was not an issue of the case. This Court's comment, in dicta, would fit into the category of cases cited in *Beaverkettle* (quoted above) in which, perhaps most of the time, delay rentals do apply only during the primary term. Yet, that should not be construed to mean that a delay rental, as a matter of law, *must* apply only during the primary term, particularly if the parties contract otherwise.

Moreover, the *Brown v. Fowler* decision (cited in *Claugus*) does not actually hold that the term "delay rental" applies, as a matter of law, to the primary term of an oil and gas lease. The two leases at issue in *Brown* contained rental provisions that are of the traditional variety: the lessees were required to drill within a specified time, paying a rental during that specified time, and the leases would expire at the end of the primary terms if no wells were drilled. *Brown*, 65 Ohio St. 507, 63 N.E. 76, at syllabus 2-5. The leases had a fixed two-year term, and the rental clause required payment of the rental during the second year of the term.

However, the *Brown* decision did address the overarching concept that the parties *could* have selected different language. Per the Court at syllabus point 2, "*held*, that the lease terminated absolutely at the end of two years, and that the right to drill ceased at the end of that time, *unless there was an extension of the time found in other parts of the lease.*" (Emphasis added.) The leases in *Brown* did not have other language that would allow an extension of the lease. Yet, this Court signaled that the parties *could have* agreed upon terms to extend the lease beyond two years without drilling.

The *Brown* decision contained another point of law that is directly on point with the Bohlens' lease and addendum. "That which is made certain in one part of a written instrument cannot be overcome or changed by words in another part, unless other words are of equal or greater certainty." Syllabus point 7.

To re-iterate the certainty of the terms in the Bohlens' lease: (1) the delay rental clause had a clear termination provision; (2) the parties used the word "rental" again ¶1 of the Addendum; (3) the parties used the same rental amount of $5,500; and (4) the parties intentionally removed ¶13 of the leave, the non-forfeiture provision. 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 very abuse that the *Beaverkettle* court cautioned against.

Curiously, the Fourth District itself issued a contrary decision in case of *Sims v. Anderson,* 2015-Ohio-2727, 38 N.E.3d 1123 (4th Dist). In *Sims*, the lessor sued the lessee for a declaration of lease termination because the lessee had failed to make its annual minimum royalty payment of $400. The lessee was short in 2012 by $8.00. The trial court ruled in favor of the lessee holding that the lessee had "substantially complied" with the minimum royalty requirement.

The Fourth District reversed and ordered that the lease had terminated—even by missing its minimum royalty by only $8.00. "When an oil and gas lease contains a forfeiture clause for the breach of an express contractual duty, upon a breach the lease terminates by operation of law under its own terms. In that situation it is the court's duty *to give effect to the parties' intentions as reflected by the express agreement*." *Id.* at ¶14. [emphasis added]

It is impossible to reconcile the *Sims* holding with the Fourth District's contrary holding in this case. The Fourth District refused to give effect to the parties intentions as reflected in the express agreement. The result for the Bohlens should have been the same as in *Sims*.

<u>Proposition of Law No. 5:</u> An oil and gas lease may not indefinitely forestall production by payment of rentals.

If the Court reverses based on the arguments in the previous section, this proposition of law becomes moot. Regardless, 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 undrilled 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 from the Seventh District decision in the case of *Hupp v. Beck Energy Corp.,* 2014-Ohio-4255, 20 N.E.3d 732 (7th Dist.), which this Court heard in 2015.

This Court resolved *Hupp* in the consolidated case of *Claugus Family Farm, L.P.*, 145 Ohio St. 3d 180, 2016-Ohio-178 (2016), in which this Court held that the subject lease was not a perpetual lease. "[W]e conclude that the Form G&T (83) cannot be extended beyond the ten years set forth in the primary term without development of oil or gas." *Id.*, at 168.

The ten-year term is the critical factual difference. In *Claugus*, the lease *actually did have a ten-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 <u>forever</u>—simply by paying an annual rental. It was indefinite.

This Court held in *Ionno*, 2 Ohio St.3d 131, 443 N.E.2d 504, 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

This Court further commented on *Ionno* in the *Claugus* decision:

> The mineral lease in *Ionno* contained no time period in which mining operations had to commence, and the mining company had paid advance royalties for 19 years without developing the land. We stated that paying royalties could not be viewed "as a substitute for timely development" of the land." *Claugus* at ¶ 22.

This is precisely what is occurring in this case. Alliance can forestall the development of the undrilled acreage (the vast majority of their acreage) forever by the payment of $5,500 annually. This case is factually akin to *Ionno*, rather than *Hupp* and *Claugus* which had a ten-year limit to non-development.

III. CONCLUSION

This Court should reverse the Fourth District Court of Appeals' decision and reinstate the trial court's grant of summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Merit Brief of Appellants** has been served this 13 day of July, 2016, by U.S. Mail, postage prepaid, upon the following:

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Ethan Vessels

APPENDIX A

ORIGINAL

NO. 15-0187

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

NOTICE OF APPEAL OF APPELLANTS RONALD AND BARBARA BOHLEN

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FILED
FEB 03 2015
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF APPEAL

Appellants, Ronald and Barbara Bohlen, hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Washington County Court of Appeals, Fourth Appellate District, journalized in Court of Appeals Case No. 14 CA 13 on December 22, 2014.

This case is one of public or great general interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Notice of Appeal of Appellants Ronald and Barbara Bohlen** has been served this 2 day of February, 2015, by U.S. Mail, postage prepaid, upon the following:

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APPENDIX B

FOURTH DISTRICT
COURT OF APPEALS
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WASHINGTON CO. OHIO

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

RONALD AND BARBARA BOHLEN,	:	
Plaintiffs-Appellees,	:	Case No. 14CA13
vs.	:	
	:	DECISION AND JUDGMENT ENTRY
ANADARKO E&P ONSHORE, LLC, ET AL.,	:	
Defendants-Appellants.	:	

APPEARANCES:

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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 Bohlens $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 Bohlens 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 Bohlens 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 Internatl. 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 Bohlens 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 Bohlens' 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 Bohlens. 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 BREATH

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 Bohlens' 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 Bohlens 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.

APPENDIX C

COMMON PLEAS COURT
WASHINGTON COUNTY, OHIO

FILED
CLERK OF COURTS
2014 MAR 27 AM 11: 30
WASHINGTON CO. OHIO

Ronald Bohlen, et al.	:	
Plaintiffs	:	Case No. 13 OT 167
-v-	:	Judge Ed Lane
Anadarko E & P Onshore et al.	:	
Defendants	:	DECISION
	:	(On Plaintiffs' and Defendants' Motion For Summary Judgment)

The above styled action is before the Court on the motions of the parties for summary judgment. The Plaintiffs filed their motion on January 7, 2014. Both sides have filed responses and replies in relation to both motions. There have been depositions and exhibits filed in this regard. The issues are now before the Court for decision.

The Plaintiffs' position is that their lease with the Defendants is void by operation of law as a lease in perpetuity and has been breached by reason of the Defendant's failure to abide by the terms of the lease. This situation is a little unique as the lease in question is not on one contiguous tract of land. The Plaintiffs own several non-contiguous tracts of land and entered into one lease covering all of their acreage. Also, two wells have been drilled on the Plaintiffs' property. Additionally, the Plaintiffs maintain that two wells cannot hold the non-contiguous tracts.

As to the third issue, the Court rejects the Plaintiffs' position. Parties are free to contract

(lease) whatever land they agree to. The fact that these are non-contiguous tracts is not determinative. The lease covers the land the parties chose to cover. The secondary issue is whether two wells equal the requirement of reasonable development. This is an issue to be determined at trial after hearing all the evidence. This is not an issue that can be decided summarily when applying the strict guidelines set forth in Civ.R. 56(C).

However, Plaintiffs' first two assertions do present issues that can be ruled on summarily. This lease is a lease that can extend in perpetuity by paying a nominal delay rental. This violates the public policy of Ohio and The United States of America, which is to encourage the development of material resources. For many good reasons the law does not recognize a contract in perpetuity.

On February 15, 2006, the Bohlens entered into an Oil and gas Lease with Alliance which covered the six, noncontiguous tracts of the Property. Several months later, on September 5, 2006, Defendant 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, Defendant Alliance commenced the drilling of the 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 has been drilled on the Property.

The primary term of the Lease was one (1) year, which ended on February 15, 2007. However, Paragraph 9 of the Addendum to the Lease provides the Lessee with an option to extend the primary term of the Lease for an "additional one (1) year period by paying to the Lessor the sum of $5,500.00 as an optional payment and not as a delay rental.

Notwithstanding, Paragraph 2 of the Lease contains a secondary lease term, also known as a *habendum* clause, which extends the term of the Lease beyond the primary term as long as

"oil or gas or their constitutes 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."

Well No. 1CM produced 76 MCF's of gas in 2007. Defendants admit in their discovery responses, no oil ha ever been produced from Well No. 1CM, and other than the gas produced in 2007, no gas has been produced from Well No. 1CM for the years 2008 through the present. Well No. 1CM is on a plug list.

As for the second well, Defendants admit that no oil has ever been produced, and only nominal amounts of gas have been produced, from Well No. 2CM. Specifically, in the six-year time frame from 2007 to 2012, the total, cumulative gas production from Well No. 2CM was 4,472 MCF. And, gas production significantly declined from 1,168 MCFs in 2007 to less than half, or 500 MCF, by 2012.

In response to Plaintiffs' Request for Admissions, Defendants further admit that no oil or gas has been produced from the remaining, undrilled acreage located in Sections 7, 31, or 32.

In addition to the above terms, Paragraph 3 of the Lease contains 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 guaranteed the delay rental payment of $5,500.00 in the event of insufficient production:

> 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.

In response to Plaintiffs' Second Set of Interrogatories requesting an itemization of all payments made to Lessors under the Lease, Defendant Alliance produced a document marked as Exhibit "1" which shows that it paid Plaintiffs an annual delay rental of $5,500.00 in 2006 and 2007 only. Defendant Alliance never once paid the full annual rental payment for the years 2008 through 2013 despite the fact that the total annual royalties in each year were below $5,500.00. Defendant Alliance knew of its obligation to make the full annual rental payment as evidenced by the Check Request forms produced as support for Exhibit "1" which expressly state as "Special handling Requirements" that "[i]f royalty on Form 1099 do not equal $5,500.00 difference must be paid." Defendant Alliance has calculated the total shortage due to Plaintiffs for annual delay rentals as $3,949.23.

Ohio has a strong public policy in favor of "oil and gas production when the extraction of those resources can be accomplished without undue threat of harm to the health, safety, and welfare of the citizens of Ohio."[1] In this regard, the Ohio Supreme Court has held that long-term oil and gas leases that allow a lessee to encumber a lessor's property in perpetuity merely by making an annual delay rental payment without any requirement to develop the land within a reasonable time "impedes the mining of mineral lands and therefore are against public policy."[2]

When a contract seriously offends public policy, it is void *ab initio*.[3] The *habendum*

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[1]*Clyde A. Hupp, et al. v. Beck Energy Corp.*, Monroe C.P. No. 2011-345 (July 12, 2012), attached hereto as Tab 8, quoting *Newbury Township Board of Trustees v. Lomak Petroleum (Ohio), Inc.*, 62 Ohio St.3d 387, 389, 583 N.E.2d 302 (1992); *Northampton Building Co. v. Board of Zoning Appeals*, 109 Ohio App.3d 193, 198, 671 N.E.2d 1309 (9th Dist. 1996).

[2]*Ionno v. Glen-Gery Corp.*, 2 Ohio St.3d 131, 134, 443 N.E.2d 504 (1983).

[3]*Walsh v. Bollas*, 82 Ohio App.3d 588, 593, 612 N.E.2d 1252 (11th Dist.); *Dunn v. Bruzzese*, 172 Ohio App.3d 320, 2007-Ohio-3500, 874 N.E.2d 1221 ¶ 81 (7th Dist.).

clause of this Lease gives Alliance the unilateral right to extend the term of the lease by merely exercising its judgment as to whether the premises are capable of producing oil and gas without any time restriction on actually developing the land.

This Lease has a delay rental provision which provides that the Lease is terminated unless Defendant Alliance pays an annual delay rental of $5,500.00 each year. Under this Lease, Alliance can pay the annual delay rental indefinitely to hold the Lease without ever developing the acreage. This could go on forever and the oil and gas would never be extracted and marketed.

Further, pursuant to Paragraph 15 of th Lease, Alliance has the sole, unfettered right to terminate the Lease by surrender. Following the clear dictates of Ohio law, the Lease is a perpetual, "no-term" lease which seriously offends public policy, and therefore, is void *ab initio*. For this reason alone, the Bohlens are entitled to judgment as a matter of law.

Additionally, this lease has terminated by its own terms. If a contract is breached it is over. Parties do not have to seek a judicial decision to terminate a contract once it has been breached. They do have the right to seek damages caused by a breach if they choose.

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"[4] Because it is a contract, "the rights and remedies of the parties to an oil or gas lease must be determined by the terms of the written instrument."[5] Put differently, each oil and gas lease is an independent contract, and like all contracts is controlled by the plain and ordinary meaning of its terms.

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[4]*Swallie v. Rousenberg*, 2010-Ohio-4573, 190 Ohio App. 3d 473, ¶ 61 (7th Dist. 2010).

[5]*Id.*

Where the terms of a contract cannot be deciphered from reading the entire contract or if the terms are reasonably susceptible of more than one interpretation, then they are ambiguous." On the other hand, "[w]here a contract is clear and unambiguous, its interpretation is a matter of law, and summary judgment is appropriate."[6]

The language of this Lease is clear and can be subject to only one interpretation. The parties executed a Lease which contains a definite delay rental provision. Under Paragraph 3 of the lease, Defendant Alliance was required to pay Plaintiffs the sum of $5,500.00 each year for the privilege of deferring the commencement of a well. The Lease is clear that if Defendant Alliance failed to pay the annual delay rental, the Lease is "null and void and all rights of either party hereunder shall cease and terminate." However, the parties also separately executed an Addendum to the Lease which, in part, 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 $5,500.00. In such instances, Defendant Alliance agreed to pay the annual delay rental of $5,500.00 offset by the total royalties paid to Plaintiffs from production in the calendar year.

For the years 2008, 2009, 2010, 2011, 2012 and 2013, the total royalties paid from production of oil and gas on the Property were less than the annual delay rental, yet Plaintiffs still never received the full annual rental payment of $5,500.00 (minus the total royalties paid from production in the calendar year) from Alliance petroleum Corporation as required under Paragraph 1 of the Addendum to the Lease. These acts alone terminate the lease. A lease is a contract that requires the parties to do those acts they contracted to. Alliance did not fulfill its

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[6] *Moore v. Adams*, 2008-Ohio-5953, ¶ 23 (5th Dist. 2008); *McClure v. Davis*, 2010-Ohio-409, 186 Ohio App. 3d 25 (4th Dist. 2010).

obligations under this lease.

As its own documents prove, Alliance knew of its obligation to pay the difference, but failed to do so. In fact, Exhibit "1" submitted by Defendant Alliance in response to plaintiff's Second Set of Interrogatories shows the total shortage due to Plaintiffs for annual rental payments is $3,949.23. The amount is not relevant. Any amount less than the amount agreed to by the parties constitutes a breach. Given that failure to pay the annual delay rental is automatic grounds for termination of the Lease, and the undisputed evidence establishes that Alliance failed to make the requisite payment under Paragraph 1 of the Addendum to the Lease, this Lease has terminated under its own terms.

Defendants admitted failure to produce sufficient oil and/or gas from the wells for eight years expressly violates the terms of the *habendum* clause of Lease; and therefore, this Lease is expired by its own terms. The applicable terms of duration for an oil and gas lease are found in the *habendum clause*, which defines how long the lease will endure. There are two parts. The first part contains a primary term for a determined time. If oil and gas is not produced within the primary term, then the lease terminates by its own terms.

If oil and gas is produced within the primary term, then there is a secondary term of indefinite duration. The secondary term will only last 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." For a lease to remain in effect there must be active production of oil and gas. Absent production, the secondary term ends, and the lease is terminated.

The lessee has an obligation to exercise due diligence to keep oil and gas producing from

the leased premises. In *Tedrow v. Shaffer*,[7] the Court of Appeals held that 36 barrels of oil over eight years was not sufficient production to keep a lease in force. In *Moore v. Adams*[8], the Fifth District Court of Appeals held that a failure to produce gas for six years was sufficient to terminate the subject lease. Furthermore, as in *Moore*, "production" sufficient to keep a lease in effect requires *continuous* production.[9]

Aside from the explicit requirements of the lease itself, the lessee also has implied covenants. "There are several generally recognized implied covenants in oil and gas leases and these include the following: "...3. The covenant of reasonable development, 4. The covenant to explore further, 5. The covenant to market the product."[10]

If the conditions of the secondary term are not met, the lease expires under its own terms and "revests the leased estate in the lessor." The terminology of the secondary term, "as long as gas or oil is produced in paying quantities," is generally construed to create a determinable fee interest, such that the lessee's interest automatically terminates upon lessee's failure to satisfy any of the listed provisions which would serve to extend the term of the lease. "In such a case, no affirmative action on the part of a lessor is required to formally terminate the lease; it expires on its own terms."[11]

Put differently, if the well stops producing in paying quantities, the lease ends with no

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[7] *Tedrow v. Shaffer*, 23 Ohio App. 343 (4th Dist. 1926), at syllabus pt. 2.

[8] *Moore v. Adams*, 2008-Ohio-5953, ¶ 23 (5th Dist. 2008); *McClure v. Davis*, 2010-Ohio-409, 186 Ohio App. 3d 25 (4th Dist. 2010).

[9] *Moore v. Adams*, 2008-Ohio-5953, ¶ 23 (5th Dist. 2008); *McClure v. Davis*, 2010-Ohio-409, 186 Ohio App. 3d 25 (4th Dist. 2010).

[10] *American Energy Services, Inc. v. Lekan*, 75 Ohio App.3d 205, 212 (5th Dist. 1992).

[11] *Tisdale v. Walla*, 1994 WL 738744, *9-10 (11th Dist. 1994)

further action required of the lessor. As a "determinable interest," the landowner need take no action: the lease simply expires.

As the Washington County Court of Common Pleas recently held in *Lauer v. Layco*:[12]

> Lessees of oil and gas have the obligation to produce oil and gas in paying quantities. Lessees have an obligation to exercise due diligence to keep oil and gas producing from the leased premises. When there are interruptions in production, the lessee must exercise reasonable diligence to place the well back into production. The failure to exercise the reasonable diligence will also terminate the lease...The failure of the Lessee to comply with its obligations forfeits the lease.

The facts of the present case are undisputed. The primary term of the Lease has expired. Therefore, per the *habendum* clause, the duration of the subject lease is now governed by the secondary term which extends the lease term indefinitely 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 sold 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 Defendants, in their motion for summary judgment assert that the lease in question is valid for the following reasons:

1. The entire acreage covered by the Subject Lease is held by production;

2. Plaintiffs waived any right to deny the validity of the Subject Lease by continuing to accept royalty checks from Alliance;

3. Plaintiffs are not entitled to the equitable remedy of forfeiture; and

4. Plaintiffs are barred from asserting the allegations in their Complaint becaus they failed to comply with the 30-day notice requirement.

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[12] *Lauer v. Layco*, Washington CP, Case No. 12 OT 83 (2012), affirmed on appeal at 2013-Ohio-1916 (4th Dist. 2013)

Most of the Defendants' assertions are not valid due to the Court's granting of summary judgment to the Plaintiffs hereinabove.

Initially, this Court will note that estoppel does not apply to a void contract.

As an initial matter, the doctrine of estoppel does not apply to a contract that is void. Rejecting the doctrine of estoppel, the Ohio Supreme Court in Columbus concluded that where a contract is void, "it cannot be made valid by any subsequent act."[13] Therefore, Plaintiffs' subsequent act of accepting lease payment is not a defense to a voided Lease.

Like a voided lease, estoppel does not revive a terminated lease. In *Stitzlein v. Willey*, the parties entered into an oil and gas lease. The lessee drilled three wells on the leased property during the primary term. After the primary term ended, the lessee drilled and produced both oil and gas from a fourth well on the leased property. The lessors accepted royalty payments based on production from the fourth well. The trial court determined that the lease had expired by its own terms upon the cessation of production after the expiration of the primary term of ten years, but found that the lessors were estopped from terminating the lease because they accepted royalty payments from the producing well. The appellate court reversed the trial court's decision and held that an already expired lease is not "reborn by estoppel."[14]

These parties had a valid and enforceable Lease which affirmatively required rental payments of at least $5,000.00 per year. The parties specifically agreed that the Lease would terminate if this did not happen. Defendant Alliance failed to make the required rental payments,

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[13] *Clyde A. Hupp, et al. v. Beck Energy Corp.*, Monroe C.P. No. 2011-345 (July 12, 2012), attached hereto as Tab 8, quoting *Newbury Township Board of Trustees v. Lomak Petroleum (Ohio), Inc.*, 62 Ohio St.3d 387, 389, 583 N.E.2d 302 (1992); *Northampton Building Co. v. Board of Zoning Appeals*, 109 Ohio App.3d 193, 198, 671 N.E.2d 1309 (9th Dist. 1996); *Ionno v. Glen-Gery Corp.*, 2 Ohio St.3d 131, 134, 443 N.E.2d 504 (1983); *Walsh v. Bollas*, 82 Ohio App.3d 588, 593, 612 N.E.2d 1252 (11th Dist.); *Dunn v. Bruzzese*, 172 Ohio App.3d 320, 2007-Ohio-3500, 874 N.E.2d 1221 ¶ 81 (7th Dist.).

[14] *Stitzlein v. Willey*, Holmes App. No. CA-318, 1979 WL 209691 (Dec. 12, 1979).

and as a result, the Lease ended by its own terms. Defendants also failed to produce sufficient oil and/or gas from the wells for eight years, which expressly violates the terms of the habendum clause of Lease; and therefore, the Lease also expired under these terms. As the *Stitzlein* court found, Plaintiffs' acceptance of the rental payments does not resurrect the terminated Lease.

Under the rationale in *Bonner* and *Stitzlein*, acceptance of these payments does not bar Plaintiffs from asserting that the Lease has terminated because, as landowners with mineral rights to the property, they were entitled to these benefits with or without the Lease.

Defendants claim that forfeiture is not an available remedy because: (1) forfeiture is not an appropriate remedy for breach of the implied covenant to reasonably develop the land; (2) Plaintiffs disclaimed all implied covenants in the Lease; and (3) Plaintiffs waived the right to forfeiture by accepting royalty payments from Defendant Alliance. None of these arguments justify summary judgment in favor of Defendants.

In *Beer*, the Ohio Supreme Court stated "[w]here legal 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." Citing *Ionno*, *Hupp* held that:

> Forfeiture will be granted when necessary to do justice to the parties, even where specific grounds for forfeiture are set forth in the lease. Even where the lessee has made minimum rental or royalty payments, a lessor's claim for forfeiture based upon breach of the implied covenant to reasonably develop the land is not precluded, provided the lessor can show that damages are inadequate. [internal citations omitted.].

"The rationale for allowing forfeiture is the fact that the real consideration for the lease is the expected return derived from the actual mining of the land, not the rental income."[15]

[15] *Stitzlein v. Willey*, Holmes App. No. CA-318, 1979 WL 209691 (Dec. 12, 1979).

Defendants assert that forfeiture is not applicable because the Lease expressly provides the terms upon which forfeiture is appropriate, i.e. failure to pay delay rentals. However, as the Ohio Supreme Court found in *Ionno*, a lessor is not precluded from forfeiture as a remedy even if specific grounds for forfeiture are set forth in the lease or the payment of royalties or rentals have been made.

Defendants argue that the Lease disclaimed all implied covenants, and therefore, Plaintiffs' claim that implied covenants were breached is barred by law. However, the Lease contains only a general disclaimer that "[t]he parties hereby expressly disclaim any and all implied covenants, whether at law or in equity, regarding production, continuing production, or future production."

Ohio law requires a specific disclaimer of the implied covenant to be disclaimed.[16]

The express purpose of the subject Lease was to produce and sell oil or gas, or both. There was no *specific* provision in the lease that disclaimed Defendants' obligation to develop the land for oil and gas production within a reasonable time.

Defendants argue that Plaintiffs are not entitled to forfeiture of the Lease because they waived this right by accepting payments made under the Lease. Ohio law defines waiver as "a voluntary relinquishment of a known right."[17] The party asserting waiver bears the burden of proving by a preponderance of the evidence "a clear, unequivocal, decisive act of the party against whom the waiver is asserted, showing such purpose or acts amounting to an estoppel on his part."[18]

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[16] *Beer v. Griffith*, 61 Ohio St.2d 119, 122, 399 N.E.2d 1227 (1980).
[17] *Glidden Co. v. Lumbermans Mut. Cas. Co.*, 112 Ohio St.3d 470, 2006-Ohio-6553, at ¶ 49.
[18] *White Co. v. Canton Transp. Co.*, 131 Ohio St. 190, 2 N.E.2d 501 (1936).

Plaintiffs did not waive forfeiture of the Lease by accepting payments under the Lease. Following the courts in *Bonner* and *Stitzlein*, the payments received from Defendant Alliance represented gas produced from their land to which they were entitled regardless of the existence of the Lease.

Defendants assert that Plaintiffs' claims are barred as a matter of law because they failed to send written notice to Defendants of their non-compliance with the Lease prior to filing suit as required under Paragraph 17 of the Lease. Indeed, Ohio federal and state courts have repeatedly discarded this argument, and instead, found that such notice requirements in oil and gas leases are inapplicable in circumstances where the lease is void as against public policy or had terminated by its own terms.[19]

More recently, in *Cameron*, the U. S. District Court for the Southern District of Ohio addressed this exact issue with respect to expired leases. The court held that the subject oil and gas lease had expired under its own terms, and accordingly, the landowner was under no obligation to give written notice of a breach of the lease.

Under the reasoning in *Hupp, Cameron*, and *Tisdale*, the notice requirement under Paragraph 17 of the Lease cannot serve to resurrect the expired Lease or modify the *habendum* clause to extend the term beyond the termination of the Lease. Here, the Lease is void as against public policy, and also, had already expired by its terms at the time Plaintiffs filed the instant lawsuit. Therefore, no lease existed with which Plaintiffs were required to comply. Therefore, Plaintiffs had no obligation to provide notice of non-compliance to Defendants under Paragraph 17 of the Lease prior to filing this action. For all of the reasons set forth herein above the

[19] *White Co. v. Canton Transp. Co.*, 131 Ohio St. 190, 2 N.E.2d 501 (1936).

Plaintiffs' Motion for Summary Judgment is well taken and shall be granted. The Defendant's Motion for Summary Judgment is not well taken and shall be denied.

_____
Judge Ed Lane

DATE: _____

c: Attorney Vessels
Attorney Brody
Attorney Eichelberger

APPENDIX D

FILED
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WASHINGTON CO. OHIO

IN THE WASHINGTON COUNTY COURT OF COMMON PLEAS
MARIETTA, OHIO

Ronald and Barbara Bohlen	:	
Plaintiffs,	:	Case No. 2013 OT 167
vs.	:	Judge Lane
Anadarko E&P Onshore LLC, *et al.*	:	
Defendants.	:	

ENTRY AND ORDER
GRANTING SUMMARY JUDGMENT
AND ORDERING THE FORFEITURE AND VOIDANCE OF
OIL & GAS LEASE

This matter came before the Court on Plaintiffs' Motion for Summary Judgment and the Defendants' collective Motions for Summary Judgment. Plaintiffs filed suit against Defendants Anadarko E & P Onshore LLC and Alliance Petroleum Corporation seeking a judicial declaration of the termination of an oil & gas lease.

The Plaintiffs (Ronald and Barbara Bohlen) filed a motion for summary judgment supported by discovery responses obtained from Defendants. The Defendants opposed this motion and filed motions for summary judgment of their own supported by written discovery, affidavits, and deposition transcripts.

Having considered the briefs of the parties, pleadings, and discovery responses, the Court concludes that there are no genuine issues of material fact, reasonable minds can come to only one conclusion, and summary judgment is appropriate. For the reasons set forth in this Court's Decision of March 27, 2014, and pursuant to Civil Rule 56, the

Court GRANTS the Plaintiffs' Motion for Summary Judgment and DENIES the Defendants' Motions for Summary Judgment.

The Court **ORDERS** the Defendant Alliance to plug and cap any existing wells on the subject property in accordance with Ohio statutes and regulations and remove all other moveable property from the subject premises within 90 days.

The Court further **ORDERS** that the Oil and Gas Lease, recorded at Volume 431, Page 565 of the Lease Records of the Washington County Recorder's Office **IS FORFEITED AND IS VOID.**

The Court FURTHER ORDERS that the Washington County Recorder FILE this **ENTRY AND ORDER** in the title records of the Washington County and **CROSS-REFERENCE this ORDER** to the Oil & Gas Lease of February 15, 2006 (Volume 431, Page 565) in order to reflect that the foregoing recorded interest is void.

THIS IS A FINAL APPEALABLE ORDER, AND THERE IS NO JUST CAUSE FOR DELAY.

SO ORDERED.

Judge Lane

THIS IS A FINAL APPEALABLE ORDER
AND THERE IS NO JUST REASON
FOR DELAY.

I certify the foregoing to be a true and correct copy of the original

Brenda L. Wolfe, Clerk of Courts
Common Pleas Court-Court of Appeals
Washington County, Ohio
By Kim Goddard 4/3/14
Deputy Clerk

Submitted by:

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