[Cite as *Mauger v. Positron Energy Resources, Inc.*, 2014-Ohio-4613.]

COURT OF APPEALS
MORGAN COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MARILYN A. MAUGER	:	JUDGES:
	:	
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	Case No. 14AP0001
	:	
POSITRON ENERGY RESOURCES, INC., ET AL.	:	
	:	
	:	
Defendants-Appellants	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Morgan County Court of Common Pleas, Case No. 12CV0063
JUDGMENT:	REVERSED AND REMANDED
DATE OF JUDGMENT ENTRY:	October 6, 2014

APPEARANCES:

For Plaintiff-Appellee:	For Defendants-Appellants:
JOHN A. WELLS Christie, Christie & Wells P.O. Box 419 McConnelsville, OH 43756	JOHN E. TRIPLETT, JR. Theisen Brock 424 Second Street Marietta, OH 45750

Delaney, J.

{¶1} Defendants-Appellants Positron Energy Resources, Inc., Halwell Company, Inc., and Stonebridge Operating Co., LLC appeal the January 17, 2014 judgment entry of the Morgan County Court of Common Pleas.

FACTS AND PROCEDURAL HISTORY

Terms of the Mellor Lease

{¶2} On February 25, 1971, Etta M. Mellor entered into an oil and gas lease with The Ohio Fuel Gas Company ("Mellor Lease"). Mellor granted The Ohio Fuel Gas Company all the oil and gas in and under Mellor's 125 acres of land located in Section No. 30 of Malta Township, Morgan County. The Mellor Lease states:

> That Lessor [Mellor], in consideration of the sum of One Dollar, receipt of which is hereby acknowledged, and of the covenants and agreements, hereinafter contained, does hereby grant to the Lessee [The Ohio Fuel Gas Company] all the oil and gas in and under the lands hereinafter described, together with the exclusive right at all times to enter thereon and drill for, produce and market oil and gas, the right to store gas in all strata underlying said premises, the right to inject and remove gas regardless of the source thereof in and from all such strata, and the right to possess, use and occupy so much of said premises as is necessary and convenient for the purposes herein specified, for a primary term of twenty (20) years and so much longer thereafter as oil or gas is produced from said premises or so long as gas is being injected, held in storage or

withdrawn by Lessee in or from the lands hereinafter described or other lands located in the same or any adjoining township; * * *

{¶3} The Mellor Lease provides for a royalty payment to be paid to the Lessor for gas marketed from the premises. If the well is used for gas storage, the lease states the Lessor will be paid a storage rental fee. The Mellor Lease states:

Lessee shall pay to Lessor at field market price for one eighth (1/8) of all gas marketed from said premises. * * * Payment of royalty on gas marketed during any calendar month shall be made on or before the twentieth (20th) of the following month. Provided however, that if and when any well on these premises is used for gas storage purposes as herein provided, Lessee shall transmit to Lessor written notice of the date of commencement of such use and thereafter, in lieu of said gas royalty payments Lessee shall pay to Lessor for the use of each such well an annual rental of Two Hundred Dollars ($200.00) payable quarterly so long as such well is used for storage purposes. When any such well is no longer used for storage purposes, Lessee shall so notify Lessor in writing and resume royalty payments as herein provided for gas marketed thereafter.

{¶4} The Mellor Lease has a term for annual rental or delay payments:

Lessee shall drill a well producing oil or gas or a well to be utilized for storage purposes on said premises within one year from this day or pay to Lessor One Hundred and Twenty Five Dollars ($125.00) each year thereafter until such well is drilled or this lease surrendered; provided

> however, that if at the expiration of the above primary term, no well is operating on the above premises, payments in like amount shall be continued so long as gas is being injected, held in storage or withdrawn by Lessee in or from the lands above described or other lands located in the same or any adjoining township, or until a well producing oil or gas or a well to be utilized for storage is drilled or this lease surrendered. If a gas well or a well to be used for storage purposes is completed before the end of the period for which such payment has been made, the unearned portion of this payment shall be a credit on the well rental. When the last well operated under this lease is abandoned, then Lessee, if it elects to hold this lease, shall resume the payments provided for herein and continue the same during the remaining term of this lease or until a well producing oil or gas, or a well to be utilized for storage is drilled or this lease surrendered.

Chain of Title -- Mellor and Lowe Leases

{¶5} Plaintiff-Appellee Marilyn A. Mauger acquired ownership of the Mellor property in 1980. Defendant-Appellant Halwell Company, Inc. was the assignee of the lease. Defendant-Appellant Positron Energy Resources, Inc. also has an interest in the lease. Defendant-Appellant Stonebridge Operating Company is the operator of Mellor Well No. 2.

{¶6} In 1977, Donovan Lowe entered into an oil and gas lease with Future Energy Corp. The Lowe Lease covered property located in Malta Township, Morgan County. The Lowe property is adjacent to the Mellor property. In 1982, Future Energy

Corp. consolidated the lands covered by the Mellor Lease and the Lowe Lease to form a gas development unit. The consolidation granted Mauger a portion of the gas royalties in the amount of 35/40 of 1/8. The consolidation states:

> The within consolidation is made by the Lessee, Future Energy Corporation, in conformity with the terms and conditions of the aforementioned leases which grant to the Lessee the right to consolidate the leased premises or any portion thereof with other lands to form a drilling unit of not more than Forty (40) Acres.

{¶7} The wells drilled under the Lowe Lease are in production and producing gas. Also located in Malta Township, Appellants were withdrawing gas from the Putnam-Bragg Unit.

The Wells on the Mellor Property

{¶8} Since 1971, three wells were permitted to be drilled on the Mellor property. Mellor Well No. 1 was never drilled. Mellor Well No. 3 was drilled in 1982 and plugged in 1984. Mellor Well No. 2 was drilled in 1979. Mellor Well No. 2 is the well at issue in the present case.

{¶9} Mellor Well No. 2 serves a 40-acre area producing from the Medina Sand formation. Mauger argues Well No. 2 stopped producing in 1995. In December 1999, Mauger witnessed workers remove the pump jack from Well No. 2. The tank was also removed from the property. Prior to November 2011, Mauger saw that a pump jack and tank were placed back on Well No. 2. Mauger observed the well was in disrepair and the road leading to the well was grown over.

{¶10} On January 2012, Mauger sent a Notice of Forfeiture to Appellants, pursuant to R.C. 5301.332. Mauger stated the forfeiture was based on the lack of production, no storage of gas under the premises, and that the well had fallen into disrepair. Appellants objected to the Notice of Forfeiture.

Complaint to Quiet Title

{¶11} On April 11, 2012, Mauger filed a Quiet Title action in the Morgan County Court of Common Pleas, naming Appellants as defendants. In her complaint, Mauger brought six claims for relief: (1) the lease terminated by its express terms, (2) abandonment, (3) implied covenant to reasonably develop, (4) implied covenant of further exploration, (5) implied covenant to conduct operations that affect the lessor's royalty interest with reasonable care and due diligence, and (6) lease terminated by its express terms.

{¶12} During the discovery proceedings, Mauger submitted a request for admissions. On June 18, 2013, the trial court granted Mauger's motion to deem the admissions admitted for Appellants' failure to respond or object to the request for admissions.

{¶13} Mauger filed a Motion for Summary Judgment on July 31, 2013. In support of her motion for summary judgment, Mauger filed her affidavit. Mauger also filed the affidavit of Melinda Paige, the legal assistant of Mauger's trial counsel. Paige's affidavit was a summary report of the monthly electricity usage statements associated with Mellor Well No. 2 submitted by Appellants pursuant to Mauger's discovery request.

{¶14} Appellants responded to Mauger's motion for summary judgment. In support of their response, Appellants filed a Notice of Filing on August 21, 2013. The

Notice of Filing states that Appellants filed the (1) Ohio Well Completion Reports, (2) Amendment to the Lease, Vol. 62, page 630, (3) Consolidation of Oil and Gas Leases, (4) Map from the ODNR showing the wells in question, and (5), relevant portions of the well permit for the Lowe well. Appellants also filed a Motion to Strike the Affidavit of Paige and Mauger.

{¶15} Mauger filed a reply on September 9, 2013.

{¶16} On September 25, 2013, Appellants filed Form 1099s from 2009 to 2012 to show that Appellants paid Mauger royalties.

{¶17} An oral hearing on the motion for summary judgment was held on November 19, 2013. The transcript of the hearing was filed.

{¶18} On January 17, 2014, the trial court issued its decision granting summary judgment in favor of Mauger. The trial court held that the primary term of the Mellor Lease expired. The trial court found there was no genuine issue of material fact that the secondary term of the lease expired due to nonproduction, nonpayment of annual rentals, and violations of the implied covenants. The trial court ordered that the Mellor Lease was forfeited and Appellants were ordered to plug Mellor Well No. 2.

{¶19} The trial court did not rule on Appellants' motion to strike the affidavits of Paige and Mauger.

{¶20} It is from this decision Appellants now appeal.

ASSIGNMENT OF ERROR

{¶21} Appellants raise one Assignment of Error:

{¶22} "THE TRIAL COURT ERRED IN GRANTING PLAINTIFF/APPELLEES' MOTION FOR SUMMARY JUDGMENT, FORFEITING OF THE LEASE AND ORDERING THE WELLS PLUGGED."

ANALYSIS

{¶23} Appellants' sole Assignment of Error argues the trial court erred in granting summary judgment in favor of Mauger. For the reasons that follow, we agree there are genuine issues of material fact as to whether the Mellor Lease was terminated by its express terms or abandonment.

Standard of Review

{¶24} We refer to Civ.R. 56(C) in reviewing a motion for summary judgment which provides, in pertinent part:

> Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for

summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

{¶25} The moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court, which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. *Dresher v. Burt,* 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). The nonmoving party then has a reciprocal burden of specificity and cannot rest on the allegations or denials in the pleadings, but must set forth "specific facts" by the means listed in Civ.R. 56(C) showing that a "triable issue of fact" exists. *Mitseff v. Wheeler,* 38 Ohio St.3d 112, 115, 526 N.E.2d 798, 801 (1988).

{¶26} Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. *Vahila v. Hall,* 77 Ohio St.3d 421, 429, 674 N.E.2d 1164 (1997), citing *Dresher v. Burt,* 75 Ohio St.3d 280, 662 N.E.2d 264 (1996).

{¶27} When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court. *Smiddy v. The Wedding Party, Inc.*, 30 Ohio St.3d 35, 506 N.E.2d 212 (1987). The appellate court reviews the motion for summary judgment de novo. *Doe v. Shaffer,* 90 Ohio St.3d 388, 2000-Ohio-186, 738 N.E.2d 1243.

Interpretation of an Oil and Gas Lease

{¶28} With respect to oil and gas leases, the Ohio Supreme Court stated in *Harris v. Ohio Oil Co*., 57 Ohio St. 118, 129, 48 N.E. 502 (1897): "The rights and remedies of the parties to an oil and gas lease must be determined by the terms of the

written instrument, and the law applicable to one form of lease may not be, and generally is not, applicable to another and different form. 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."

{¶29} A contract is to be interpreted to give effect to the intention of the parties. *Morrison v. Petro Evaluation Serv*., Inc., 5th Dist. Morrow No. 2004 CA 0004, 2005-Ohio-5640, ¶ 29 citing *Employer's Liab. Assur. Corp. v. Roehm*, 99 Ohio St. 343, 124 N.E. 223 (1919), syllabus. It is a fundamental principle in contract construction that contracts should "be interpreted so as to carry out the intent of the parties, as that intent is evidenced by the contractual language." *Id*. quoting *Skivolocki v. E. Ohio Gas Co*., 38 Ohio St.2d 244, 313 N.E.2d 374 (1974), paragraph one of the syllabus. "The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement." *Id*. quoting *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth*., 78 Ohio St.3d 353, 361, 1997-Ohio-202, 678 N.E.2d 519.

{¶30} In order to demonstrate a breach of contract, the plaintiff must demonstrate by a preponderance of the evidence (1) that a contract existed, (2) that the plaintiff fulfilled her obligations, (3) that the defendants failed to fulfill their obligations, and (4) that damages resulted from this failure. *Moore v. Adams*, 5th Dist. Tuscarawas No. 2007AP090066, 2008-Ohio-5953, ¶ 22.

{¶31} If there is a breach of an oil and gas lease, the remedy of forfeiture or cancellation is an equitable remedy that rests within the discretion of the trial court. *Moore* at ¶ 23. Forfeiture is an appropriate remedy when legal damages resulting in the

contractual breach are inadequate; upon the breach of implied covenants; upon a claim of abandonment; or when necessary to do justice. *Id*.

{¶32} In this case, Mauger argues reasonable minds could only conclude that the Mellor Lease terminated by its express terms or in the alternative, Appellants abandoned Mellor Well No. 2. The term of the Mellor Lease at issue in the present case states as follows:

> That Lessor [Mellor], in consideration of the sum of One Dollar, receipt of which is hereby acknowledged, and of the covenants and agreements, hereinafter contained, does hereby grant to the Lessee [The Ohio Fuel Gas Company] all the oil and gas in and under the lands hereinafter described, together with the exclusive right at all times to enter thereon and drill for, produce and market oil and gas, the right to store gas in all strata underlying said premises, the right to inject and remove gas regardless of the source thereof in and from all such strata, and the right to possess, use and occupy so much of said premises as is necessary and convenient for the purposes herein specified, *for a primary term of twenty (20) years and so much longer thereafter as oil or gas is produced from said premises or so long as gas is being injected, held in storage or withdrawn by Lessee in or from the lands hereinafter described or other lands located in the same or any adjoining township*; * * *

(Emphasis added.)

{¶33} This clause, known as the habendum clause, has two parts. The first part, or the primary term, is of a definite duration and is for 20 years. There is no factual

dispute that the primary term of the Mellor Lease expired on February 24, 1991. The second part of the habendum clause, or the secondary term, is of indefinite duration and operates to extend the Mellor Lease for "so much longer thereafter as oil or gas is produced from said premises or so long as gas is being injected, held in storage or withdrawn by Lessee in or from the lands hereinafter described or other lands located in the same or any adjoining township."

{¶34} This Court noted in *American Energy Services, Inc. v. Lekan*, 75 Ohio App.3d 205, 212, 598 N.E.2d 1315 (5th Dist.1992), "[i]f after the expiration of the primary term the conditions of the secondary term are not continuing to be met, the lease terminates by the express terms of the contract herein and by operation of law and revests the leased estate in the lessor."

Did the Mellor Lease Expire by its Express Terms?

The Secondary Term

{¶35} Mauger first argues the Mellor Lease expired by its own terms. The primary term expired on February 24, 1991. Mauger argues the secondary term has also expired because since 1995, Appellants have not produced gas or oil from Mellor Well No. 2.

{¶36} Appellants respond that the Mellor Lease is still in effect because not only Mellor Well No. 2 is currently in production, but also because the secondary term of the Mellor Lease considers more than the production of gas and oil from the wells on the Mauger property to maintain the viability of the lease. The secondary term of the Mellor Lease states that Appellants have the exclusive right to the oil and gas for 20 years "and so much longer thereafter as oil or gas is produced from said premises, or so long

as gas is being injected, held in storage or withdrawn by Lessee in or from the lands hereinafter described or other lands located in the same or any adjoining township." Appellants state the Mellor Lease considers the injection, storage, or withdrawal of gas on other properties located in the same or adjoining township to determine whether the secondary term of the Mellor Lease is still in effect.

{¶37} In support of their argument the Mellor Lease is still in effect per the terms of the lease, Appellants point to the Lowe Lease, which encumbers property located adjacent to the Mellor Lease property. Appellants state they provided Civ.R. 56 evidence to show the wells drilled pursuant to the Lowe Lease are producing gas. Appellants also provided information to the trial court to demonstrate the Putnam-Bragg Unit, which is an adjoining unit in the same township, is producing gas.

{¶38} Appellants further argue the Mellor Lease is still in effect because of the 1982 consolidation of the Mellor and Lowe Leases to create a gas development unit. Appellants argue the 1982 consolidation amended the Mellor Lease to create a larger area to withdraw gas for which Mauger would receive a percentage of the royalties.

{¶39} Mauger argues it is Appellants' burden to demonstrate production of oil and gas from the Mellor wells to demonstrate that the Mellor Lease is still in effect. Appellants state it is the lessor's burden to prove non-production. In *Hanna v. Shorts*, 163 Ohio St. 44, 125 N.E.2d 338 (1955), paragraph one of the syllabus, the Ohio Supreme Court held:

> Where an owner of land leases all the oil and gas and their constituents in and under that land for a period of five years and so much longer thereafter as oil, gas or their constituents are produced from said land in

> paying quantities and where such period of five years has expired, the lessee, who contends that the term of such lease extended beyond the end of such five-year period, must allege and prove either (a) some express or implied agreement for the extension of such term beyond said five-year period or (b) that oil, gas or their constituents were produced in paying quantities from said land within and beyond said five-year period or (c) that they could have been so produced if the acts of the lessor had not prevented or interfered with such production.

{¶40} The Fourth District Court of Appeals addressed the parties' burden of proof in an action on an oil and gas lease in *Positron Energy Resources, Inc. v. Weckbacher*, 4th Dist. Washington No. 07CA59, 2009-Ohio-1208. The Fourth District found the "burden of proof question is not controlled by substantive oil and gas law, but rather procedure." *Id*. at ¶ 18. The court acknowledged the party who asserts the claim carries the burden of proving the claim, which includes the obligation to demonstrate the existence of any fact necessary to the prosecution of that claim. *Id*. at ¶ 19. The case presented in *Weckbacher* was a request for declaratory judgment that the oil and gas leases were valid. In order to prove the leases were valid, the appellants were required to prove the leases were still in effect because there were no gaps in production for 60 days. *Id*. at ¶ 18. The court held the appellants asserted the claim for declaratory judgment that the leases were valid, therefore the appellants had the burden to prove the leases were still in effect. *Id*. at ¶ 19.

{¶41} In the present case, Mauger filed a complaint for quiet title to declare the Mellor Lease was no longer valid. Mauger filed a motion for summary judgment arguing

there was no genuine issue of material fact that the Mellor Lease was no longer in effect and Appellants abandoned the wells. Appellants' burden was to demonstrate there were genuine issues of material fact for trial as to whether the Mellor Lease was in effect and the wells have not been abandoned. It is the trial court's granting of Mauger's motion for summary judgment that is before this Court. Pursuant to the dictates of Civ.R. 56, each party has a corresponding burden of proof as to the production or non-production of oil and gas.

{¶42} The express terms of the secondary term state the lease will continue beyond the primary term of 20 years "and so much longer thereafter as oil or gas is produced from said premises, or so long as gas is being injected, held in storage or withdrawn by Lessee in or from the lands hereinafter described or other lands located in the same or any adjoining township." In determining whether the secondary term is still in effect, the plain language of the Mellor Lease demonstrates the scope of the lease is not limited to only oil or gas production from wells on the Mauger property. The language of the secondary term extends the range of the Mellor Lease to beyond the 125 acres of the Mauger property to consider whether "gas is being injected, held in storage or withdrawn by Lessee in or from the lands hereinafter described or other lands located in the same or any adjoining township." Appellants presented evidence to create a genuine issue of material fact whether there is gas being injected, held in storage, or withdrawn by Appellants from lands located in the same or adjoining township -- specifically, the Lowe Unit and the Putnam-Bragg Unit located in Malta Township.

{¶43} Under the plain language of the secondary term of the Mellor Lease, we find upon our de novo review that there is a genuine issue of material fact whether the Mellor Lease is still in effect.

The Annual Rental Fee or Delay Payments

{¶44} The Mellor Lease contains a provision for the payment of an annual rental fee or a delay payment to Mauger by Appellants:

> Lessee shall drill a well producing oil or gas or a well to be utilized for storage purposes on said premises within one year from this day or pay to Lessor One Hundred and Twenty Five Dollars ($125.00) each year thereafter until such well is drilled or this lease surrendered; provided however, that if at the expiration of the above primary term, no well is operating on the above premises, payments in like amount shall be continued so long as gas is being injected, held in storage or withdrawn by Lessee in or from the lands above described or other lands located in the same or any adjoining township, or until a well producing oil or gas or a well to be utilized for storage is drilled or this lease surrendered. If a gas well or a well to be used for storage purposes is completed before the end of the period for which such payment has been made, the unearned portion of this payment shall be a credit on the well rental. When the last well operated under this lease is abandoned, then Lessee, if it elects to hold this lease, shall resume the payments provided for herein and continue the same during the remaining term of this lease or until a well

producing oil or gas, or a well to be utilized for storage is drilled or this lease surrendered.

{¶45} In Mauger's motion for summary judgment, Mauger argued the delay rental payment did not act as a shut-in royalty clause to preserve the Lease during a period of non-production. Mauger, however, did not argue in her motion that Appellants failed to pay her the $125.00 annual delay rental payment thereby causing a breach of the Mellor Lease.

{¶46} In granting summary judgment in favor of Mauger, the trial court found there was no evidence in the record to show that Appellants paid Mauger $125.00 per year after the expiration of the primary term while there was no production from the Mellor wells. The trial court found that the non-payment of the annual delay payment caused the Mellor Lease to be surrendered pursuant to the terms of the Lease.

{¶47} The primary term of the Mellor Lease expired on February 24, 1991. The Civ.R. 56 evidence shows that Mellor Well No. 2 was in production until 1994. Oil and gas production stopped on the Mellor property in 1995. The delay rental provision of the Mellor Lease states: "if at the expiration of the above primary term, no well is operating on the above premises, payments in like amount shall be continued so long as gas is being injected, held in storage or withdrawn by Lessee in or from the lands above described or other lands located in the same or any adjoining township, or until a well producing oil or gas or a well to be utilized for storage is drilled or this lease surrendered." The Mellor wells were not producing oil or gas from 1995 to 2007. We found above there was a genuine issue of material fact whether there was gas being

injected, held in storage, or withdrawn by Appellants in or from the Mauger property or other lands located in the same or any adjoining township.

{¶48} Pursuant to the plain language of the Mellor Lease, if no well is in operation on the 125 acres, Appellants were to pay Mauger $125.00 per year so long as gas was being injected, held in storage, or withdrawn by Appellants in or from the Mauger property or other lands located in the same or any adjoining township.

{¶49} A review of the record in this case shows that there is no Civ.R. 56 evidence, from Mauger or Appellants, as to the $125.00 delay rental payments. Mauger's affidavit makes no mention of the $125.00 delay rental payment. Appellants provide no Civ.R. 56 evidence as to the delay rental payment. Based on the paucity of the record, we cannot say reasonable minds could only conclude that Appellants did not pay Mauger the $125.00 annual delay rental payment. Mauger argues in her motion for summary judgment that the delay rental payment provision of the Mellor Lease is not a shut-in royalty clause, but makes no argument that Appellants breached the Mellor Lease by their alleged failure to pay the annual payment while the Mellor wells were out of production. There remains a genuine issue of material fact whether Appellants breached the terms of the Mellor Lease pursuant to the delay rental payment provision.

{¶50} Accordingly, our de novo review of the record and motion for summary judgment considered in a light most favorable to Appellants finds that there are genuine issues of material fact as to whether the Mellor Lease expired by its express terms.

Did Appellants Abandon the Mellor Lease?

{¶51} Mauger next argues that if the Mellor Lease did not expire by its express terms, there is no genuine issue of material fact that Appellants abandoned the Mellor Lease.

{¶52} An oil and gas lease may be abandoned by a lessee. *Moore v. Adams*, 5th Dist. Tuscarawas No. 2007AP090066, 2008-Ohio-5953, at ¶ 53 quoting *American Energy Services, Inc. v. Lekan*, 75 Ohio App.3d 205, 212, 598 N.E.2d 1315 (5th Dist.1992). We stated in *Moore*:

> The passage of time alone is insufficient, but the absence of any activity on the property over a substantial period of time is a factor that should be considered in light of all the circumstances leading to a determination of relinquishment of possession, both as to the lease and the equipment thereon. *Id.*

Moore v. Adams, 5th Dist. Tuscarawas No. 2007AP090066, 2008-Ohio-5953, ¶ 53.

{¶53} Mauger argues the facts of the present case are on point with our decision in *Moore v. Adams* regarding whether the lessee abandoned the oil and gas lease. In *Moore*, the lessor and lessee entered into an oil and gas lease in 1980. The habendum clause of the lease stated the lease shall be "... for a term of two (2) years and so much longer thereafter as oil, gas or their constituents are produced in paying quantities thereon or operations are maintained on all or part of that certain tract of land ..." The lease also included a shut-in royalty clause. In 2000, the well was shut-in. The lessee failed to pay the shut-in royalty from 2001 to 2006. In 2006, the lessor filed a complaint alleging (1) breach of the lease because the well had not produced for six years not had

operations been maintained by the lessee, (2) breach of implied covenants, and (3) abandonment of the well and equipment. The lessor requested forfeiture and an accounting. The matter was heard at a bench trial. The trial court found in favor of the lessor on all claims of his complaint.

{¶54} We found there was competent and credible evidence to support the trial court's finding that the lessee abandoned the lease and the equipment. There was no production on the well for six years, since the well was shut-in due to a broken pipeline. The lessee never fixed the pipeline and there was photographic evidence depicting rusted equipment and detached pipes. The lessee also failed to pay the shut-in royalties.

{¶55} We compared the facts of *Moore* to those of *North Star Oil & Gas Co. v. Blubaugh*, 5th Dist. Holmes No. CA 328, 1982 WL 6434 (Oct. 6, 1981). In *North Star Oil*, the lessee ceased operations and removed the surface equipment from the leasehold, but left the well casing in the ground. After eight years, the lessee brought an action to prevent the landowner from disposing of the casing. The court held that due to the passage of eight years, the lessee had abandoned the casing, and the title to the same was left with the landowner.

{¶56} In the present case, Mauger provided her affidavit in support of her motion for summary judgment. She avers that in December 1999, the pump jack connected to Mellor Well No. 2 was disconnected and removed from the property. The tank on the Mauger property was removed and to Mauger's knowledge, relocated onto the Lowe property. Mauger's affidavit states that at some time after the removal, Appellants replaced the pump jack and tank. Mauger attached photographs to her affidavit that she

alleges shows the pump jack and tank are in a state of disrepair. She provides a photograph of the road leading to the Mellor Well No. 2 that she states is overgrown.

{¶57} Mellor Well No. 2 was in production from 1984 to 1995. Production stopped in 1995 and resumed in 2008.

{¶58} At first glance, this case appears to be on point with *Moore* and *North Star Oil*; however, there are issues in this case that could prevent reasonable minds from concluding Appellants abandoned the Mellor Lease. First, there is the language of the Mellor Lease. As discussed above, the Mellor Lease contemplates more than production of oil and gas on the Mauger property. The Mellor Lease also encompasses the injection, storage, or withdrawal of gas in or from the 125 acres of the Mauger property *or* other lands located in the same or any adjoining township. During the period of inactivity from Mellor Well No. 2, Appellants were withdrawing gas from the Lowe Unit and Putnam-Bragg Unit. Appellants provided 1099s in their response to the motion for summary judgment to show that Mauger received royalties from Appellants: $149.54 in 2009; $45.14 in 2010; $49.82 in 2011; and $129.37 in 2012. It is unclear if these royalties were generated from production from the Mellor Well No. 2 or from the gas consolidation agreement. Second, the pump jack and tank were removed from the Mauger property to the Lowe property. The pump jack and tank were later replaced on the Mauger property.

{¶59} As we stated in *Moore*, the passage of time alone is insufficient, but the absence of any activity on the property over a substantial period of time is a factor that should be considered in light of all the circumstances leading to a determination of relinquishment of possession, both as to the lease and the equipment thereon. *Moore*

did not establish a bright-line test to determine abandonment, but rather stated factors to be considered in light of all the circumstances. In the present case, the circumstances presented could cause reasonable minds to come to different conclusions as to whether Appellants abandoned the Mellor Lease.

Did Appellants Breach the Implied Covenants?

{¶60} Mauger also argues Appellants breached the implied covenants of the Mellor Lease. "[I]n every lease, unless it is specifically excluded, there is an implied covenant that the lessee will operate the lease with due diligence." *Moore v. Adams*, 2008-Ohio-5953 at ¶ 31. Our review of the terms of the Mellor Lease shows that it does not contain any language excluding the implied covenants.

{¶61} The generally recognized implied covenants in oil and gas leases are:

{¶62} 1. The covenant to drill an initial exploratory well.

{¶63} 2. The covenant to protect the lease from drainage.

{¶64} 3. The covenant of reasonable development.

{¶65} 4. The covenant to explore further.

{¶66} 5. The covenant to market the product.

{¶67} Mauger's complaint alleges Appellants breached the implied covenants of reasonable development, to explore further, and to market the product. In its judgment entry granting summary judgment, the trial court found there was no genuine issue of material fact that Appellants breached the implied covenants.

{¶68} Upon our de novo review, we find the language of the Mellor Lease obviates the conclusion that reasonable minds could only find that Appellants breached the implied covenants. The Mellor Lease contemplates more than production of oil and

gas on the Mauger property. The Mellor Lease also encompasses the injection, storage, or withdrawal of gas in or from the 125 acres of the Mauger property *or* other lands located in the same or any adjoining township. During the period of inactivity from Mellor Well No. 2, Appellants were withdrawing gas from the Lowe Unit and Putnam-Bragg Unit. The language of the Mellor Lease creates a genuine issue of fact whether Appellants breached the implied covenants.

There are Genuine Issues of Material Fact for Trial

{¶69} This court reviews a motion for summary judgment under a de novo standard of review. Upon due consideration of the plain language of the Mellor Lease and the facts presented in this case, we find there are genuine issues of material fact that prevent summary judgment in favor of Mauger. Accordingly, the sole Assignment of Error of Appellants is sustained. The judgment of the Morgan County Court of Common Pleas is reversed and the matter is remanded for further proceedings consistent with this opinion and law.

The Affidavits of Paige and Mauger

{¶70} While not raised as a separate Assignment of Error, Appellants argue the trial court erred in failing to rule on its motion to strike the affidavits of Paige and Mauger that were submitted in support of Mauger's motion for summary judgment.

{¶71} “If a trial court fails to mention or rule on a pending motion, the appellate court presumes that the motion was implicitly overruled.” *Swinehart v. Swinehart,* 5th Dist. Ashland No. 06-COA-020, 2007-Ohio-6174, ¶ 26.

{¶72} Based on our decision above to reverse the granting of summary judgment in favor of Mauger, we find the implicit denial of the motion to strike the affidavits of Paige and Mauger to be moot.

CONCLUSION

{¶73} The sole Assignment of Error of Appellants is sustained.

{¶74} The judgment of the Morgan County Court of Common Pleas is reversed and the matter remanded for further proceedings consistent with this opinion and law.

By: Delaney, J.,

Hoffman, P.J. and

Baldwin, J., concur.