IN THE SUPREME COURT OF OHIO

Barry L. Browne, *et al*., Appellants	)	**Case No. 2018-0942**
v.	)	**On Appeal from the Court of Appeals of Guernsey County**
Artex Oil Co., *et al.,* Appellees	)	**Fifth Appellate District**
	)	**Court of Appeals Case No. 17CA20**

MEMORANDUM IN SUPPORT OF JURISDICTION BY AMICI CURIAE OHIO FARM BUREAU FEDERATION AND GUERNSEY COUNTY FARM BUREAU ON BEHALF OF APPELLANTS

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MEMORANDUM IN SUPPORT OF JURISDICTION

I. STATEMENT OF INTEREST

The Ohio Farm Bureau Federation ("OFBF") and the Guernsey County Farm Bureau (collectively, hereinafter, "Farm Bureau") respectfully ask this Court to accept this appeal. OFBF is Ohio's largest general farm organization, representing Ohio's farm families. OFBF is a federation of member-county Farm Bureaus, representing all of Ohio's 88 counties. Guernsey County Farm Bureau is one of those member-counties, with 937 member-families in Guernsey County. Farm Bureau members in this and every county of the state serve on boards and committees working on legislation, regulations, and issues that affect agriculture, rural areas, and Ohio's citizens in general. Many members are involved in farm and agribusiness activities, including crop and livestock production, food processing, commodity processing, conditioning and handling, biofuel production, and greenhouse operations. Members of the Farm Bureau run the gamut from large to small businesses.

Farm Bureau is a truly grassroots organization. All of the policy positions taken by the Farm Bureau began as an idea from an individual member. Those policy positions are vetted by the individual member's county, then a state committee, and finally approved by a delegate body representing the members in every county of the state.

Oil and gas development, as well as its impact on private property rights and landowners, has become a significant point of discussion in Farm Bureau's yearly policy development process. Ohio Farm Bureau policy states that the organization supports clearly defining specific production activities that keep an energy development lease active and in force. Ohio Farm Bureau Federation, 2018 State Policies, Policy #141: Energy, at 10, line 41-42 (2017) available at https://ofbf.org/app/uploads/2018/02/2018-OFBF-Policy-Book.pdf (last accessed July 12, 2018).

Farm Bureau policy also supports requiring companies to plug and decommission non-productive, non-operating wells according to R.C. Chapter 1509, forfeit the leasehold back to the landowner, and automatically record an affidavit of forfeiture and abandonment with the county recorder's office. Ohio Farm Bureau Federation, 2018 State Policies, Policy #542: Oil and Gas, at 95, line 73-76 (2017) available at https://ofbf.org/app/uploads/2018/02/2018-OFBF-Policy-Book.pdf (last accessed July 12, 2018).

II. EXPLANATION OF WHY THIS CASE IS OF GREAT PUBLIC AND GENERAL INTEREST

This case presents two issues that are critical to the property rights of those whose land is leased for oil and gas development: (1) whether the expiration of a lease for non-production is a breach of the lease or simply an expiration under the lease terms, and (2) whether production reports legally required to be filed with the Ohio Department of Natural Resources (ODNR) are relevant to determining whether the well is producing in paying quantities.

A. Breach vs. Expiration

The first issue is critical for this reason: it definitively determines when or if a claim can be brought. When a lease expires for non-production, if the non-production is considered a breach of the lease, then an eight-year statute of limitations applies under R.C. 2305.041 and 2305.06.[1] If the non-production simply ends the term of the lease, then a twenty-one-year statute of limitations applies under R.C. 2305.04.

[1] Prior to September 28, 2012, the statute of limitations for written contracts in R.C. 2305.06 was 15 years. The statute of limitations was lowered to eight years in 2012 S.B. No. 224. No party is arguing for an eight-year statute of limitations in this case, but that would likely be the applicable statute of limitations for any claims arising after 2012 if the 5th District's decision is allowed to stand.

The lower court incorrectly interpreted R.C. 2305.041 when it found that the expiration of the lease fell under the catchall provision in such section which states: "An action alleging a breach with respect to *any other issue that the lease or license involves* shall be brought within the time period specified in section 2305.06 of the Revised Code." (emphasis added). This is erroneous because the expiration of a lease for non-production is not a breach, and does not give rise to an action alleging a breach. Rather the lease has simply expired on its own terms. *See Rudolph v. Viking Resources*, 2017-Ohio-7369, 84 N.E.3d 1066, ¶44 (4th Dist.).

Once the term of the lease has expired (including for non-production), the lessee has a legal duty to have the lease released of record in the county where such land is situated without cost to the lessor/landowner. R.C. 5301.09. Unfortunately, lessees often neglect to do this, and the lessor/landowner is stuck with the burden of trying get the expired lease removed from their chain of title. This is most often accomplished through a quiet title action, at the landowner's expense. If the oil and gas company has decided to resume production at some point after the lease expired, then the oil and gas company has become an adverse possessor and must be forcibly removed before the 21-year statute of limitation runs.

It is concerning that the lower court's decision effectively creates an incentive for companies to not fulfill their duties under R.C. 5301.09. With the shorter statute of limitations, oil and gas companies are incentivized to keep expired leases on the books, and then resume production once technology or market conditions improve. While it is already very difficult for landowners to fight these David vs. Goliath battles, shortening the statute of limitations to eight years makes it all that much more difficult. Landowners often work for years just to gather basic information about the old leases and wells that encumber their property, attempting to navigate historical (and often incomplete) records of lease assignments, transfers and spotty recordkeeping.

Due to the burden placed on the landowner, all this investigatory work must be completed prior to even filing an action to clear the landowner's title—even though no such action should be required if the company had followed its legal duty to clear the title once the lease expired.

There is an environmental and safety concern here as well. OFBF members are significantly concerned about the circumstances of orphaned and unplugged wells across this state. Further removing any incentive to attend to these abandoned interests by shortening the statute of limitations could serve to exacerbate the problem of unproductive wells left to unsafely languish in hopes that they will someday in the indeterminable future become profitable again.

B. Relevancy of Legally Required Production Reports

The second issue presented in this case is equally critical: whether production reports legally required to be filed with ODNR are relevant to determining whether a well is producing in paying quantities. Most oil and gas leases contain a habendum clause which provides that the term shall be for a specified number of years (the primary term), and so long thereafter as oil and gas is produced in paying quantities (secondary term). The lease in this particular case has a slightly different habendum clause, which provides for a primary term of one year, and said term shall extend long thereafter as oil and gas, or either of them, is produced by lessee from said land or from a communized unit as hereafter provided. Either way, under the standard clause or the clause in the lease in this case, production of oil and gas is the relevant question.

So, how does the lessee prove production, or how does the lessor prove non-production? Under the lower court's decision, a self-serving affidavit from the lessee will suffice, even if it conflicts with the legally required production reports (or lack thereof) that the lessee is legally required to file with ODNR. *See also Burkhart Family Trust v. Antero Resources Corp.*, 2016-

Ohio-4817, 68 N.E.3d 142 ¶23 (7th Dist.), *Mobberly v. Wade*, 2015-Ohio-5287, 44 N.E.3d 313, ¶ 16 (7th Dist.).

Despite the decisions in the 5th and 7th Districts, amici are left wondering how can a lessor prove non-production, or lack of production in paying quantities, if he cannot rely on the production records that the lessee files with the relevant state regulatory agency? If legally required public records of production (or lack thereof) hold no weight, it will be nearly impossible for lessors to prove a lack of production. This case presents the perfect opportunity for this Court to correct this injustice and establish that ODNR production reports can be used by lessors as evidence of production or non-production.

Because this case has a significant impact on the rights of landowners, the Farm Bureau members of Guernsey County, and the thousands more members throughout this state who desire to see the minerals under their lands developed in a reasonable and marketable manner, we ask this Court to accept jurisdiction of this case.

III. STATEMENT OF THE CASE AND FACTS

Farm Bureau adopts the statement of the case and facts as set forth by Appellant.

IV. ARGUMENT IN SUPPORT OF AMICI'S PROPOSITIONS OF LAW

Proposition of Law No. 1: The expiration of an oil and gas lease for non-production is not a breach, but instead an automatic expiration, occurring as an operation of law, and therefore the appropriate action for a lessor to confirm that expiration and clear title is a quiet title action with a 21-year statute of limitations under Ohio Revised Code 2305.04.

A. Oil and gas leases are a unique confluence of property and contract law.

This Court has ruled, as recently as 2015, that oil and gas leases are a unique confluence of property interest and contract law. The Court has also ruled that while a lease may present similar to other types of contracts, the vast control and rights it grants results in a property interest of fee simple determinable subject to reverter. *Chesapeake Exploration L.L.C. v. Buell*, 144 Ohio

St.3d 490, 2015-Ohio-4551, 45 N.E. 3d 185, ¶61. As this Court's decisions have made clear, and the law in R.C. 5301.09 also states, oil and gas leases are an interest in real estate. "Ohio law has long recognized that minerals underlying the surface, including oil and gas, are part of the realty." *Chesapeake* ¶21.

B. When an oil and gas lease expires the leased estate automatically re-vests in the lessor.

It is well-settled law that an oil and gas lease that expires under a habendum clause does so as an operation of the law and automatically re-vests the leased estate in the lessor. *See Chesapeake* ¶75, *see also Cox v. Kimble*, 5th Dist. Guernsey, No. 13CA32, 2015-Ohio-2470, ¶64, *Am. Energy Services Inc. v. Lekan*, 75 Ohio App.3d 205, 212, 598 N.E.2d 1315 (5th Dist.1992), *Holland v. Gas Enterprises Company*, 4th Dist. Washington County No. 15CA42, 2016-Ohio-4792, ¶25. The termination is automatic as it affects the parties. However, "the landowner may need to resort to the courts to obtain complete relief, i.e. cancellation of the lease of record and removal of the cloud from the title." *Rudolph v. Viking Resources*, 2017-Ohio-7369, 84 N.E.3d 1066, ¶41 (4th Dist.). The expiration or termination of a lease creates no record on the chain of title that the rights have reverted back to the lessor. *Chesapeake* ¶75. The lessor, then, may, but is not required to, take affirmative steps to clarify that the lease has expired.

C. The expiration of a lease upon its own terms involves the property interest of the lessor, and is appropriately disputed as a quiet title action.

When interests in real estate are disputed, with a possessor and an adverse interest, those interests are rightfully disputed under the quiet title actions provided in the Revised Code. *Rudolph* ¶44. Just as any other claim that a fee simple determinable with possibility of reverter had, in fact, reverted, would be heard as a quiet title action, so should the claim that the oil and gas lease interest has reverted to the fee simple landowner.

While the court must engage in contract interpretation when it comes to the written terms of an oil and gas lease, or a breach of those terms, the property interest is at issue when considering the status and scope of the lease itself. Ohio courts have settled that oil and gas leases like the one at hand, utilizing both a primary and secondary term, create a fee simple determinable interest with a reversionary interest retained by the lessor. *Chesapeake Exploration L.L.C. v. Buell*, 144 Ohio St.3d 490, 2015-Ohio-4551, 45 N.E. 3d 185, at ¶61, *see also Harris v. Ohio Oil Co.*, 57 Ohio St. 118, 128, 48 N.E. 502 (1897) at 129-130. That reversionary interest can be triggered by any list of events, likely negotiated into the terms of the lease. The reversion is commonly dependent, as here, upon a habendum clause which causes the lease to expire upon the lack of production in paying quantities.

D. The correct statute of limitations is 21 years under Ohio Revised Code 2305.04.

Unfortunately, the lessee in the underlying case is attempting to frame this dispute as a breach of contract in order to take advantage of a much shorter statute of limitations under R.C. 2305.041 and 2305.06. But the expiration of a lease on its own terms for lack of production in paying quantities is <u>not</u> a breach of contract to which contract limitations should be applied. *See Rudolph v. Viking Resources*, 2017-Ohio-7369, 84 N.E.3d 1066, ¶44 (4th Dist.).

All property leases have a term and eventually that term ends. Leases can terminate on a date certain, they can terminate because one party provides notices or fails to renew, or they can terminate because some other condition has occurred or not occurred. These terminations, or expirations, are hardly considered breaches. If they were considered breaches, then other contractual provisions would be triggered, such as notice requirements, opportunities to cure, alternative dispute resolution, and payment of attorney fees.

In a similar fashion, the expiration of an oil and gas lease on its own terms is not a breach of the lease's term; rather, it is the effect of the lease's terms. In general, the leases continue so long as there is production in paying quantities. Once that stops, the lease stops, and the property interest reverts to, and re-vests in, the lessor. That does not mean the lessee breached the lease. The lessor need not give the lessee notice and an opportunity to cure. *Rudolph* at ¶40. Normally the lessee goes away at that point. If not, the lessor must bring an action to recover title to or possession of an interest in real property, and twenty-one years under R.C. 2305.04 is the proper statute of limitations. *Rudolph* at ¶46.

Proposition of Law No. 2: Legally required records of production, or lack thereof, must be given sufficient weight when determining whether a well has "produced in paying quantities" so as to extend an oil and gas lease past the primary term.

Ohio Revised Code 1509.11 places an affirmative duty upon a company to report the production of a well. These production records create the only publicly accessible record available to the very landowners where these wells are stationed. If a landowner suspects the well on their property is not producing, this is the valid resource that can be used to form the basis of any claim to clear title when that landowner may be forced to go to the courts. Landowners use these reports to review the production of the wells on their property, learn about the production history, and to audit any reports that may come with their royalties. It is not uncommon for landowners to find upon acquiring a property with an existing well and lease that ODNR production records are historically sporadic at best and non-existent at worst. They then must often navigate the labyrinth of the large corporations that own the wells, and wait inordinate lengths of time for responses to their inquiries as to production and sale amounts. The responses received are often incomplete and impossible to decipher.

The 5th District ruled for the lessees in this case on summary judgment on the basis of self-serving affidavits professing there was some production of oil, this despite the fact that the legally

required, government-mandated records were absent or contradicted the lessee's affidavits. Further, the affidavits merely suggested there was production, but did not evidence that there was production "in paying quantities," the standard which the lease at hand (and likely the majority of oil and gas leases in this state) requires to stay in force.

Summary judgment requires examining all evidence in a light most favorable to the non-movant, and noncompliance with legal reporting requirements should not result in a benefit to those who fail to comply.

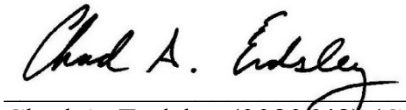
As companies are legally required to file production reports, the information contained in those reports or the lack thereof should be heavily weighed and create a presumption that production either occurred or did not. Under the 5th District's holding, a company can use a violation of its reporting duty to its advantage, avoiding the need to actually prove that which a lease requires to stay in force. As many old oil and gas leases remain throughout this state, landowners should feel secure in knowing that the presence or absence of such legally required records, and the information contained therein, will be relevant and reliable if they file a claim to clear their title.

V. CONCLUSION

The ability of a property owner to use, access and enjoy the property which they rightfully own is a right which must be respected, for "private property is held forever inviolate" in this state. Ohio Constitution, Article 1, Section 19. The 21-year statute of limitation applied under the quiet title action affords the landowner an appropriate period to investigate possible claims and secure them to ensure their property rights are protected. An oil and gas lease represents a property interest, and when such lease expires as an operation of law, a quiet title action is the appropriate action in which to clear the title of a landowner's property of the expired or terminated oil and gas

lease. Further, landowners must be able to rely upon the only publicly available, legally required records to determine how the oil and gas wells on their lands are operating. If such legally required records are afforded no weight or discounted, landowners lose their ability to understand and defend the private property rights held so dear under our Ohio Constitution. For the reasons above, the Ohio Farm Bureau and Guernsey County Farm Bureau respectfully ask this court to grant jurisdiction and to hear this case of great public importance.

Respectfully Submitted,



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