IN THE SUPREME COURT OF OHIO

Barry Browne, *et al.*,	:	**Case No. 2018-0942**
	:	
Plaintiffs-Appellants	:	**Appeal from the Court of**
	:	**Appeals, Fifth Appellate District,**
v.	:	**Guernsey County, Ohio**
	:	
Artex Oil Company, *et al.*,	:	**Case No. 17CA 20**
	:	
Defendants-Appellees	:	

MEMORANDUM OF APPELLEES, ARTEX OIL COMPANY, ARTEX ENERGY GROUP, LLC, ARLOMA CORPORATION, AND JAMES HUCK, LLC, IN OPPOSITION TO JURISDICTION

Daniel P. Corcoran (0083512)
Kristopher O. Justice (0082182)
THEISEN BROCK
a legal professional association
424 Second Street
Marietta, Ohio 45750
Telephone: 740.373.5455
Telecopier: 740.373.4409
corcoran@theisenbrock.com
Counsel for Appellees

Donald D. Brown (0012670)
Donald D. Brown Law Offices
803 Steubenville Ave.
Cambridge, Ohio 43725
Telephone: 740-432-5683
brownlaw2@firewireinternet.com
Counsel for Appellees

Bryan C. Conaway (0089625)
Knowlton Bennett & Conaway
126 North 9th Street
Cambridge, Ohio 43725
Telephone: 740-439-2719
Telecopier: 740-432-4937
bconaway@knowltonbennett.com
*Counsel for Appellant*s

Ethan Vessels (0076277)
Fields, Dehmlow, and Vessels
309 Second Street
Marietta, Ohio 45750
Telephone: 740.374.5346
ethan@fieldsdehmlow.com
Counsel for Appellants

Chad A. Endsley (0080648)
Leah F. Curtis (0086257)
Amy Milam (0082375)
280 N. High Street
P.O. Box 182383
Columbus, Ohio 43218-2383
cendsley@ofbf.org
lcurtis@ofbf.org
amilam@ofbf.org
Counsel for Ohio Farm Bureau and Guernsey County Farm Bureau

Timothy B. McGranor (0072365)
Gregory D. Russell (0059718)
Vorys, Sater, Seymour and Pease, LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
tbmcgranor@vorys.com
GDRussell@vorys.com
Counsel for Ohio Oil and Gas Association

Table of Contents

Table of Authorities

Cases

Revised Codes

Other Sources

Statement of the Case and Facts

Appellants, Barry L. Browne and Rosa R. Browne, are the owners of 86 acres, more or less, of real property ("Property") in Guernsey County, Ohio. Complaint, ¶ 3; Answer, ¶ 3. The lease ("Lease") that currently burdens the Property was dated December 20, 1975 and recorded January 26, 1976. Complaint, ¶¶ 4-5; Answer, ¶¶ 4-5.

Pursuant to the Lease, one oil and gas well ("Well") was drilled on the Property, identified as the Mercer No. 1 Well. Complaint, ¶ 6; Answer, ¶ 6. Appellees acquired an interest in the Lease from Mike Johnson, dba Johnson Oil and Gas, by Assignment recorded on October 4, 1999. Complaint, ¶ 10; Answer, ¶ 10. Appellees' production records show that from December, 1999 through September 2014, the Well produced 1,771.49 barrels of oil and the gross revenue from such sales was $100,776.31. First Aff. of Deborah Smith, ¶¶ 2, 4. During this period of time, the Well "continually produced oil into the tank on a regular basis." Aff. of Joe Liptak, ¶ 3b, Aff. of Rick Hunt, ¶ 3b. The oil production was sufficient to yield a profit over pumping expenses. Aff. Eugene Huck, ¶ 11.

On December 1, 2014, Appellants filed a Complaint against Appellees, Artex Oil Company, Artex Energy Group LLC, Arloma Corporation, and James Huck, LLC (collectively, "Artex") for quiet title, declaratory judgment, and unjust enrichment alleging that the Lease was no longer valid. On December 15, 2014, Artex filed an Answer and Counterclaim, asking the trial court to declare that the Lease was valid and fully enforceable.

On January 1, 2015, Artex filed its Second Motion for Summary Judgment, which the trial court denied on May 5, 2016. On June 27, 2017, Artex filed a Motion for Reconsideration based on new case law that had been decided in the intervening period of time.

On July 31, 2017, the trial court granted Artex's Motion for Reconsideration, declared that Artex's Lease was valid, and dismissed Appellants' claims with prejudice. Appellants appealed the decision but it was unanimously affirmed by the Fifth District on May 31, 2018.

Appellees' Statement of Why This Is Not A Case Of Public Or Great General Interest

The decision below is not of public or great general interest. Although Appellants dramatically assert that the decision "creates an impossible evidentiary standard for lessors" (Appellant's Memorandum, p. 1), the truth is that the Fifth District's decision is based on the clear language of the Lease, applicable Ohio statutes, and well-established case law.

Appellants filed this case to terminate Artex's Lease, but they have never presented any admissible evidence in support of their claims. Artex, on the other hand, presented seven separate affidavits from six different witnesses including 1) Debra Smith (Artex's accountant), 2) Eugene Huck (Artex's Vice President), 3) James Vernon Patterson (a former owner of the Property from 1999-2000 and nephew of Mary Louise Miller, deceased, who owned the Property from 1975-1999), 4) Michael Kavage (a retired ODNR field inspector for Guernsey County from 1980-2010), 5) Joe Liptak (a former pumper of the Well), and 6) Rick Hunt (a former pumper of the Well). These affidavits, along with the Artex production records attached thereto, showed that the Well had been in continuous production.

In response to the seven affidavits presented by Artex, Appellants presented nothing – not a single pleading, affidavit, answer to interrogatory, or written admission. Appellants did not even bother to take any depositions in this case. Without presenting at least some evidence, Appellants could not demonstrate a disputed issue of material fact. The trial court therefore dismissed Appellants' Complaint and entered judgment in favor of Artex.

Appellants' argument, that they should be permitted to go to trial without any evidence, would require this Court to dramatically and fundamentally rewrite Ohio law. Ironically, this would have a far more disruptive impact on established substantive and procedural law than the supposed parade of horribles presented by Appellants.

Response to Proposition of Law No. 1

A. The evidence is undisputed that the Well produced prior to 1999.

The only admissible evidence that has been presented concerning the Well's production prior to 1999 was presented by Artex.[1] It is undisputed that, when Appellants' Property was owned by Mary Louise Mercer, James Vernon Patterson regularly visited and hunted on the Property.[2] Aff. of James Vernon Patterson, ¶¶ 5-6. He observed that the Well produced oil and was pumped on an interval basis regularly. Aff. of James Vernon Patterson, ¶ 7. It is undisputed that, during the period prior to April 6, 1999, gas and oil were produced from the Well and royalties were paid. Aff. of James Vernon Patterson, ¶ 11. On September 1, 1999, the attorney for the estate of Mary Louise Mercer sent a letter to Artex's predecessor, Mike Johnson, dba Johnson Oil, advising that the Property had been transferred and that all future royalty checks be issued to Mr. Patterson.[3] Aff. of James Vernon Patterson, ¶ 9. Mr. Patterson testified that "oil was hauled and sold once or twice a year during the period of my Aunt's and my ownership." Aff. James Vernon Patterson, ¶ 12.

[1] Appellants attempted to present what purported to be a production graph from Mammoth (a prior owner of the Well). Artex moved to strike the graph and moved *in limine* to exclude the graph because it was unauthenticated and inadmissible hearsay.

[2] Mary Louise Mercer owned the Property from the time the Lease was signed in 1975 until her death in 1999. Mr. Patterson owned the Property from 1999 until it was sold in 2000.

[3] Incredibly, the attorney sending the letter regarding the Well's royalty payments was from the same law firm as counsel for Appellants.

Michael Kavich, an ODNR field inspector for Guernsey County from 1980 to 2010, testified that during his time as field inspector, he never received a complaint that the Well was not in production. Aff. of Michael Kavich, ¶¶ 2, 7. Mr. Kavich would have issued a notice of violation if he inspected a well that was not producing and was not capable of producing, yet he never issued any such violation for the Well, even though he inspected each well in his area approximately once a year. Aff. of Michael Kavich, ¶¶ 4, 7, 8.

Finally, Eugene Huck testified that, in his opinion, the Well had been in production since it was drilled to completion. Aff. of Eugene Huck, ¶ 8.

Appellants did not present any affidavits, depositions, answers to interrogatories, written admissions, or other admissible evidence to contradict any of the evidence presented by Artex. Collectively, the undisputed testimony of Mr. Patterson, Mr. Kavich, and Mr. Huck clearly establishes that the Well was in continuous production prior to 1999.

B. Appellants may not terminate the Lease based on an alleged lack of production more than 15 years prior to the filing of this lawsuit.

In this case, Appellants say the trial court should not have applied R.C. 2305.041 to their claim that the Lease expired. Contrary to all the admissible evidence that has been presented, they argue that the Lease expired because the Well did not have any reported production of oil or gas from the Well's inception in 1976 until 1999.

The court below and the Seventh District have applied a 15-year statute of limitations to actions to terminate an oil and gas lease. *See Potts v. Unglaciated Indus.*, 2016-Ohio-8559, 77 N.E.3d 415 (7th Dist.). In *Potts*, the Seventh District recognized that "R.C. 2305.03 specifically provides a civil action may be commenced only within the period prescribed in R.C. 2305.04 to 2305.22, unless a different limitation is prescribed by statute." *Id.* ¶ 110. It

also recognized that, under R.C. 2305.14, the legislature has provided for a catchall limitations period of ten years for those causes of action found to fall outside any specific statute. *Id*.

In *Potts*, the Seventh District held that a special statute of limitations governs oil and gas leases, specifically R.C. 2305.041.[4] *Id*. ¶¶ 110-111. After noting the strong public policy that exists for statutes of limitations, it concluded that "[w]here a lease is in production, a prior period of alleged non-production or insufficient production is a situation encompassed in the legislative mandate to apply the statute of limitations for a written contract." *Id*. ¶ 113.

Regardless of whether the Well was in production prior to 1999 when it was acquired by Artex, the facts are clear and undisputed that the Well has produced continuously in paying quantities for a period of at least 15 years from 1999 to 2014, the year this action was commenced. Under either the 15-year limitation period, applied by the Fifth District below and the Seventh District in *Potts*, or under the 10-year limitation period set forth in the catch-all statute (R.C. 2305.14), any period of alleged non-production or insufficient production prior to 1999 is a situation encompassed in the legislative mandate to apply the statute of limitations. Appellants' claim to terminate the Lease based on a lack of production prior to 1999 is now time-barred.

C. The 21-year statute of limitations does not apply to Appellants' claims.

Appellants argue that, if any statute of limitations applies to their claims, it is the 21-year statute of limitations for adverse possession of real property set forth under R.C.

[4] Importantly, under R.C. 1.51, if a general statutory provision conflicts with a special or local provision, and if the conflict is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevails. Here, the 21-year statute of limitations, R.C. 2305.04, has been effective for decades and was last amended on January 13, 1991, whereas R.C. 2305.041, which adopts a 15-year statute of limitations, was enacted April 6, 2007.

2305.04. They say this is appropriate because their claims constitute an action to recover title to or possession of real property.

1. The Lease does not give Artex "title" to Appellants' mineral estate.

"Title" is the legal link between a person who owns property and the property itself, and it includes all the elements constituting the legal right to control and dispose of the property, including ownership, possession, and custody. *See* Black's Law Dictionary.

There are some important differences between a leasehold estate in minerals (the interest held by Artex in this case) and title to minerals. Actual title is not a defeasible estate; there is no reversionary interest. A leasehold estate, by contrast, continues only for as long as the conditions of the secondary term of the lease are satisfied; typically, when there is no longer production in paying quantities, all rights revert to the lessor, who holds the title. The duration of a leasehold estate is based on the law of contracts. For this reason, when the conditions of the secondary term are not met, a lease terminates "by the express terms of the contract." *State ex. rel. Claugus Family Farm v. Seventh Dist. Court of Appeals*, 145 Ohio St.3d 180, 2016-Ohio-178, 47 N.E.3d 836, ¶ 20 (emphasis added)(quoting *Am. Energy Servs., Inc. v. Lekan*, 75 Ohio App.3d 205, 212, 598 N.E.2d 1315 (5th Dist. 1992)).

Also, a person holding title to minerals does not have an obligation to pay a royalty on the production to anyone. The holder of a leasehold estate, by contrast, is required by contract to pay the lessor a royalty. The very existence of the lessee's royalty payments essentially acknowledges that the title to the minerals is held by the lessor, the mineral owner.

It is certainly true that an oil and gas lease creates an interest in real estate. See R.C. 5301.09. But an "interest" in land is "far broader than ownership of property." *See Chesapeake Exploration, L.L.C. v. Buell*, 144 Ohio St. 3d 490, 2015-Ohio-4551, 45 N.E.3d 185,

¶ 60, ¶ 38. Although a lease affects the possession and custody of a mineral estate, it does not alter the actual ownership (or title) of the mineral estate. *See Buell*, ¶ 60 (holding that an oil and gas lease affects the possession and custody of a mineral estate, but "not its ownership.").

Appellants' attempt to cancel Artex's Lease is not an action to recover "title" to real property because Artex's Lease never divested Appellants of their title to their minerals in the first place. Artex has at all times recognized Appellants' reversionary interest and right to receive royalties. Artex's production operations over the last 15+ years has not been adverse to or inconsistent with Appellants' title to the minerals. Since this is not an action to recover title to Appellants' real property, the 21-year statute of limitations under R.C. 2305.04 does not apply.

2. The Lease does not give Artex "possession" of Appellants' "real property."

Under Ohio law, minerals form part of the realty while they are in the earth. *See Nonamaker v. Amos*, 73 Ohio St. 163, 170, 76 N.E. 949 (1905); *see also Schlabach v. Kundik*, 7th Dist. Harrison No. 16 HA 0017, 2017-Ohio-8016, ¶ 23. But, as long as the minerals remain in the ground, nobody is in actual possession of them. *See Bergholtz Coal Holding Co. v. Dunning*, 11th Dist. Lake No. 2004-L-209, 2006-Ohio-3401, ¶40 ("In the present case, the property in question is the right to mine subsurface coal deposits. No party has begun to extract the subject coal. Accordingly, no party may be said to be in actual possession of the property.").

When oil and gas reaches a well and is produced on the surface, it immediately becomes personal property and belongs to the owner of the well. *See Nonamaker*, 73 Ohio St. at 170; *Schlabach*, ¶ 23. An oil and gas lessee obtains possession of the minerals when production occurs, but at that point, the minerals become personal property and are no longer considered part of the realty.

Appellants' claims to recover possession of, or damages for, the oil that Artex has produced and sold over the last 15+ years (Appellants' Third and Fourth Claims) are claims to recover personal property, not "real property." Appellants' claims to cancel Artex's Lease (Appellants' First and Second Claims) are not aimed at recovering "possession" of real property, because Artex is not in possession of the oil and gas that lies in the earth. So, none of Appellants' claims are to recover "possession" of "real property."

The ancillary rights that Artex enjoys under the Lease to enter the Property and remove the oil and gas are not in the nature of real property and cannot be physically possessed. Instead, they are in the nature of a *profit a prendre*,[5] which is incorporeal in nature, meaning that they have a conceptual existence but no tangible, physical existence. See Black's Law Dictionary. Since the Lease at issue here has not granted Artex actual possession of Appellants' real property, the 21-year statute of limitations under R.C. 2305.04 does not apply.

3. Not every claim to "quiet title" or for adverse possession is governed by the 21-year statute of limitations.

Appellants cannot finesse their way into the scope of the 21-year statute of limitations by characterizing their claim as an action to quiet title. The words "quiet title" are not a mystical incantation that can transform the substance of Appellants' claims. Courts have recognized that, in some cases, an action to "quiet title" is governed by a statute of limitations that is less than 21-years. *See Bonham v. City of Hamilton*, 12th Dist. Butler No. CA2006-02-030, 2007-Ohio-349 (holding that a property owner's claim which sought the reformation of a

[5] A *profit a prendre* is an easement that confers the right to enter and remove [such things as] timber, minerals, oil, gas, game, or other substances from land in the possession of another. *Hunker v. Whitacre-Greer Fireproofing Co*., 155 Ohio App. 3d 325, 2003-Ohio-6281 ¶ 27 (7th Dist.) (*Waite,* concurring) (citing 1 Restatement of the Law, 3d. Property (2000) 12, Section 1.2).

deed was governed by the ten-year statute of limitations under R.C. 2305.14, even though the complaint was filed in order to "quiet title").

Likewise, not every action in adverse possession is governed by the 21-year statute of limitations. The limitation period depends on the nature of what is being possessed. Although adverse possession of "real property" is governed by the 21-year statute of limitations under R.C. 2305.04, adverse possession of personal property is governed by the 4-year statute of limitations under R.C. 2305.09(B). Since this Court has recognized that oil and gas leases "straddle the line between property and contract" (*Buell*, 2015-Ohio-4551, ¶41), a landowner's claim to terminate an oil and gas lease does not fit neatly within the scope of R.C. 2305.04.

D. The applicable statute of limitations is based on the actual nature or subject matter of the case.

Appellants suggest that they can manipulate the applicable statute of limitations by artful pleading. Specifically, they say that if their claim arises from an expiration of the Lease, instead of a "breach" of the Lease, that R.C. 2305.04 should apply.

Appellants cannot avail themselves of a longer, more favorable statute of limitations under R.C. 2305.04 by invoking (or refraining from invoking) certain magic words in the pleadings or by drawing superficial distinctions. Under Ohio law, it is well-recognized that "[a] party cannot transform one cause of action into another through clever pleading or an alternative theory of law in order to avail itself of a more satisfactory legal status." *Creech v. Gaba*, 10th Dist. Franklin No. 15AP-1100, 2017-Ohio-195, ¶10 (citing *Callaway v. Nu-Cor Automotive Corp.*, 166 Ohio App. 3d 56, 2006-Ohio-1343, ¶14, 849 N.E.2d 62 (10th Dist.)). In determining which statute of limitations applies, courts must look to the actual nature or subject matter of the case, rather than to the form in which the action is pleaded. *Schlabach v. Kundik*, 7th Dist. Harrison No. 16 HA 0017, 2017-Ohio-8016, ¶ 18.

In *Schlabach*, the Seventh District refused to apply the 21-year statute of limitations to an action to reform a deed because the interest purportedly reserved (a lessor's interest in an oil and gas lease) "would not vest Schlabach with a title interest or a possessory interest in the real property." *Schlabach*, ¶ 34. Likewise, since the Lease at issue here has not granted Artex actual title to or possession of Appellants' real property, the 21-year statute of limitations under R.C. 2305.04 does not apply.

E. *Rudolph* is neither binding nor persuasive.

Appellants urge this Court to adopt the Fourth District's holding in *Rudolph v. Viking Int'l Res. Co., Inc.*, 4th Dist. Washington No. 15CA26, 2017-Ohio-7369, ¶3. In *Rudolph*, the Fourth District purported to apply a 21-year statute of limitations to a landowner's claim to terminate an oil and gas lease. In that case, however, it was undisputed that there had been a permanent cessation in production from the well between 1998 and 2001 and that the landowner's claims therefore accrued in 2001. *Id.* ¶18. Since landowner filed his declaratory judgment action in 2014, it made no difference to the outcome of the case whether the court applied a 15 or a 21-year statute of limitations. *Id.* ¶51.

Response to Proposition of Law Nos. 2, 3, and 4

A. Artex does not need to produce run tickets for every sale of oil that has ever taken place.

Although Artex has presented their production records going all the way back to 1999, Appellants say that these records cannot be used to show that the Well has been producing. They say that only "objective" and "verifiable" evidence from third parties can be used to show that a well is producing. Memorandum, pp. 1, 3, 13. Using their made-up evidentiary standard requiring "objective" and "verifiable" third-party records, Appellants ignore all of Artex's production records, except the available run tickets from 2009, 2010 and 2011.

There is no legal requirement that Artex must prove the production with a specific type of evidence, such as run tickets. The fact that Artex does not have run tickets for every oil sale since 1976, a period of over 41 years, does not mean that the sales did not take place. Artex regularly inputs the information from the run tickets into its computerized production records (attached to the affidavits of Debra Smith) and does not keep run tickets. According to these records, there have been many more sales than those that occurred in 2009, 2010, and 2011.

B. Artex's own production records are admissible for the purpose of showing that the Well was producing.

Under the actual rules that apply to the presentation of evidence, Artex's production records are relevant and admissible. Under Ohio Rule of Evidence 401, "relevant evidence" is defined very broadly to include "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Under Ohio Rule of Evidence 402, all relevant evidence is admissible unless some exception applies. Since Appellants have failed to identify any such exception, Artex's production records can be used to show that the Well has been producing.

From December 1999 (when Artex acquired the Well) through September 2014, the Well produced 1,771.49 barrels of oil and the gross revenue from such sales was $100,767.31. First Aff. of Deborah Smith ¶¶ 2, 4. After deducting cumulative severance taxes of $236.98 and miscellaneous other deductions of $100.36, the net revenue from oil sales was $100,438.97. Since 1999, $12,554.87 in landowner royalties were paid to Appellants and their predecessors. Aff. of Eugene Huck, ¶ 9. Artex's vice president, Eugene Huck, testified that the Well produced quantities of oil sufficient to yield a profit to Artex over pumping expenses. Aff. of Eugene Huck, ¶ 11.

Artex's production records are properly authenticated and attached to the affidavit of Debra Smith. They are also supported by the affidavit testimony of Eugene Huck and those who pumped the Well from 1999 through 2014, namely Rick Hunt and Joe Liptak. According to the testimony that has been presented, the Well continuously produced oil during this period of time. Aff. of Rick Hunt, ¶ 3; Aff. of Joe Liptak, ¶ 3. Appellants did not attempt to strike any of this evidence. The fact that the persons familiar with Artex's production operations also happen to be Artex's employees does not mean that their testimony should all be disregarded as "self-serving." There is absolutely no legal or factual basis for this Court to hold that Artex's production records are inadmissible.

C. Oil is sold periodically when it has accumulated in the tank.

Appellants argue that oil should only be considered produced at the time it is sold. Specifically, they say that, since there were no sales from the Well in 2002, 2005, and 2008, the Well did not produce in those years. This ignores the fact that, unlike natural gas, which is typically sold at the time it is produced, produced oil is usually pumped into a tank until enough has accumulated to commercially sell. So, even though oil production is continuous and ongoing, oil sales take place only periodically. Oil sales may occur more than a year apart, but that does not mean that the well is out of production between sales. To the contrary, a well must be in production between sales for it to accumulate something to sell.

Courts have already recognized that a lease may be maintained by continuous production even though oil sales occur periodically. In *Blausey v. Stein*, 6th Dist. Ottawa No. OT-78-3, 1978 Ohio App. LEXIS 9031 (Dec. 8, 1978), the lessee produced and sold oil from a single well from the time he acquired the lease in 1962. *Id*. at 2. From 1971 to 1975, the well was occasionally pumped but no oil was sold. *Id.* Since no oil was sold, no royalties accrued

during this period. *Id.* at 3. There were several sales of oil in 1976 from which royalties accrued but were not paid because the lessor refused to sign a division order. *Id*.

The court of appeals in *Blausey* held that the lease had not been forfeited, the term of the lease had not expired, and the lease continued in full force and effect. *Id*. at 16. Given that the well in *Blausey* was only occasionally pumped from 1971 to 1975, and that no oil was actually sold during a five-year period, Appellants' argument that the court can invalidate Artex's Lease for less than a two-year interval between oil sales lacks any merit.

Moreover, Artex presented evidence from persons who pumped the Well from 1999 to 2014, namely Rick Hunt and Joe Liptak. According to their testimony, the Well continuously produced oil during this period of time. Aff. of Rick Hunt, ¶ 3; Aff. of Joe Liptak, ¶ 3. Their testimony explains that oil sales occurred when sufficient oil had accumulated in the tank. Once again, Appellants have presented no evidence to the contrary. Based on the unambiguous language of the Lease, so long as oil continued to be produced, it is irrelevant whether oil sales were made in each calendar year.

D. The lack of an ODNR production record does not show that a well was not producing.

Appellants argue that the Well was not producing prior to 1999 based solely on the lack of reported production to ODNR. But Ohio only began requiring producers to file production records with the state in 1965. *See* R.C. 1509.11 (Eff. Oct. 15, 1965).

In any event, courts have repeatedly held that the absence of such production records is irrelevant in determining whether a well actually produced oil and gas. *See Mobberly v. Wade*, 7th Dist. Monroe No. 12 MO 18, 2015-Ohio-5287, ¶ 16 ("[w]hether or not Appellee sent ODNR Production reports is not a relevant issue in this matter. To prevail, Appellee need only produce evidence that oil was produced, not that he filed the requisite production records to ODNR.");

Burkhart Family Trust v. Antero Resources Corp., 2016-Ohio-4817, 68 N.E.3d 142, ¶ 23 (7th Dist.) ("[T]he failure to file production reports with ODNR does not add to the determination of whether a well is producing."); *Potts v. Unglaciated Indus.*, 2016-Ohio-8559, 77 N.E.3d 415, ¶75 (7th Dist.); *Burkhart v. Miley*, 7th Dist. Monroe Nos. 15MO12, 15MO13, 15MO14, 2017-Ohio-9006, ¶48; *Pfalzgraf v. Miley*, 7th Dist. Monroe Nos. 16MO5, 16MO6, 2018-Ohio-2828, ¶37.

The failure to file production records does not show a lack of production any more than the failure to file a tax return shows a lack of taxable income. This is especially true when all the evidence shows that production was continuous. Thus, in analyzing whether a lease expired, the relevant question is whether the lease actually produced, not whether that production was reported to the ODNR.

Response to Proposition of Law Nos. 5 and 6

On a motion for summary judgment "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 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, 296, 662 N.E.2d 264 (1996). If the moving party carries its burden, the nonmoving party has a reciprocal burden of setting forth specific facts showing that there is a genuine issue for trial. *Id.* at 293.

In this case, Artex met its initial responsibility of demonstrating the absence of a genuine issue of material fact by presenting seven affidavits. Appellants failed to meet their reciprocal burden because they did not present any evidence. The trial court did not err in granting Artex's motion for summary judgment because Appellants failed to show a genuine issue for trial. Since Appellants presented no evidence in opposition to Appellees' Motion for Summary Judgment, the Complaint was properly dismissed, even when construing the evidence in a light most favorable to Appellants.

Conclusion

Appellants urge this Court to broadly and fundamentally remake Ohio law by placing the burden of production on Artex, by ignoring the relevant statute of limitations, and by creating a new and discriminatory judicial presumption that all leases are invalid unless the producer proves otherwise by way of "objective" and "verifiable" records from third parties. This Court should apply the Rules of Evidence and the Rules of Civil Procedure as they were written, not as Appellants wish they were written. The Fifth District correctly and unanimously affirmed the judgment entry of the trial court dismissing Appellants' Complaint and determining that Artex has a valid lease on the Property. This case is not of public or great general interest.

/s/ Daniel P. Corcoran
Daniel P. Corcoran (0083512)
Kristopher O. Justice (0082182)
THEISEN BROCK, *a legal professional association*
424 Second Street
Marietta, Ohio 45750
Telephone: 740-373-5455
Telefax: 740-373-4409
Corcoran@theisenbrock.com
Attorney for Appellees, Artex Oil Company, Artex Energy Group LLC, Arloma Corporation, and James Huck, LLC

/s/ Donald D. Brown
Donald D. Brown (0012670)
Donald D. Brown Law Offices
803 Steubenville Ave.
Cambridge, Ohio 43725
Telephone 740-432-5638
Brownlaw2@firewireinternet.com
Counsel for Appellees, Artex Oil Company, Artex Energy Group LLC, Arloma Corporation, and James Huck, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **Memorandum of Appellees, Artex Oil Company, Artex Energy Group, LLC, Arloma Corporation, and James Huck, LLC, in Opposition to Jurisdiction** was served on the following by email this 3rd day of August, 2018:

Bryan C. Conaway
Knowlton Bennett & Conaway
126 North 9th Street
Cambridge, Ohio 43725
bconaway@knowltonbennett.com
*Counsel for Appellant*s

Chad A. Endsley
Leah F. Curtis
Amy Milam
280 N. High Street
P.O. Box 182383
Columbus, Ohio 43218-238
cendsley@ofbf.org
lcurtis@ofbf.org
amilam@ofbf.org
Counsel for Ohio Farm Bureau and Guernsey County Farm Bureau

Timothy B. McGranor
Gregory D. Russell
Vorys, Sater, Seymour and Pease, LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
tbmcgranor@vorys.com
GDRussell@vorys.com
Counsel for Ohio Oil and Gas Association

Ethan Vessels
Fields, Dehmlow, and Vessels
309 Second Street
Marietta, Ohio 45750
ethan@fieldsdehmlow.com
Counsel for Appellants

/s/ Daniel P. Corcoran
Daniel P. Corcoran
Counsel for Appellees, Artex Oil Company, Artex Energy Group LLC, Arloma Corporation, and James Huck, LLC

(444489)