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.*,	:	**Ct. App. Case No. 17CA 20**
	:	
Defendants-Appellees	:	

MERIT BRIEF OF APPELLEES, ARTEX OIL COMPANY, ARTEX ENERGY GROUP, LLC, ARLOMA CORPORATION, AND JAMES HUCK, LLC

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Introduction

The shale drilling in southeastern Ohio has enticed some landowners (many of whom have been solicited by opportunistic plaintiff's lawyers) to try to break existing leases on their property. The prospect of obtaining a considerable cash "bonus" upon signing new leases has incentivized these landowners (and their counsel) to find creative ways to challenge the viability of historically producing leases, even if it means scouring old production records to locate interruptions in production (real or perceived) going back many decades.[1] Barry and Rosa Browne ("the Brownes") propose that, if any statute of limitations applies to their lease termination claims, it should be the 21-year statute of limitations under R.C. 2305.04 (the longest available statute of limitations). And, they suggest that the statute should not begin to run until they subjectively determine/discover that the validity of the existing lease is in dispute, which could be 30, 50, or even 100 years after the alleged termination occurred. This would allow landowners to file lawsuits based on events that happened many decades ago, and producers in such cases would have no meaningful way to defend themselves because of the difficulties of proof. This threat of litigation would adversely impact production from existing wells and future drilling and development on older leases.

A. Revised Code 2305.04 does not apply to a claim to terminate an oil and gas lease.

The 21-year statute of limitations under R.C. 2305.04 does not apply to the Brownes' claims to terminate the lease in this case. An oil and gas lease does not convey a lessee "title" to the property or the oil and gas underlying the property. Under Ohio law, the ownership of oil and gas is still governed by a modified rule of capture. While the lease is in

[1] In some cases (such as this) landowners try to use the lack of any available production records, decades after the fact, as proof that a well did not produce.

effect, the lessee is permitted to conduct commercial production operations on the property for as long as it provides an economic benefit to the lessor (in the form of a royalty), but the lessor retains actual ownership of the property. Also, a lease does not give the lessee "possession" of the landowner's "real property" because nobody is in possession of the oil and gas while it is in the ground. Once the lessee captures the oil and gas by bringing it to the surface, it is considered personal property. The lessee's right under the lease to enter upon the surface of the property is a *profit a prendre*, which is a non-possessory interest in land.

B. Revised Code 2305.041 is a special statute of limitations for claims arising under oil and gas leases.

The Brownes' claims, like all other civil claims, should be subject to a statute of limitations. The legislature has enacted a special statute of limitations for claims arising under oil and gas leases, which became effective on April 6, 2007. Claims relating to the calculation or payment of royalties are subject to a 4-year statute of limitations under R.C. 1302.98, while claims arising from any other issue that the lease involves are governed by a 15-year (now 8-year[2]) statute of limitations under R.C. 2305.06. Revised Code 2305.06 applies to any action upon an "agreement" in writing, regardless of whether that agreement constitutes a "contract," and regardless of whether the claims arise out of a "breach" of the agreement. Alternatively, if neither R.C. 2305.04 nor R.C. 2305.041 apply, this Court should apply the 10-year catch-all statute of limitations under R.C. 2305.14. The statute of limitations should begin to run when

[2] Section 4 of the uncodified law underlying the 2012 amendment to R.C. 2305.06 says that causes of action that accrued prior to the effective date of the amendment will be barred 8 years from September 28, 2012 or the expiration of the prior 15 year limitation period, whichever occurs first.

any production activity openly occurs on the property after the event that allegedly terminates the lease (here, an alleged cessation in production).[3]

C. This case was improvidently accepted.

Though the Brownes' appeal should fail on the merits, there is a more fundamental problem: the acceptance of the Brownes' proposition of law will not affect the outcome of this case. The Brownes have failed to present any evidence that, since the Well was drilled in the 1970s, it has ever stopped producing. So, regardless of whether this Court applies an 8-year, 10-year, 15-year, or 21-year statute of limitations, there is no basis for concluding that the Lease ever automatically expired for lack of production in the first place. Even if this Court accepts the Brownes' proposition of law and holds that the 21-year statute of limitations governs their lease termination claims, these claims would still be time-barred. This Court should decline the Brownes' invitation to render an advisory opinion and should dismiss this appeal.

Statement of Facts and the Case

A. Facts of this case.

The lease ("Lease") that currently burdens the property ("Property") was dated December 20, 1975 and was recorded January 26, 1976. (Supp. 21, 39). Pursuant to the Lease, one oil and gas well ("Well") was drilled on the Property, identified as the Mercer No. 1 Well. (Supp. 21, 39).

The Brownes are the owners of the Property. (Supp. 21, 39). They bought the Property in 2012, which is more than 13 years after Artex Oil Company, Artex Energy Group,

[3] Artex has been openly operating the Well since it acquired the Well in 1999. These operations have produced 1,771.49 barrels of oil, and the gross revenue from the sale of such oil was $100,776.31. All royalties have been paid.

LLC, Arloma Corporation, and James Huck, LLC (collectively, "Artex") acquired the Lease and began their period of operating the Well in 1999. (Supp. 22, 28, 39) .

1. There is no evidence that the Well ever stopped producing oil and gas.

In their merit brief, the Brownes say that the Well did not produce "for years." The Brownes' Brief, p. 4. Of course, there is no citation to any evidence in the record to support this allegation (in violation of S.Ct.Prac.R. 16.02(B)(3)) because there is no such evidence. The Brownes themselves have no idea what the Well produced in the 1970s, 1980s, or 1990s because they bought the Property in 2012. (Supp. 28). And, although the Brownes had more than a year to conduct discovery on this issue (from December 1, 2014—the day this case was filed—through December 21, 2015—the discovery completion deadline) they did not present any admissible evidence from anyone showing that the Well did not produce at any point in time, let alone "for years."

The complete lack of proof is utterly fatal to the Brownes' claims; their case should be dismissed on that basis alone. So, with less than a month to go before the trial date (scheduled for August 22, 2017), the trial court did so. The Brownes did not have any evidence to present in support of their claims at trial. In fact, the Brownes asserted throughout the case that they did not actually need to present any evidence.[4] The Brownes simply refuse to accept that their unsupported allegations are insufficient to demonstrate a genuine issue of material fact.

2. All the admissible evidence that has been presented shows that the Well has been in continuous production since it was drilled.

[4] Recall that, under the Brownes' Proposition of Law No. 5 (which this Court has twice rejected), the Brownes believe that the lessee has the burden of proof in an action, filed by the lessor, to terminate the lessee's oil and gas lease. In other words, the Brownes believe that they do not have the burden of presenting any evidence in support of their claims at trial.

The only admissible evidence that was presented concerning the Well's production was presented by Artex. The undisputed testimony shows that, when the Brownes' Property was owned by Mary Louise Mercer (the original lessor), James Vernon Patterson (her nephew) regularly visited and hunted on the Property.[5] (Supp. 194). He observed that the Well produced oil and was pumped on an interval basis regularly. (Supp. 194). It is undisputed that, during the period prior to April 6, 1999, oil was produced from the Well and royalties were paid. (Supp. 195). 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.[6] (Supp. 195, 201). Mr. Patterson testified that "oil was hauled and sold once or twice a year during the period of my Aunt's and my ownership." (Supp. 195).

Michael Kavich, an Ohio Department of Natural Resources ("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. (Supp. 202). 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. (Supp. 202).

Finally, Eugene Huck testified that, in his opinion, the Well had been in production since it was drilled to completion. (Supp. 193).

3. Artex acquired the Well in 1999.

[5] Mary Louise Mercer owned the Property from the time the Lease was signed in 1975 until her death in 1999. (Supp. 195). Mr. Patterson owned the Property from 1999 until it was sold in 2000. (Supp. 195).

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

Artex acquired an interest in the Lease from Mike Johnson, dba Johnson Oil and Gas, by Assignment recorded on October 4, 1999. (Supp. 22, 39). Artex's production records show that from December, 1999 through September 2014, the Well produced 1,771.49 barrels of oil and the gross revenue from the sale of this oil was $100,776.31. (Supp. 171). During this period of time, the Well "continually produced oil into the tank on a regular basis." (Supp. 204, 206). The oil production was sufficient to yield a profit over pumping expenses. (Supp. 193).

The Brownes did not present any evidence disputing any of the testimony set forth above.

B. Artex's property rights are entitled to just as much protection and respect under the Ohio Constitution as are the Brownes' property rights.

Artex Oil Company is a privately owned Ohio-based corporation formed in 1995; all but one of Artex Oil Company's investors are owners of the company and Ohio residents. (Supp. 192). Artex Oil Company owes its decades of success to innovation, a sound strategic vision, and a willingness to take calculated risks. The oil and gas industry in general, and Artex Oil Company in particular, represents a bright spot in the economy of this state, especially in an area (southeastern Ohio) that has been distressed for the last several decades. The hardworking people at Artex Oil Company, and the other local oil and gas producers who will be affected by this case, are everyday Ohioans just as much as the Brownes and the members of the Farm Bureau.

Artex Oil Company makes money from the exploration and production of oil and gas, not from promotion. (Supp. 192). This means that its existing wells, and the leases under which they are operated, are essential to the survival of the company. Over the years, it has

invested millions of dollars in drilling and producing oil and gas wells in the state of Ohio.[7] With the support of the Farm Bureau, however, the Brownes are attempting to forfeit those assets. They say that they should "have the benefit" (Farm Bureau Brief, p. 11) of the longest possible statute of limitations (if this Court adopts any statute of limitations at all) so that their property rights may be "respected." They cite to and rely upon the Ohio Constitution, Article 1, Section 19, which says that "private property is held forever inviolate," as justification for their positon. But Artex's wells and leases are private property too. Essentially, the Brownes and the Farm Bureau say that this Court should protect their private property rights by facilitating the forfeiture of Artex's private property.

This appeal is not a substitute for the legislative process. The role of this Court is not to enact new policy. These briefs should not be used for one side or the other to lobby for "the benefit" of a longer or a shorter statute of limitations. Both sides in this case have property rights that may be affected by this Court's ruling and both sides have a pecuniary interest in the outcome of this case.

C. Procedural history of this case.

On December 1, 2014, the Brownes filed a Complaint against Artex for quiet title, declaratory judgment, and unjust enrichment alleging that the Lease was no longer valid. (Supp. 20). The Brownes asserted that the Lease had terminated based on events (disputed by persons with knowledge of the facts at the time) that occurred more than a decade before they acquired the Property in 2012. On December 15, 2014, Artex filed an Answer and Counterclaim, asking the trial court to declare that the Lease was valid and fully enforceable. (Supp. 39).

[7] Oil and gas do not freely flow from below ground to the surface. Extracting these resources requires a significant investment to be placed at risk.

On January 19, 2016, Artex filed its second motion for summary judgment, which the trial court denied on May 5, 2016. (Supp. 6). This case was stayed for a period of time pending this Court's decision in *Schultheiss v. Heinrich Enterprises, Inc.*, 150 Ohio St.3d 181, 2017-Ohio-2895, 80 N.E.3d 455, which ultimately never came.[8] (Supp. 8). The case was returned to the trial court's active docket on June 6, 2017. (Supp. 9). 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. (Supp. 9).

On August 1, 2017, the trial court granted Artex's motion for reconsideration, declared that Artex's Lease was valid, and dismissed the Brownes' claims with prejudice. (Supp. 9). The Brownes appealed the decision but it was unanimously affirmed by the Fifth District on May 31, 2018. (Supp. 10, 16).

Answer to the Brownes' Proposition of Law No.1

A. The 21-year statute of limitations under R.C. 2305.04 does not apply to the Brownes' lease termination claims.

The Brownes 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. 2305.04. The Brownes' Brief, p. 1. They say this is appropriate because their claims constitute an action to recover the title to or possession of real property.

1. The Lease does not give Artex "title" to the Property or the oil and gas underlying the Property.

[8] On May 22, 2017, *Schultheiss* was dismissed by this Court *sua sponte* as having been improvidently accepted.

An oil and gas lease does not grant a lessee title[9] to the property. After signing an oil and gas lease, a lessor may still sell, devise, mortgage, or otherwise encumber his property, just as before, subject only to the lessee's rights under the lease. The lessor remains the owner of the property.

An oil and gas lease does not grant a lessee title to the oil and gas underlying the property. Under Ohio law, the ownership of oil and gas is governed by a modified rule of capture. *See Northwestern Ohio Natural Gas Co. v. Ullery*, 68 Ohio St. 259, 272, 67 N.E. 494 (1903)("as oil and gas are migratory in character, no one can tell from whence they came, or whither they are going, and they must, therefore, belong to him upon whose lands they are captured. No one else can have any ownership interest in them, and a man can be awarded only that which he owns")(partially superseded by R.C. Chapter 1509, which codifies the doctrine of co-relative rights); *Kelly v. Ohio Oil Co.*, 57 Ohio St. 317, 328, 49 N.E.399 (1897)("[oil] is the property of, and belongs to, the person who reaches it by means of a well and severs it from the realty and converts it into personalty."). As recently as 2016, the Seventh District has recognized that, although the rule of capture has been limited, it has not been abrogated. *See Barnes v. Reserve Energy Exploration*, 2016-Ohio-4805, 68 N.E.3d 133, ¶30 (7th Dist.).

Artex does not have ownership of the oil and gas underlying the Property until it has been reduced to possession by bringing it to the surface. The Brownes' attempt to cancel Artex's Lease is not an action to recover "title" to real property because the Lease never conveyed to Artex title to the Property or the minerals underlying the Property in the first place.

[9] "Title" is defined as "[t]he union of all elements (as ownership, possession, and custody) constituting the legal right to control and dispose of property." *Chesapeake Exploration, LLC v. Buell*, 144 Ohio St.3d 490, 2015-Ohio-4551, 45 N.E.3d 185, ¶59 (quoting Black's Law Dictionary at 1712).

a. A financial return for the lessor is fundamental to the consideration for an oil and gas lease.

An oil and gas lease grants the lessee a leasehold estate in the minerals. There are some important differences between a leasehold estate in minerals and title to minerals. Under a deed conveying a fee simple determinable, title to the property is unaffected by whether the grantee's activity on the property results in any kind of financial benefit or return for the grantor.

An oil and gas lease is different. This Court has recognized that, unless an oil and gas lease expressly says otherwise, the lessee has a duty to properly develop the property. *See Harris v. Ohio Oil Co.*, 57 Ohio St. 118, 127, 48 N.E. 502 (1898). In *Harris*, this Court analogized an oil and gas lease to a lease of a farm for tillage on the shares. In that circumstance, the tenant has an implied duty to cultivate the farm in the manner usually done by reasonably good farmers. *Id.* Thus, the implied covenant of reasonable development was born.

In *Ionno v. Glen-Gery Corp.*, 2 Ohio St.3d 131, 134, 443 N.E.2d 504 (1983), this Court discussed how the consideration for the lease, and "the expected return derived from the actual mining of the land," were at the heart of the lessee's duty to develop the property. It held that, under a lease, lessees were obligated to work the land "not simply for their own advantage and profit, but also so that lessors may secure the actual consideration for the lease, *i.e.*, the production of minerals and the payment of a royalty on the minerals mined." *Id.* This Court recognized this basic principle once again in *Chesapeake Exploration, LLC v. Buell*, 144 Ohio St.3d 490, 2015-Ohio-4551, 45 N.E.3d 185, ¶16. The purpose of an oil and gas lease is "commercial production of [oil and] gas by the lessee for sale to third parties." *See Gardner v. Oxford Oil Co.*, 2013-Ohio-5885, 7 N.E.3d 510, ¶41 (7th Dist); *see also Pottmeyer v. East Ohio Gas Co.*, 2016-Ohio-1294, 62 N.E.3d 617, ¶37 (4th Dist.). Thus, courts have held that anything "incidental" to this purpose (such as providing the lessor free gas) will not continue the lease.

b. The lessee has an obligation to pay the lessor a royalty because the lessee does not have title to the minerals underlying the property.

A mineral owner can drill his own well on his own property and does not have an obligation to pay a royalty to anyone when the oil and gas is produced. The holder of a leasehold estate, by contrast, is required by contract to pay the lessor a royalty.

Artex does not assert that the Lease granted it title to the minerals underlying the Brownes' Property. Instead, it simply asserts that it has rights in the Property consistent with the terms of the Lease, no more and no less. Artex has at all times recognized the Brownes' right to receive royalties (and they have paid the royalties to the Brownes and their predecessors). Artex's production operations over the last 15+ years have not been adverse to or inconsistent with the Brownes' title to their land. Since the Lease has not granted Artex title to the Brownes' real property, the 21-year statute of limitations under R.C. 2305.04 does not apply.

c. An oil and gas lease is not perpetual.

The language in a lease's habendum clause describing the duration the lease resembles the language in a grant under a deed for a fee simple determinable. Under a typical deed granting a fee simple determinable, land is conveyed to the grantee "for so long as the property is used for school purposes" or "for so long as no alcohol is brought onto the property." Any kind of fee simple, even a fee simple determinable, may endure forever. The grantee under a deed for a fee simple determinable holds defeasible title to the land, in perpetuity.

An oil and gas lease is different. Although the secondary term of an oil and gas lease is indefinite, and even though the secondary term of a lease may continue for many decades, the rights granted to the lessee will eventually revert to the lessor. It is not possible for oil and gas wells to produce in paying quantities in perpetuity, and (as discussed above) it is not the intention of the parties to an oil and gas lease that the lease should continue when there is no

financial benefit for the lessor. For this reason, this Court has recognized that perpetual leases are void as against public policy. *See 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, ¶21 (citing *Ionno*, 2 Ohio St.3d at 134). Because of its economic purpose and limited duration, an oil and gas lease is not a freehold estate.[10] It therefore does not convey title to real property.

d. *Buell* does not hold that an oil and gas lease conveys title to the oil and gas to the lessee.

The Brownes rely very heavily on this Court's decision in *Buell*, 2015-Ohio-4551, syllabus pt. 1, in which it held that an oil and gas lease was an occurrence under the Dormant Mineral Act, R.C. 5301.56(B)(3)(a). In *Buell*, this Court determined that when an oil and gas lease is filed or recorded, the mineral interest is the subject of a "title transaction." As this Court recognized in *Buell*, however, "title transaction," as defined under R.C. 5301.47(F), and as used in R.C. 5301.56(B)(3)(a), is extremely broad. Based on the statutory definition, a title transaction is not limited to those transactions transferring title to ownership of land.[11] *See Buell*, ¶¶ 36-37. Instead, a transaction is considered a "title transaction" under R.C. 5301.47(F) if it is merely "affecting title" to any interest in land.

In *Buell*, this Court recognized that, for purposes of its analysis, the distinction between the different kinds of property interests created by an oil and gas lease did not make any difference. *Buell*, ¶ 49. Revised Code 5301.09 makes it clear that an oil and gas lease creates an

[10] This kind of interest in land is sometimes referred to as a chattel real.

[11] For example, R.C. 5301.49(A) described certain interests to which a record marketable title is subject and provides that "easements, use restrictions, or other interests created prior to the root of title" should be identified in the chain of title by a "recorded title transaction" that created the "easement, use restriction, or other interest." Thus, a "title transaction" under the Marketable Title Act can mean a transaction that creates an easement or use restriction. Although easements and use restrictions certainly fall within the category of "any interest in land," they do not actually transfer the land's title.

interest in real estate. But an "interest" in land is "far broader than ownership of property." *See Buell*, ¶ 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."). So, while a lease conveys the custody and use of the mineral estate to the lessee, the lessor "continue[s] to own the mineral estate on paper." *Buell*, ¶ 62.

This Court could certainly conclude, and did conclude in *Buell*, that an oil and gas lease affects the title to a mineral interest under R.C. 5301.56. The lessor's title to the minerals is affected when it is made subject to the rights of a lessee under an oil and gas lease. But this Court in *Buell* was not asked to determine whether an oil and gas lease actually conveys title from the lessor to the lessee. Thus, as Justice Kennedy recognized in her concurring opinion, it was not necessary to determine what interest in land a traditional oil and gas lease created, since it was clear that the General Assembly did not intend that "affecting title" would be synonymous with shifting or impairing ownership. *Buell*, ¶¶ 95, 102, 105.

2. The Lease does not give Artex "possession" of the Brownes' "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); *Pure Oil Co. v. Kindall*, 116 Ohio St. 188, 201, 156 N.E. 119 (1927); *Buell*, 2015-Ohio-4551, ¶ 21. 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.").

As this Court noted in *Buell*, an oil and gas lease "ultimately" (when it is produced) "grants title in the oil and gas underlying the property to the lessee." *Buell*, ¶64. But, when the oil and gas reaches the lessee's possession (and he obtains title to it), it immediately becomes personal property. *See Nonamaker v. Amos*, 73 Ohio St. at 170; *Kelly v. Ohio Oil Co.*, 57 Ohio St. at 328; *Schlabach v. Kondik*, 2017-Ohio-8016, 98 N.E.3d 1048, ¶ 23 (7th Dist.). When actual possession occurs, the minerals become personal property and are no longer considered part of the realty. Thus, the Brownes' claims to cancel Artex's Lease 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, and the oil that Artex has actually produced and possessed is personal property.

a. A *profit a prendre* does not grant Artex possession of the Brownes' real property.

An oil and gas lease grants the right to enter upon the surface of the land "to the extent reasonably necessary to perform the terms of the instrument." *Buell*, 2015-Ohio-4551, ¶53 (quoting *Harris*, 57 Ohio St. at 130). This right is "limited to the purposes of the lease." *Buell*, ¶60.

The rights that Artex enjoys under the Lease to enter the Property and remove the oil and gas are in the nature of a *profit a prendre*. 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, 801 N.E.2d 469, ¶ 27 (7th Dist.)(Waite, concurring)(citing 1 Restatement of the Law, 3d. Property (2000) 12, Section 1.2). An easement

is a non-possessory property interest in the land of another.[12] *See Pomante v. Marathon Ashland Pipe Line LLC,* 187 Ohio App.3d 731, 2010-Ohio-1823, 933 N.E.2d 831, ¶7 (10th Dist.)(citing *Andrews v. Columbia Gas Transmission Corp.*, 544 F.3d 618, 624 (6th Cir. 2008)).

Artex's right to enter upon the surface of the Property is in the nature of an easement, and is not a possessory interest in land. Since the Lease at issue here has not granted Artex a possessory interest in the surface of the Brownes' Property, the 21-year statute of limitations under R.C. 2305.04 does not apply.

b. This Court's decision in *Dundics* does not mean that the Lease grants Artex possession of the Browne's' real property.

The Brownes rely on this Court's decision in *Dundics v. Eric Petroleum Corp*., Slip Opinion No. 2018-Ohio-3826, where it held that an oil and gas lease falls within the definition of "real estate" for purposes of R.C. 4735.01(B), which is the statute requiring a real estate license for real estate brokers. The statutory definition of "real estate" under R.C. 4735.01(B) is very broad and includes "leaseholds as well as any and every interest or estate in land situated in this state, whether corporeal or incorporeal, whether freehold or nonfreehold, and the improvements on the land…."

The language used in the 21-year statute of limitations that the Brownes' urge this Court to adopt under R.C. 2305.04 is not nearly as broad. It applies only to an action "to recover the title to or possession of real property." The fact that an oil and gas lease is considered "real

[12] Easements and *profits a prendre* are types of incorporeal hereditaments, meaning that they are inheritable interests in property but they have no tangible, physical existence. *See* Black's Law Dictionary.

estate" under the expansive statutory definition used in R.C. 4735.01(B) does not mean that an oil and gas lease conveys "title to or possession of real property" under R.C. 2305.04.[13]

3. Not every claim to "quiet title" and not every action that may affect title is governed by the 21-year statute of limitations.

The Brownes cannot finesse their way into the scope of the 21-year statute of limitations by characterizing their claim to terminate Artex's Lease as an action to "quiet title." The words "quiet title" are not a magical incantation that can transform the substance of the Brownes' claims. 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*, 2017-Ohio-8016, ¶ 18.

Courts have recognized that, in some cases, an action to "quiet title" may be governed by a statute of limitations that is less than 21-years.[14] *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 deed was governed by the 10-year statute of limitations under R.C. 2305.14, even though the complaint was filed in order to "quiet title"). In *Byers DiPaola Castle, LLC v. Portage Cnty. Bd. of Comm'rs,* 2015-Ohio-3089, 41 N.E.89 (11th Dist.), the court

[13] There are other instances in which oil and gas leases have not been treated like real estate for certain purposes. For example, in *In re: Frederick Petroleum Corp*., 98 B.R. 762, (S.D. Ohio Apr. 13, 1989), the Federal District Court held that oil and gas leases were not rental agreements for the use of real property under 11 U.S.C. 365(m) or leases of nonresidential real property under 11 U.S.C. 365(d)(4). In *Egnot v. Triad Hunter LLC*, Case No. 2:12-cv-1008, 2013 U.S. Dist. LEXIS 141336 (S.D. Ohio Sept. 30, 2013), the Federal District Court held that an oil and gas lease was not subject to a spouse's dower rights under Ohio law.

[14] 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).

held that a claim for the violation of the terms of a grant of an "interest in real property" (an easement) was governed by the 10-year statute of limitations set forth under R.C. 2305.14.

4. *Cox* did not adopt a 21-year statute of limitations for an action to terminate an oil and gas lease.

The Brownes say that the decision below is inconsistent with the Fifth District's previous ruling in *Cox v. Kimble*, 5th Dist. Guernsey No. 13CA32, 2015-Ohio-2470. The Brownes' Brief, pp. 9-10, 16. In *Cox*, the parties entered into an oil and gas lease on March 24, 1980. *Id.* ¶ 3. There were several hand written changes made to the "form" lease by the parties, including a provision at the end of the lease which read as follows:

> If a second well is not drilled within one year after the first well, the acreage not included in the first well tract will be released.

Cox, ¶ 5. The first well was drilled on May 31, 1981 but no additional well was drilled thereafter and no portion of the lease was released. *Id.* ¶¶ 8, 10. When the lessor demanded a release from the lessee in 2011, the lessee claimed that the drilling unit for the first well was drawn to hold all 100 acres, that the lessee had acquired an interest in the property by adverse possession, and that the lessee was therefore not required to drill a second well. *Id.* ¶¶ 12, 13.

The trial court rejected the lessees' arguments and entered judgment in favor of the lessors. On appeal, the Fifth District held that the lessors' claim was not barred by the statute of limitations because the lessee had not taken possession of the disputed property. *Id.* ¶ 61. Since the landowners were only attempting to cancel the lease with respect to the undrilled acreage, the producer's activities with respect to the first well did not constitute possession of the disputed portion of the property. Regardless of whether the Fifth District applied a 4, 8, 10, 15, or 21-year statute of limitations, the landowners' claim was not time-barred because the claim had only recently accrued. To the extent the Fifth District suggested in *Cox* that the applicable

statute of limitations might be the 21-year statute of limitations under R.C. 2305.04, it did not affect the outcome of the case and is therefore non-binding dictum.

In this case, and unlike the landowners in *Cox*, the Brownes are not just arguing that the Lease should be terminated with respect to the undrilled acreage. Instead, they are arguing that the entire Lease is null and void and that the Lease has been invalid for more than the last 35 years, during which time Artex and its predecessors have been engaged in open, continuous, and profitable production operations on the Property. If the Lease was entirely void, as the Brownes assert, then any activity by Artex or their predecessors upon the Brownes' Property constituted an overt act causing the Brownes' cause of action to accrue and the statute of limitations to begin to run. The Brownes' claims, and the relevant facts at issue here, are completely unlike the situation presented in *Cox*.

5. *Rudolph* is based on a misinterpretation of *Cox*, its relevant "holding" is actually dicta, and it is neither binding nor persuasive.

The Brownes also urge this Court to adopt the Fourth District's holding in *Rudolph v. Viking Int'l Res. Co., Inc.*, 2017-Ohio-7369, 84 N.E.3d 1066, ¶ 3 (4th Dist.). The Brownes' Brief, p. 15. In *Rudolph*, the Fourth District followed the Fifth District's dictum in *Cox* and applied 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, at the latest, when production recommenced in 2001. *Id.* ¶ 18. Since the 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.

B. The Brownes' claims are governed by R.C. 2305.041 and R.C. 2305.06.

The Fifth District held that the Brownes' lease termination claims were governed by R.C. 2305.041. Revised Code 2305.041, which first became effective on April 6, 2007, says that:

> With respect to a lease or license by which a right is granted to operate or to sink or drill wells on land in this state for natural gas or petroleum and that is recorded in accordance with section 5301.09 of the Revised Code, an action alleging breach of any express or implied provision of the lease or license concerning the calculation or payment of royalties shall be brought within the time period that is specified in section 1302.98 of the Revised Code. 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.

This statute is specifically concerned with cases that arise from the beach of an oil and gas lease.[15] It distinguishes between different types of claims that may arise and divides them into those which concern 1) the calculation or payment of royalties and 2) any other issue that the lease or license involves.

The Brownes say that their claims are not governed by R.C. 2305.041. Specifically, they say that are not alleging the "breach" of any agreement and that there is a difference between saying that a lease has been "broken" and that it is "no longer in effect." The Brownes' Brief, p. 9. The Brownes assert that oil and gas leases have a dual nature in that they are both a contract and a conveyance of a property right. The Brownes' Brief, p. 11. They believe the claims they have asserted in this case "lie entirely on the 'property law' side of the line" because the expiration of a lease under the habendum clause "delves into the 'property'

[15] 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.

nature of an oil and gas lease." The Brownes' Brief, p. 11. The Brownes believe that the last part of R.C. 2305.041 (claims governed by R.C. 2305.06) applies only when there has been a breach of a contractual provision under the lease, and does not apply to a claim for declaratory relief that an oil and gas lease has expired.

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

The Brownes' discussion on semantics suggests that they can manipulate the applicable statute of limitations by artful pleading. 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.

The Brownes 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, 849 N.E.2d 62, ¶ 14 (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. *See Schlabach.* 2017-Ohio-8016, ¶ 18.

The last sentence in R.C. 2305.041 applies broadly to a breach "with respect to any other issue that the lease or license involves" (emphasis added).[16] The substance of the

[16] The word "any" means "one or something indiscriminately of whatever kind," "one, no matter what one," "one that is selected without restriction or limitation of choice," "one or some of whatever kind or sort," and "one, some, or all indiscriminately of whatever quantity." *Davis v.*

Brownes' claims is within the scope of R.C. 2305.041, and they cannot avoid the applicable statute of limitations through clever pleading. Under the 15-year limitation period set forth R.C. 2305.041, 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. The Brownes' claims to terminate the Lease based on a lack of production prior to 1999 are now time-barred.

2. This Court must give meaning and effect to every word and clause in R.C. 2305.041.

The Brownes' interpretation of R.C. 2305.041 would render the last part of the statute completely meaningless. Before April 6, 2007 (when R.C. 2305.041 first became effective) a claim arising from the breach of a "contractual provision" under an oil and gas lease was governed by R.C. 2305.06 anyway. If the latter part of R.C. 2305.041 is as limited as the Brownes suggest, there would have been no reason to include it in the statute, because it would be simply a restatement of existing law.

This Court has recently reaffirmed that it must evaluate statutes as a whole and interpret them in a manner that will give effect to every word and clause, avoiding a construction that would render a provision meaningless or inoperable. *State ex. rel. Nat'l Lime & Stone Co., Marion Cnty. Bd. Of Comm'rs*, 152 Ohio St.3d 393, 396, 2017-Ohio-8348, 97 N.E.3d 404, ¶ 14 (citing *State ex. Rel. Myers v. Bd. Of Educ.*, 95 Ohio St. 367, 373, 116 N.E. 516 (1917)). Both the language and the structure of R.C. 2305.041 indicate that the legislature intended to divide all claims arising under oil and gas leases into just two categories: (1) those concerning the calculation or payment of royalties and (2) those alleging a breach with respect to any other issue

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Davis, 115 Ohio St. 3d 180, 2007-Ohio-5049, 873 N.E.2d 1305, ¶19 (citing Webster's Third New International Dictionary (1986) 1896).

that the lease or license involves. The legislature did not intend that a court should regularly have to discern the nature of the lease provision at issue in order to ascertain whether the particular claim might be governed by an entirely different statute.

Also, the meaning of the word "breach," as used in R.C. 2305.041, is not as narrow as the Brownes suggest. "Breach" is defined to mean "a violation or infraction of a law or obligation." *See* Black's Law Dictionary. In order to maintain the term of an oil and gas lease, a lessee has an obligation to satisfy the conditions or special limitations in the habendum clause, which in this case means that production must continue. Thus, in both the legal and in the colloquial sense of the word, it is a "breach" of the lease when a lessee does not continue to satisfy those obligations and conditions or special limitations.

3. The Brownes' complaint constitutes an action upon a written contract or agreement.

Regardless of whether the Brownes' claims are within the scope of 2305.041, the Brownes' claims are still governed by R.C. 2305.06. Unlike R.C. 2305.041, nothing in R.C. 2305.06 says that it is limited to claims that arise from a "breach" of a "contract." Instead, R.C. 2305.06 is much broader: it applies to any action "upon a specialty or an agreement, contract, or promise in writing." Also note that R.C. 2305.06 applies to any action upon an "agreement" in writing, regardless of whether that "agreement" constitutes a "contract." So, if the Brownes' claims are based "upon" the Lease, and regardless of whether the Lease is a "contract" or their claims arise out of a "breach" of the Lease, their claims are governed by R.C. 2305.06.

4. The terms that describe the duration of an oil and gas lease are contractual in nature.

The Brownes say that the failure to perform a "contractual" provision of the lease would be a breach of contract but the cessation of production implicates the conveyance part of

the lease. The Brownes' Brief, p. 14. Since a cessation in production triggers a reversion under the habendum clause, they say it is a matter of title that relates to the conveyance part of the lease, rather than a contractual dispute.

Under a fee simple determinable, the continuation of the estate that has been granted depends solely on the grantee's open use and possession of the property; there is no ongoing contractual relationship between the grantor and the grantee. An oil and gas lease is different. An action to terminate an oil and gas lease is an attempt to terminate an ongoing relationship between the parties for mutual financial gain. Whereas a deed simply conveys title to land, an oil and gas lease sets forth extensive terms pursuant to which the lessee may explore and exploit the land's mineral resources in exchange for royalties and other consideration.

Under most oil and gas leases, the lease continues so long as there is production is in "paying quantities."[17] It is not possible to determine whether a lease is continuing or has continued solely by the existence of an oil and gas well on the property, even one that is producing. Instead, this determination requires a financial analysis of the lessee's business records showing production, revenue, expenses, profits, and losses. This financial analysis often results in complex factual disputes. What expenses are capital expenses and what expenses are operating expenses? To what extent, if any, must expenses related to the producer's general operations be allocated to a specific well? Did the lessee act with reasonable diligence in making necessary repairs whenever there was an interruption in production? Over what time frame is the profitability of a well evaluated? How is profitability affected by a sudden decrease in

[17] This Court has defined the term "paying quantities" 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).

commodity prices? Artex is unaware of any other situation in which a person's rights in real property depend on a complex and often disputed financial analysis of profitability.[18]

This Court has recognized that 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)). Since the continuation of an oil and gas lease depends on an entirely different kind of analysis involving a financial calculation, it is contractual in nature, and the lessee's failure to maintain production in "paying quantities" should be considered a breach of a contractual provision under the lease.

C. If neither the 15-year statute of limitations under R.C. 2305.041 and R.C. 2305.06 nor the 21-year statute of limitations under R.C. 2305.04 apply to the Brownes' claims, then their claims are governed by the 10-year "catch-all" statute of limitations under R.C. 2305.14.

Obviously, there is much that can be said about the nature of oil and gas leases and the statute of limitations that should apply in a case like this. There is a much simpler solution.

As this Court has recognized in *Buell*, oil and gas leases are unique, as they "straddle the line between property and contract." *Buell*, 2015-Ohio-4551, ¶ 41. Because oil and gas leases are *sui generis* in the context of the statute of limitations, a landowner's claim to terminate an oil and gas lease does not fit neatly within the scope of R.C. 2305.04. Thus, if this

[18] The profitability of the lessee's wells is analyzed from the standpoint of the lessee and is subject to his good-faith determination. *See Pottmeyer v. E. Ohio Gas Co.*, 2016-Ohio-1294, 62 N.E.3d 617, ¶ 33–34 (4th Dist.); *Lang v. Weiss Drilling Co.*, 2016-Ohio-8213, 70 N.E.3d 625, ¶ 34 (7th Dist.).

Court does not believe that the Brownes' claims are governed by R.C. 2305.041 and R.C. 2305.06, then it should apply the 10-year "catch-all" statute of limitations under R.C. 2305.14.

D. Because there is no evidence that the Well ever failed to produce, there is no basis for terminating the Lease, regardless of which statute of limitations applies.

The Brownes' Proposition of Law No. 1, even if it is adopted by this Court, will not result in a termination of the Lease. As initially discussed in Artex's Motion to Dismiss, filed October 2, 2018, which is hereby incorporated by reference, the Brownes are essentially asking this Court to adopt a proposition of law based on a hypothetical set of facts. No evidence exists in this case that there was ever a cessation in the Well's production in the last 15-years, 21-years, or ever.[19] Since this Court does not issue advisory opinions, it should dismiss this matter as having been improvidently accepted.[20]

1. The purported graph is inadmissible.

The Brownes' Statement of Facts refers to what they describe as a Mammoth Production Company graph.[21] The Brownes' Brief, p. 4. Based on this graph, the Brownes assert that the Well had declining production "from 1977 to 1980 and no production from 1981 to 1996."[22] The Brownes' Brief, p. 4.

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[19] The lack of any evidence is especially apparent when considering the Brownes' argument about when their cause of action supposedly accrued. They say that the statute of limitations should not begin to run from the end of the period of production or from the date of resumed production. The Brownes' Brief, p. 19. But when, exactly, do the Brownes think that the production from the Well ever ended or resumed? They do not know and there is no evidence that it ever did so.

[20] As this Court is aware, courts refrain from giving opinions on abstract propositions and avoid the imposition by judgment of premature declarations or advice upon potential controversies. *Fortner v. Thomas*, 22 Ohio St.2d 13, 14, 257 N.E.2d 371, 372 (1970).

[21] Mammoth Production Company was another prior operator of the Well.

[22] The Brownes' version of the facts in this case has been a moving target. In the courts below, the Brownes argued that "the Well did not have any reported production of oil or gas from the Well's inception [in 1976] until 1999." (Supp. 232). Now that the Brownes want to make the

a. An unauthenticated document has no evidentiary value.

Under the Civil Rules, the purported graph is inadmissible and is insufficient to demonstrate a genuine issue of material fact about whether the Well ever stopped producing. Documents submitted in connection with summary judgment that are not sworn, certified, or authenticated by affidavit have no evidentiary value and may not be considered by the court in deciding whether a genuine issue of material fact remains for trial. *See Novel v. Estate of Gallwitz,* 5th Dist. Knox No. 10 CA 000005, 2010-Ohio-4621, ¶ 36 (citing *Citizens Ins. Co. v. Burkes*, 56 Ohio App.2d 88, 95-96, 381 N.E.2d 963 (8th Dist. 1978)).

The purported graph has not been authenticated—it was not created by Artex. It is not a document that is self-authenticating under Ohio Rule of Evidence 902. The Brownes have failed to present any evidence to support that the graph is what they claim it to be. The Brownes can only speculate about who prepared the graph, when the graph was prepared, for what purpose the graph was prepared, whether the graph is genuine, or what the graph even purports to show. For this reason, the graph has no evidentiary value.

b. Inadmissible hearsay cannot demonstrate a genuine issue of material fact.

Even if the graph was authenticated (which it is not), the graph is inadmissible hearsay under Ohio Rule of Evidence 802. Under Ohio Rule of Evidence 802, "[h]earsay is not admissible except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio."

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purported graph a centerpiece of their case, they admit that the Well did, in fact, produce from 1976 to 1980.

The Brownes have failed to present any evidence which would establish that the graph is admissible as an exception to the hearsay rule, such as a business record under Ohio Rule of Evidence 803(6). The Brownes have no idea whether this graph was ever kept in the course of a regularly conducted business activity or if it was the regular practice of a business to make the graph. They have no idea whether the information set forth in the graph was made at or near the time of the acts, events, or conditions that are described from information transmitted by a person with knowledge. The Brownes have no idea who is the custodian of the graph and have not identified any other person who would be qualified to testify regarding the source of the graph's information or the circumstances of its preparation. The graph therefore cannot demonstrate a genuine issue of material fact as to whether the Well has been in continuous production.

c. Artex asserted that the purported graph was inadmissible in the courts below.

Artex filed a motion to strike the graph with the trial court on February 2, 2016 and it filed a motion in limine to prevent the Brownes from presenting the graph at trial on July 21, 2017.[23] (Supp. 51, 85). In responding to the motion to strike, the Brownes admitted that the motion was based on "sound evidentiary principles." (Supp. 83). The Brownes said that they intended to reach out to Mike Johnson d.b.a. Johnson Gas & Oil (the prior operator of the Well) to verify the information in the graph. They never did. Thus, the Brownes never provided any verification for the graph that they admitted was a necessary prerequisite to its admissibility.

Finally, and perhaps most importantly, on its face the graph does not support the Brownes' proffered interpretation. The Brownes say that production from the Well is indicated

[23] Artex's motion in limine was denied as moot when the trial court granted its motion for reconsideration and dismissed the Brownes' Complaint on August 1, 2017. (Supp. 9).

in the years 1977 through 1980 but that the graph shows no production of oil for the years 1981 through 1996. The Brownes' Brief, p. 4. In fact, the graph (Supp. 92) is incomplete. The line on the graph abruptly terminates in the year 1980. There is no data on the graph anywhere after that point. If, as the Brownes assert, the graph showed no production from 1981-1996, then the line on the graph would immediately plummet to zero in 1981 and then continue from left to right across the bottom. Instead, the line on the graph appears to end in 1980 and no further information about the Well's production is shown after that year.

2. The lack of production reports to the ODNR is irrelevant.

The Brownes' Statement of Facts also asserts that the operators prior to 1999 never filed any production reports from the Well to the ODNR. The Brownes' Brief, p. 4. It is important to recognize that nobody ever reported that the Well failed to produce during this time. Instead, there is simply an absence of any reporting as to what the production had been.

The validity of the Lease in this case does not depend on whether production reports were made to the ODNR. The courts of appeals have repeatedly recognized that the lack of production reports filed with the ODNR cannot demonstrate a genuine issue of fact as to whether a well has been in production. *See Mobberly v. Wade*, 2015-Ohio-5287, 44 N.E.3d 313 (7th Dist.); *Burkhart Family Trust v. Antero Res. Corp.*, 2016-Ohio-4817, 68 N.E.3d 142, ¶ 23 (7th Dist.); *Potts v. Unglaciated Indus.*, 2016-Ohio-8559, 77 N.E.3d 415, ¶ 75 (7th Dist.); *Burkhart v. Miley*, 2017-Ohio-9006, 101 N.E.3d 563, ¶ 48 (7th Dist.); *Pfalzgraf v. Miley*, 7th Dist. Monroe Nos. 16MO05, 16MO06, 2018-Ohio-2828, ¶ 37. As the court held in *Mobberly*, the failure to file these reports in the period prior to 1999 is "not a relevant issue." *Id.* at ¶ 16 (emphasis added). Under Ohio Rule of Evidence 402, "[e]vidence which is not relevant is not admissible."

a. There is no basis for presuming that production did not occur when the producer failed to file a report.

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 actual evidence that has been presented shows that the Well was in continuous production for decades. Also, the Lease in this case says that it extends as "long thereafter as oil and gas, or either of them, is produced." The continuation of the Lease depends on the Well's production, not on whether production reports are filed with the ODNR. Despite the Brownes' assertions to the contrary, the lack of these reports is not evidence of a lack of production.

In the appeal below, the Farm Bureau argued that the lack of an ODNR production report should "create a presumption" that production did not occur. (Supp. 313). Yet, at the same time, the Farm Bureau admitted that it is not uncommon for ODNR production records to be historically sporadic at best and non-existent at worst.[24] (Supp. 312). Significantly, this undercuts the Farm Bureau's own argument: if reporting has historically been sporadic and inaccurate, there is very little basis for recognizing a presumption based on the existence or non-existence of such reports. Thus, in a case such as this, where the lessee's evidence of historical production is undisputed by the landowner, the landowner should not be permitted to create a triable issue of fact based solely on the absence of ancient ODNR production reports.

b. The Brownes did not challenge the trial court's ruling on the relevance of the ODNR records in their appeal to the Fifth District.

The trial court held that the failure to file ODNR production reports, alone, cannot create a genuine issue of material fact on this issue. On appeal, the Brownes did not raise the trial court's ruling on the relevance of the ODNR records as a separate assignment of error.

[24] The Farm Bureau admitted that ODNR largely does not use these reports for any sort of regulatory review or process. (Supp. 312).

(Supp. 229). It was not offered by the Brownes or accepted by this Court as a proposition of law in this appeal. Thus, this aspect of the trial court's ruling is not under review and is now the "law of the case."[25] Thus, even if this Court adopts the Brownes' Proposition of Law No. 1 and applies a 21-year statute of limitations, the absence of ODNR production reports in the period prior to Artex's ownership cannot create a disputed issue of fact as to whether the Well was in continuous production.

3. The Brownes did not present any admissible evidence in opposition to Artex's motion for summary judgment.

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 separate affidavits from six different witnesses including 1) Debra Smith (Artex Oil Company's accountant), 2) Eugene Huck (Artex Oil Company'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

[25] Under the law-of-the-case doctrine, a court must follow rulings on issues previously resolved within the same case. *See Reid v. Cleveland Police Dep't*, 151 Ohio St.3d 243, 2017-Ohio-7527, 87 N.E.3d 1231, ¶ 11.

Well). (Supp. 171-207). These affidavits, along with the Artex's production records attached thereto, showed that the Well had been in continuous production since it was drilled.

The Brownes failed to meet their reciprocal burden because they did not present any evidence showing that there had ever been a cessation in the Well's production. In response to the seven affidavits presented by Artex, the Brownes presented nothing – not a single pleading, affidavit, answer to interrogatory, or written admission. The Brownes did not bother to take any depositions in this case—not even of the people who submitted affidavits. The Brownes themselves cannot offer any testimony about the Well or its production because they acquired the Property in 2012, just 2 years before they filed this lawsuit. Without presenting at least some evidence, the Brownes cannot demonstrate a disputed issue of material fact as to whether the Well was in continuous production. On this basis alone, the trial court was correct in dismissing their claims prior to trial.

E. The Brownes' claims are clearly governed by a statute of limitations.

The Brownes have a rather broad and flexible view of the scope of this appeal. Although this Court accepted Proposition of Law No. 1 for review, the Brownes have asserted a new, alternative proposition of law in their brief that no statute of limitations should apply to their claims. Contrary to all the admissible evidence that has been presented, they argue that because there was "no production from 1981 to 1996" they should be allowed to terminate the Lease. The Brownes' Brief, p. 4.

1. This Court did not accept this appeal for the purpose of deciding that no statute of limitations applies to the Brownes' claims.

The Brownes' Proposition of Law No. 1 (the only proposition of law accepted by this Court for review) states that:

> In an action to declare that an oil and gas lease has terminated under its own terms for lack of production in paying quantities, the applicable statute of limitations is 21 years, per Ohio Revised Code 2305.04, and does not begin to run until a "justiciable controversy" arises.

In their merit brief, the Brownes actually urge this Court to reject their own proposition of law and to instead hold that no statute of limitations applies to an action to terminate an oil and gas lease. The Brownes' Brief, pp. 16-18.

This appeal was accepted as a matter of public or great general interest with respect to the Brownes' Proposition of Law No. 1. The acceptance of this appeal does not give the Brownes license to bootstrap additional arguments, or to argue a new proposition of law that is even more favorable to their legal position. For the reasons set forth below, this Court should absolutely reject the Brownes' argument that no statute of limitations applies to their claims and this portion of their merit brief should be stricken.

2. 1981 was a long time ago.

Before getting to the merits of the Brownes' argument, this Court should first pause to consider just how far back in time the events, which form the basis of the Brownes' claims, allegedly took place. In 1981, the cost of a postage stamp just $0.20. Nightline with Ted Koppel premiered on ABC. Space shuttle Columbia launched on its maiden voyage. President Ronald Reagan was shot by John Hinkley Jr. Sandra Day O'Connor became the first woman on the United States Supreme Court. Pete Rose tied and then broke the National League hit record. Earle Bruce was the head football coach at The Ohio State University. Finally, and on a more personal note, the Brownes' counsel of record, Ethan Vessels, was in elementary school. Artex's counsel of record was not yet born.

Operations for the production of oil and gas under a lease may continue for many years, perhaps even decades. In some cases, there are oil and gas leases today with wells that

were drilled over a century ago, and yet they are still producing a profit. The idea that any claimant should be allowed to assert a claim so long after the cause of action allegedly accrued should be met with a healthy dose of skepticism. This Court should therefore reject The Brownes' alternate proposition of law.

3. Revised Code 2305.03 makes all claims subject to a statute of limitations.

Under Ohio law, every claim has a statute of limitations. Under R.C. 2305.03, 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. Revised Code 2305.03 is clear and unambiguous. The Brownes claims are therefore subject to a statute of limitations.

4. Case law has recognized that claims to terminate oil and gas leases are subject to a statute of limitations.

Courts (and not just the Fifth District in the opinion below) have specifically recognized that a claim to terminate an oil and gas lease is subject R.C. 2305.03. In *Potts*, 2016-Ohio-8559, a lease was executed and recorded in 1896 and had a primary term of 5 years. *Id*. at 3. It was undisputed that Unglaciated (the producer) had been assigned the lease in 1989 and that, since 1991, there had been production. *Id*. ¶¶ 3, 8.

The landowners filed suit in 2013 to terminate the lease. *Id*. ¶ 3. The landowners argued that Unglaciated "was required to show production from the day after expiration of the primary term through the present day with no gaps in production." *Id*. ¶ 67. In *Potts*, this would have been the entire 112 years between the end of the primary term in 1901 and the filing of the complaint in 2013. *Id*. ¶ 90.

In *Potts*, the Seventh District observed that a special statute of limitations has been enacted to govern oil and gas leases, specifically R.C. 2305.041.[26] *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."[27] *Id*. ¶ 113.

Even assuming for the sake of argument that the Lease at issue in this case truly expired at some indeterminate time in the 1980s, the Brownes cannot sit on their rights indefinitely while Artex continues to openly undertake production operations on the Property which are clearly inconsistent with the idea that the Lease is expired.[28] This Court should therefore reject the Brownes' alternate proposition of law.

5. Statutes of limitations serve an important purpose.

This Court should recall the general purposes of statute of limitations:

1. To ensure fairness to the defendant;
2. To encourage prompt prosecution of causes of action;
3. To suppress stale and fraudulent claims; and
4. To avoid the inconveniences engendered by delay—specifically the difficulties of proof presented in older cases.

[26] It also recognized that, under R.C. 2305.14, the legislature had provided for a catchall limitations period of 10 years for those causes of action found to fall outside any specific statute. *Id*.

[27] The Brownes assert that the Seventh District has "ostensibly abandoned" its holding regarding the statute of limitations in *Potts* based on its more recent decision in *Neuhart v. Transatlantic Energy Corp*, 7th Dist. Noble No. 17 NO 0449, 2018-Ohio-4099. Brief. p. 17. The facts in *Neuhart*, which concerned the release of undrilled acreage under a purported Pugh Clause, are completely different from *Potts* and from this case. Moreover, *Neuhart* is still pending, is currently subject to a motion for reconsideration, and may yet undergo further appellate review.

[28] Despite its prior holding in *Schultheiss v. Heinrich Enters., Inc*, 2016-Ohio-121, 57 N.E.3d 361 (4th Dist), not even the Fourth District has continued to adhere to a position that is so plainly inconsistent with Ohio law. *See Rudolph v. Viking Int'l Resources*, 2017-Ohio-7369, 84 N.E. 3d 1066, ¶ 53 (4th Dist.) ("any language in *Schultheiss* that indicates there is no statute of limitation on actions to declare a lease has terminated by its own terms is incorrect.").

See Flagstar Bank, F.S.B. v. Airline Unions Mortg. Co., 128 Ohio St. 3d. 529, 536, 2011-Ohio-1961, ¶ 27 (2011) (quoting *Doe v. Archdiocese of Cincinnati*, 109 Ohio St. 3d. 491, 2006-Ohio-2625, 849 N.E.2d 268 (2006)).

Production and expense records from decades ago (needed in order to evaluate the profitability of a well) rarely exist, and most producers never thought that their records had to be kept indefinitely. [29] By comparison, taxpayers are required to keep their tax records for just 7 years. Under Ohio Rule of Professional Responsibility 1.15(a), lawyers (officers of the court) are required to keep certain financial records for just 7 years. Refusing to apply any statute of limitations will retroactively impose an indefinite recordkeeping requirement for every well that has ever been drilled, and the validity of virtually every lease that has been "held by production" would be called into question if the available production and expense records are incomplete.

To make matters worse, oil and gas leases are frequently transferred to new operators, meaning that the same well can be operated by several producers over its life. Revenue and expense records do not always accompany these transfers, especially when the transferor is bankrupt or financially insolvent. Even when ancient records have not been lost or discarded, often they were kept in a format that is no longer technologically accessible. The

[29] It is significant that the specific statute of limitations that applies to the calculation and payment of royalties under R.C. 2305.041 is just 4 years. For regulatory compliance purposes, the owner of an oil and gas well "shall preserve records of such volume for at least 2 years after the date the record is made." See R.C. 1509.30. It would create an anomaly to relieve the lessee of any liability for payment of royalties after just 4 years, and yet still require the lessee to indefinitely retain all of his business records related to the production revenue and expenses. The same difficulties of proof that accompany a claim for payment of royalties are also present when attempting to determine whether a lease has continued based on production from the well in paying quantities.

floppy discs, operating systems, and word processing and spreadsheet software from the 1980s and 1990s are long gone and are no longer compatible with the systems used today.

Also, many of the people who may recall what happened more than 35 years ago are now deceased. The original lessor under the Lease, Mary Louise Mercer, has been dead for more than 15 years. (Supp. 194). One of the previous pumpers of the well, Carl Brazelle, is also deceased. (Supp. 203). Refusing to apply any statute of limitations to the Brownes' claim creates difficulties of proof and is extremely unfair to Artex. This Court should therefore reject the Brownes' alternate proposition of law.

6. Applying a statute of limitations will not undermine the lessee's duty to release a lease under R.C. 5301.09.

The Farm Bureau points out that, under R.C. 5301.09, a lessee has a statutory duty to release an oil and gas lease when the lease expires or is forfeited. Farm Bureau Brief, pp. 2, 7. They say that applying a statute of limitations "creates an incentive for companies to not fulfill their duties" and for them to "keep expired leases on the books, and then resume production once technology or market conditions improve." Farm Bureau Brief, p. 2

Neither the Farm Bureau nor the Brownes can identify when Artex's alleged duty to release the Lease might have arisen in this case. Based on the undisputed evidence that has been presented, no such duty ever arose. Since the Lease was signed in 1975, there is no evidence that it ever expired for lack of production. Artex never "resumed" production because there is no evidence that the Well ever stopped producing in the first place.

A duty to release the Lease did not arise in the 1980s and does not arise simply because the Brownes say so 35 years after the fact. If the Brownes or their predecessors in title truly believed that the Lease somehow expired in the 1980s, they should have done something or said something prior to 2014. If a lessee does not believe that a lease has expired, he is not going

to release it anyway. Thus, applying a statute of limitations to a claim to terminate an oil and gas lease will not undermine a lessee's duty to release a lease under R.C. 5301.09.

7. Applying a statute of limitations is not unfair to the landowners.

The Farm Bureau asserts that the landowners they represent are lacking in "power and position" and should therefore be excused from asserting a claim against a lessee or from even notifying the lessee of their legal position for decades. Farm Bureau Brief, p. 8.

First, it is simply untrue that a lease dispute between a producer and a landowner presents a disparity in power comparable to "David vs. Goliath" (Farm Bureau Brief, p. 2). The vast majority of the historically producing oil and gas well in this state (especially the ones that have been in production for many decades) are usually owned by small, family-run businesses. These locally-based producers have no more power or influence than a typical farmer or landowner.

Also, any alleged disparity in the power or influence of the parties is irrelevant to whether the law should be upheld. The Farm Bureau's infantilization of all landowners is a very poor justification for disregarding R.C. 2305.03, for wrenching away a producer's property rights decades after the fact, and for forfeiting his investment in a well that was reasonably made (when it did not appear that the landowner disputed his ownership). Finally, and despite their alleged lack of any power or influence, landowners have repeatedly shown that they are quite capable of asserting and defending their property rights in court when they want to do so. There has been no shortage of cases filed over the last 10 years by landowners attempting to terminate old leases.

The Farm Bureau also complains about the difficulties their members allegedly face in obtaining production information from producers. Farm Bureau Brief, p. 2. First, these

alleged difficulties have nothing to do with whether the Well at issue in this case has been producing. This issue should have absolutely no influence whatsoever on this Court's ruling. Second, and even when ODNR production reports are unavailable, landowners have a special statutory right under R.C. 1509.30 to request certain production information, and violations of R.C. 1509.30 can result in civil penalties and other adverse action under R.C. 1509.33. Thus, the law already protects a landowner's right to obtain any information he may need to maintain and defend his property rights.

8. Applying a statute of limitations will not undermine the basic principle that oil and gas leases expire automatically by operation of law.

The Brownes say that, if this Court applies a statute of limitations to their claims, it would "eviscerate" this Court's prior holdings on the automatic nature of a reversion. The Brownes' Brief, p. 20.

The Brownes' are greatly exaggerating what would result from applying a statute of limitations. There are many oil and gas leases that are signed, then automatically expire, no lawsuit is ever filed, and the lessee ceases all production operations on the property. If a lessee never attempts to resume production from a lease that has expired, then the statute of limitations for an action to terminate the lease does not begin to run. In these situations the landowner need not do anything to affect an expiration of the lease.

On the other hand, if a lessee does produce oil and gas from an allegedly expired oil and gas lease, as the Brownes allege that Artex has been doing for more than 35 years, the landowner must assert a claim to terminate the lease within the applicable limitation period. Where the status of the lease is in dispute a landowner should not permit a lessee to produce oil and gas from his property for decades.

F. The applicable statute of limitations begins to run when a cause of action accrues.

The Brownes' Proposition of Law No. 1 asserts that the statute of limitations for their claims did not begin to run until a "justiciable controversy" arose. The Brownes say that their cause of action does not accrue, and the statute of limitations does not begin to run, until "the lessee is overtly claiming the mineral estate in obvious dispute of the landowner's claim." The Brownes' Brief, p. 19. Essentially, the Brownes believe that their claims to terminate the Lease should be subject to some kind of discovery rule and that the open, continuous operation of the Well on their Property, and the payment of royalties, is insufficient to notify them that Artex believes the Lease is still in effect.

1. The Brownes did not argue when the statute of limitations should begin to run in the courts below.

Regardless of the merit of the Brownes' argument, it was never presented by the Brownes in the courts below. Once again, the Brownes are attempting to use this appeal as an opportunity to completely reargue their case. Essentially, they hope that, if this Court affirms that their claims are subject to a 15-year statute of limitations, they can somehow avoid having their claims time-barred by showing that they accrued at a later point in time.

It is well-settled that a party may not raise any new issues or legal theories for the first time on appeal. *See Stores Realty Co., v. Cleveland*, 41 Ohio St.2d 41, 43, 322 N.E.2d 629 (1975). Thus, a litigant who fails to raise an argument before the trial court forfeits the right to raise that issue on appeal. *See City of Independence v. Office of the Cuyahoga County Exec.*, 142 Ohio St.3d 125, 2014-Ohio-4650, 28 N.E.3d 1182, ¶ 30 (stating that "an appellant generally may not raise an argument on appeal that the appellant has not raised in the lower courts"); *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 21 (explaining that defendant forfeited his constitutional challenge by failing to raise it during trial court

proceedings); *Gibson v. Meadow Gold Dairy*, 88 Ohio St.3d 201, 204, 724 N.E.2d 787 (2000) (concluding that party waived arguments for purposes of appeal when party failed to raise those arguments during trial court proceedings); *State ex rel. Gutierrez v. Trumbull Cnty. Bd. of Elections*, 65 Ohio St.3d 175, 177, 602 N.E.2d 622 (1992)(explaining that an appellant cannot "present…new arguments for the first time on appeal").

The Brownes never argued in the courts below that their claims were subject to some kind of discovery rule, or that the statute of limitations did not begin to run until (their definition of) a "justiciable controversy" arose. The Brownes have forfeited the right to raise this issue for the first time in this appeal. This Court should therefore reject the Brownes' argument and this portion of their brief should be stricken.

2. The discovery rule does not apply to the Brownes' claims.

This Court has been very reluctant to apply a discovery rule to claims, other than where such application is set forth by statute. *See Investors Reit One v. Jacobs*, 46 Ohio St.3d 176, 546 N.E.2d206 (1989)("The legislature's express inclusion of a discovery rule for certain torts arising under R.C. 2305.09, including fraud and conversion, implies the exclusion of other torts arising under the statute, including negligence."). And, it has been recognized that, under Ohio law, claims for breach of contract do not enjoy the protections of the discovery rule. *Marok v. Ohio State Univ*., 10th Dist. Franklin No. 13AP-12, 2014-Ohio-1184, ¶ 25 (citing *Med. Mut. of Ohio v. Amalia Ents., Inc.*, 548 F.3d 383, 393 (6th Cir. 2008)).

It is not as if the lessor under an oil and gas lease is completely unaware of the operations on his property and the oil and gas revenues that are being generated.[30] Oil and gas wells are located on the surface of the land. Under a typical oil and gas lease, the lessor receives a

[30] The lessor is also constructively aware that no release of the lease has ever been recorded, as would be required upon expiration or termination under R.C. 5301.09.

1/8 royalty. He can simply multiply his royalty check by 8 to determine the total gross sales for the period of time during which the royalty has been paid. This will give the lessor an indication as to whether or not the purported sales are in "paying quantities" and, if there is any question in his mind, he may ask for further production information under R.C. 1509.30 or even initiate a legal action to determine his legal rights.

3. Any production activity that openly occurs on the Property is sufficient to cause the Brownes' cause of action to accrue.

The Brownes repeatedly emphasize that oil and gas leases expire automatically, but this argument completely misses the point. Even if oil and gas leases expire automatically, a landowner should not be excused for standing idly by for more than a decade while a lessee continues to openly engage in production operations on his property. As the Fifth District recognized in *Cox*, 2015-Ohio-2470, ¶ 60, a cause of action accrues when the lessee takes action that is inconsistent with the lessor's property rights, such as by taking possession of disputed property. Any production operations that openly occur on a property after a lease has supposedly expired or terminated is inconsistent and should cause the landowner's claim to accrue.

In this case, Artex has been producing oil from the Brownes' property for 15 years prior to the filing of this action in 2014. The evidence is undisputed that oil was produced even before Artex acquired the well in 1999. The production and sale of oil from the Brownes' property is inconsistent with the Brownes' ownership of the property, free and clear of Artex's Lease. Therefore, the Brownes' claim to terminate Artex's Lease and to quiet title to the Property must have accrued, at a minimum, more than 15 years ago.

Conclusion

This Court should not issue an advisory opinion on which statute of limitations applies to a landowner's claim to terminate an oil and gas lease. Regardless of whether it adopts

the Brownes' Proposition of Law No. 1, it will make no difference in whether the Lease should be terminated because there is no evidence that the Well ever stopped producing since it was drilled. This appeal should be dismissed as having been improvidently accepted.

Applying the 15-year statute of limitations under R.C. 2305.041 and R.C. 2305.06 or the 10-year statute of limitations under R.C. 2305.14, as opposed to the 21-year statute of limitations under R.C. 2305.04, will encourage lessors to promptly prosecute their causes of action. Allowing over two decades to elapse before this occurs is unfair to the lessee.

For all of the reasons set forth above, the court of appeals and the trial court correctly held that the Brownes' lease termination claims were subject to the 15-year statute of limitations set forth under R.C. 2305.06. This Court should therefore reject the Brownes' Proposition of Law No. 1 and affirm judgment in favor of Artex.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **Merit Brief of Artex, 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 14th of December, 2018:

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