**IN THE SUPREME COURT OF OHIO**

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

# BRIEF OF AMICUS CURIAE OHIO OIL AND GAS ASSOCIATION AND AMICUS CURIAE SOUTHEASTERN OHIO OIL AND GAS ASSOCIATION IN SUPPORT OF APPELLEES

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## STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae, the Ohio Oil and Gas Association ("OOGA"), is a statewide trade association with more than 2,000 members who are engaged in all aspects of the exploration, development, and production of oil and natural gas in this state. Its membership includes small independent producers and major energy companies, as well as Ohio contractors, service and supply companies, manufacturers, utilities, accountants, insurers, engineers, and landowners. OOGA's mission is to protect, promote, foster, and advance the common interest of those engaged in all aspects of the Ohio crude oil and natural gas producing industry. OOGA occasionally participates as amicus curiae in cases involving important legal issues concerning the Ohio oil and gas industry. OOGA believes this to be such a case.

Amicus Curiae the Southeastern Ohio Oil and Gas Association ("SOOGA") is a non-profit organization comprised of nearly 500 local producers and businesses involved in oil and gas operations in southeastern Ohio and northern West Virginia. Since it was established in 1978, SOOGA has addressed issues and concerns unique to the Mid-Ohio River Valley. It firmly believes that the local oil and gas industry is vital to the continued economic growth and development of this geographic area and to the entire country. Like OOGA, SOOGA occasionally participates as amicus curiae in cases involving important legal issues concerning the Ohio oil and gas industry. SOOGA also believes this to be such a case.

OOGA and SOOGA are participating in this appeal because the proposition of law proposed by Appellants Barry and Rosa Browne and their supporting amicus ask this Court to adopt a statute of limitations designed to sow uncertainty, hinder oil and gas development, and increase litigation. Appellants seek a rule that will allow landowners to purposely delay enforcing their rights until such time as oil and gas producers can no longer effectively defend against their claims, while the landowners simultaneously reap the financial benefits of the

producers' activities. Instead, this Court should recognize the contractual nature of the relationship between the landowner and the producer and hold that the applicable statute of limitations is the contractual one selected by the General Assembly. The decision below should be affirmed.

## STATEMENT OF FACTS

Amici adopt the statement of facts set forth by Appellees in their merit brief.

## ARGUMENT

**Appellants' Proposition of Law:**
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.

**Response of Amicus Curiae:**
The statute of limitations for an action to terminate an oil and gas lease under its own terms, regardless of how phrased, is governed by R.C. 2305.041 and R.C. 2305.06. The action accrues when the event giving rise to the termination occurs.

### I. The appropriate statute of limitations for a claim is determined by the substance of the action, not the form in which it is pleaded.

The only question before this Court is which is the appropriate statute of limitations to apply to claims that seek termination of an oil and gas lease.[1] The courts of appeals have struggled to answer this question, reaching different conclusions. *See, e.g.*, *Rudolph v. Viking Int'l Res. Co.*, 2017-Ohio-7369, 84 N.E.3d 1066 (4th Dist.) (adopting real estate statute of limitations); *Potts v. Unglaciated Indus.*, 2016-Ohio-8559, 77 N.E.3d 415 (7th Dist.) (adopting contract statute of limitations); *Ricketts v. Everflow E., Inc.*, 2016-Ohio-4807, 68 N.E.3d 165 (7th

[1] Although both the Brownes and their supporting amicus suggest that there should be no statute of limitations at all that would apply to their claims, that argument was not presented to the court of appeals and is not before this Court. In any event, their suggestion in this regard is contrary to Ohio law as discussed in sections II, III, and IV, below.

Dist.) (adopting contract statute). This struggle, however, is the result of the courts' failure to abide by this Court's precedent for determining the applicable statute of limitations for a given claim. When this Court's principles are followed, the correct answer becomes clear—the contract statute applies.

To determine the appropriate statute of limitations for an action, this Court has explained that it is the substance of the action that controls, not the form that the attorney chose to use for pleading that cause of action. *See Hambleton v. R.G. Barry Corp.*, 12 Ohio St.3d 179, 183, 465 N.E.2d 1298 (1984). Otherwise, creative attorneys could extend the time to bring an action by simply choosing different words to plead the same claim. *Love v. Port Clinton*, 37 Ohio St.3d 98, 99–100, 524 N.E.2d 166 (1988). Thus, it is the "essence of the action" that determines the applicable statute of limitations, not the form of relief. *St. Paul Co. Comm. Recovery Serv. v. Linder*, 5th Dist. Stark No. 2000CA00012, 2000 Ohio App. LEXIS 2682, *6, 2000 WL 873762 (June 19, 2000); *New Artesian v. Stiefel*, 5th Dist. Stark No. 1999CA00163, 2000 Ohio App. LEXIS 515, *12, 2000 WL 222110 (Feb. 14, 2000).

Under the facts pleaded by the Appellants, it is clear that the essence of their action is a contractual dispute arising under the written terms of the parties' oil and gas lease. Appellants' complaint contains the following allegations:

> 19. ***Based on the express language of the Lease***, the Lease continues from the date it was signed and shall extend [as] long thereafter as oil and gas, or either of them is produced by lessee. . . .
>
> 22. ***The Lease has been broken*** in that the Defendants, or the Defendants[']predecessors, failed to produce either oil or gas from the Lease's inception through at least 1999.
>
> 23. The Well has been inoperative for a sufficient time to ***terminate and void the Lease***. . . .

> 27. Plaintiffs seek a declaratory judgment . . . that ***the Lease*** as previously entered . . . is no longer in effect, and as a matter of law, ***the Lease should be cancelled***.
>
> 28. ***Pursuant to the Lease***, the Lessee was required to produce Oil and Gas, or either of them to continue the existence of the Lease. One or more of the Defendants along with their predecessors holding the lease rights as lessee, ***have breached the express provision of the Lease*** requiring said production.

Compl. ¶¶ 19, 22–23, 27–28, Dec. 1, 2014 (emphasis added).

The appropriate question is whether this dispute, at its essence, is "an action upon a specialty or an agreement, contract, or promise in writing," R.C. 2305.06, or is it an "action to recover the title to or possession of real property," R.C. 2305.04. The focus in the Brownes' complaint (and in lease-termination disputes generally) is whether the ongoing relationship between the parties will continue under the terms of the parties' written agreement. While real property rights are part of that overall dispute, those rights are not the essence of the action asserted. Because an action to obtain termination of an oil and gas lease is at its essence a dispute about the end of the parties' entire contractual relationship, it should be governed by the statute of limitations applicable to contracts. As discussed in the following section, this conclusion comports with this Court's law on the nature of an oil and gas lease.

## II. Disputes over the end of an oil and gas lease are contractual in nature.

### A. An oil and gas lease governs the entire contractual relationship between the parties, not just when the producer's property interest ends.

This Court had occasion to extensively discuss the nature of an oil and gas lease in *Chesapeake Exploration, L.L.C. v. Buell*, 144 Ohio St.3d 490, 2015-Ohio-4551. As *Buell* explained, "There is no question that oil and gas leases are unique, as they seemingly straddle the line between property and contract: they are neither residential leases nor commercial contracts for the sale of goods." *Id.* ¶ 41. Through this dual nature, the oil and gas lease not only governs

the parties' property interests, it also governs the entire ongoing financial relationship between the landowner and the producer. The Court explained that the basic underlying consideration for the lease is the development of minerals in exchange for the payment of royalties:

> The oil and gas lease is central to the oil and gas industry. 1 Brown, Brown & Gillaspia, The Law of Oil and Gas Leases, foreword (2d Ed.2014). "The principal or basic consideration for a [mineral rights] lease is the agreement by the lessee to develop the premises for oil and gas and pay royalties thereon to the lessor." *Id.* at Section 3.01(2). In this context, "royalty" generally refers to the "share of the product or profit reserved by the owner of land for permitting another to develop his land for oil or gas." *Id.* at Section 6.01.
>
> . . . With the recent advances in techniques for extracting oil and natural gas from shale beds, such as the Marcellus and Utica Shale regions underlying parts of eastern Ohio, oil and gas leases are potentially lucrative instruments for both landowners and energy developers. Richardson, *Hite v. Falcon Partners: A Model Rule for Marcellus and Utica Shale States Precluding the Use of Delay Rental Payments to Extend the Primary Term in an Oil and Gas Lease*, 46 Akron L.Rev. 1133, 1135–1136 (2013). The lease provides a mechanism by which an owner of mineral rights can permit others to explore and exploit the land's mineral resources in exchange for royalties and other consideration. Brown at Section 3.01(2); *Garman v. Conoco, Inc.*, 886 P.2d 652, 656 (Colo.1994); Bibikos & King, *A Primer on Oil and Gas Law in the Marcellus Shale States*, 4 Tex. J. Oil Gas & Energy L. 155, 156-167 (2009).

*Id.* at 16–17.

Unlike a deed, an oil and gas lease is not signed for the primary purpose of conveying title to another. While a lease certainly creates a "vested, though limited interest" in property, the primary purpose of it is to facilitate the development of the oil and gas beneath the property for the mutual financial benefit of the landowner and the producer. The property interest vested in the producer is but one part of the broader commercial function of the lease. To further the parties' mutual benefit, the lease may contain the financial terms governing whether the landowner is to be paid a bonus or a delay rental and the amount of royalty to be paid from production. *Id.* at ¶ 54. But beyond the financial terms, the lease will contain other provisions such as whether geophysical or other testing is permitted, what type of equipment the producer

may use, where on the property the lessee may operate, and countless other provisions that govern the parties' relationship. *See id.* at ¶¶ 56–57. And the oil and gas lease will contain terms governing how long the lease will remain in effect. While the lease in this case is tied to how long the lease produces in paying quantities, that is not the only type of term that could be found in a lease: some are tied to a set period of time, others to whether "operations" are ongoing, and still others to whether gas is being stored on the property or adjoining properties.

Thus, when a landowner seeks to terminate an oil and gas lease, the landowner does not "seek only recognition of their reversionary interest," Appellants' Br. at 9, but also an end to the entire commercial relationship between the parties. In other words, the landowner seeks to terminate the operators' ability to derive a profit from its investment in the well and its ongoing operations on the property. As explained in the next section, whether the lessee continues to generate a profit is the key question when a paying-quantities analysis is required by the lease's terms.

### B. Whether an oil and gas lease has terminated is an intensely factual issue that concerns the economics of the well operations and whether the operator has an objective, good-faith basis for believing the lease to be profitable.

An oil and gas lease is unlike the typical situation where a defeasible fee interest might terminate based on the happening of some event, such as property no longer being used for a particular purpose that a deed requires. Rather, the end of an oil and gas lease represents the end of the broad commercial, contractual relationship between the landowner and the operator. The lease term here is tied to production. Compl. Ex. B ("It is agreed that this lease shall remain in force for a primary term of one year . . . and said term shall extend long thereafter as oil and gas, or either of them, is produced from said land or from a communized unit as hereinafter

provided."). Production for these purposes generally refers to production in paying quantities. This Court has explained that:

> [t]he term "paying quantities," when used in the *habendum* clause of an oil and gas lease, has been construed by the weight of authority to mean "quantities of oil or gas sufficient to yield a profit, even small, to the lessee over operating expenses, even though the drilling costs, or equipping costs, are not recovered, and even though the undertaking as a whole may thus result in a loss."

*Blausey v. Stein*, 61 Ohio St.2d 264, 265–66, 400 N.E.2d 408 (1980). This Court noted that: "Because an oil and gas lessee bears the risk of nonproduction in a lease of this kind, we believe that appellee should be allowed to attempt to recoup his initial investment for as long as he continues to derive any financial benefit from production." *Id.* at 266, 400 N.E.2d 408.

Based on *Blausey*, the courts of appeals have explained that whether a lease has terminated under a paying-quantities analysis is determined from the standpoint of the lessee and is subject to the lessee's good-faith determination of whether the lease is profitable:

> We have previously held that "[s]uch language indicates it is for lessee to determine if a profit is being generated above the amount of operating expenses." *Siley v. Remmele*, 4th Dist. Washington No. 86CA6, 1987 Ohio App. LEXIS 6063, 1987 WL 7585, *3 (Mar. 6, 1987). As the leases emphasize, "'the construction of the phrase "paying quantities" must be from the standpoint of the lessee and his "good faith judgment" that production is in paying quantities must prevail.'" *Hupp v. Beck Energy Corp.*, 2014-Ohio-4255, 20 N.E.3d 732, P 103 (7th Dist.), quoting *Cotton v. Upham Gas Co.*, 5th Dist. Knox No. 86-CA-20, 1987 Ohio App. LEXIS 6152, 1987 WL 8741, *1 (Mar. 6, 1987); *see also Litton v. Geisler*, 80 Ohio App. 491, 496, 76 N.E.2d 741 (4th Dist. 1945) ("The prevailing rule seems to be that the phrase 'paying quantities' is to [be] construed from the standpoint of the lessee, and by his judgment if exercised in good faith").
>
> Appellants contend that the leases remain viable under the terms of the habendum clauses because the landowners' use of the wells to provide gas to multiple dwellings on the properties is equivalent to production in paying quantities.

*Pottmeyer v. E. Ohio Gas Co.*, 2016-Ohio-1294, 62 N.E.3d 617, ¶ 33–34 (4th Dist.)

> Despite the Langs' argument against this standard, this court recently reiterated that the lessee has discretion to determine whether a well is profitable. *Burkhart Family Trust v. Antero Resources Corp.*, 2016-Ohio-4817, ¶ 18, 68 N.E.3d 142. And while the lessee has discretion to determine a well's profitability, the

> determination of whether a well is profitable cannot be arbitrary. *Id.*, citing *Hupp v. Beck Energy Corp.*, 2014-Ohio-4255, ¶ 103, 20 N.E.3d 732. Instead, courts impose a standard of good faith on the lessee. *Id.*, citing *Hupp*.

*Lang v. Weiss Drilling Co.*, 2016-Ohio-8213, 70 N.E.3d 625, ¶ 34 (7th Dist.).

Disputes over termination of an oil and gas lease thus lead to complex factual disputes over the amount of production from the lease, the various operating expenses incurred by the lessee, whether the lessee's decision regarding profitability is made in good faith, and similar inquiries regarding the relationship between the landowner and the lessee. *See, e.g.*, *Hogue v. Whitacre*, 2017-Ohio-9377, 103 N.E.3d 314, ¶ 19 (7th Dist.) (examining whether a lease terminated due to lack of production in paying quantities); *Potts v. Unglaciated Industries*, 2016-Ohio-8559, 77 N.E.3d 415, ¶ 80–89 (7th Dist.) (same); *Paulus v. Beck Energy Corp.*, 2017-Ohio-5716, 94 N.E.3d 73, ¶ 51 (7th Dist.); *RHDK Oil & Gas LLC v. Dye*, 7th Dist. Harrison No. 14 HA 0019, 2016-Ohio-4654 (same).

In this case, for example, the lessee produced evidence showing production from the time it acquired the lease in October 1999 through the filing of the complaint in December 2014, i.e., for more than 15 years.

In cases where production has ceased for a period of time, the court must also examine whether the cessation was permanent, thus terminating the lease, or merely temporary, in which case the lease remains in full force. *RHDK Oil & Gas, L.L.C. v. Dye*, 7th Dist. No. 14 HA 0019, 2016-Ohio-4654, ¶ 24 ("[A]bsent a finding of unreasonableness, a six-month cessation period is temporary and does not terminate a lease."). The Seventh Appellate District has declined to adopt a bright-line test for this decision and instead makes a fact-specific determination on a case-by-case basis. *Id.*

The Brownes and their supporting amicus ask this Court to decide that the termination of oil and gas lease merely transfers title to real property back to the landowner. The case law of

this state show that much more is at stake when an oil and gas lease ends. Instead, disputes over the termination of an oil and gas lease concern the end of the entire commercial relationship between the landowner and operator and turns entirely on the written terms of the instrument. The decision to terminate an oil and gas lease ends the lessee's opportunity to profit from its operations on the property. Because lease-termination disputes involve the entire contractual relationship between the parties and not merely the passage of title, the statute of limitations for contracts should govern.

## III. The policies underlying statutes of limitations are best fulfilled by adopting the contract statute of limitations for actions to terminate an oil and gas lease.

Statutes of limitations are key to ensuring "the proper administration of justice." *Cundall v. U.S. Bank*, 122 Ohio St.3d 188, 2009-Ohio-2523, 909 N.E.2d 1244, ¶ 22. Statutes of limitation fulfill several important public policies: "ensuring fairness to the defendant, encouraging prompt prosecution of causes of action, suppressing stale and fraudulent claims, and avoiding the inconvenience engendered by delay and by the difficulty of proving older cases." *Id.* Applying the contract statute of limitations to disputes over the termination of an oil and gas lease fosters all of these policies while still giving a landowner a reasonable amount of time to assert a claim; adopting the 21-year real estate statute, on the other hand, would encourage the assertion of fraudulent and stale claims, forcing courts to decide decades-old disputes where records may be lost, memories faded, and witnesses gone.

Unlike a typical real estate dispute where a view of the property itself can determine whether the conditions of the deed are met, as explained above, whether an oil and gas lease remains in effect is factually complex and not evident from the property itself. The question turns on the economics of the production from the lease over a period of time, the good faith of the lessee, and whether any production gaps were temporary or permanent. The question can

also turn on whether there are other contractual provisions in the lease that would provide grounds for extending the secondary term, such as shut-in provisions, continuous operations clauses, and the like.

The evidence to address these questions will therefore be found in the business records of the lessee during the relevant period and testimony of individuals who have knowledge of the property and the operations of the lessee, such as the employees of the lessee, the landowner at the relevant time, and other third parties (family and neighbors of the landowner, government inspectors, etc.). Oil and gas leases, however, are frequently assigned by lessees to new operators, meaning that the same lease can be operated by several lessees over the course of its secondary term. The lessee at the time of the claimed termination of the lease, therefore, might no longer be in existence and its records may no longer be available. *See, e.g.*, *RHDK Oil & Gas LLC v. Dye*, 7th Dist. Harrison No. 14 HA 0019, 2016-Ohio-4654, ¶ 32 ("[A] problem arises when looking at 1983 through 2009, as the parties have not submitted evidence of royalty checks. Again, this is likely because RHDK did not have an interest in the lease during this period and its predecessor died before the assignment to RHDK was made."). And even if it still exists, the relevant documentation for examining production in paying quantities may no longer exist. Even when the lease has not changed hands, production records and operating cost information from decades earlier may no longer be retained by the company. On the landowner side, the owner of the property of the time of the alleged breach may have moved, died, or no longer remember key facts.

This case demonstrates the problems that would exist if the Brownes' proposed statute of limitations were adopted. The Brownes base their claim for termination of the lease on a claimed lack of production that ended in 1999. Compl. ¶ 19. Yet they did not own the property then;

they did not acquire the oil and gas rights until November 2012. Compl. Ex. A. Rather, the property was owned by a Mary Louise Mercer until her death on April 6, 1999. The property then passed by will to a James Vernon Patterson, who submitted an affidavit stating that the well on the property did in fact produce oil and gas and that he was paid royalties. Affidavit of James Vernon Patterson at ¶¶ 5-7, 9, 11. Thus, the Brownes are claiming a termination of the lease based on events that occurred more than a decade before they acquired the property, events that are expressly disputed by persons with knowledge of the facts at the time. On the operator side, Appellee Arloma was assigned the lease on October 4, 1999, from a Mike Johnson d/b/a Johnson Oil and Gas. Compl. ¶ 10. While Arloma's own production records showed continuous production after it acquired the lease, it does not appear that any production records from its predecessor were cited, presumably because those were no longer able to be found more than 15 years later.

Applying the shorter contract statute of limitations, in contrast, furthers the proper administration of justice. It encourages landowners that have a legitimate belief that their leases have terminated to raise disputes with the operator who is continuing to conduct operations on the property at a time when the evidence still exists. It lessens the chance that the property is transferred to a new landowner or new operator before the dispute is raised. And it discourages unscrupulous landowners from asserting stale or fraudulent claims in the hopes that the lessee will be caught without the evidence to prove their viable defenses.

The Brownes and their amicus ask this Court to adopt a rule that would increase litigation while simultaneously making that litigation more difficult to prove. This Court should reject this invitation and instead apply the contract statute of limitations to what is a contractual dispute.

## IV. The arguments by the Brownes and their amicus that there ought to be no statute of limitations or that the statute should be subject to a discovery rule should be rejected.

The Brownes and their amicus seek to further exacerbate the harms that an inappropriately long statute of limitations would cause by suggesting that no statute of limitations should apply or that the statute of limitations should not begin to run until the landowner discovers that there is a dispute. This Court should reject these arguments for several reasons.

### A. All civil actions in Ohio have an applicable statute of limitations.

The argument that no statute of limitations should apply at all is contrary to Ohio law. An action to seek termination of an oil and gas lease—whether framed as a declaratory judgment or quiet title or some other claim—is a civil action. *See* Civ. R. 2 ("There shall be only one form of action, and it shall be known as a civil action."); *Potts v. Unglaciated Industries*, 2016-Ohio-8559, 77 N.E.3d 415, ¶ 110 (7th Dist.). The General Assembly has decided that absent a more specific statute to the contrary, all civil actions in Ohio have an applicable statute of limitations. R.C. 2305.03 ("[U]nless a different limitation is prescribed by statute, a civil action may be commenced ***only within the period prescribed in sections 2305.04 to 2305.22*** of the Revised Code. If interposed by proper plea by a party to an action mentioned in any of those sections, lapse of time shall be a bar to the action.") (emphasis added).

The Brownes claim that because the lease terminates "automatically" when the conditions set forth in the lease are no longer being fulfilled, no statute of limitations applies. But whether or not an event is "automatic" is irrelevant to whether a civil action must be brought to resolve a dispute over whether that event occurred. Where there is a factual dispute over the occurrence of that event, a court will need to resolve that dispute and that can only be done

through a civil action. By statute, that civil action is time-barred unless brought within the statute of limitations. R.C. 2305.03; *see, e.g.*, *Rudolph v. Viking Int'l Res. Co.*, 2017-Ohio-7369, 84 N.E.3d 1066 (4th Dist.) ("[W]e agree that any language in *Schultheiss* [*v. Heinrich Enters., Inc.*, 2016-Ohio-121, 57 N.E.3d 361 (4th Dist.)] that indicates there is no statute of limitation on actions to declare a lease has terminated by its own terms is incorrect.").

The absurd results that would occur if the Brownes' argument that no statute of limitations should apply are seen in *Potts*. In that case, the plaintiffs sought termination of an oil and gas lease signed in 1896 for lack of production in paying quantities. 2016-Ohio-8559, 77 N.E.3d 415, ¶ 3–5. The lessee asserted that it had produced oil and gas on the property since it obtained the lease in 1991. The landowners, however, argued that because no statute of limitations should apply to claims asserting termination of an oil and gas lease, the lessee should be required to prove continuous production from the lease for its entire 112-year history. *Id.* ¶ 67. *Potts* rejected this argument, noting that the factual issues involved in determining when an oil and gas lease terminates would create insurmountable problems of proof if no statute of limitations applied. Specifically, the court was troubled by how an unlimited statute of limitations would apply when a temporary cessation argument was made:

> [U]nder Appellants' theory, a lessor would have an unlimited amount of time after a cessation and resumption in production to sue and claim the cessation lasted too long to be temporary. Under this theory, where a 1904 lessor was satisfied a broken wellhead was fixed in a diligent manner by the lessee, a 2013 successor mineral owner could argue the 1904 cessation in production should be viewed as more than temporary causing the lease to automatically expire with no constraints of a statute of limitations.

2016-Ohio-8559, 77 N.E.3d 415, ¶ 109. Instead, *Potts* correctly held that R.C. 2305.03 precludes any argument that there is no statute of limitations. *Id.* ¶ 110.

**B. This Court should not adopt a discovery rule.**

It would be inappropriate to adopt a discovery rule for disputes over the termination of an oil and gas lease. Although the Brownes avoid using the phrase "discovery rule," it is clear that this is what they are seeking when they state that the key question is "at what point did the lessor know that there was a dispute over the continuation of the lease?" Appellants' Br. at 19. In fact, this proposed formulation is more favorable than that found in the narrow set of cases where this Court has adopted a discovery rule: in those cases, the statute is triggered when the claimant knows *or should have known through the exercise of reasonable diligence* that the claim has accrued.

This Court has made clear that "[t]he general rule is that a statute of limitations begins to run when the injurious act is committed." *LGR Realty, Inc. v. Frank & London Ins. Agency*, 152 Ohio St.3d 517, 2018-Ohio-334, 98 N.E.3d 241, ¶ 26, citing *O'Stricker v. Jim Walter Corp.*, 4 Ohio St.3d 84, 87 447 N.E.2d 727 (1983); *Flagstar Bank, F.S.B. v. Airline Union's Mtge. Co.*, 128 Ohio St.3d 529, 2011-Ohio-1961, 947 N.E.2d 672, ¶ 13. This Court has created exceptions to that general rule only when applying the general rule "would lead to the unconscionable result that the injured party's right to recovery can be barred by the statute of limitations before he is even aware of its existence" *Id.*, quoting *Wyler v. Tripi*, 25 Ohio St.2d 164, 168, 267 N.E.2d 419 (1971). These narrow exceptions have been created in cases such as legal or medical malpractice, *see Oliver v. Kaiser Community Health Found.*, 5 Ohio St. 3d 111, 113 449 N.E.2d 438 (1983) and *Harris v. Reedus*, 2015-Ohio-4962, 50 N.E. 3d 1036, ¶ 13 (10th Dist.), and asbestos exposure. *Graening v. Ecrement*, 5th Dist. Stark Case No. CA-7549, 1988 Ohio App. LEXIS 5392, at *3 (Dec. 27, 1988) (explaining, "a cause of action for bodily injury caused by exposure to asbestos or to chromium in any of its chemical forms arises upon the date on which the Plaintiff is informed by competent medical authority that he has been injured by such

exposure, or upon the date on which, by the exercise of reasonable diligence, he should have become aware that he had been injured by the exposure, whichever date occurs first.").

The end of the parties' relationship at the termination of an oil and gas lease is not a situation appropriate for a judicially created discovery rule. Unlike the cases in which this Court has adopted a discovery rule, the fact that the operator believes the lease to remain in effect will be obvious. The lessee will continue to operate the well, produce oil and gas, pay royalties, pay taxes, and generally operate the well. All of that happened here from 1999 forward. Affidavit of Debrah Smith, ¶ 14; Affidavit of Joe Liptak, ¶ 3B; Affidavit of Rich Hunt, ¶ 36. Further, as the Ohio Farm Bureau recognizes, the lessee has an obligation to record a release of lease once the lease has expired under its own terms. Amicus Br. at 7, citing R.C. 5301.09. When an operator does not record such a release, this is a clear indication to the landowner that the operator believes the lease to remain in effect, especially when the operator continues to produce oil and gas from the property and otherwise operate and maintain the well. Constructive knowledge, such as is provided by the recording statutes, is sufficient to trigger knowledge of an event even under a discovery rule. *Cundall v. U.S. Bank*, 122 Ohio St.3d 188, 2009-Ohio-2523, 909 N.E.2d 1244, ¶ 30 ("*[C]onstructive* knowledge of facts, rather than *actual* knowledge of their legal significance, is enough to start the statute of limitations running under the discovery rule.") (emphasis sic.) (citation omitted). The landowner will also be able to see the continued presence of well equipment on the property, indicating that the operator believes it still has a right to be there. In contrast, when a lease is terminated, the operator has a duty to obtain a permit to plug

and abandon the well. *See* R.C. 1509.062. When in doubt, the royalty owner for a natural gas well has a statutory right to request reports of the production from the well. *See* R.C. 1509.30.[2]

This Court should not countenance a rule that would allow a landowner to remain willfully blind to the fact that the operator believes the lease to remain in effect.

## V. The General Assembly has expressly adopted the statute of limitations for contract claims for disputes concerning oil and gas leases.

The Brownes' complaint expressly pleads a cause of action based on the alleged breach of the parties' oil and gas lease. Compl. ¶¶ 19, 22-23, 27-28, Dec. 1, 2014. The General Assembly has made clear that it views oil-and-gas-lease disputes to be contractual in nature by adopting R.C. 2305.041:

> 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***.

(emphasis added).

Where there is a specific statute of limitations touching on the subject matter of the dispute, the courts are obliged to apply that statute. *Andrianos v. Community Traction Co.*, 155 Ohio St. 47, 50, 97 N.E.2d 549 (1951) (stating in context of applying statute of limitations that "a special statutory provision which relates to the specific subject matter involved in litigation is controlling over a general statutory provision which might otherwise be applicable"). The

[2] Notably, production records are required to be kept for purposes of complying with this statute for a period of two years. R.C. 1509.30. The Brownes' proposed statute of limitations would require these same records to be kept for two decades or, potentially, forever.

General Assembly recognized that although oil and gas leases do convey property interests, they also create much broader contractual relationships between the parties that should be subject to the contractual statute of limitations. This Court should recognize the General Assembly's decision and apply the contract statute of limitations to all actions to terminate an oil and gas lease based on its own written terms.

## CONCLUSION

The Brownes ask this Court to adopt a rule that would allow a lessor to intentionally delay filing suit indefinitely while simultaneously accepting the benefits of the lessee's operations in the form of royalties. Such a rule does not serve the "proper administration of justice." Instead, the court of appeals correctly determined that the Brownes' claims were barred by the statute of limitations found in R.C. 2305.06. That decision should be affirmed.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on this 14th day of December 2018, a copy of the foregoing was served by email pursuant to S.Ct.Prac.R. 3.11(C)(1) on the following:

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