NO. _____

THE SUPREME COURT OF OHIO

APPEAL FROM THE COURT OF APPEALS
SEVENTH APPELLATE DISTRICT
NOBLE COUNTY, OHIO
CASE NO. CA449

GULFPORT ENERGY CORPORATION
Defendant-Appellant

v.

VELMA J. NEUHART, *et al.*,
Plaintiffs-Appellees

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT GULFPORT ENERGY CORPORATION

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I. STATEMENT OF WHY THIS CASE IS ONE OF PUBLIC AND GREAT GENERAL INTEREST

A. Proper Application of a Statute of Limitations to A Claim Seeking to Terminate an Oil and Gas Lease Is of Great Public Importance and General Interest.

There has been a disjointed and inconsistent application of the statute of limitations by the Ohio appellate courts in civil actions seeking to terminate oil and gas leases. This fact is distinctly illustrated by comparing the Seventh District's opinion in *Potts v. Unglaciated Industries, Inc.*, 2016-Ohio-8559, 77 N.E.3d 415 (2016) to the Seventh District's opinion in this case. In *Potts*, the Seventh District aptly noted that "the fact an act or omission is alleged to have occurred, which would cause a lease to expire automatically and by operation of law, does not eliminate the application of a specific statute of limitations." *Id*. at ¶ 101. Conversely, the Seventh District contradicted itself in this case, holding that "the property automatically reverted to [the landowners] at the end of the primary term by operation of this [pugh] clause and discussion of any statute of limitations is irrelevant." Oct. 2, 2018 J.E. at Appx. 2. The Seventh District's holding in this regard blatantly ignores the Ohio legislature's mandate set forth at R.C. 2305.03(A) that all civil actions must be commenced within the statute of limitations period prescribed in sections R.C. 2305.04 through 2305.22.

The Seventh District's holding is also directly contrary to public interest in that it creates uncertainty and chaos in the world of real estate title law and ownership which requires order and certainty. This is particularly true in this case wherein the landowners waited over twenty-two (22) years to file a lease termination lawsuit arising out of the alleged breach of an unrecorded letter agreement. During the 22 year interim, Appellant Gulfport acquired deep rights under the lease at a substantial cost, and commenced drilling and production of lateral wellbores.

This Court, through its recent acceptance of jurisdiction in *Browne v. Artex*, Case No. 18-0942, clearly recognizes the importance of offering guidance to the appellate courts concerning the application of the statute of limitations in lease termination litigation. *Browne* involves a lease termination claim based upon an alleged failure to produce in paying quantities. Acceptance of this appeal is a logical extension of the Court's exercise of jurisdiction in *Browne*, as it will once and for all provide necessary guidance to the lower courts concerning the applicability of a statute of limitations in *any* civil action setting forth a claim for termination of an oil and gas lease.

B. A Subsequent Bona Fide Purchaser Without Notice of an Unrecorded Pugh Clause Should Not Be Barred From Presenting Affirmative Defenses.

The public at large, and specifically landowners and oil and gas operators, have a great interest in this Court clarifying whether a subsequent bona fide purchaser without notice is nevertheless bound by an automatic forfeiture provision in an unrecorded document. Indeed, the Ohio Legislature has adopted recording statutes for the purpose of providing notice of any "conveyance or encumbrance of lands". *See* R.C. 5301.25(A). Any such instruments not properly recorded "are fraudulent insofar as they relate to a subsequent bona fide purchaser . . ." *Id*.

Here, the Seventh District held that pursuant to the 1991 Unrecorded Letter Agreement, all undrilled acreage automatically reverted to the landowners on June 9, 1993. Appellant Gulfport, a subsequent bona fide purchaser without notice of the 1991 Unrecorded Letter Agreement, expended substantial time and money in developing the undrilled acreage. Nevertheless, the Seventh District held that Gulfport's affirmative defense of bona fide purchaser without notice was not "available" to Gulfport where the land had reverted back to the landowner. The Seventh District's holding in this regard effectively thwarts the entire purpose

and rationale behind R.C. 5301.25(A), and creates an environment of uncertainty and uncontrollable risk for all oil gas operators seeking to develop and produce oil and gas in Ohio.

C. Summary Judgment Should Not Be Entered *Sua Sponte* for a Non-Moving Party and an Appellate Court Should Not Refuse Remand to Consider Alternative Legal Arguments Never Developed at the Trial Court Level.

The Rules of Civil Procedure are in place to provide uniformity and predictability to the process of civil litigation. Litigants, their counsel, and the general public have a great interest in determining whether procedural rules in place are being appropriate applied and interpreted by the appellate courts. "Rule 56 does not authorize courts to enter summary judgment in favor of a non-moving party." *Marshall v. Aaron*, 15 Ohio St. 3d 48, 48, 472 N.E.2d 335, 336 (1984); see also *Bowen v. Kil-Kare, Inc.*, 63 Ohio St. 3d 84, 94, 585 N.E.2d 384, 393 (1992). Nonetheless, the Seventh District reversed summary judgment in favor of Gulfport and Northwood and *sua sponte* granted summary judgment in favor of the non-moving party.

Likewise, it was undisputed on appeal that Gulfport timely invoked the affirmative defense of bona fide purchaser without notice, but the defense was never fully briefed given the trial court's bifurcation of legal issues and ultimate determination that the statute of limitations was dispositive. The Seventh District refused to remand the matter to the trial court for consideration of the alternative affirmative defenses, effectively removing Gulfport's ability to fully develop and argue said defenses.

II. STATEMENT OF THE CASE AND FACTS

At issue in this appeal is the "Waldie Lease" which covers approximately 178 acres, more or less, of real property located in Beaver Township, Noble County, Ohio. *See Cmplt*. ¶¶ 17, 25. On June 9, 1991, Neil Neuhart and Velma Neuhart and James Waldie and Mary Lou Waldie, as Lessors, entered into an Oil and Gas Lease with TransAtlantic, Lessee, pertaining to

the 178 acres, which Lease was recorded at Noble County Lease Volume 110, Page 676. *See id.* At the time, Neil Neuhart and Velma Neuhart owned 50% of the oil and gas rights underlying the Waldie Property and James Waldie and Mary Lou Waldie owned the other 50% of the oil and gas rights underlying said property. *See id.*

The Waldie Lease provided for a primary term of "(2) two years, and so much longer thereafter as oil or gas or their constituents are produced or are capable of being produced on the premises in paying quantities." *See Cmplt.*, Ex. J. Appellees alleged in their Complaint that a one page, unrecorded, partially executed letter dated June 9, 1991, "amended" the Waldie Lease ("1991 Unrecorded Letter Agreement"). The 1991 Unrecorded Letter Agreement was only signed by only half of the lessors under the Waldie Lease, specifically, Neil and Velma Neuhart. It was not signed the other Waldie Lease lessors, James and Mary Lou Waldie. *See* Cmplt. ¶ 68, at Exh. K. The 1991 Letter Agreement was also never recorded in the land records for Noble County, Ohio. The 1991 Letter Agreement states:

> TransAtlantic Energy Corp. does hereby agree, at the expiration of the primary term of the lease, to release the balance of the undrilled acreage covered by that certain Oil & Gas Lease dated June 9, 1991, and being recorded in Volume 110, Page 767 of the Noble County Lease Records, in the event that (3) three Wells are not drilled on the above referenced Lease within the primary term of (2) Two years. . . .

See Cmplt. ¶ 68, at Exh. K.

It is undisputed that two producing wells were drilled prior to expiration of the primary terms of the Waldie Lease utilizing acreage under the Waldie Lease, the Neuhart #1 Well (API 34121238290000) and the Neuhart #2 Well (API 34121238480000) (cumulatively hereinafter the "Neuhart Wells"). The Trial Court held, and the Seventh District Court of Appeals affirmed that the Neuhart Wells were producing in paying quantities. *See* Oct. 4, 2018 J.E., Apx. 1.

By virtue of an Assignment and Bill of Sale dated January 26, 2006, Northwood Energy Corporation acquired all right, title and interest in the Neuhart and Waldie Leases from TransAtlantic. *See* Cmplt. ¶ 33. Northwood is the current lessee of the shallow formations under the Neuhart and Waldie Leases and the operator of the Neuhart Wells. *See id.* Gulfport is the current lessee of the oil and gas rights under the Waldie Lease as to all formations lying 100 feet below the stratigraphic equivalent of the Queenston Shale or deeper by virtue of a Partial Assignment of Oil, Gas and Mineral Interests entered into between Gulfport and Northwood Energy Corporation, TransAtlantic's successor-in-interest, which Partial Assignment recorded on June 13, 2013, at Noble County Official Records Volume 225, Page 657. Gulfport owns, operates and is producing oil and gas from three horizontal wells which encompass acreage from the Waldie Lease by virtue of Gulfport's assignment of the deep rights. *See* Cmplt. ¶ 39.

A. Gulfport Asserted Multiple Affirmative Defenses to the Complaint, Including Statute of Limitations and Bonafide Purchaser Without Notice.

Plaintiffs filed suit on June 22, 2015, seeking, in part, a declaration that the Waldie Lease had terminated. Although the Complaint contained several counts, Count IV sought an order of specific performance directing the lessees to release the undrilled acreage of the Waldie Property pursuant to the 1991 Letter Agreement. Gulfport timely raised several affirmative defenses, including subsequent bonafide purchaser without notice and laches.

B. Gulfport and Northwood Move For and Are Awarded Summary Judgment by the Trial Court.

Gulfport and Northwood filed motions for summary judgment on all claims. The trial court determined that the statute of limitations argument may be dispositive of any arguments arising out of the 1991 Unrecorded Letter Agreement. As such, the Trial Court bifurcated discovery and briefing on the issues as follows: (1) whether any argument regarding the undrilled

acreage under the Waldie Lease was barred by the statute of limitations, and (2) whether the Neuhart Wells were producing in paying quantities to hold the drilled acreage. No opportunity was provided to brief Gulfport's affirmative defenses, including subsequent bonafide purchaser without notice and laches.

On November 15, 2016, the Trial Court granted partial summary judgment to Gulfport and Northwood, holding that the eight (8) year statute of limitations under R.C. § 2305.041 operated to time bar Appellants' claims arising out of the 1991 Letter Agreement. *See* Trial Court Nov. 15, 2016 J.E. The ruling was subsequently journalized via a Partial Judgment Entry entered on December 29, 2016.

Thereafter, on June 13, 2017, the Trial Court granted summary judgment to Gulfport and Northwood on the remaining claims in the Complaint, finding that there was no genuine issue of material fact in dispute and the Neuhart Wells are producing in paying quantities. The landowners filed an appeal.

C. **The Seventh District Reversed the Trial Court on the Issue of Statute of Limitations and Sua Sponte Issued Judgment In Favor of the Landowners**.

The Seventh District affirmed the Trial Court's holding that the Neuhart Wells were producing in paying quantities, but reversed the Trial Court's November 15, 2016 Judgment Entry ("Judgment Entry") granting summary Judgment to Gulfport and Northwood based upon the affirmative defense of statute of limitations. *See* Oct. 4, 2018 J.E., at Apx. 1. Gulfport filed a Motion for Reconsideration on the grounds that the Seventh District erred in not remanding to the Trial Court for a determination of Gulfport's remaining affirmative defenses -- including laches and subsequent bona fide purchaser without notice – which were never briefed at the Trial Court level in light of the Trial Court's conclusion that the affirmative defense of statute of

limitations was dispositive and subsequent entry of a bifurcated briefing schedule. Appellant Northwood filed a similar Motion for Reconsideration.

The Seventh District denied the respective Motions for Reconsideration of Gulfport and Northwood, concluding that because the 1991 Unrecorded Letter Agreement operated as a Pugh Clause, the undrilled acreage automatically reverted back to the landowners by operation of law, such "there are no defenses available" to the civil action. *See* Dec. 11, 2018 J.E., at Apx. 2.

III. ARGUMENT

Proposition of Law No. 1: A Civil Action Including a Claim for Termination of an Oil and Gas Lease Is Subject to a Statute of Limitations.

Proposition of Law No. 2: A Landowner's Claim in a Civil Action that Undrilled Acreage Under and Oil and Gas Law Automatically Reverted to the Landowner is Subject to a Statute of Limitations That Begins to Run on the Date the Automatic Reversion or Forfeiture Occurred.

Revised Code 2305.03(A) clearly states that a civil action may be commenced only within the period prescribed in sections 2305.04 to 2305.22 of the Revised Code. R.C. 2305.041 provides that an action alleging a breach of a lease provision concerning calculation or payment of royalties shall be brought pursuant to R.C. 1302.98, while "[a]n 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." The landowners' claims did not involve an alleged breach regarding calculation and payment of royalties, therefore the statute of limitations set forth at R.C. 2305.06 governed the landowners' claims. R.C. 2305.06 provides "[e]xcept as provided in sections 126.301 and 1302.98 of the Revised Code, an action upon a specialty or an agreement contract, or promise in writing shall be brought within eight years after the cause of action accrued." R.C. 2305.06.

The fact that the landowners' claims were styled as one for specific performance and/or declaratory judgment makes no difference in the application of a statute of limitations. When determining which statute of limitations applies to a particular claim, the law in Ohio mandates that the courts "look to the actual nature or subject matter of the case, rather than to the form in which the action is pleaded." *Hambleton v. R.G. Barry Corp.*, 12 Ohio St.3d 179, 183, 465 N.E.2d 1298, 1302 (1984); *see also Ricketts v. Everflow Eastern, Inc.*, 68 N.E.3d 165, 2016-Ohio-4807 ¶¶ 5, 15 (7th Dist., June 29, 2016) (the Seventh District noting that "[a]lthough styled as a declaratory judgment action, the case *sub judice* sounds in breach of contract law.") Here, the claims regarding the 1991 Unrecorded Letter Agreement involved breach of contract claims, *i.e.*, a request for specific performance of an alleged breached provision of the oil and gas lease.

As such, the Seventh District Court erred when it concluded that no statute of limitations applied to a lease termination claim involving an alleged automatic reversion of property interests. Crucially, the Seventh District's holding in this regard is directly contrary to its prior opinion set forth in *Potts v. Unglaciated Industries, Inc.* 77 N.E.3d 415 (2016), where the Seventh District indicated that a statute of limitations should apply even in claims alleging an automatic expiration or reversion of property interest:

> The fact an act or omission is alleged to have occurred, which would case a lease to expire automatically and by operation of law, does not eliminate the application of a specific statute of limitations.

Id. at ¶101. The Seventh District even went a step further in *Potts*, explaining when the statute of limitations should begin to run:

> The alleged date the estate transferred by operation of law is the date the statute of limitations begins to run.

Id., n. 12. As such, here, the statute of limitations established by the Ohio Legislature under R.C. 2305.06 applied to the landowners' claims arising out of the oil and gas lease, and the statute began to run on the date that the landowners' claimed automatic reversion of the undrilled acreage, i.e., June 9, 1993.

Proposition of Law No. 3: An Unrecorded Lease Document Is not Binding On a Subsequent Bona Fide Purchaser Without Notice.

Proposition of Law No. 4: Subsequent Bona Fide Purchaser Without Notice is an Available Affirmative Defense In a Civil Action Claiming that a Lease Interest Automatically Reverted to the Landowner.

R.C. 5301.09 specifically pertains to the proper acknowledgment and recordation of oil and gas leases:

> In recognition that such leases and licenses create an interest in real estate, all leases, licenses, and assignments thereof, or of any interest therein, given or made concerning lands or tenements in this state, by which any right is granted to operate or to sink or drill wells thereon for natural gas and petroleum or either, or pertaining thereto, shall be filed for record and recorded in such lease record without delay, and shall not be removed until recorded. . . .
> **No such lease or license is valid until it is filed for record**, except as between the parties thereto, unless the person claiming thereunder is in actual and open possession.

R.C. 5301.09 (emphasis added). The 1991 Unrecorded Letter Agreement was never recorded, and therefore was not valid except as between the parties thereto pursuant to R. C. 5301.09. Moreover, R.C. 5301.25, specifically provides that unrecorded instruments which convey or encumbrance land are fraudulent as to bona fide purchasers such as Northwood and Gulfport herein:

> *Recording of instruments conveying or encumbering lands; name of surveyor; exceptions; tax certificates.*
> (A) All deeds, land contracts referred to in division (A)(21) of section 317.08 of the Revised Code, and instruments of writing properly executed for the conveyance or encumbrance of lands, tenements, or hereditaments, other than as provided in division (C)

> of this section and section 5301.23 of the Revised Code, **shall be recorded in the office of the county recorder of the county in which the premises are situated. Until so recorded or filed for record, <u>they are fraudulent insofar as they relate to a subsequent bona fide purchaser</u>, having, at the time of purchase, no knowledge of the existence of that former deed, land contract, or instrument**.

R.C. 5301.25 (emphasis added). "A 'bona fide purchaser' is one who acquires legal title to real estate for valuable consideration, in good faith, and without knowledge or notice of another's equitable interest in that property." *Swallie v. Rousenberg*, 190 Ohio App. 3d 473, 478, 2010-Ohio-4573, P24, 942 N.E.2d 1109, 1112-1113 (Ohio Ct. App., Monroe County 2010) (internal citations omitted). As such, the 1991 Unrecorded Letter Agreement is fraudulent and void as to Gulfport's interests, a subsequent bona fide purchaser without notice. The Seventh District's holding that the bona fide purchaser without notice defense was "unavailable" is contrary to Ohio's recording statutes and the public policy behind them of having reliable and clear land records.

<u>Proposition of Law 5</u>: An Appellate Court May Not Enter Summary Judgment *Sua Sponte* for A Non-Moving Party.

<u>Proposition of Law 6</u>: An Appellate Court May Not Refuse Remand for Consideration of Affirmative Defenses Properly Raised But Not Considered by the Trial Court Prior to Its Entry of Summary Judgment.

It is undisputed that the narrow focus of the Trial Court's award of partial summary judgment on Count IV of the Plaintiffs' Complaint seeking specific performance of the 1991 Unrecorded Letter Agreement was based solely upon the statute of limitations, to the exclusion of all the alternative grounds raised by Gulfport. The Trial court bifurcated the briefing of the issues, determining that the statute of limitations was dispositive. On appeal, the Seventh District not only reversed summary judgment in favor of Gulfport and Northwood, it *sua sponte* entered summary judgment in favor of the non-moving party in clear contravention of Rule 56.

Ohio Civil Procedure "Rule 56 does not authorize courts to enter summary judgment in favor of a non-moving party." *Marshall v. Aaron*, 15 Ohio St. 3d 48, 48, 472 N.E.2d 335, 336 (1984); see also *Bowen v. Kil-Kare, Inc.*, 63 Ohio St. 3d 84, 94, 585 N.E.2d 384, 393 (1992) ("We agree with the court of appeals' determination that since appellees never moved for summary judgment on the negligent infliction of emotional distress claims of Bowen's wife and children, appellees were not entitled to summary judgment on these claims."). Moreover, on appeal:

> [a] reviewing court, even though it must conduct its own examination of the record, has a different focus than the trial court. If the trial court does not consider all the evidence before it, an appellate court does not sit as a reviewing court, but, in effect, becomes a trial court. . . . [Civ. R. 56(C)] mandates that the trial court make the initial determination whether to award summary judgment; the trial court's function cannot be replaced by an 'independent' review of an appellate court.

Hollins v. Shaffer, 182 Ohio App.3d 282, 912 N.E.2d 637, 2009-Ohio-2136 at ¶ 22 (2009), citing to *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 360, 604 N.E.2d 138, 1992-Ohio-95 (1992). By reversing the trial court's grant of summary judgment and effectively entering summary judgment *sua sponte* in favor of the non-moving party the Seventh District acted outside the permissible scope of Rule 56 as well as the role of a reviewing court.

Furthermore when summary judgment has been granted on an isolated affirmative defense without an opportunity for the parties to development alternative arguments and defenses, it is improper for an appellate court to not remand to the trial court for consideration of the alternative defenses. *See Riverside v. State*, (10th Dist.) 2010-Ohio-5868, ¶ 58, 190 Ohio App. 3d 765, 792, 944 N.E.2d 281, 302 ("Because the trial court here has not decided either the city's standing to maintain an equal protection challenge or the merits of the city's equal protection argument, we decline to address those issues in the first instance and, instead, remand

this matter for the trial court to initially consider and decide them."); *Schmucker v. Kurzenberger*, (9th Dist.) 2011-Ohio-3741, ¶ 14 (noting that the appellate court could not properly "consider alternate grounds in support of a motion for summary judgment" for the first time on appeal where the trial court has not engaged in a review of the issue in the first instance because to do so would place the appellate court in the role of the trial court).

The Seventh District herein readily acknowledged that Gulfport's alternate affirmative defenses of laches and bona fide purchaser without notice were never decided in light of the trial court's decision to bifurcate the statute of limitations issue. *See* Dec. 11, 2018 J.E. at Apx. 2. As such, those arguments were not properly before the Seventh District on appeal. Nonetheless, the Seventh District determined that the affirmative defenses were not "available" because the property had automatically reverted to the landowners, effectively granting summary judgment on Count IC of the Complaint in favor of the non-moving party and precluding any opportunity for Gulfport to brief and develop its alternative affirmative defense.

IV. CONCLUSION

This Court should exercise its jurisdiction in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies a copy of the foregoing ***"Memorandum in Support of Jurisdiction of Appellant Gulfport Energy Corporation"*** was filed and served on the 25th day of January, 2019, upon the following parties by placing a copy in the U.S. mail, postage prepaid:

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APPENDIX 1

Court of Appeals**,** Opinion and Judgment Entry, October 4, 2018 *Neuhart v. TransAtlantic Energy Corp*., 7th Dist. Noble No. 17 NO 449, 2018-Ohio-4099

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
NOBLE COUNTY

VELMA J. NEUHART, et al.,

Plaintiffs-Appellants,

v.

TRANSATLANTIC ENERGY CORP., et al.,

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 17 NO 0449

Civil Appeal from the
Court of Common Pleas of Noble County, Ohio
Case No. CVH-215-0064

BEFORE:
Cheryl L. Waite, Gene Donofrio, Carol Ann Robb, Judges.

JUDGMENT:
Affirmed in Part. Reversed and Remanded in Part.

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Dated: October 5, 2018

WAITE, J.

{¶1} Appellants Velma J. Neuhart, Charles R. Neuhart, Mary Lou Waldie, James Waldie, Candie J. Clark, Menno A. Byler, Marie A. Byler, Menno M. Byler, Jr., and Christina E. Byler appeal two Noble County Common Pleas Court judgment entries. In the first, dated November 15, 2016, the trial court ruled that Appellants' claim regarding undrilled acreage was barred by the statute of limitations and granted summary judgment in favor of Appellees Northwood Energy Corp. ("Northwood"); Gulfport Energy Corp. ("Gulfport"); Ralph W. Talmage, Trustee of the Ralph W. Talmage Trust; and David E. Haid, Trustee of the David E. Haid Trust. In the second entry, dated June 13, 2017, the trial court ruled that the remaining acreage was producing oil and/or gas and granted summary judgment in favor of Appellees.

{¶2} Appellants' argument regarding the undrilled acreage has merit. As such, the trial court's November 15, 2016 judgment entry is reversed and the matter is remanded. However, Appellants' argument regarding the production of the existing

wells is without merit. Accordingly, the trial court's June 13, 2017 judgment entry is affirmed.

Factual and Procedural History

{¶3} This oil and gas action involves two tracts of land in Beaver Township, Noble County: the Neuhart property and the Waldie property. The Neuhart property encompasses 24.71 acres of land, owned in fee simple by Velma J. Neuhart. Based on the complaint, only Velma J. Neuhart owns an interest in the minerals underlying the Neuhart property. (6/22/15 Complaint, pp. 5-7.) Charles R. Neuhart, Mary Lou Waldie, James Waldie, Candie J. Clark, Menno A. Byler, Marie A. Byler, Menno M. Byler, Jr., and Christina E. Byler own an interest in the Waldie Property. The Waldie Property is not at issue in this appeal.

{¶4} In 1991, Appellants and TransAtlantic Energy Corp. ("TransAtlantic") entered into an oil and gas lease. The lease is signed by Neil A. and Velma J. Neuhart and a TransAtlantic representative and is dated June 9, 1991. The lease contains a two-tiered habendum clause setting out both a primary and secondary term. The length of the primary term was two years. The clause provided that the lessee would remain in the lease past the primary term "so much longer thereafter as oil or gas or their constituents are produced or are capable of being produced on the premises in paying quantities, in the judgment of the Lessee." (June 9, 1991 Lease, paragraph 2.)

{¶5} On the same day, TransAtlantic sent Neil and Velma Neuhart an amendment letter agreeing to release any undrilled acreage in the event that three wells were not drilled on the property by the end of the primary term. A TransAtlantic representative and the Neuharts signed the letter. When the primary term ended in

1993, TransAtlantic had drilled two wells on the Neuhart property. On December 30, 1992, TransAtlantic assigned a 2% interest in the Neuhart wells to Sabre. On February 9, 2006, TransAtlantic assigned the leases to Northwood.

{¶6} According to Appellants, they first learned that Transatlantic and Northwood continued to claim an interest in the undrilled acreage in 2011. On October 13, 2011, Velma J. Neuhart filed and recorded an affidavit of nonproduction regarding the wells. Appellants then sent TransAtlantic a notice of abandonment. Appellants also sent TransAtlantic and Northwood a letter stating their belief that TransAtlantic's interest in the undrilled acreage had terminated pursuant to the June 9, 1991 amendment letter. Both TransAtlantic and Northwood responded, claiming they had a continuing interest in the undrilled acreage.

{¶7} On June 22, 2015, Appellants filed a complaint against Appellees, collectively. The complaint also named TransAtlantic, Sabre Energy Corp., Donald R. Quest, and Candace L. Bennett as defendants. The complaint sought declaratory judgment on their claims regarding both the Neuhart and Waldie properties and quiet title to both properties. As earlier discussed, this appeal involves only the Neuhart property. On July 23, 2015, Appellees filed a counterclaim. On December 30, 2015, Appellees Northwood; Ralph W. Talmage, Trustee of the Ralph W. Talmage Trust; and David E. Haid, Trustee of the David E. Haid Trust, filed a partial motion for summary judgment. They argued that the Neuhart wells were producing in paying quantities and that Appellants' claim regarding the undrilled acreage was barred by the statute of limitations. On February 26, 2016, Appellee Gulfport filed its own motion for summary judgment on the same issues. Named defendants TransAtlantic, Sabre, Donald R.

Quest, and Candace L. Bennett failed to file either a brief in support of or in opposition to summary judgment. On March 21, 2016, the trial court entered an order bifurcating the issues.

{¶8} On November 15, 2016, the trial court granted summary judgment in favor of Appellees on the issues involving the undrilled acreage. On June 13, 2017, the trial court also granted summary judgment in favor of Appellees on the remaining issue of paying quantities. Appellants appeal both the November 15, 2016 and June 13, 2017 judgment entries.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED AS A MATTER OF LAW BY FAILING TO DETERMINE THAT TRANSATLANTIC'S LEASE RIGHTS IN THE UNDRILLED ACREAGE EXPIRED AUTOMATICALLY AT THE END OF THE PRIMARY TERM OF THE LEASE BECAUSE TRANSATLANTIC NEVER DRILLED A THIRD WELL.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED AS A MATTER OF LAW IN DETERMINING THAT *ANY* STATUTE OF LIMITATIONS BARRED THE LANDOWNERS' CLAIMS BECAUSE THESE CLAIMS DID NOT ACCRUE UNTIL 2011, AT THE EARLIEST, WHEN THE LANDOWNERS FIRST HAD REASON TO BELIEVE THAT NORTHWOOD CLAIMED AN ADVERSE INTEREST IN THE UNDRILLED ACREAGE.

{¶9} Pursuant to the letter amendment to the parties' contract, Appellants argue that the undrilled acreage automatically reverted to them at the end of the primary

term because Appellees failed to drill three wells. Appellants contend that no action was required on their part due to the automatic reversion, thus, there is no statute of limitations issue in this matter. In the event that this case involves an issue where a statute of limitations applies, Appellants argue that it should be twenty-one years in accordance with *Rudolph v. Viking International Resources, Co.*, 2017-Ohio-7369, 84 N.E.3d 1066 (4th Dist.).

{¶10} In response, Appellees maintain that the statute of limitations in cases involving oil and gas leases is controlled by R.C. 2305.041. Appellee Northwood argues that the statute of limitations is fifteen years. Acknowledging that uncodified law exists that interprets an amendment to R.C. 2305.041, Appellee TransAtlantic argues that the statute of limitations is eight years. Regardless which statute of limitations is applied, both Appellees contend that Appellants' claim is barred because the triggering event in this matter occurred in 1993, twenty-two years before their complaint was filed.

{¶11} The determinative issue here is whether the letter amendment to the parties' contract amounts to a Pugh clause. Generally, leased lands are considered indivisible. *Summitcrest, Inc. v. Eric Petroleum Corp.*, 2016-Ohio-888, 60 N.E.3d 807 (7th Dist.). A Pugh clause in a lease allows land to become divisible when the lease is held by production of less than the whole acreage. *Id.* The Pugh clause allows the lease to continue only as to the producing acreage. *Id.* Hence, if the language of the letter amending the parties' contract is construed to be a Pugh clause, the undrilled acreage automatically reverted to Appellants. No further action on their part would have been required and no statute of limitations would apply.

{¶12} The original lease was signed by the parties on June 9, 1991. On that same day, the parties signed the amendment letter. The letter states in full:

> Please be advised that TransAtlantic Energy Corp. has agreed to Lease your property with the following stipulations;
>
> TransAtlantic Energy Corp. does hereby agree, at the expiration of the primary term of the lease, to release the balance of the undrilled acreage covered by that certain Oil & Gas Lease dated June 9, 1991, and being recorded in Volume 110, Page 676 of the Noble County Lease Records, in the event that (3) three Wells are not drilled on the above referenced Lease within the primary term of (2) Two Years. However, It [sic] is futher [sic] agreed that TransAtlantic Energy Corp. shall hold the acreage that is required to comprise the Well unit as set out by the ODNR Division of Oil & Gas for the depth to which the Well has been drilled.
>
> This letter shall be made a part of the aforementioned Lease by this reference and shall be deemed binding to both parties of said Lease as long as the terms and conditions of the lease have been complied with. [sic]

(6/9/91 Amendment Letter.)

{¶13} It is apparent from the facts of this case that the letter integrated a term into the lease the parties had intended to include, but for some unknown reason this term was omitted from the underlying lease. The amendment by letter incorporated its language into the original lease and made this language a lease term.

{¶14} Appellees contend that the contents of the amendment letter merely created a drilling covenant rather than a term covenant. The plain language of the letter, however, specifically provides for the release of undrilled acreage at the end of the primary term. This language evinces that the parties certainly intended to terminate the lease as to any undrilled acreage at the end of the primary term. Hence, the language addresses the term of the lease rather than merely addressing the manner or method of drilling. If the parties had intended to create a drilling covenant, language regarding the release of undrilled land would have been excluded as unnecessary.

{¶15} It is a general principle of law that "a contract is to be construed against the party who drew it." *Poirier v. Chong Hui Sin*, 7th Dist. No. 97 C.A. 158, 1999 WL 35306, *6 (Jan. 14, 1999), citing *Graham v. Drydock Coal Co.*, 76 Ohio St.3d 311, 313-314, 667 N.E.2d 949 (1996). Appellees drafted both the original lease and the letter amending the lease. Any ambiguity is therefore construed against Appellees.

{¶16} Appellees urge that, even if the amendment letter constitutes a Pugh clause, it was not recorded. However, Appellants are blameless for the failure to record the amendment letter. Again, Appellees drafted both the original lease and the amendment letter. Appellees recorded the original lease, which was signed the same date as the amendment letter. Appellees have not explained why they failed to record the letter of amendment. Northwood points out that their predecessor, TransAtlantic, was in possession of the lease file at the time the documents were drafted and the original lease was recorded, and urge that they should not be held to account for TransAtlantic's failure to record the amendment. However, when Northwood purchased

the lease file, Northwood stepped into TransAtlantic's place. Northwood has no greater rights or fewer duties than TransAtlantic possessed.

{¶17} Although the trial court determined that to regain the rights to their property Appellants were required to take some further action, and so construed this matter as a statute of limitation problem, because the amendment letter sets out a Pugh clause the undrilled acreage automatically reverted to Appellants by operation of law. Appellants were not required to take any action in order to obtain their right to the undrilled acreage once the primary term ended in 1993. Appellees rely on *Potts v. Unglaciated Industries,* 7th Dist. No. 15 MO 0003, 2016-Ohio-8559 and *Ricketts v. Everflow Eastern, Inc.,* 2016-Ohio-4807, 68 N.E.3d 165 (7th Dist.) to contend Appellants waited too long to assert their rights. However, neither *Ricketts* nor *Potts* involved a Pugh clause. This clause governs the rights and duties of the parties regarding the undrilled property. The right to control the undrilled property automatically reverted to Appellants at the end of the primary term by operation of this clause and discussion of any statute of limitations is irrelevant.

{¶18} Accordingly, Appellants' first and second assignments of error have merit and are sustained. However, our determination regarding the automatic reversion of rights in the undrilled acreage to Appellants does not fully resolve this issue. In Appellants' complaint they sought the remedy of specific performance or monetary damages for Appellees' continued use of the property. Because the trial court ruled that the statute of limitations barred Appellants' claim, any harm suffered by them and the issue of remedy was never addressed. Thus, this issue is remanded to the trial court in order to address Appellants' outstanding claims.

ASSIGNMENT OF ERROR NO. 3

THE TRIAL COURT ERRED IN DENYING THE LANDOWNERS' SUMMARY JUDGMENT MOTION AND GRANTING APPELLEES' SUMMARY JUDGMENT MOTIONS AS WHETHER THE NEUHART NO. 1 WELL PRODUCED OIL OR GAS IN PAYING QUANTITIES.

ASSIGNMENT OF ERROR NO. 4

THE TRIAL COURT ERRED IN DETERMINING THAT NO GENUINE ISSUES OF MATERIAL FACT REMAINED AS TO WHETHER THE NEUHART NO. 2 WELL PRODUCED OIL AND GAS IN PAYING QUANTITIES.

{¶19} Appellants also contend that the lease has terminated as to the property containing the two existing wells, Neuhart Well No. 1 and Neuhart Well No. 2, due to the wells' lack of production in paying quantities. Appellants focus on production during the years 2013 through 2016. However, they argue that even if this Court looks to the period relied on by Appellees, 2010 through 2016, the lease has expired due to lack of production in paying quantities.

{¶20} We note that Appellants filed their complaint in May of 2015 and the expense records pertaining to these wells are not part of the appellate record. Thus, we cannot complete an analysis regarding paying quantities for the months of June through December of 2015 or for the year 2016. For ease of understanding, then, Appellants' third and fourth assignments of error will be addressed together.

Applicable Law

{¶21} The Ohio Supreme Court has defined the term "paying quantities" as the production of "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).

{¶22} A lessee is given discretion to determine whether a well is profitable, however, a good faith standard is imposed on the lessee. *Burkhart Family Trust v. Antero Resources Corp.*, 7th Dist. Nos. 14 MO 0019, 14 MO 0020, 2016-Ohio-4817, 68 N.E.3d 142, ¶ 18, citing *Hupp v. Beck*, 7th Dist. Nos. 12 MO 0006, 13 MO 0002, 13 MO 0003, 13 MO 0011, 2014-Ohio-4255, 20 N.E.3d 732. A plaintiff bears the burden of proving that a well is not producing in paying quantities. *Burkhart, supra*, at ¶ 13, citing *Moore v. Adams*, 5th Dist. No. 2007AP090066, 2008-Ohio-5953.

Neuhart Well No. 1

{¶23} Appellants argue that in their calculations Appellees have misrepresented their expenses by omitting a monthly $175 administrative fee and maintenance and repair costs. According to Appellants, this well suffered a loss of $7,696.27 from 2013 to 2016. If the time period is extended to include 2010 through 2016, Appellants assert that Appellees lost $7,597.69. If the administrative fees are added to the paying quantities analysis, the well caused Appellees to lose $16,096.27 between 2013 and 2016. When the time period is extended to include 2010 through 2012, that number rises to $18,457.69. Appellants also argue that gathering and compression fees were not considered in making the paying quantities analysis.

{¶24} In response, Appellees argue that any analysis of paying quantities should consider 2010 through 2016 as the base period rather than basing an examination of production separately, year-to-year. Regardless, Appellees contend that the numbers Appellants cite from the expense report do not provide an accurate representation of the well's expenses. According to Appellees, the report does not differentiate between the types of expenses, including: operating expenses, capital expenses, administrative charges, and gathering and compression fees. According to Appellees, only the operating expenses should be included in an analysis of paying quantities.

{¶25} Additionally, Appellees point out that Appellants concede they have attempted to terminate the lease since 2011. Because of Appellants' efforts in this regard, Appellees urge that they were unable to make significant expenditures, because they would not recoup those costs in the event the lease was terminated. Appellees cite to caselaw from other states holding that a lessor's obligations are suspended during the time that a landowner asserts forfeiture claims. Even if we were to adopt these cases, however, the record reveals that months after the complaint in this matter was filed, Appellees invested $5,000 in the property to replace a broken pump. As Appellees were apparently willing to invest relatively large amounts of money in this well even after the complaint was filed, there is no evidence in this record suggesting that Appellees were unable to make expenditures due to any uncertainty regarding their right to the leasehold.

{¶26} It is unclear from the trial court's entry whether it analyzed the well's production on a year-to-year basis or using as a base period the years 2010 through 2016. Beginning with 2010, Appellees' records show that the well produced 532 MCF

of gas, generating $3,933.66 in revenue. No oil was sold during this year, but there is evidence that oil was collecting in the tank. According to certain records, Appellees incurred $4,323.42 in expenses during 2010. However, Holly Clemens testified in her deposition that this amount includes operating expenses, capital expenses, and compression and gathering fees. (3/31/17 Clemens Depo., pp. 36-37.) According to Clemens, only the operating expenses are directly related to the production of oil and gas.

{¶27} Appellees do not dispute that the following operating expenses are relevant in a paying quantities analysis: $22.73 for tax purposes, $7.58 to Noble County for property tax purposes, $1,200 for the cost of pumping the wells, $64.50 for chart integration fees, $40.85 to Sweeney Services (routine maintenance work), $80 for brine removal, and $532.34 for royalties. These total $1,948.

{¶28} Appellants argue that a monthly $175 administration fee should be included as an operating expense. Clemens testified that this is a service fee charged to the working owners and is paid to Northwood. According to Clemens, the fee covers only the costs of recordkeeping services, accounting services, and the disbursement of royalties. (3/31/17 Clemens Depo., p. 30.) It is calculated on the individual owner's percentage of ownership. For example, if an investor owns one-half percent of a working interest, that owner would be charged one-half percent, times the total administrative fee amount ($175), which in this example totals eighty-eight cents (.50 X $175 = 88). This amount is then paid to Northwood. (3/31/17 Clemens Depo., p. 33.)

{¶29} The issue of whether monthly payments are operating expenses for purposes of a paying quantities analysis depends on whether the fee is directly related

to the production of oil and gas. In *Hogue v. Whitacre*, 2017-Ohio-9377, -- N.E.3d -- (7th Dist.), appeal not allowed *Hogue v. Whitacre*, 152 Ohio St.3d 1480, 2018-Ohio-1990, we considered whether monthly administrative fees paid by an oil and gas company to a third-party entity constituted an expense in a paying quantities analysis. We determined that these fees were not directly related to the production of oil and gas, and were not to be included. We based our decision on evidence showing that the monthly payments did not contribute to the production of oil and gas. However, in *Kraynak v. Whitacre*, 7th Dist. No. 17 MO 0014, 2018-Ohio-2784, we held that a monthly payment from an oil and gas company to a third-party entity was a direct operating cost. We relied on testimony from the oil and gas company president that the monthly payments did represent a cost of operating the well. *Id.* at ¶ 30.

{¶30} The record in this case contains evidence that the administrative fee in question did not contribute to the production of oil and gas. Instead, the evidence shows that the payments covered overhead costs. As such, the administrative fee should not be deducted as an expense in any paying quantities analysis in this matter.

{¶31} Appellants next argue that gathering and compression fees should be included in a paying quantities analysis, here. The Sixth Circuit has defined gathering as "the movement of lease production to a central accumulation and/or treatment point on the lease, unit or communitized area, or to a central accumulation or treatment point off the lease, unit or communitized area." *Poplar Creek Dev. Co. v. Chesapeake Appalachia L.L.C.*, 636 F.3d 235, fn. 1 (6th Cir.2011). The Court defined compression as " 'the process of raising the pressure of gas.' It is often used to transport low pressure gas through the pipeline to a place where it can be sold." *Id.* at fn. 2. Both

gathering and compression are considered post-production processes as they occur after the gas leaves the well. *Id.* at 239.

{¶32} Gathering and compression costs are not directly related to the production of oil and gas. In fact, they become relevant only after oil and gas is produced. Importantly, Appellees in this case own the pipeline. (3/31/17 Clemens Depo., p. 52.) Even if the gathering and compression process were somehow related to the production of oil and gas, these fees are not expenses. Instead, the fees represent merely an accounting mechanism, as Appellees essentially pay themselves for use of their own pipeline. (3/31/17 Clemens Depo., p. 66.) Hence, the gathering and compression fees are not expenses for purposes of a paying quantities analysis in this matter.

{¶33} Accordingly, this record shows that Appellees' expenses for 2010 amounted to $1,948. Appellees generated $3,933.66 in revenue. Simple subtraction reveals they received a profit of $1,985.66 for that year.

{¶34} In 2011, the well produced 575.54 MCF of gas for a total revenue of $4,139.09. Appellees do not dispute the following expenses are included in a paying quantities analysis for 2011: $47.94 for income tax purposes, $30.36 in Noble County property tax, $1,200 for the cost of pumping the well, $117.80 for chart integration fees, and $556.99 for royalties. These expenses total $1,953.09.

{¶35} As administrative fee and gathering and compression fees are not to be included, the above represent the sole expenses in a paying quantities analysis. Again, Appellees generated $4,139.09 in revenue and had $1,953.09 in expenses. They received a profit of $2,186 for 2011.

{¶36} In 2012, the well produced 382 MCF of gas for a total revenue of $2,268.82. Appellees concede the following expenses: $13.54 to Noble County for property taxes, $19.89 income tax, $1,200 in pumping costs, $117 for chart integration fees, and $288.14 for royalties. These total $1,638.57 and Appellees received a profit of $630.25.

{¶37} In 2013, the well produced 299 MCF of gas, generating $1,901.36 in revenue. The following expenses are included: $13.10 in Noble County property taxes, $9.02 for income tax, $1,300 for pumping the well, $117 for chart integration fees, and $247.23 for royalties. These total $1,686.35, so that Appellees had a profit of $215.01.

{¶38} In 2014, the well produced 155 MCF of gas, generating $1,017.50 in revenue. Appellees agree to the following expenses: $7.34 for property taxes, $4.70 for income tax, $1,200 for pumping, $136.50 chart integration fees, and $102.25 for royalties. These expenses total $1,450.79. Based on these totals, Appellees lost $433.29 in 2014.

{¶39} Through the date of filing of the complaint in May of 2015, the well produced 56.26 MCF of gas and generated $480.19 in revenue. The direct operating costs for this period of time include: $4.46 property taxes, $48.75 chart integration fee, $500 pumping fee, $1.73 income taxes, and $15.68 for royalty payments. As the total expenses amount to $570.62, Appellees lost $90.43 through May of 2015.

{¶40} Although the expense records from June through December of 2015 are not part of the appellate record, it is important to consider the production records during this timeframe as they explain the dip in production in 2014 and in the first half of 2015. According to Appellees, a broken pump was responsible for low production during this

period. The production report shows that from the time of replacement of the pump in August, the well produced 189.12 MCF through December of 2015, almost twice the production from January to July (108 MCF). The evidence reflects that low production was likely caused by the broken pump.

{¶41} Thus, we must determine whether the low production in 2014 and in the first half of 2015 was a temporary or permanent cessation. "It is in the very nature of an oil and gas well for production interruptions to occur ranging from temporary to permanent." *Paulus v. Beck Energy Corp.*, 2017-Ohio-5716, 94 N.E.3d 73, ¶ 75 (7th Dist.), citing *Dennison Bridge, Inc. v. Resource Energy, L.L.C.*, 2015-Ohio-4736, 50 N.E.3d 242, at ¶ 24. The Fourth District has provided the general rule regarding temporary cessation in *Wagner v. Smith*, 8 Ohio App.3d 90, 92, 456 N.E.2d 523 (4th Dist.1982). *Wagner* determined: "Courts universally recognize the proposition that a mere temporary cessation in the production of a gas or oil well will not terminate the lease under a habendum clause of an oil and gas lease where the owner of the lease exercises reasonable diligence and good faith in attempting to resume production of the well." *Id.*

{¶42} "[A] critical factor in determining the reasonableness of the operator's conduct is the length of time the well is out of production." *RHDK Oil & Gas, L.L.C. v. Dye*, 7th Dist. No. 2016-Ohio-4654, ¶ 21, citing *Wagner* at 93, 456 N.E.2d 523; *Jath Oil Co. v. Durbin Branch*, 490 P.2d 1086 (Okl.1971). Additionally, a court must consider all attendant circumstances. *RHDK* at ¶ 21, citing *Wager* at 93; *Barrett v. Dorr*, 140 Ind.App. 295, 212 N.E.2d 29 (1966).

{¶43} Here, the cessation lasted from early 2014 until August of 2015. While we have declined to establish a bright-line rule, we have acknowledged that "other appellate districts have held that a lease expires when there is no oil or gas produced for two years or more." *Lang v. Weiss Drilling Co.*, 2016-Ohio-8213, 70 N.E.3d 625, ¶ 16 (7th Dist.), citing *Schultheiss v. Heinrich Ents. Inc.*, 2016-Ohio-121, 57 N.E.3d 361, ¶ 19 (4th Dist.), reconsideration granted in part (Mar. 11, 2016), appeal not allowed, 146 Ohio St.3d 1431, 2016-Ohio-4606, 52 N.E.3d 1205, ¶ 19, reconsideration granted, 146 Ohio St.3d 1494, 2016-Ohio-5585, 57 N.E.3d 1172, and appeal allowed, 146 Ohio St.3d 1494, 2016-Ohio-5585, 57 N.E.3d 1172; *Wagner*, *supra*, at 94.

{¶44} The record does not specify when Appellees learned the well had a broken pump. Northwood President William Arnholt testified that the company that pumps the well would have alerted them to the issue and then Northwood would have arranged for necessary repairs. (Arnholt Depo., pp. 112-113.) The record is devoid of any evidence that Appellees failed to take reasonable action to resume production after learning that the pump was broken. The record shows that the pump was replaced in August of 2015 and that production resumed to normal levels immediately.

{¶45} Appellants argue that the costs of replacing the pump should be considered an expense for purposes of a paying quantities analysis. However, we have held that a pump replacement "can be considered a non-recurring, capital investment to be excluded from operating expenses as an equipping cost." *Paulus, supra,* at ¶ 61. Thus, these expenses are not considered in a paying quantities analysis. Even so, the repair occurred in August. The expense records from June through December of 2015 are not a part of the appellate record.

{¶46} Appellants claim that additional maintenance and repair expenses must be calculated in a paying quantities analysis. However, the only expenses Appellants raise are the previously discussed pump replacement. While they also make a vague reference to repairs that were included in a deposition exhibit, these were not made part of the appellate record.

{¶47} Appellants also contend that William Arnholt, President of Northwood, admitted in his deposition that the well did not produce in paying quantities. Civ.R. 30(B)(5) provides:

> A party, in the party's notice, may name as the deponent a public or private corporation, a partnership, or an association and designate with reasonable particularity the matters on which examination is requested. The organization so named shall choose one or more of its proper employees, officers, agents, or other persons duly authorized to testify on its behalf. The persons so designated shall testify as to matters known or available to the organization. Division (B)(5) does not preclude taking a deposition by any other procedure authorized in these rules.

{¶48} Appellees designated that Holly Clemens was to testify regarding any matter dealing with the calculation of profitability, not Arnholt. Regardless, the alleged admission occurred when Appellants asked Arnholt if the well was producing in paying quantities. Arnholt initially said it was, but Appellants' counsel asked him if the well was producing in paying quantities once Appellants' calculations were considered. It was to this question that Arnholt responded, "no." We can readily determine that Arnholt

believed the well was profitable unless the administrative fee and compression and gathering fees were (improperly) included in a paying quantities analysis.

{¶49} Appellants also contend that an internal email between Arnholt and a Gulfport representative indicated that the well was not producing in paying quantities. While Appellants are correct about this email, it was sent before the broken pump was repaired. Again, production greatly increased after the broken pump was replaced.

{¶50} As to the base period used in the paying quantities analysis, we recognize that the base period "can be influenced by various considerations, requiring an assessment of the totality of the circumstances and the good faith of the lessee." *Paulus, supra,* at ¶ 78. We also recognize that "[t]he trial court was the fact-finder whose job was to determine the reasonableness of the base period to be used." *Id.* at ¶ 85.

{¶51} It is unclear from the trial court's judgment entry in this matter which base period was used, but all of the evidence shows that the well produced in paying quantities during the relevant time period no matter how the period was set. Appellants made a profit in the years 2010, 2011, 2012, and 2013. Although production declined in 2013 and Appellants lost money in 2014 and from January through May of 2015, it is apparent that production resumed for the remaining months of 2015, and that the losses were as a result of a temporary cessation caused by a broken pump.

{¶52} Accordingly, Appellants' third assignment of error is without merit and is overruled.

Neuhart Well No. 2

{¶53} Appellants contend that Neuhart Well No. 2 also failed to produce in paying quantities. Appellants repeat their arguments concerning administrative fee and repair expenses. Although Appellants' complaint alleged a lack of production from 2010 through 2015, on appeal they limit this period to 2014 through 2016. Again, the complaint was filed in May of 2015 and the record contains expense reports only through that date. Thus, we lack sufficient evidence to review June through December of 2015 and any portion of 2016.

{¶54} In 2014, Neuhart Well No. 2 produced 508 MCF of gas for a total revenue of $2,299.88. Appellees agree that the following are included as operating expenses: $126.75 for chart integration, $1,200 for pumping, $14.36 to Noble County for real estate taxes, $15.36 for income taxes, and $194.34 for royalty payments. These expenses total $1,550.81 and Appellees made a profit of $749.07 for the year 2014.

{¶55} In 2015, the well produced a total of 547.88 MCF for a total revenue of $2,427.64. From January through May of 2015, the well produced 130.16 MCF for a total revenue of $473.73. Appellees agree to the following operating expenses: $68.25 for chart integration, $500 for pumping, $14.18 for Noble County real estate taxes, $3.94 for income taxes, and $31.10 for royalty payments. These expenses total $617.47 and Appellees lost $143.74 from January to May of 2015.

{¶56} While the well operated at a loss for the first five months of 2015, the evidence shows the well went on to produce 417.72 MCF in the remaining months (June through December) of 2015. "[T]he caselaw indicates that absent a finding of unreasonableness, a six-month cessation period is temporary and does not terminate a

lease." *RHDK* at ¶ 24; *Lang* at ¶ 16. The record is devoid of any evidence to suggest that the five month loss period was unreasonable.

{¶57} Although we are without sufficient evidence to complete an analysis of paying quantities for the remainder of 2015, production admittedly resumed to normal levels after a temporary cessation. Hence, the record contains evidence that the well produced in paying quantities. Appellants' fourth assignment of error is without merit and is overruled.

Conclusion

{¶58} Appellants are correct that the trial court erred in holding that any statute of limitations barred their claim regarding the undrilled acreage. The right to control this property automatically reverted to Appellants. The trial court's November 15, 2016 judgment entry granting Appellees summary judgment is reversed. Because Appellants were prevented from arguing damages, the matter is remanded for further proceedings. Appellants also argue that Neuhart Well No. 1 and Neuhart Well No. 2 have failed to produce in paying quantities. However, the record demonstrates that both wells produced in paying quantities during the relevant timeframe. The trial court's June 13, 2017 judgment entry is affirmed.

Donofrio, J., concurs.

Robb, P.J., concurs.

For the reasons stated in the Opinion rendered herein, Appellants' first and second assignments of error are sustained and their third and fourth assignments are overruled. It is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Noble County, Ohio, is affirmed in part and reversed in part. We hereby remand this matter to the trial court for further proceedings according to law and consistent with this Court's Opinion. Costs to be taxed against Appellees.

JUDGE CHERYL L. WAITE

JUDGE GENE DONOFRIO

JUDGE CAROL ANN ROBB

NOTICE TO COUNSEL

This document constitutes a final judgment entry.

APPENDIX 2.

Court of Appeals, Opinion and Judgment Entry, denying motion for reconsideration, December 11, 2018, *Neuhart v. TransAtlantic Energy Corp*., 7th Dist. Noble No. 17 NO 449, 2018-Ohio-5115

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
NOBLE COUNTY

VELMA J. NEUHART, et al.,

Plaintiffs-Appellants,

v.

TRANSATLANTIC ENERGY CORP., et al.,

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 17 NO 0449

Appellants' Partial Motion for Reconsideration;
Appellees' Motion for Reconsideration

BEFORE:
Cheryl L. Waite, Gene Donofrio, Carol Ann Robb, Judges.

JUDGMENT:
Appellants' Partial Motion for Reconsideration Granted.
Appellees' Motion for Reconsideration Denied.

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Atty. Lucas K. Palmer
Atty. J. Breton McNab and
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Energy Corporation

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Atty. Kristopher O. Justice, Theisen Brock, L.P.A., 424 Second Street, Marietta, Ohio 45750, for Defendants-Appellees, Northwood Energy Corporation, Ralph W. Talmage, Trustee of the Ralph W. Talmage Trust, and David E. Haid, Trustee of the David E. Haid Trust

Atty. John P. Brody, Kegler Brown Hill & Ritter, 65 E. State Street, Suite 1800, Columbus, Ohio 43215, for Defendant Transatlantic Energy Corp., Don Quest and Candace Bennett

Atty. W. Prentice Snow, Morrow & Erhard Co., L.P.A., 10 W. Locust Street, P.O. Box 487, Newark, Ohio 43055, for Defendant Sabre Energy Corporation.

Dated: December 11, 2018

PER CURIAM.

{¶1} Appellants Velma J. Neuhart, Charles R. Neuhart, Mary Lou Waldie, James Waldie, Candie J. Clark, Menno A. Byler, Marie A. Byler, Menno M. Byler, Jr., and Christina E. Byler have filed a motion for partial reconsideration of our decision in *Neuhart v. TransAtlantic Energy Group,* 2018-Ohio-4099, -- N.E.3d -- (7th Dist.). Appellants argue that paragraph three of our Opinion erroneously describes the acreage of land involved in the appeal. Appellees also filed a motion for reconsideration, arguing that the matter should be remanded for consideration of several defenses that were presented in their answer to the complaint but were not addressed at the summary judgment stage. For the reasons provided, Appellants' motion for partial reconsideration is granted and Appellees' motion for reconsideration is denied.

{¶2} This oil and gas action involves two tracts of land in Beaver Township, Noble County: the Neuhart property and the Waldie property. In 1991, Appellants and

TransAtlantic Energy Corp. ("TransAtlantic") entered into an oil and gas lease. The lease contains a two-tiered habendum clause setting out both a primary and secondary term. The length of the primary term was two years. The clause provided that the lessee would remain in the lease past the primary term "so much longer thereafter as oil or gas or their constituents are produced or are capable of being produced on the premises in paying quantities, in the judgment of the Lessee." (June 9, 1991 Lease, paragraph 2.)

{¶3} On the same day they signed the lease, TransAtlantic sent Neil and Velma Neuhart an amendment letter agreeing to release any undrilled acreage in the event that three wells were not drilled on the property by the end of the primary term. When the primary term ended in 1993, TransAtlantic had drilled two wells on the Neuhart property.

{¶4} Appellants first learned that TransAtlantic and Northwood continued to claim an interest in the undrilled acreage in 2011. On October 13, 2011, Velma J. Neuhart filed and recorded an affidavit of nonproduction regarding the wells. Appellants then sent TransAtlantic a notice of abandonment. Appellants also sent TransAtlantic and Northwood a letter stating their belief that TransAtlantic's interest in the undrilled acreage had terminated pursuant to the June 9, 1991 amendment letter. Both TransAtlantic and Northwood responded, claiming they had a continuing interest in the undrilled acreage.

{¶5} On June 22, 2015, Appellants filed a complaint against Appellees, collectively. The parties filed competing motions for summary judgment. The trial court bifurcated the issues as follows: 1) whether any arguments regarding the undrilled land

were barred by the statute of limitations, and 2) whether the drilled land was producing in paying quantities. On November 15, 2016, the trial court granted summary judgment in favor of Appellees on the issues involving the undrilled acreage. On June 13, 2017, the trial court also granted summary judgment in favor of Appellees on the remaining issue of paying quantities.

{¶6} On appeal, we reversed the trial court's decision that the statute of limitations barred Appellants' arguments regarding the undrilled acreage and affirmed the court's decision that the remaining acreage was producing oil and gas. As to the undrilled acreage, we held that the June 9, 1991 amendment letter amounted to a Pugh clause, allowing the undrilled acreage otherwise subject to the lease to return to Appellants automatically by operation of law when Appellees failed to comply with the terms of the Pugh clause.

> The test generally applied upon the filing of a motion for reconsideration in the court of appeals is whether the motion calls to the attention of the court an obvious error in its decision, or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been.

Columbus v. Hodge, 37 Ohio App.3d 68, 523 N.E.2d 515 (10th Dist.1987), paragraph one of the syllabus.

{¶7} "Reconsideration motions are rarely considered when the movant simply disagrees with the logic used and conclusions reached by an appellate court." *State v. Himes*, 7th Dist. No. 08 MA 146, 2010-Ohio-332, ¶ 4, citing *Victory White Metal Co. v.*

Motel Syst., 7th Dist. No. 04 MA 245, 2005-Ohio-3828; *Hampton v. Ahmed*, 7th Dist. No. 02 BE 66, 2005-Ohio-1766.

{¶8} Here, Appellants seek partial reconsideration of our Opinion pertaining to the undrilled acreage. Specifically, they contend that in our Opinion we switched the property descriptions for the Waldie property and Neuhart property. They do not otherwise challenge this Court's Opinion.

{¶9} Our review of the record shows that the parties have used the nomenclature "Waldie property" and "Neuhart property" interchangeably. The parties also labeled the existing wells as the "Neuhart wells" which they now argue are actually located on the Waldie property. Due to the confusion created by the parties' own descriptions, and which occurred at the trial court level, we grant Appellants' motion for partial reconsideration and direct the trial court on remand to correctly identify the description of the property at issue in this case.

{¶10} Appellees ask this Court to instruct the trial court to consider defenses raised in their answer to Appellants' complaint. These defenses include issues pertaining to the statute of frauds and request the court to award equitable remedies. The underlying Opinion in this matter clearly resolves all issues pertaining to the undrilled acreage, including any that Appellees raised in their answer to Appellants' complaint. In holding that the land automatically reverted to Appellants by operation of law, we expressly held that Appellants were not required to take any further action to reclaim their land. Thus, there are no defenses available to Appellees in this matter and there are no remaining issues in this regard to remand to the trial court.

{¶11} Accordingly, Appellants' sole argument pertaining to its motion for partial reconsideration is granted and Appellees' motion for reconsideration is denied.

JUDGE CHERYL L. WAITE

JUDGE GENE DONOFRIO

JUDGE CAROL ANN ROBB

NOTICE TO COUNSEL

This document constitutes a final judgment entry.