[Cite as *Hogue v. Whitacre*, 2022-Ohio-3616.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MONROE COUNTY

DONALD G. HOGUE, et al.

Plaintiffs-Appellees,

v.

KOY L. WHITACRE, et al.,

Defendants-Appellants.

OPINION AND JUDGMENT ENTRY
Case No. 20 MO 0011

Civil Appeal from the
Court of Common Pleas of Monroe County, Ohio
Case No. 2018-062

BEFORE:
Cheryl L. Waite, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Reversed.
Summary Judgment Entered in Favor of Appellants.

Atty. Timothy B. Pettorini, Roetzel & Andress, LPA, 222 South Main Street, Suite 400, Akron, Ohio 44308 and *Atty. Sara E. Fanning*, Roetzel & Andress, LPA, 41 South High Street, Huntington Center, 21st Floor, Columbus, Ohio 43215, for Plaintiffs-Appellees Donald G. Hogue and Carol L. Hogue

Atty. Richard A. Yoss, Yoss Law Office, LLC, 122 North Main Street, Woodsfield, Ohio 43793, for Defendants-Appellants Koy L. Whitacre, K.L.J., Inc., Buckeye Oil Company, Clearfork Oil Company, Whitacre Oil Company and Whitacre Enterprises, Inc.

Atty. Aaron M. Bruggeman, Bricker & Eckler LLP, 160 East Main Street, P.O. Box 270, Barnesville, Ohio 43713-1004, *Atty. Kara H. Herrnstein* and *Atty. Christine Rideout Schirra*, Bricker & Eckler LLP, 100 South Third Street, Columbus, Ohio 43215 and *Atty. Matthew W. Warnock*, Bricker & Eckler LLP, 1350 Euclid Avenue, Suite 650, Cleveland, Ohio 44115-1840, for Defendant-Appellant Gulfport Energy Corporation

Atty. Christopher W. Rogers, Frost Brown Todd, LLC, 501 Grant Street, Suite 800, Pittsburgh, Pennsylvania 15219, for Defendant-Appellant American Energy — Utica Minerals, LLC

Dated: September 30, 2022

WAITE, J.

{¶1} Appellants Koy L. Whitacre, Whitacre Enterprises, Inc., Whitacre Oil Company, K.L.J., Inc., Gulfport Energy Corporation, American Energy-Utica Minerals, LLC, Buckeye Oil Company, and Clearfork Oil Company appeal a July 31, 2019 judgment entry of the Monroe County Court of Common Pleas granting summary judgment in favor of Appellees Donald G. and Carol L. Hogue. Appellants argue that the trial court improperly determined that the lease expired on its own terms due to the failure to produce oil and gas in paying quantities. For the reasons provided, Appellants' arguments have merit. The judgment of the trial court is reversed and summary judgment is granted in favor of Appellants.

Factual and Procedural History

Hogue Lease

{¶2} This case is the fourth in a series of "paying quantities" cases involving Koy Whitacre, Whitacre Enterprises, and Whitacre Store. In addressing the facts of the instant case we must also address the previous matters. We note that although the first case in

the Whitacre "series" also involved a landowner named Donald Hogue, it appears that this matter involves a different Donald Hogue and a different property.

{¶3} In the instant case, the property includes approximately 57.87 acres of land. On September 11, 2006, Appellees entered into an oil and gas lease with Koy Whitacre. The lease contains a typical habendum clause, providing both a primary and secondary lease term. The primary term was fifteen months. In relevant part, the secondary term allows the lease to continue beyond the primary term "as much longer as oil or gas is found in paying quantities thereon."

{¶4} Whitacre drilled the "G. Hogue Well" on June 12, 2007. There is no question that the well produced both oil and gas at least until the relevant time period of 2010 to 2016. On February 13, 2018, Appellees filed a complaint seeking to terminate the lease based on their stance that it had expired on its own terms due to the failure of the well to produce in paying quantities.

{¶5} Following a series of assignments, Appellant Gulfport obtained what Whitacre refers to as "certain interests in an overriding royalty interest deriving from the sublease." (Appellant's Brf., p. 3.) The interest is rooted in deep-drilling rights.

Whitacre Entities

{¶6} Critical to the issue at hand is the interplay between Whitacre Enterprises and Whitacre Store. Both entities are owned by Koy Whitacre, but are wholly separate entities that perform different work.

{¶7} Whitacre Enterprises owns various oil and gas wells. At the time of litigation, Whitacre Enterprises owned 350 wells, including the Hogue Well involved in this

matter. Whitacre Enterprises does not have employees, buildings, vehicles, or equipment.

{¶8} Whitacre Store is a convenience store. The store has employees, buildings, and vehicles that it occasionally lends to Whitacre Enterprises to service the wells owned by Whitacre Enterprises. Again, although there is some sharing of resources and both entities are owned by Koy Whitacre, the two entities are wholly separate companies that have vastly different functions.

{¶9} Each well owned by Whitacre Enterprises is charged a flat monthly fee paid to Whitacre Stores. This monthly fee has been the source of continued litigation. The fee is predetermined and fluctuates periodically, but each well owned by Whitacre Enterprises is charged the same amount. If a well is plugged at any point, the plugged well no longer pays the monthly fee once it ceases to exist. However, because the overhead expenses remain nearly the same no matter how many wells exist, the amount lost from the plugged well is often recouped by adjusting the fee paid by the other wells, if needed. Hence, there has been periodic fluctuation in monthly fee amounts.

{¶10} For instance, at some point during the relevant time period a well involved in the previously mentioned litigation was plugged after a court deemed the lease forfeited due to a lack of production in paying quantities. The litigation involving this well is addressed more extensively below. Relevant to this discussion, the loss of this well prompted Koy Whitacre to reevaluate the expenses of his businesses. He learned that his expenses were not as high as previously thought and reduced the monthly fee attributed to each well and paid to Whitacre Store from $300 to $100.

{¶11} Koy Whitacre explained that he uses this system as a tax accounting mechanism. He has used this system since the 1980's. Until litigation involving these entities began, the expenses and profits were maintained in a software program called "G.O.A.L.S." At the time of litigation, the company that sells the G.O.A.L.S. software had ceased support for the program, causing Whitacre to switch to a program called "SherWare." Older data remained in the G.O.A.L.S. software while newer data is stored in SherWare.

Complaint

{¶12} On February 13, 2018, Appellees filed a complaint against Koy Whitacre, Whitacre Enterprises, KLJ, Buckeye Oil Company, Clearfork Oil Company, American Energy – Utica, and Gulfport. Appellees had originally filed a complaint on October 7, 2015 but voluntarily dismissed their initial complaint without prejudice on February 14, 2017. In the first count of the 2018 complaint, Appellees sought a declaratory judgment that the Hogue Well had stopped producing oil or gas in paying quantities. In the second count they asserted that Appellants had violated certain implied covenants within the lease. The third count sought to quiet title. Only the issue involving paying quantities is relevant, here.

Whitacre I, II, and III

{¶13} As previously stated, this matter represents the fourth in a series of cases involving Whitacre and his companies. In the first case, we were presented with the issue of whether the reoccurring monthly payment from Whitacre Enterprises to Whitacre Store constituted a direct expense for the purposes of determining paying quantities. See *Hogue v. Whitacre*, 2017-Ohio-9377, 103 N.E.3d 314 (7th Dist.), appeal not allowed by

Hogue v. Whitacre, 152 Ohio St.3d 1480, 2018-Ohio-1990, 98 N.E.3d 294 ("*Whitacre I*"). We were also tasked with determining whether exhibits created by Lisa Jones (daughter of Koy Whitacre) detailing the costs related to production and overhead expenses were admissible under the voluminous records exception to the hearsay rule. At the time, the issue of whether a monthly fee constituted a direct or indirect cost was a matter of first impression in Ohio.

{¶14} We held that the landowners failed to rebut Whitacre's testimony that the monthly payments did not pertain directly to production of oil and gas from the well and, instead, were payments to compensate Whitacre Store for its operation of Whitacre Enterprises' entire business. *Id*. at ¶ 30. We also held that the Jones' exhibits were properly admitted pursuant to the voluminous records exception to the hearsay rule.

{¶15} The second case is *Kraynak v. Whitacre*, 7th Dist. Monroe No. 17 MO 0014, 2018-Ohio-2784 ("*Whitacre II*"). In *Whitacre II*, we were presented with the same issue of whether monthly payments from Whitacre Enterprises to Whitacre Store constituted direct operating expenses. We also reviewed whether the exhibits detailing these expenses were admissible under the business records exception to the hearsay rule.

{¶16} Critically, the difference in outcomes between *Whitacre I* and *Whitacre II* was the existence of rebuttal evidence. The *Whitacre II* landowners were able to produce evidence to rebut Whitacre's claims. Specifically, the landowners offered an interrogatory where Whitacre admitted that the expenses labeled "operating costs" exceeded profit on the well. *Id.* at ¶ 8. Whitacre attempted to clarify his statement by explaining that he did not understand that "operating" costs are broken into subcategories of direct and indirect costs and that the operating costs he viewed had not been divided into these categories.

Id. at ¶ 41. The court found this contradiction created a genuine issue of material fact and the matter proceeded to a bench trial. At trial, the court weighed the credibility of the witnesses and apparently did not believe Whitacre's testimony. (In contrast, the landowners in *Whitacre I* presented no evidence to rebut Whitacre's evidence, thus the matter was decided in summary judgment.) Because *Whitacre II* proceeded to a bench trial, the standard of review on appeal is more deferential to the trial court's use of discretion, particularly in the area of credibility issues. In a matter decided in summary judgment, there are no issues of credibility involved, as it can only be granted where there is no question of material fact and the issue is determined solely on the basis of law. With this in mind, the *Whitacre II* Court affirmed the trial court's decision that the monthly payments constituted direct operating expenses and that the exhibits were inadmissible hearsay. This decision resulted in the plugging of the well discussed earlier.

{¶17} Shortly thereafter, we reviewed the third Whitacre case, *Ullman v. Whitacre Enterprises, Inc*., 7th Dist. Monroe No. 19 MO 0025, 2021-Ohio-4656 "*Whitacre III*." In *Whitacre III,* we addressed the reason for the seemingly different outcomes in *Whitacre I* and *Whitacre II* and clarified that *Whitacre I* remains good law and controls in cases involving summary judgment, where there are no material facts in dispute. We emphasized that *Whitacre I* involved a motion for summary judgment whereas *Whitacre II* involved contested facts requiring a bench trial, during which the trial court was tasked with determining and weighing credibility. While *Whitacre II* remains valid, it is clearly limited to the facts and evidence specifically presented in that case.

{¶18} The facts and issues presented to this Court in *Whitacre III* were nearly identical to those in *Whitacre I. Whitacre III* was decided by summary judgment. Hence,

there was no dispute of material fact and thus, there were no decisions involving credibility of any witnesses presented to the trial court. Whitacre introduced various spreadsheets demonstrating that the well was profitable. The appellees failed to offer any evidence to rebut this determination. Instead, the appellees argued that the monthly payment to Whitacre Store constituted a direct expense and on this basis, operated to reduce the amount of profit claimed by Whitacre. The appellees also argued that the exhibits compiled by Jones (similar to the ones in *Whitacre I* and in the instant matter) were inadmissible. Based on its decision in *Whitacre II*, the trial court ruled that the monthly payment constituted a direct expense and was to be deducted from gross profit. On appeal, we explained in depth that *Whitacre I* is the controlling law where competing motions for summary judgment are filed and all that remains is a question of law. Unless the opposing party offers evidence to rebut the evidence demonstrating the Whitacre Store fee is an indirect expense, there is no basis on which to find this fee is, instead, a direct expense. Based on *Whitacre I,* we reversed the judgment of the trial court and entered summary judgment in favor of Whitacre.

{¶19} We also addressed the identical issue in an unrelated case, *Neuhart v. TransAtlantic Energy Corp*., 2018-Ohio-4099, 121 N.E.3d 802 (7th Dist.), appeal not allowed by *Neuhart v. TransAtlantic Energy Corp*., 155 Ohio St.3d 1421, 2019-Ohio-1421, 120 N.E.3d 867. In *Neuhart*, we held a monthly payment attributed to overhead expenses was not a direct expense related to the production of oil and gas in the absence of any evidence to the contrary. *Id*. at ¶ 29-30. In reaching this conclusion, we contrasted the facts of *Whitacre II* where, again, Koy Whitacre provided contradictory testimony that the payments to Whitacre Store contributed to the production of oil and gas. Consistent with

Whitacre I and *Whitacre III, Neuhart*, which was decided on the basis of summary judgment, did not involve contested facts or an issue of credibility.

{¶20} The common thread among *Whitacre I, Whitacre III,* and *Neuhart* is that these cases were resolved on the basis of competing motions for summary judgment, where the parties introduced evidentiary material and agreed that this evidence represented the entirety of the relevant, material facts in the case and thus, the matter turned solely on an issue of law. The evidence presented in regard to the monthly payment in these cases supported a finding that the payment constituted an indirect expense. The landowners in all three of those cases failed to produce any evidence to the contrary to contest this conclusion.

{¶21} Again, in *Whitacre II* the parties did dispute the material facts of the case. Whitacre presented evidence that the profit exceeded the direct operating costs and the landowners rebutted this evidence using an interrogatory where Whitacre admitted that the "operating expenses" for the wells exceeded the profit. *Id.* at ¶ 8. At trial, Whitacre attempted to clarify his admission by asserting that it was a misstatement based on his lack of an understanding of how operating costs are broken down into direct and indirect expenses. The issue became one based on credibility; whether Whitacre's admission was a misstatement on his part or the truth. At the bench trial, the trial court decided that his apparent admission was more believable.

{¶22} With these cases in mind, we turn to the facts of the instant case to determine whether genuine issues of material fact remain for trial and, if not, whether the court properly applied the relevant law.

Trial Court Proceedings

{¶23} The parties filed competing motions for summary judgment. Hence, they have agreed that no material fact remains in question for trial. Whitacre submitted spreadsheets prepared by Jones detailing the expenses of the well in question. Despite the fact that Appellees offered no evidence to rebut this, the trial court relied on its decision in *Whitacre II* to grant Appellees summary judgment. The court determined, as it had in *Whitacre II*, that the monthly fee paid from Whitacre Enterprise to Whitacre Store constituted a direct operating expense related to the production of oil and gas. The court also relied on the fact that none of the investors made a profit on their interest in the Hogue Well. Instead of undertaking a separate review of the listed expenses to determine whether each expense was, in fact, directly related to production or only indirectly related and then performing the mathematical formula (gross profits minus direct expenses equals profit) required by the Ohio Supreme Court, the trial court relied solely on the labels given to certain expenses by a layman. It is from this entry that Appellants timely appeal.

Bankruptcy Stay

{¶24} On December 18, 2020, this appeal was placed under a bankruptcy stay when Appellant Gulfport filed a suggestion of bankruptcy. On November 2, 2021, Gulfport filed a Notice of Exit from Bankruptcy. On February 25, 2022, we returned the case to the active docket after receiving a notice of termination of the automatic stay.

Motion to Dismiss

{¶25} In a motion mirroring the landowners' motion to dismiss in *Whitacre III,* Appellees filed a motion to dismiss in this case. Appellees attempted to use Appellant

Gulfport's bankruptcy proceedings as an opportunity to file the trial court's entry with the recorder's office, seeking to moot this appeal. In a lengthy entry that will not be repeated, here, we denied Appellees' motion.

Summary Judgment

{¶26} An appellate court conducts a de novo review of a trial court's decision to grant summary judgment, using the same standards as the trial court set forth in Civ.R. 56(C). *Grafton v. Ohio Edison Co*., 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Before summary judgment can be granted, the trial court must determine that: (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most favorably in favor of the party against whom the motion for summary judgment is made, the conclusion is adverse to that party. *Temple v. Wean United*, *Inc*., 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). Whether a fact is "material" depends on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc.*, 104 Ohio App.3d 598, 603, 662 N.E.2d 1088 (8th Dist.1995).

{¶27} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." (Emphasis deleted.) *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 662 N.E.2d 264 (1996). If the moving party carries its burden, the nonmoving party has a reciprocal burden of setting forth specific facts showing that there is a genuine issue for trial. *Id.* at 293. In other words, when presented with a properly supported motion for summary

judgment, the nonmoving party must produce some evidence to suggest that a reasonable factfinder could rule in that party's favor. *Brewer v. Cleveland Bd. of Edn*., 122 Ohio App.3d 378, 386, 701 N.E.2d 1023 (8th Dist.1997).

{¶28} The evidentiary materials to support a motion for summary judgment are listed in Civ.R. 56(C) and include the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact that have been filed in the case. In resolving the motion, the court views the evidence in a light most favorable to the nonmoving party. *Temple*, 50 Ohio St.2d at 327, 364 N.E.2d 267.

ASSIGNMENT OF ERROR

The trial court erred in concluding that the Lease terminated due to the failure to produce oil and/or gas in paying quantities.

Burden of Proof

{¶29} Our analysis begins by addressing Appellees' attempt to place the burden of proof on Appellants, claiming they must demonstrate that the well is producing in paying quantities. The established law in Ohio clearly provides the opposite: that the plaintiff (in this case Appellees) bears the burden of proving that a well is no longer producing oil or gas in paying quantities. *Burkhart Family Trust v. Antero Resources, Corp*., 2016-Ohio-4817, 68 N.E.3d 142, ¶ 13 (7th Dist.), citing *Moore v. Adams*, 5th Dist. Tuscarawas No. 2007AP090066, 2008-Ohio-5953. Contrary to Appellees' assertion, they maintain the burden of proof in this matter.

Paying Quantities

{¶30} We begin with the long-established law in Ohio that has not deviated in forty-two years. 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). Based on *Blausey* and its progeny, our only concern in a "paying quantities" analysis is the difference between gross profit and the direct expenses attributable to the production of oil or gas. Indirect expenses that do not contribute to production or are paid regardless of a well's existence do not factor into this mathematical equation and are of absolutely no relevance to this analysis.

{¶31} "[T]he Court essentially defers to lessee's judgment by allowing the lessee to continue even though the operation as a whole does not profit as long as the income minus current operating expenses makes a profit." *Paulus v. Beck Energy Corp*., 2017-Ohio-5716, 94 N.E.3d 73 (7th Dist.), ¶ 77. While a lessee is given discretion to determine whether a well is profitable, a good faith standard is imposed. *Burkhart, supra*, at ¶ 18, citing *Hupp v. Beck*, 2014-Ohio-4255, 20 N.E.3d 732 (7th Dist.).

{¶32} This is not a new or novel issue. Appellees attempt to change the well-established law by not only reassigning the burden of proof in this matter, but by attempting to insert indirect expenses into the analysis. For instance, Appellees attempt to confuse the issue by arguing that investor reports admitted into the record show that the investors did not receive a profit. However, whether investors profit from their

investment is also wholly irrelevant to a "paying quantities" analysis. Again, any "paying quantities" analysis involves a mathematical equation that begins with gross income and subtracts only direct expenses to arrive at profit. Direct expenses are defined as expenses that directly relate to the production of oil and gas. See *Whitacre I, supra; Whitacre II, supra; Whitacre III supra; Neuhart, supra; Paulus, supra.* We note that even the case relied on by Appellees, *Whitacre II,* clearly provides that a paying quantities analysis looks solely to the *Blausey* standard. *Whitacre II* at ¶ 16.

{¶33} In applying the above cited definition, investor reports are in no way relevant to any definition of direct expenses. Appellees cannot cite to any law to suggest that they should be added to the *Blausey* standard. The *Blausey* standard concerns itself only with gross profit and direct expenses. *Blausey* and its progeny does not mention nor address whether or how much a specific investor is paid. In fact, *Blausey* specifically states that a well can be considered profitable even if the operation as a whole does not result in a profit. Investor reports show how much an investor profited. They are clearly not part of the paying quantities analysis as developed by the caselaw and should not have been relied on, here.

{¶34} Despite the fact that Appellees filed for summary judgment in this case, they next assert that they have created a genuine issue of material fact based on Jones' "guesswork." In Jones' deposition, she admitted some of her figures were based on "guessing" and estimates. Jones testified as follows.

Q. Okay. And so if I add all of the direct expenses on Exhibit 3 --

A. Uh-huh.

Q. -- for 2012 as you've characterized them here, Ms. Jones, that total amount equals $735.39?

A. For the direct, yes.

Q. Okay. And then you took that amount and subtracted it from 3600 to come up with the indirect expenses?

A. I did the exact opposite to try to be fair.

Q. Okay.

A. I calculated what I thought would be the indirect [expenses] and then subtracted it from the 36 and said, okay, the difference is direct [expenses].

Q. Okay.

A. Because if I did it the other way, I was afraid I would be too biased.

Q. Okay.

A. So I was trying to do it fair so I went the indirect [expense] route and then said the difference would be direct [expenses], which would be in my opinion a high number for direct.

(4/29/19 Lisa A. Jones Depo., pp. 34-35.)

{¶35} Later in her deposition, she discussed her classification of operating expenses:

Q. These aren't Whitacre Enterprises' expenses?

A. No, this is my best guess or best attempt at trying to come up with a fair way to break out that direct and indirect.

* * *

Q. * * * If you look in the left-hand column where the expenses are listed, do you see the word "operating"?

A. Yes.

Q. Does that include both what you refer to as the direct and indirect expenses --

A. Yes.

Q. -- do you know?

A. Yes.

Q. Okay. Has there been any attempt to break out operating expenses as that word is used in the Ohio Supreme Court case Blausey, if you are aware?

A. I have never heard of that case.

(4/29/19 Lisa A. Jones Depo., pp. 30; 54-55.)

{¶36} Jones did attempt to label some of the expenses as direct and indirect expenses somewhat incorrectly. However, the decision whether expenses are determined to be direct or indirect is a legal one, and it is unsurprising a layperson may be confused. In fact, Jones testified in her deposition that she has never heard of *Blausey* and did not have an understanding as to how expenses are legally determined to be direct and indirect.

{¶37} We reiterate that the law guides any determination of what expenses are considered direct and indirect. As previously discussed, an expense must relate to the production of oil and gas for a well to be considered a direct operating expense. There is a plethora of caselaw, mostly from this district, delineating what constitutes a direct versus an indirect expense. The ultimate determination as to how an expense is characterized must be made by the trial court, not a lay witness. Here, Jones clearly provided the court with enough information to independently determine which expenses were direct and which were indirect. Instead of engaging in a separate review and determination of these, the court erroneously relied only on Jones' often incorrect labels.

{¶38} Jones also incorrectly attempted to perform the *Blausey* equation to determine net profit. However, as previously stated, Jones was not familiar with the caselaw, and had no idea which expenses to subtract from the gross profits. Jones testified that she subtracted the indirect, not direct, costs from the gross profits. (4/29/19 Lisa A. Jones Depo., p. 34.) In addition to being incorrect, Jones' equation would have resulted in a much higher figure for direct expenses than actually exists in the record. This fact was acknowledged during her deposition. Again, we reiterate that the trial court, not a laywitness, should have ultimately performed the *Blausey* equation. Appellees did

not offer any evidence to rebut any expenses, just Jones' label for the expenses. The characterization of the expenses is a legal issue. The amount of the expenses and whether they were actually incurred is a question of fact. This record reveals the trial court accurately found there was no question of fact, but erred in application of the law. The court was equipped with the relevant information to accurately perform the *Blausey* equation. Instead, the court merely copied and pasted Jones' version of the math into its judgment entry. Thus, the equation used by the court to rule on the merits was gross profits minus indirect costs, which is clearly at odds with *Blausey* and its lineage of cases.

{¶39} Turning to Appellees' arguments, they appear to be red herrings, intended to confuse the simple paying quantities analysis: gross income minus direct operating costs equals profit. It is abundantly clear from more than forty years of paying quantities cases that indirect expenses are excluded from this equation and are not to be considered. The record reveals that Jones may have guessed at the amount of certain expenses. It is apparent from this record, however, that her "guesswork" was limited to expenses that can only be characterized as indirect.

{¶40} Appellees could have chosen to contest any of the direct expenses provided by Jones, but did not. For instance, landowner royalties are a direct expense. Appellees certainly had access to these figures, as they received monthly checks for their royalties. The failure to contradict the amount of royalties can lead to only one conclusion: that the numbers supplied by Jones are correct. The oil and gas severance taxes are direct costs. Appellants' interrogatory states that documents pertaining to these costs were provided to Appellees. See 4/29/19 Plaintiff's Motion for Partial Summary Judgment, Exh. A-4, Admission 10. Again, the fact that Appellees did not rebut the tax figures in the

spreadsheets leads to the conclusion that the amounts provided by Appellants are correct. Maintenance records are also a direct expense. The maintenance records were provided by Appellants and are attached as exhibits to Appellants' motion for summary judgment. See 4/29/19 Plaintiffs' Motion for Partial Summary Judgment, Exh. A-7. Appellees similarly do not contest these figures.

{¶41} Appellees opened their oral argument by complaining that they cannot obtain a new, higher paying signing bonus because they are "stuck with this lease." However, Appellees willingly signed this lease and it is nothing less than a binding contract. Appellees cannot escape their obligations under this contract based solely on their belief that they stand to receive more money somewhere else. Appellees are subject to the same "paying quantities" analysis as every other Ohio landowner and oil and gas company. Hence, we now turn to an analysis pursuant to *Blausey* requirements.

Monthly Payment

{¶42} A reoccurring theme among the *Whitacre* cases is the monthly payment made by Whitacre Enterprises to Whitacre Store. For purposes of *Blausey,* Appellees contend that this monthly payment constitutes a direct expense. Whitacre argues that the payment is not related to the production of oil and gas, but is used to fund the operation of his entire business.

{¶43} According to Whitacre, the monthly payment represents a flat fee that each well "pays" for use of Whitacre Store resources. We begin by again noting that Koy Whitacre owns both Whitacre Enterprises and Whitacre Store. Essentially, the money transfers from one of Whitacre's businesses to the other in a similar fashion to the manner in which money may transfer from a person's savings account to a checking account.

While somewhat unorthodox, and most certainly outdated, the system is described as a tax accounting mechanism. The system is not illegal nor unethical, however, it does make any *Blausey* analysis more difficult.

{¶44} Again, Whitacre Enterprises does not have employees, vehicles, buildings, or equipment. Whitacre Enterprises owns only the 350 wells. Importantly, each well pays the exact same amount to the Store regardless of how productive that particular well is for Whitacre Enterprises. All of the expenses used to operate the Whitacre Store business are paid through this money obtained from the wells.

{¶45} When a well is plugged, it no longer pays the monthly fee. The money lost from a plugged well is often recouped by increasing the fee for the remaining wells. However, after Whitacre Enterprises recently plugged the Kraynak Well (as a result of *Whitacre II*), Koy Whitacre realized that he had been "overcharging" the wells and decided to reduce the monthly fee for all of his wells from $300 a month to $100 a month. In his deposition, Koy Whitacre testified as follows.

> Q. And the $300 a month that was being paid to Whitacre Store, are you the one who set that number?
>
> A. Yes.
>
> Q. Okay. Was it intended to correlate to the action operating expenses of the well?
>
> A. No.

Q. Okay. And the current $100 a month payment from Whitacre Enterprises to Whitacre Store, did you set that number?

A. Yes.

Q. All right. And is it intended to correlate to the actual operating expenses of the well?

A. No.

(4/29/19 Koy L. Whitacre Depo., pp. 64-65.)

{¶46} Whitacre later explained that the monthly payment is used to pay the operating expenses, not as the law defines "direct expense," but as an ordinary business person would describe the costs of operating his or her business. (4/29/19 Koy L. Whitacre Depo., p. 74.) He explained that he does not have an understanding of the legal terms "direct" and "indirect" expenses. He uses the term "operating" to reflect the expenses of his Whitacre Store company, which do not change even if a well is plugged. If an expense is paid regardless of a well's existence, it cannot be considered a direct operating expense of a well as it does not pertain to the production of oil or gas from that well.

{¶47} We note that the record contains several invoices paid to Whitacre Store for various repairs and maintenance. These expenses were properly classified by Appellants as direct expenses. Thus, to the extent that money was paid to Whitacre Store which did represent a direct expense, it was properly deducted from profit in their *Blausey* analysis.

{¶48} We reiterate that the burden of proof lies with Appellees. If they were unsatisfied with evidence presented by Whitacre, it was their burden to use the various tools available to challenge that evidence. Appellees had the power of subpoena to seek any information they believed was not being provided by Appellants. Instead of challenging the components of the monthly billing to try to show that some portion of a payment did not fit the definition of an indirect expense, they instead argued that the entire payment should be labeled a direct expense. Thus, we are left with the sole evidence provided as to this payment, which has been Whitacre's consistent position that this money is used to pay the costs of operating his entire Whitacre Store business and does not correlate to the actual operating expenses of any specific well owned by Whitacre Enterprises.

{¶49} Again, this issue has been litigated extensively and has been resolved multiple times by this Court. Despite the number of times this issue has been addressed, Appellees appear to attempt another bite of the same apple, here. Absent any evidence that these monthly payments to Whitacre Store relate in any way to direct operating expenses, they are excluded from a paying quantities analysis. There is no new evidence in this case pertaining to these payments that this Court has not previously considered. The undisputed facts demonstrate that the monthly payments are not a direct expense and are not to be considered in a paying quantities analysis.

G.O.A.L.S. Exhibits

{¶50} As in each of the preceding *Whitacre* cases, Appellees filed a motion to strike Whitacre's exhibits containing its Whitacre Enterprises business records. These exhibits consist of excel spreadsheets that detail the profits and expenses of the well at

issue. Jones testified that she created the spreadsheets by importing the data from the G.O.A.L.S. software directly into the spreadsheet, which she referred to as a "data dump."

{¶51} We begin by noting that the trial court did not rule on Appellees' motion to strike the exhibits. As the trial court failed to rule on the motion, it is presumed to be overruled. See *Whitacre I* at ¶ 11 ("If a trial court has failed to rule on a motion at the time the case is disposed, an appellate court will presume that the motion was overruled.") It is certainly clear from the court's judgment entry that it considered and relied on these spreadsheets in arriving at its ultimate decision.

{¶52} A trial court's decision on a motion to strike evidence in a summary judgment motion is reviewed for an abuse of discretion. *Whitacre I* at ¶ 12, citing *Miller v. J.B. Hunt Transport, Inc.*, 10th Dist. Franklin No. 13AP-162, 2013-Ohio-3892; *Ward v. Summa Health Sys.*, 128 Ohio St.3d 212, 2010-Ohio-6275, 943 N.E.2d 514; *Bellamy v. Montgomery*, 10th Dist. Franklin No. 11AP-1059, 2012-Ohio-4304.

{¶53} Although they sought to strike the exhibits, in each of Appellees' arguments they attempt to attack the evidence provided in these spreadsheets. Thus, at the same time as arguing the evidence should be excluded, Appellees rest their entire case on this evidence. Appellees cannot have it both ways. Even if we were inclined to review the issue and rule in Appellees' favor, this would result in a complete lack of evidence on this issue. As Appellees hold the burden of proof, any such ruling would immediately result in a ruling that is adverse to them.

{¶54} Turning to the ultimate issue in this case, the complaint alleged that the well failed to produce oil or gas in paying quantities during the time period of 2010 to 2016. Again, the paying quantities analysis is straight-forward and directs a court to determine

which expenses are direct and which are indirect, and then simply subtract the direct expenses from the total profit to determine whether the well remains profitable to the lessee. Any evidence pertaining to indirect payments is irrelevant. As discussed earlier, the spreadsheets provided sufficient information and included data on the relevant direct expenses and the gross profit, both of which are necessary to complete a *Blausey* analysis.

2010

{¶55} In the year 2010, the G. Hogue Well produced 538 MCF of gas which was sold for a profit of $3,271.05. No oil was sold during this year. Thus, the *Blausey* analysis for this year begins with a gross profit of $3,271.05. We now turn to the direct expenses which must be deducted from the gross profit.

{¶56} Indirect overhead expenses include " 'the administrative cost of production alone' which includes expenses such as 'the cost of accounting, interest, postage, office supplies, telephone, depreciation of office equipment, and all the other indirect expenses of the oil company regarding production.' " *Whitacre I* at ¶ 28, citing *Mason v. Ladd Petroleum*, 1981 OK 73, 630 P.2d 1283, 1286 (Okl. 1981). As earlier noted, these expenses are excluded from a paying quantities analysis.

{¶57} Direct expenses are the expenses directly related to the production of oil or gas and must be included in a paying quantities analysis. The expenses listed on the exhibits include: landowner royalties, gas severance taxes, maintenance, "other expenses," professional, operating, and insurance expenses.

{¶58} In reviewing the caselaw, it is clear that landowner royalties, gas and oil severance taxes, and most maintenance expenses fall within direct operating costs. It is

also clear that insurance, SERC emergency response, and professional expenses are indirect costs. See *Whitacre I, III.* The term "operating" found within Appellants' spreadsheets is used to describe the monthly payments which, as previously discussed, are indirect costs regardless of the label given these expenses.

{¶59} The direct costs for this year amount to $543.62. This includes: landowner royalties ($408.91), gas severance taxes ($13.85), maintenance ($69.88), and county taxes ($50.98). We note that the maintenance category is confirmed by a receipt found in Plaintiff's Motion for Summary Judgment, Exh. A-7. The receipt is broken down into the different wells that were repaired and the costs attributed to the "G. Hogue Well" is $69.88. An amount labeled "other expenses" is also in evidence ($53.86). The "other expense" appears to represent Monroe County tax ($50.98) and SERC ($2.88). We have previously determined that county taxes are direct expenses and that SERC payments are indirect expenses. See *Whitacre I* at ¶ 38; *Whitacre III* at ¶ 68.

{¶60} Using these figures, the gross profit ($3,271.05) minus the direct expenses ($543.62) provides a net profit of $2,727.43. Thus, the record shows this well produced in paying quantities for the year 2010.

2011

{¶61} In 2011, the well produced 296 MCF of gas which was sold for a profit of $1,708.16. The well also produced 9.14 barrels of oil which was sold for $739.36. The combined gas and oil gross profit was $2,447.52.

{¶62} The direct costs for the year amount to $649.69. This includes: landowner royalties ($305.97), gas severance taxes ($8.88), oil severance taxes ($1.83), maintenance ($142.27), county taxes ($35.50), and water/brine hauling ($155.24). Again,

the maintenance costs are confirmed by a receipt found in Plaintiff's Motion for Summary Judgment, Exh. A-7. Again, the cost is delineated well by well and the cost associated with the repair of this well is $142.27. The "other expenses" are listed as $193.52. This includes county taxes ($35.50), SERC ($2.78), and water/brine hauling ($155.24). Water and brine hauling are direct expenses. See *Whitacre I* at 38.

{¶63} Using these figures, the gross profit ($2,447.52) minus the direct expenses ($649.69) provides a net profit of $1,797.83. Thus, the well produced in paying quantities for the year 2011, also.

2012

{¶64} In 2012, the well produced 513 MCF of gas which was sold for a profit of $1,385.85. No oil was sold during this year.

{¶65} The direct costs for the year amount to $383.19. This includes: landowner royalties ($173.26), gas severance taxes ($15.39), maintenance ($170.26), and county taxes ($24.28). The receipts for a repair and "weed eat" totaling $170.26 is found in Plaintiff's Motion for Summary Judgment, Exh. A-7. The "other expenses" are $27.01. This includes county taxes ($24.28) and SERC ($2.73).

{¶66} The record shows the gross profit ($1,385.85) minus the direct expenses ($383.19) provides a net profit of $1,002.66. The well again produced in paying quantities for the year 2012.

2013

{¶67} In 2013, the well produced 472 MCF of gas which was sold for a profit of $1,824.72. No oil was sold during this year.

{¶68} The direct costs for the year amount to $300.04. This includes: landowner royalties ($228.11), gas severance taxes ($12.93), maintenance ($35.00), and county taxes ($24.36). The maintenance record shows a "weed eat" in the amount of $35 and found in Plaintiff's Motion for Summary Judgment, Exh. A-7. The "other expenses" total $27.03. This includes county taxes ($24.36) and SERC ($2.67).

{¶69} Based on this record, the gross profit ($1,824.72) minus the direct expenses ($300.04) provides a net profit of $1,524.68. This well produced in paying quantities for the year 2013.

2014

{¶70} In 2014, the well produced 563 MCF of gas which was sold for a profit of $2,089.13. No oil was sold during this year.

{¶71} The direct costs for the year amount to $337.46. This includes: landowner royalties ($261.13), gas severance taxes ($16.89), maintenance ($35.00), and county taxes ($24.44). Again, the maintenance record shows a "weed eat" in the amount of $35 evidenced in Plaintiff's Motion for Summary Judgment, Exh. A-7. The "other expenses" are $26.09. This includes county taxes ($23.44) and SERC ($2.65).

{¶72} Based on the above, the gross profit ($2,089.13) minus the direct expenses ($337.46) provides a net profit of $1,751.67 and. the well produced in paying quantities for the year 2014.

2015

{¶73} In 2015, the well produced 561 MCF of gas which was sold for a profit of $1,067.33. No oil was sold during this year.

{¶74} The direct costs for the year amount to $224.11. This includes: landowner royalties ($133.44), gas severance taxes ($16.85), maintenance ($50.00), county taxes ($23.82). The "other expenses" amounted to $26.47. This includes county taxes ($23.82) and SERC ($2.65).

{¶75} Based on these figures, the gross profit ($1,067.33) minus the direct expenses ($224.11) reveals a net profit of $843.22. Despite this small amount, the well did produce in paying quantities for the year 2015.

2016

{¶76} In 2016, the well produced 1,118.78 MCF of gas which was sold for a profit of $1,599.95. The well also produced 25.47 barrels of oil which was sold for $846.75. The total gas and oil profit was $2,446.70.

{¶77} The direct costs for the year amount to $353.46. This includes: landowner royalties ($305.97), gas severance taxes ($33.56), oil severance taxes ($5.09), maintenance ($0.00), and county taxes ($8.84). The "other expenses" were $8.84, which entirely consists of county taxes. We acknowledge that there is one exhibit showing a maintenance record of $112.60 that seems to reflect two possible dates, December of 2016 and January of 2017. We note that some documents for the year 2017 were inexplicably included in the record.

{¶78} However, the gross profit ($1,599.95) minus the direct expenses ($353.46) amounts to a net profit of $1,246.49. Thus, the well produced in paying quantities for the year 2016.

{¶79} Even a "marginally productive" profit was deemed sufficient in *Blausey*, though it resulted in "a small income." *Blausey* at *266. Because Appellants provided

uncontested evidence that production resulted in some profit after deducting direct expenses, this record reveals the trial court erroneously deemed the lease forfeited based on a lack of paying quantities. Appellants' sole assignment of error has merit and is sustained.

Conclusion

{¶80} Appellants argue that the trial court improperly found that the oil and gas well failed to produce in paying quantities and determined that the lease expired on its own terms. For the reasons provided, Appellants' arguments have merit and the judgment of the trial court is reversed. Summary judgment is entered in favor of Appellants.

Donofrio, P.J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is sustained and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Monroe County, Ohio, is reversed. Summary judgment is hereby entered in favor of Appellants. Costs to be taxed against the Appellees.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.