[Cite as *Ullman v. Whitacre Ents., Inc.*, 2021-Ohio-4656.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MONROE COUNTY

ROBERT L. ULLMAN, et al.,

Plaintiffs-Appellees,

v.

WHITACRE ENTERPRISES, INC., et al.,

Defendants-Appellants.

OPINION AND JUDGMENT ENTRY
Case Nos. 19 MO 0025; 19 MO 0026

Civil Appeal from the
Court of Common Pleas of Monroe County, Ohio
Case No. 2016-066

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

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

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

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

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

Atty. Kara H. Herrnstein, Bricker & Eckler LLP, 100 South Third Street, Columbus, Ohio 43215 and *Atty. Zachary M. Simpson*, Gulfport Energy Corporation, 14313 North May Avenue, Suite 100, Oklahoma City, Oklahoma 73134, for Defendant-Appellant Gulfport Energy Corporation

Dated: December 27, 2021

WAITE, P.J.

{¶1} Appellants Koy L. Whitacre, Buckeye Oil Company, Whitacre Oil Company, K.L.J., Inc., Carl F. Whitacre, Kimberly Whitacre, American Energy - Utica Minerals, L.L.C., and Gulfport Corporation (collectively referred to as "Appellants") appeal a June 3, 2019 decision of the Monroe County Common Pleas Court to grant summary judgment in favor of Appellees Robert L. and Carol J. Ullman (collectively referred to as "Appellees"). Appellants argue that the trial court erroneously determined the Ullman well is not producing oil and gas in paying quantities and, consequently, erred in holding the lease forfeited pursuant to its own terms. For the reasons provided, Appellants' arguments have merit. The judgment of the trial court is reversed and summary judgment is entered in favor of Appellants.

Factual and Legal History

Ullman Lease

{¶2} The well at issue derives from a lease entered into between Harry W. and Edna Ullman and George L. Mann. The lease involves the southern 40-acre tract that is part of a 121.87-acre parcel of land. The lease contained a three-month primary term. The date on the lease is illegible, however, the parties appear to agree that the primary term ended on July 3, 1980. The lease also included a secondary term that allowed the lease to continue past the primary term "as long thereafter as drilling or reworking operations for oil or gas, or either of them, are being conducted on the premises, or oil or gas, or either of them, is being produced in paying quantities." (Exhibit B).

{¶3} We note that the secondary term is two-pronged. The language allows the lease to continue in two instances: (1) drilling or reworking operations, (2) production in paying quantities. At issue, here, is the second component, whether oil or gas is being produced in paying quantities.

{¶4} On August 4, 2011, the lease was amended to include a pooling agreement, signed by both parties. This agreement is not relevant to the issues at hand.

{¶5} According to Ohio Department of Natural Resources records, it appears that the Ullman well has been producing both oil and gas since 1988. The well has continued to produce both oil and gas at least through the filing of the complaint in this matter.

Whitacre Entities

{¶6} Important to understanding the issues involved, here, is the interplay between Whitacre Enterprises and Whitacre Store. The entities are both owned by Koy Whitacre and are wholly separate entities that perform different work. Relevant to the matter at hand, Whitacre Enterprises is the entity that owns the various oil and gas wells. At the time of litigation, Whitacre Enterprises owned 350 wells, including the Ullman well.

Whitacre Enterprises does not own any equipment, property, or vehicles, nor does it have any employees.

{¶7} Conversely, Whitacre Store, which is described as a convenience store, has employees, buildings, vehicles, and equipment. In addition to its operation as a convenience store, Whitacre Store provides Whitacre Enterprises with the resources necessary to operate the wells.

{¶8} Each well is charged a predetermined monthly payment that is paid by Whitacre Enterprises to Whitacre Stores. The combination of the payments from all of the 350 wells pays for the expenses of running Whitacre Enterprises' entire business. Essentially, the monthly payments are a tax accounting mechanism that allows money from one entity to be moved to another entity.

{¶9} Because the monthly payments are based on the number of wells owned by Whitacre Enterprises, if a particular well is plugged, that well is no longer charged a monthly payment. (Koy Whitacre Depo., p. 13.) In order to keep sufficient funds available to operate Whitacre Enterprises, the monthly fee for the remaining wells is typically increased after a well is plugged. (Lisa Jones Depo., p. 33.) Thus, while a well no longer pays a fee after it is plugged, loss of the fee is recouped through the remaining wells.

{¶10} The reason for this is many of the expenses paid through the monthly payments are paid regardless of any well's existence, and must still be paid even if a well is plugged. (Lisa Jones Depo., p. 40.) For example, each of Whitacre Store's employees are paid a salary, which continues to be paid regardless of the number of wells that exist. If one well is plugged, the pumpers continue to pump the remaining wells.

Complaint

{¶11} On February 22, 2016, the Ullmans filed a complaint to terminate the lease based on their belief that the well was no longer profitable. The named defendants included: Whitacre Enterprises, Inc., Koy L. Whitacre, Buckeye Oil Company, KLJ, Inc., Carl F. Whitacre, Kimberly Whitacre, Jerry E. Jones, American Energy – Utica Minerals, LLC, M.M. Mann, Sarah A. Mann, Julia A. Mann, Floyd O. Mann, Janice L. Mann, James T. Mann, Katherine Haselberger, John L. Christman, Charlotte V. McCoy, George L. Mann, Laura L. Mann, and Jennifer L. Mann. We note that Mann, Christman, Haselberger, Jones, and McCoy are not involved in this appeal. The claims regarding these defendants were resolved and are not at issue here.

{¶12} As to the Whitacre defendants, the complaint sought declaratory judgment, asking the court to declare that the Ullman well was not producing oil and gas in paying quantities and Appellants failed to conduct reasonable operations and market production.

{¶13} On April 21, 2016, Appellants filed an answer and counterclaim alleging tortious interference with contractual rights and business relationships. They asserted that Appellees' efforts to terminate the lease functioned to preclude production from the Ullman well and harmed a contract with Ergon Oil, which purchases oil produced from the well.

{¶14} The parties filed competing motions for summary judgment acknowledging that there were no outstanding issues of material fact and the matter should be decided on the law, but all of these motions were denied by the trial court. While the instant matter was pending, an appeal was filed in a second case involving Koy Whitacre, *Kraynak v. Whitacre*, 7th Dist. Monroe No. 17 MO 0014, 2018-Ohio-2784 ("*Whitacre II*"). The trial court stayed the proceedings in this case pending the result of *Whitacre II.*

{¶15} After the release of *Whitacre II,* the trial court lifted the stay in the instant case. Based on the court's interpretation of *Whitacre II,* it granted summary judgment in favor of Appellees. It is from this judgment that Appellants timely appeal.

Whitacre I and *Whitacre II*

{¶16} This case is the third in a series of "paying quantity" cases involving Koy Whitacre, Whitacre Enterprises, and Whitacre Store. In the first case, we were presented with the issue of whether a reoccurring monthly payment from Whitacre Enterprises to Whitacre Store constituted a direct expense for paying quantities purposes. 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 that detailed the costs related to production expenses and overhead expenses were admissible under the voluminous records exception to the hearsay rule.

{¶17} In summation, we held that the landowners failed to rebut the testimony of Koy Whitacre that the monthly payments did not pertain directly to production of oil and gas from the Hogue well and, instead, were payments to compensate Whitacre Store for operating 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.

{¶18} 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 the expenses were admissible under the business records exception to the hearsay rule. Unlike *Whitacre I,*

Whitacre II proceeded to a bench trial where certain admissions made during Koy Whitacre's deposition testimony were raised and was reviewed on appeal under a manifest weight of the evidence standard. The *Whitacre II* Court affirmed the trial court's decision that the monthly payments constituted direct operating expenses and the exhibits were inadmissible hearsay. Thus, we affirmed the trial court's determination that the lease had terminated due to a lack of production in paying quantities.

Summary Judgment

{¶19} 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).

{¶20} "[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).

{¶21} 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.

{¶22} On December 2, 2020, this appeal was placed under a bankruptcy stay after Appellant Gulfport filed a suggestion of bankruptcy. We subsequently ordered the parties to brief the extent of Gulfport's interest in this matter. Due to Gulfport's interest in deep drilling rights, we continued the stay. On November 2, 2021, Gulfport filed a Notice of Exit from Bankruptcy. On October 7, 2021, we returned the case to the active docket after receiving a notice of termination of the automatic stay.

ASSIGNMENT OF ERROR

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

{¶23} Each of Appellants' arguments challenge the trial court's determination that the well is not producing oil and gas in paying quantities. According to Appellants, Exhibits B and C demonstrate that the direct costs of operating the well do not exceed income. Noting that the trial court failed to rule on Appellees' motion to strike these exhibits, Appellants argue that the exhibits were properly admitted pursuant to the voluminous records exception to the hearsay rule. Next, Appellants argue that the court incorrectly classified the monthly payments made by Whitacre Enterprises to Whitacre Store as a direct expense when the evidence showed that the payments are merely an accounting method of moving money from one entity into a separate entity.

{¶24} Appellees respond by arguing that the monthly payment is paid only if a well exists and is used to produce oil and gas, thus must be considered a direct expense. As to Exhibits B and C, Appellees contend that those exhibits are not business records and do not represent voluminous records. As to the business record exception, Appellees urge that Lisa Jones testified that these exhibits were prepared in preparation for litigation, so are not kept during the regular course of business. Regarding the voluminous records exception, Appellees argue that the exhibits are not based on voluminous records and the original records were not made available.

{¶25} As previously discussed, the instant matter is the third in a series of cases concerning paying quantity analysis involving Koy Whitacre, Whitacre Enterprises, and Whitacre Store. In each of these cases, which had different plaintiffs, the central issues revolve around the exhibits prepared by Lisa Jones and the monthly payment from Whitacre Enterprises to Whitacre Store. The facts surrounding each case are similar to one another.

{¶26} However, there is one distinction in these cases that becomes important. While *Whitacre II* remains good law, this matter is controlled by *Whitacre I*. *Whitacre I*, like the instant matter, was resolved in summary judgment. Again, in the competing motions for summary judgment, the parties agree on the material facts in the matter and on the law that must be applied. While they do not agree with the manner in which the law is to be applied, both parties admit that there is no matter of material fact to be tried. *Whitacre II* was not decided in summary judgment and the trial court in that case was faced with issues of contested fact. Additionally, certain admissions were made by Koy Whitacre in his deposition testimony that are not pertinent to either *Whitacre I* or the instant case. Further, because of the contested factual questions in *Whitacre II*, it was reviewed under a manifest weight of the evidence standard of review by this Court of Appeals following a bench trial. The discretion afforded to the trial court in a manifest weight review is not afforded in a case decided on summary judgment that involves only an issue of law, such as *Whitacre I* and the instant matter.

Exhibits B and C

{¶27} Before we proceed to a paying quantities analysis, we must determine whether Exhibits B and C were admissible pursuant to the voluminous records exception to the hearsay rule. The data contained in Exhibits B and C is derived from the G.O.A.L.S. database. G.O.A.L.S. is Appellants' operating system. The data is then broken down into expense categories. For instance, all the payroll data during a given year is condensed into one column, the royalty payments are condensed in another column, and so forth.

{¶28} In *Whitacre I,* we analyzed whether the same spreadsheets that included expense records from the Hogue well were admissible pursuant to the voluminous records exception. Although the numbers are different because the spreadsheets pertain to different wells, the *Whitacre I* exhibits mirror the exhibits at issue, here.

{¶29} Similar to the instant case, the trial court in *Whitacre I* did not rule on a motion to strike the contested exhibits. As such, we presumed the motion was denied. 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.") We held that the contested exhibits contained condensed data that represented a large number of documents. As such, we held the exhibits were properly admitted as summary judgment evidence pursuant to the voluminous records exception to the hearsay rule.

{¶30} In *Whitacre II,* the trial court granted the Kraynak motion to strike the Lisa Jones exhibits based on a finding that the exhibits did not fall within the business records exception to the hearsay rule. *Id.* at ¶ 36. The trial court was not faced with the question, and did not address, whether the exhibits were admissible under the voluminous records exception.

{¶31} Appellees attempt to distinguish *Whitacre I* from the instant matter on the grounds that it involved an issue of a temporary cessation. While temporary cessation was one of several issues in *Whitacre I*, the exhibits were designed to show the costs of production broken down into direct versus indirect costs, and had nothing to do with a temporary cessation. Appellees also seem to argue that the holding in *Whitacre II* somehow abrogates the holding in *Whitacre I*. Appellees appear to assume that because

they, somewhat erroneously, believe the facts of the instant case mirror those in *Whitacre II* the same ruling must apply to the instant case.

{¶32} First and foremost, *Whitacre II* did not overrule or abrogate *Whitacre I.* Not only was *Whitacre II* reviewed under a different standard than *Whitacre I*, it did not address the voluminous records exception at issue in *Whitacre I.* The trial court ruled that the exhibits in *Whitacre II* were inadmissible, and based this decision on a business records rule. In *Whitacre I* and in the instant matter, the trial court did not rule on the motion to strike the exhibits, and we must presume the trial court denied the motion. Thus, a different analysis is required. As such, *Whitacre I* is controlling, here.

{¶33} The contested exhibits in the instant matter are labeled Exhibits B and C. The documents, which are spreadsheets, were created by Lisa Jones. According to Jones, the data depicted in these spreadsheets was taken directly from the company's operating system, G.O.A.L.S. (Lisa Jones Depo., p. 24.) Jones testified that she is the original creator of the Whitacre G.O.A.L.S. database. (Lisa Jones Depo., 59.)

{¶34} The G.O.A.L.S system is a software specifically designed for the oil and gas business to track revenue and expenses. Jones acknowledged that the software is designed to track income and profit from an income tax perspective but explained that the same data is used to determine profitability. (Lisa Jones Depo., p. 69.) In fact, Jones testified that the G.O.A.L.S. system is used to provide information regarding profitability to investors of a well to allow them to decide whether to maintain the well or have it plugged. (Lisa Jones Depo., p. 71.) Although the Ullman well does not have investors, the G.O.A.L.S. data is the same information that would be given to an investor if any existed. In summation, Exhibits B and C included data exported from the G.O.A.L.S.

system which is broken down into categories of expenses, such as payroll, maintenance, vehicles, and so forth.

{¶35} Appellants argue that, as in *Whitacre I,* these documents fall within the voluminous records exception to the hearsay rule. Appellants do not argue that the exhibits are admissible under the business records exception and the narrow issue before us is whether the trial court properly admitted the exhibits under the voluminous records exception to hearsay.

{¶36} Our analysis begins with the appropriate standard of review. The trial court did not rule on Appellees' motion to strike Exhibits B and C. Appellees appear to argue that the exhibits were deemed inadmissible hearsay within the trial court's June 3, 2019 judgment entry. However, the entry does not mention the exhibits nor does it provide any analysis of the motion to strike.

{¶37} Because the trial court did not rule on the motion to strike, we presume that it was overruled and the exhibits were admissible as summary judgment evidence. "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." *Whitacre I,* at ¶ 11, citing *State v. Labiaux*, 7th Dist. Harrison No. 16 HA 0016, 2017-Ohio-7760; *Cherol v. Sieben Invests*., 7th Dist. Mahoning No. 05 MA 112, 2006-Ohio-7048.

{¶38} 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.

{¶39} Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). A hearsay statement may still be admissible if it falls within a recognized exception. One such exception is the voluminous records exception which is found within Evid.R. 1006.

{¶40} Pursuant to Evid.R. 1006,

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

{¶41} The original records at issue include all data relevant to profits and expenses from all wells covering the years 2005 until 2016. As such, this data is voluminous. Appellees argue that this original data, which is found on the G.O.A.L.S. software, was not made available to them. As discussed by the Eighth District, although some courts require the admission or offered admission of the voluminous records, "[t]hese cases appear to confuse admissibility under Evid.R. 1006 with the original document or 'best evidence.' " *Daniels v. Northcoast Anesthesia Providers, Inc., et al.,* 2018-Ohio-3562, 120 N.E.3d 52, ¶ 29 (8th Dist.). The *Daniels* court explained that the point of Evid.R. 1006 is to allow parties to admit summaries of voluminous evidence in

lieu of actually presenting that evidence in court. *Id.* at ¶ 27. It is then up to the trial court to determine if that voluminous evidence must be produced regardless of its volume.

{¶42} There is no evidence here that Appellees sought to examine the original G.O.A.L.S. data or that Appellants took any action to prevent review of that data. The record also does not reflect that the trial court ordered Appellants to produce the underlying voluminous records. Consequently, as the original records are voluminous and the exhibits are a condensed version of those records, they are admissible under the voluminous records exception in this matter.

{¶43} Condensed data must be accurate, cannot go beyond the data in the original documents, and cannot be embellished. There is no evidence in this record of embellishment or use of data beyond what is included within the G.O.A.L.S. system. However, Appellees appear to dispute the accuracy of Exhibits B and C.

{¶44} While the condensed data was taken directly from G.O.A.L.S., Lisa Jones testified that some of the information in the exhibits is based on estimates. As to the overhead expenses, Jones testified that she estimated some of the expense data in Exhibits B and C because those expenses are paid regardless of any specific well's existence and cannot be attributable to a single well. The following occurred at Jones' deposition:

> [Appellees' Counsel] So all of these numbers except for your -- are all of your -- what you've characterized, the operating direct expense, that's an estimate each year?
>
> [Jones] Uh-huh.

> [Appellees' Counsel] Okay.
>
> [Jones] And I feel it's tilted in your favor because I tried to be unbiased, and in my attempt to be unbiased, I think I was a little bit too much the other way.

(Lisa Jones Depo, pp. 76-77.)

{¶45} An example of an estimated expense regards the well pumpers. Apparently, it is impossible for the well pumpers to track the exact time spent at each well because they travel from well to well quickly and there is no technology available that would allow them to track their arrival and departure times. (Lisa Jones Depo, pp. 18; 76.) Jones also explained that these pumpers are paid regardless of the Ullman well's existence because they are salaried employees and tend to all 350 wells. (Lisa Jones Depo., p. 40.) If any specific well is plugged, the pumpers continue to pump the remaining wells with no change in salary.

{¶46} To calculate an expense that is not attributed to a specific well, Jones testified that she divides the total expense by the number of wells. This figure constitutes approximately the portion attributed to a single well. (Lisa Jones Depo., p. 34.) As to the well pumpers, Jones also considered the fact that the well pumpers spend approximately the same amount of time pumping each well and additionally accounted for traveling time to and from each well.

{¶47} The crux of this analysis is whether any estimated expenses cause the data to be inaccurate. Based on the uncontroverted evidence, the estimated expenses were not attributable to a single well but an average per well cost. There is no evidence within

the record to suggest that the Ullman well was more expensive to tend to than any other well. In fact, Koy Whitacre testified that the Ullman well has been one of the least expensive wells to operate that he owns. This record shows these estimates did not cause the data to be inaccurate.

Paying Quantities Analysis

{¶48} A paying quantities analysis must begin with a discussion of the burden of proof. A plaintiff holds the burden of proving that a well is not producing in paying quantities. *Burkhart Family Trust v. Antero Resources, Corp*., 7th Dist. Monroe Nos. 14 MO 0019, 14 MO 0020, 2016-Ohio-4817, 68 N.E.3d 142, ¶ 13, citing *Moore v. Adams*, 5th Dist. Tuscarawas No. 2007AP090066, 2008-Ohio-5953. In this case, the burden of proving that the well is not producing in paying quantities falls on the Ullmans as the plaintiffs.

{¶49} 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). "[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*., 7th Dist. No. 16 MO 0008, 2017-Ohio-5716, 94 N.E.3d 73, ¶ 77

{¶50} 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*, 7th Dist.

Monroe Nos. 12 MO 0006, 13 MO 0002, 13 MO 0003, 13 MO 0011, 2014-Ohio-4255, 20 N.E.3d 732.

Monthly Payments

{¶51} The monthly payments from Whitacre Enterprises to Whitacre Store represent a threshold issue to the paying quantities analysis. While there was testimony from both Koy Whitacre and Lisa Jones that the monthly payment would not be paid if the Ullman well did not exist, the issue is more complex than consideration of the well's existence.

{¶52} In *Whitacre I,* we held that the landowners did not present evidence to contradict Whitacre's testimony that the monthly payment is not a direct cost related to the production of oil and gas. As such, the landowners failed to meet their burden of establishing that the well was not producing oil and gas in paying quantities.

{¶53} In *Whitacre II,* we held that the trial court did not abuse its discretion in finding the testimony given by Koy Whitacre and Lisa Jones during the bench trial was self-serving and lacked credibility. Additionally, and importantly, Koy Whitacre admitted in an interrogatory that the subject well was not producing in paying quantities. Consequently, the trial court's decision in *Whitacre II* that the subject well was not producing oil and gas in paying quantities was not against the manifest weight of the evidence. We note that the admissions made by Koy Whitacre in *Whitacre II* are not present in *Whitacre I* or in the present matter. For this reason alone, *Whitacre II* is inapplicable to the case currently on review.

{¶54} After both *Whitacre I* and *Whitacre II* were released, we reviewed an unrelated paying quantities case involving a monthly payment. *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 that paid for overhead expenses was not a direct expense related to the production of oil and gas. *Id.* at ¶ 29-30. In reaching this conclusion, we contrasted the facts of *Whitacre II* where the trial court, after weighing the evidence, found that the monthly payment did not relate to costs of producing oil and gas.

{¶55} In the matter before us, Koy Whitacre testified in a deposition that the monthly fee does not affect the well's profit because that fee is paid from Whitacre Enterprises to Whitacre Store. (Whitacre Depo., p. 76.) Importantly, while the two entities are separate, they are both owned solely by Koy Whitacre. Thus, while money is being moved from one company to the other, it remains in the control of Koy Whitacre. The strategy is described as a tax accounting mechanism.

{¶56} The uncontroverted evidence established that the purpose of the monthly payments is to provide money to operate Koy Whitacre's entire business. Again, it appears that Whitacre's payment system is akin to a person moving money from one account, such as a saving account, to a separate account, such as a checking account, for purposes of paying all of their bills. Exhibits B and C include spreadsheets that break down each of the individual expenses paid by the monthly fee. After the expenses are paid, any money remaining from the monthly payment is retained by Koy Whitacre as profit.

{¶57} According to Whitacre, he assigns each well an arbitrary monthly payment. He testified that this money is used to pay all bills associated with the costs of operating Whitacre Enterprises. Some of those expenses are direct expenses, such as

maintenance of wells and pumping fees. However, a large portion of those expenses are overhead expenses which do not directly contribute to the production of oil and gas.

{¶58} The monthly payment is paid to Whitacre Store because it has employees, equipment, and vehicles whereas Whitacre Enterprises, which owns the wells, does not. While the monthly payment represents a somewhat arbitrary number, Lisa Jones testified that it is based on the total cost of operating Whitacre Enterprises. (Lisa Jones Depo., p. 34.) That cost is divided by the total number of wells owned by Whitacre Enterprises. The resulting amount is the monthly payment that each well must make to Whitacre Store. If a well is plugged and is no longer owned by Whitacre Enterprises, then typically the monthly fees for the remaining wells were increased to compensate for the loss of that monthly payment. (Lisa Jones Depo., p. 33.)

{¶59} While the trial court correctly acknowledged that both Koy Whitacre and Lisa Jones testified at their depositions that if a well was plugged that well would no longer be making a monthly payment, the court ignored testimony that if a well was plugged, the monthly payment for the remaining wells would be increased. The court also ignored evidence that the monthly fees pay both direct operating expenses per well and overhead expenses involved in operating the entire Whitacre Enterprises business. The court apparently discounted evidence that the monthly payment is merely a tax accounting mechanism to allow money to be transferred from one entity owned by Koy Whitacre to another entity also owned by Koy Whitacre, and that the money left after payment of all of the bills was retained by Koy Whitacre as profit. Again, this matter was resolved after competing motions for summary judgment were filed and so this evidence was unrebutted and should be taken as true.

{¶60} Based on this evidence and our holding in *Whitacre I,* the trial court's determination that the monthly payment is a direct operating cost related to the production of oil and gas was erroneous and will not be considered as a direct operating expense in our review.

{¶61} Turning to the ultimate issue in this case, the matter was filed in early 2016, and the Appellees alleged the well had stopped producing in paying quantities in 2011. Thus, the trial court properly had before it the question whether the well produced in paying quantities during the years 2011, 2012, 2013 and 2015. It appears clear from the record that the court did find the well was properly producing in 2015, immediately before this matter was filed. At some point, the trial court undertook a review of both 2016 and 2017 as well, a review that appears to be beyond the scope of the complaint. The trial court found that the well failed to produce oil and gas in paying quantities for the years 2011, 2013, 2014, 2016, and 2017. Only these years are the subject of this appeal, and will be reviewed in chronological order.

2011

{¶62} The net balance at the end of the year showed a negative profit of $607.94. However, Exhibits B and C break down the expenses into separate categories. 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). These expenses are excluded from a paying quantities analysis.

{¶63} Here, Appellants provided evidence that the following expenses fall within the category of indirect overhead expenses: office payroll ($154.93), office lease ($139.88), oil and gas software ($9.38), office expenses ($23.63), office postage ($5.63), office professional ($56.70), building utilities ($48.98), fire resistant clothing ($19.00), insurance for building and vehicles ($77.44), shop and warehouse lease ($1,063.20), furniture, equipment, and machines ($177.82), and vehicles ($425.59).

{¶64} According to Lisa Jones, the following expenses are paid regardless of whether a single producing well is owned: SERC Emergency Response ($2.78), county tax ($14.46), tax accounting fee ($22.00), and well insurance ($126.46). (Lisa Jones Depo., pp. 45; 48.) We have previously established that expenses paid regardless of a well's existence are excluded from a paying quantities. Even so, there is no evidence that any of these specific expenses contribute to the production of oil or gas.

{¶65} Koy Whitacre and Lisa Jones concede that the final category of expenses are direct operating expenses that contribute to the production of oil and gas. These expenses include: landowner royalties ($339.09), oil severance tax ($0), gas severance tax ($13.89), maintenance expenses ($92.60), utilities ($309.12), and "operating" ($197.83). The total expenses amount to $952.53 for the year.

{¶66} No oil was produced during this year, thus no income from oil sales was generated. However, the well produced 462 MCF of gas showing income of $2,712.46. After subtracting the direct operating expenses, the well generated a profit of $1,759.93. Accordingly, Appellants presented evidence for purposes of summary judgment that the well produced oil and gas in paying quantities during the year 2011. Appellees, who bear the burden of proof, have not contradicted that evidence. Thus, as the parties concede

that no material issue of fact is disputed and the matter should be decided by law, the record shows the trial court erred in its determination that the well did not produce oil and gas in paying quantities in the year 2011.

2013

{¶67} In the year 2013, Appellants provided evidence that the following expenses fall within indirect overhead expenses: office payroll ($201.53), office lease ($181.95), oil and gas software ($12.20), office expenses ($30.74), office postage ($7.32), office professional ($73.76), building utilities ($63.71), fire resistant clothing ($24.72), insurance for building and vehicles ($100.74), shop and warehouse lease ($1,383.02), furniture, equipment, and machines ($231.31), and vehicles ($553.61). As previously discussed, these expenses are excluded from a paying quantities analysis.

{¶68} Also excluded from the analysis are costs paid regardless of the well's existence: SERC Emergency Response ($2.67), county tax ($25.04), tax accounting fee ($23.50), and well insurance ($113.75).

{¶69} The direct operating costs include: landowner royalties ($187.48), oil severance tax ($0), gas severance tax ($10.50), maintenance expenses ($0), utilities ($313.05), and operating ($135.39). There is an expense labeled "maintenance" in the amount of $1,021.95 in the indirect expense column of Exhibit R in the Jones Deposition. This expense includes the cost of painting the tank, pump jack, and separator. (Lisa Jones Depo., p. 32.) This cost also included a "weed eating" fee. Regarding painting the equipment, Koy Whitacre testified that this is the first time in ten years he has had to paint, which is done to prevent rust. (Koy Whitacre Depo., p. 86.) The portion of the maintenance expense attributed to painting is $2,600. Based on the evidence in the

record, this expense is a capital investment. A capital investment is a non-recurring expense that the operator may eventually recover if the well continues to show a profit above normal operating expenses. *Paulus v. Beck Energy Corp*., 7th Dist. Monroe No. 16 MO 0008, 2017-Ohio-5716, 94 N.E.3d 73, ¶ 61. A capital investment is excluded from direct operating expenses. *Id.* The expense also included a "weed eating" fee amounting to a total of $113.50. The parties agree that this is a direct operating cost. The total direct operating costs amount to $759.92.

{¶70} No oil was produced during this year, thus there is no income generated. However, the well produced 389 MCF of gas income of $1,499.71. After subtracting the direct operating expenses, the well had a profit of $739.79 and the trial court erred in finding otherwise.

2014

{¶71} The following expenses are indirect operating costs: office payroll ($201.53), office lease ($181.95), oil and gas software ($12.20), office expenses ($30.74), office postage ($7.32), office professional ($73.76), building utilities ($63.71), fire resistant clothing ($24.72), insurance for building and vehicles ($100.74), shop and warehouse lease ($1,383.02), furniture, equipment, and machines ($231.31), and vehicles ($553.61).

{¶72} The following expenses are paid regardless: SERC Emergency Response ($2.65), county tax ($40.70), tax accounting fee ($23.50), and well insurance ($87.90).

{¶73} Direct operating expenses that contribute to the production of oil and gas include: landowner royalties ($179.18), oil severance tax ($0), gas severance tax ($11.46), maintenance expenses ($50.00), utilities ($320.14), and operating ($135.39). These expenses amount to $696.17 for the year 2014.

{¶74} No oil was produced, thus there is no income generated. However, the well produced 382 MCF of gas income of $1,433.33. After subtracting the direct operating expenses, the well had a profit of $737.16. As such, Appellants presented uncontroverted summary judgment evidence that the well operated at a profit in 2014 and the trial court erred in finding that the well did not generate a profit that year.

2015

{¶75} Again, the trial court apparently determined that in 2015, immediately before the complaint was filed in February of 2016, the well did produce in paying quantities. This determination is borne out in the record and is correct. Appellants provided evidence of the following indirect overhead expenses: office payroll ($201.53), office lease ($181.95), oil and gas software ($12.20), office expenses ($30.74), office postage ($7.32), office professional ($73.76), building utilities ($63.71), fire resistant clothing ($24.72), insurance for building and vehicles ($100.74), shop and warehouse lease ($1,383.02), furniture, equipment, and machines ($231.31), and vehicles ($553.61).

{¶76} Again, the following expenses are paid regardless: SERC Emergency Response ($2.65), county tax ($24.48), tax accounting fee ($23.00), and well insurance ($84.90).

{¶77} The direct operating expenses that contribute to the production of oil and gas include: landowner royalties ($603.83), oil severance tax ($14.87), gas severance tax ($10.81), maintenance expenses ($50.00), utilities ($424.94), and operating ($60.39). These expenses amount to $1,164.84 for the year 2015.

{¶78} In 2015, 74.35 barrels of oil were sold for income of $4,126.70. Additionally, the well produced 360.42 MCF of gas for income of $709.70. The total income from the

well was $4,830.40. After subtracting the direct operating expenses, the well clearly had a profit of $3,665.56.

2016

{¶79} The complaint in this case was filed in February of 2016. In Koy Whitacre's answer to the complaint, he raised a counterclaim alleging the lawsuit affected his ability to produce oil and gas, as he feared that any investments made while litigation was pending would be lost if the lease was deemed forfeited, and that this also interfered with his contract with the oil hauling company.

{¶80} As the record reveals that Appellants should have been granted summary judgment in this case because the well was, in fact, producing in paying quantities for all of the years prior to filing the complaint, no review of the years 2016 and 2017 was necessary. Because the trial court did address these years and because some evidence was offered for the record, we will review this evidence as well.

{¶81} Exhibits B and C include information only through September of 2016. Information pertaining to the remaining months is found in a less detailed exhibit that does not provide the same breakdown, and some of the expense categories cannot be read because it was partially cut off. However, it appears that the direct operating expenses include: landowner royalties ($277.36), oil severance tax ($7.64), gas severance tax ($10.76), maintenance expenses ($50.00), "other" expenses ($13.66), utilities ($485.44), and operating ($1,825.00). Again, it is unclear what the "operating" cost entails. The total expenses amount to $2,669.86 for the year 2016.

{¶82} In 2016, 38.25 barrels of oil were sold for income of $1,707.02. Additionally, the well produced 356.70 MCF of gas showing income of $511.74. This record shows

the total income from the well was $2,218.76. After subtracting the direct operating expenses, the well had a negative profit of $451.10.

{¶83} Again, evidence was introduced that this litigation, filed in 2016, had a negative impact on production of the well. Because the uncontroverted evidence demonstrates that the complaint affected Koy Whitacre's ability to produce oil and gas during 2016, the minimal loss cannot be attributed to Koy Whitacre, who understandably did not want to risk losing further investments due to the pending litigation. The well did produce in paying quantities for all of the preceding years, especially in 2015, the year before. As such, although profit was marginally negative in 2016, the record demonstrates that this is the result of litigation, not the well's ability to produce oil and gas in paying quantities.

{¶84} At oral argument, Appellees argued that the complaint does not operate as a "tolling event." However, this is not an issue involving tolling. Appellants have presented uncontroverted evidence that at least some investments were withheld based on a fear of losing investment money due to pending litigation. This determination is consistent with *Blausey*, which affords an oil and gas company great discretion in continuing to operate a well to recoup their investments.

2017

{¶85} This year also reflects production after the filing of the complaint. The direct operating expenses include: landowner royalties ($112.99), gas severance tax ($10.01), "other" expenses ($40.06), utilities ($533.01), and operating ($750.00). These expenses amount to $1,446.07 for the year 2017.

{¶86} In 2017, no oil was sold. However, the well produced 333.42 MCF of gas for income of $903.64. After subtracting the direct operating expenses, the well had a negative profit of $542.10. Again, there is uncontroverted evidence that this marginal loss is due to pending litigation, not the well's ability to produce oil and gas in paying quantities. The well had been reliably producing in paying quantities for all of the years up to the filing of this lawsuit. Thus, Appellees have not met their burden to prove that the well is not producing oil and gas in paying quantities.

{¶87} This record contains uncontroverted evidence that the well was producing in paying quantities for all of the years involved in the complaint in this matter. For the two years of minor loss, incurred only after the lawsuit was filed and not directly at issue in the matter before the trial court, such loss is directly attributable to the active litigation in this matter, and not to the well's capability to produce. The record reveals that the trial court erroneously weighed evidence in summary judgment and applied the wrong standard to certain facts. As such, Appellants' sole assignment of error has merit and is sustained. Appellees were not entitled to summary judgment in this matter. Because the parties filed competing motions for summary judgment and agree that there is no outstanding issue of material fact, there is no need to remand this case to the trial court. The uncontroverted facts of record reveal that Appellees failed to meet their burden to show the well was not producing in paying quantities. Appellants' motion for summary judgment is well-taken and they are entitled to judgment as a matter of law.

Conclusion

{¶88} Appellants argue the trial court erroneously determined that the Ullman well is not producing oil and gas in paying quantities and, consequently, found that the lease

has been forfeited pursuant to its own terms. For the reasons provided, Appellants' arguments have merit and the judgment of the trial court is reversed and summary judgment is entered in favor of Appellants.

Donofrio, J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, Appellants' assignment of error is sustained. It is the final judgment and order of this Court that the judgment granting summary judgment to Appellees of the Court of Common Pleas of Monroe County, Ohio, is reversed and summary judgment is 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.