[Cite as *McCoy v. C.G.O., Inc.*, 2023-Ohio-2945.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MONROE COUNTY

CHARLOTTE V. McCOY ET AL.,

Plaintiffs-Appellees,

v.

C.G.O., INCORPORTATED,

Defendant/Third-Party Plaintiff-Appellant.

v.

RICHARD D. WEBER ET AL.,

Third-Party Defendants

OPINION AND JUDGMENT ENTRY
Case No. 22 MO 0015

Civil Appeal from the
Court of Common Pleas of Monroe County, Ohio
Case No. 2018-352

BEFORE:
Mark A. Hanni, Carol Ann Robb, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Matthew W. Onest, Krugliak, Wilkins, Griffiths & Dougherty Co., L.P.A., 6715 Tippecanoe Road, Suite 2C, Canfield, Ohio 44406 and *Atty. Wayne A. Boyer*, Krugliak, Wilkins, Griffiths & Dougherty Co., L.P.A., 4775 Munson Street NW, P.O. Box 36963, Canton, Ohio 44735, for Plaintiffs-Appellees and

Atty. Michael P. McCormick and *Atty. Kyle W. Bickford*, Hanlon, McCormick, Schramm, Bickford & Schramm Co., LPA, 46457 National Road West, St. Clairsville, Ohio 43950, for Defendant-Appellant.

Dated: August 22, 2023

HANNI, J.

{¶1} Defendant-Appellant, C.G.O. Incorporated, appeals from a Monroe County Common Pleas Court judgment granting summary judgment in favor of Plaintiffs-Appellees, Charlotte V. McCoy, Trustee of the Malaga Charitable Remainder Trust dated June 16, 2015, and McCoy Resources, LLC, on Appellees' claims to have three oil and gas leases declared to be expired by their terms. Appellant also appeals from a separate judgment granting Appellees' motion for spoliation of evidence.

{¶2} Appellees own 183.519 acres of property in Malaga Township, Monroe County (the Property). The Property is divided into three tracts. This case involves three separate oil and gas leases: the Hall Lease; the Weber Lease; and the Ackerman Lease (the Leases). Each of the Leases encumbers a separate tract of land owned by Appellees. Appellant owns the oil and gas wells (the Wells) that hold the Leases. There is one Well on each of the three tracts.

{¶3} The Hall Lease's primary term ran from June 2, 1951 until June 2, 1961. Its secondary term began on June 3, 1961, and was to continue "so much longer thereafter as oil, gas, or their constituents are produced in paying quantities thereon[.]"

{¶4} The Weber Lease's primary term ran from January 22, 1948 until January 22, 1958. Its secondary term began on January 23, 1958, and was to continue "so much longer thereafter as oil, gas, or their constituents are produced in paying quantities thereon[.]"

{¶5} The Ackerman Lease's primary term ran from December 10, 1942 until December 10, 1945. Its secondary term began on December 11, 1945, and was to continue "so much longer thereafter as oil, gas, or their constituents are produced in paying quantities thereon[.]"

{¶6} In November 2017, Appellees demanded in writing that Appellant release the Leases for nonproduction. In June 2018, Appellees demanded in writing that Appellant conduct additional operations and drill additional wells under the Leases under the implied covenant of reasonable development. Appellees alleged that: (1) they have not received gas royalty payments from Appellant; (2) Appellant failed to report any production from the Wells for 12 years; and (3) Appellant failed to produce enough oil and gas from the Wells to make a profit.

{¶7} On September 13, 2018, Charlotte V. McCoy and Charlotte V. McCoy as Trustee of the Malaga Charitable Remainder Trust dated June 16, 2015, filed a complaint against Appellant seeking a declaration that the Leases expired by their terms, an order quieting title of the oil and gas rights in their favor, and injunctive relief. On January 15, 2019, the trial court granted the motion for leave to amend the complaint to substitute and replace plaintiff Charlotte McCoy with Appellee McCoy Resources, LLC.

{¶8} On January 17, 2019, Appellees served their first set of discovery requests on Appellant seeking, in part, documents relating to the Wells' production.

{¶9} On April 22, 2021, Appellees deposed Edward Crum, Appellant's president, who stated that he had destroyed, and continued to destroy, business records relating to Appellant's calculations about how much gas the Wells produce. (Crum Depo. 79-80, 207-209, 229). Consequently, on July 22, 2021, Appellees filed a motion for spoliation of evidence asserting Appellant continued to destroy evidence relevant to the case. The trial court granted Appellees' motion and shifted the burden of proof on the issue of paying quantities to Appellant. Appellant filed a notice of appeal from that judgment. This Court determined that the order was not a final, appealable order and dismissed that appeal.

{¶10} On June 29, 2022, the parties filed competing motions for summary judgment. The trial court granted Appellees' motion and overruled Appellant's motion on September 14, 2022. It found that Appellant could not show that the Wells produced consistent profits over the last 21 years. Thus, the court determined that the Leases had expired by their own terms due to a lack of production in paying quantities.

{¶11} Appellant filed a timely notice of appeal on October 11, 2022. It now raises six assignments of error.

{¶12} In reviewing a trial court's decision on a summary judgment motion, appellate courts apply a de novo standard of review. *Cole v. Am. Industries & Resources Corp*., 128 Ohio App.3d 546, 552, 715 N.E.2d 1179 (7th Dist.1998). Thus, we shall apply the same test as the trial court in determining whether summary judgment was proper. Civ.R. 56(C) provides that the trial court shall render summary judgment if no genuine issue of material fact exists and when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *State ex rel. Parsons v. Fleming*, 68 Ohio St.3d 509, 511, 628 N.E.2d 1377 (1994). A "material fact" 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), citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247-248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

{¶13} Appellant's first assignment of error states:

> THE TRIAL COURT ERRED DENYING APPELLANT'S MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT ON APPELLEES' AMENDED COMPLAINT'S CLAIMS FOR DECLARATORY JUDGMENT SINCE APPELLEES FAILED TO JOIN AS EITHER DEFENDANTS OR CROSS THIRD-PARTY DEFENDANTS ALL NECESSARY PARTIES WHO HAVE A REAL INTEREST IN THE OIL & GAS LEASES.

{¶14} Appellant argues that Appellees failed to join all necessary parties to this action. It asserts Appellees were required to join all parties who have an interest in the Leases. Specifically, Appellant claims Appellees failed to join: (1) the heirs and assigns of Anton Weisend and Pauline Weisend, who have an interest in the Ackerman Lease; (2) Mark Burke, Lorraine Burke, John Doe, Jane Doe, and their unknown spouses, heirs, successors, and assigns, if any, who have an interest in the Weber Lease; and (3) Parkside Petroleum of Ohio, Inc. and John Doe, its unknown successors and assigns, if any, who have an interest in the Weber Lease.

{¶15} Appellant joined all of these parties as third-party defendants in its Second Amended Counterclaim and Second Amended Third-Party Complaint, serving them mostly by publication. It argues Appellees were required to do the same.

{¶16} Civ.R. 19(A) provides for joinder of a party necessary for a just adjudication and provides that a person subject to service "shall be joined as a party in the action" if:

> (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (a) as a practical matter impair or impede his ability to protect that interest or (b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest, or (3) he has an interest relating to the subject of the action as an assignor, assignee, subrogor, or subrogee. * * * If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. * * *

{¶17} Generally, the defense of failure to join an indispensable party can be waived if not timely asserted. Civ.R. 19(A), citing Civ.R. 12(G) and (H). But this case involves a declaratory judgment on the expiration of a lease. When declaratory relief is sought under Chapter 2721, "all persons who have or claim any interest that would be affected by the declaration shall be made parties to the action or proceeding. * * * a declaration shall not prejudice the rights of persons who are not made parties to the action or proceeding." R.C. 2721.12(A).

{¶18} The Ohio Supreme Court examined whether, in an action for declaratory judgment in which it becomes apparent that not all interested persons have been made parties, the party seeking relief may join the absent party by amending its pleading. *Plumbers & Steamfitters Local Union 83 v. Union Local School Dist. Bd. of Edn*., 86 Ohio St.3d 318, 322, 715 N.E.2d 127 (1999):

{¶19} Essentially, appellee is asking this court to hold that, in an action for declaratory judgment, the initial pleading is the only means by which an interested person can be made a party. To do this, we would have to write into R.C. 2721.12 a clause that does not appear: "When declaratory relief is sought, all persons shall be made parties [in the initial pleading] who have or claim any interest which would be affected by the declaration." R.C. 2721.12 provides the substantive requirement that all interested

persons be made parties; it does not purport to govern the procedural method by which this is accomplished, and it certainly does not limit parties to their initial pleadings.

{¶20} Thus, as explained in 22A American Jurisprudence 2d (1988) 860, Declaratory Judgments, Section 221:

> "The procedure and practice with respect to amendments in declaratory judgment actions is similar to that prevailing in ordinary actions at law and suits in equity. It has been said that a court should not refuse relief on the ground of lack of jurisdiction, without giving leave to amend. And while the court has discretionary power to refuse to enter a declaratory judgment which does not terminate the uncertainty or controversy giving rise to the proceeding, amendment rather than dismissal of the complaint has been held to be preferable where the entire controversy between the parties can thus be brought before the court for complete and final disposition." (Footnotes omitted.)

{¶21} Thus, the Ohio Supreme Court has indicated that while all interested persons must be made parties in a declaratory judgment action, there is not a single procedural method by which this must be accomplished. And the Court recognized that leave to amend should be granted as opposed to dismissal of the complaint. The Court focused on the end result being that all necessary parties were joined, not the means or method of joining them.

{¶22} In this case, Appellant added each of the parties it now claims were necessary to this lawsuit. Appellant admits this in its Brief: "Appellant joined all of these necessary parties as third-party defendants in its Second Amended Counterclaim and Second Amended Third-Party Complaint because they all have a real interest in its leases." And Civ.R. 19(A) requires only that necessary parties be joined as parties "in the action." The Rule does not specify how they must be joined. Because all parties deemed necessary were ultimately joined in this case, we cannot find the trial court erred in denying Appellant's motion to dismiss or motion for summary judgment on the basis of failure to join necessary parties.

{¶23} Accordingly, Appellant's first assignment of error is without merit and is overruled.

{¶24} Appellant's second assignment of error states:

> THE TRIAL COURT ERRED DENYING APPELLANT'S MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT ON APPELLEES' AMENDED COMPLAINT FOR LACK OF JURISDICTION SINCE THE ORIGINAL PLAINTIFFS LACKED STANDING FOR WANT OF A REAL INTEREST IN APPELLANT'S OIL & GAS LEASES UPON THE COMMENCEMENT OF THIS CASE BECAUSE MCCOY RESOURCES, LLC, THE SOLE LESSOR OF APPELLANT'S OIL & GAS LEASES, DID NOT INITIATE THE ORIGINAL COMPLAINT.

{¶25} The original complaint was filed on September 13, 2018, by plaintiffs Charlotte V. McCoy and Charlotte V. McCoy, Trustee of the Malaga Charitable Remainder Trust. On December 19, 2018, Appellant filed a motion to dismiss for lack of jurisdiction asserting that plaintiffs lacked standing because they did not own the oil and gas rights at issue. Subsequently, plaintiffs filed a response and motion for leave to amend the complaint. They stated that they inadvertently listed Charlotte V. McCoy instead of McCoy Resources, LLC. Charlotte V. McCoy had conveyed her oil and gas interest to McCoy Resources, LLC. Charlotte V. McCoy, Trustee of the Malaga Charitable Remainder Trust is the surface owner of the Property and has always been a plaintiff in this case. On January 15, 2019, the trial court granted plaintiffs leave to file an amended complaint in order to amend the complaint to substitute and replace Charlotte V. McCoy with McCoy Resources, LLC and denied Appellant's motion to dismiss.

{¶26} Appellant asserts here that at the time of the lawsuit's inception, the original plaintiffs had no real interest in the subject oil and gas estates or the Leases. Thus, Appellant asserts the trial court should have granted its motion to dismiss because the original plaintiffs did not have standing to bring the lawsuit. It asserts standing must exist at the time the action is filed or the trial court is without jurisdiction to proceed. It argues McCoy Resources, LLC is the only party with an interest and it was not included as a plaintiff in the original complaint.

{¶27} In order to have standing, a party, in an individual or representative capacity, has to have some real interest in the action. *Youngstown Edn. Assn. v. Kimble*, 7th Dist. Mahoning Nos. 16 MA 0013, 16 MA 0014, 2016-Ohio-1481, ¶ 12 citing *State ex rel. Dallman v. Court of Common Pleas*, 35 Ohio St.2d 176, 298 N.E.2d 515 (1973). "Because standing to sue is required to invoke the jurisdiction of the common pleas court, 'standing is to be determined as of the commencement of suit.'" *Federal Home Loan Mortg. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 24 quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1991), fn. 5.

{¶28} A party has standing to invoke the jurisdiction of the court if the party has, in an individual or representative capacity, some real interest in the subject matter of the action. *Youngstown Edn. Assn.*, 2016-Ohio-1481, ¶ 12, citing *Dallman*, 35 Ohio St.2d at the syllabus.

{¶29} At the commencement of this action, Charlotte V. McCoy, Trustee of the Malaga Charitable Remainder Trust was the surface owner of the Property. The fact that Charlotte V. McCoy, Trustee of the Malaga Charitable Remainder Trust was the surface owner at the time this action was initiated gives the trust standing because it had an interest in the property that is the subject of this action. *See Cain Ridge Beef Farm, LLC v. Fisher*, 7th Dist. Monroe No. 19 MO 0024, 2020-Ohio-4727, ¶ 23. The Leases cover and burden the trust's property and the Wells are located on that property.

{¶30} Because one of the plaintiffs to the original complaint had standing to bring the complaint, the trial court properly overruled Appellant's motion to dismiss.

{¶31} Accordingly, Appellant's second assignment of error is without merit and is overruled.

{¶32} Appellant's third and fourth assignments of error share the same law and facts. The third assignment of error argues the trial court erred in denying Appellant's summary judgment motion and the fourth assignment of error argues the trial court erred in granting Appellees' summary judgment motion. Thus, we will address these two assignments of error together.

{¶33} Appellant's third assignment of error states:

> THE TRIAL COURT ERRED DENYING APPELLANT'S MOTION FOR SUMMARY JUDGMENT ON ITS SECOND AMENDED COUNTERCLAIM AND SECOND AMENDED THIRD-PARTY COMPLAINT WHEN THE UNDISPUTED EVIDENCE DEMONSTRATES APPELLANT'S PRODUCTION COSTS WERE MINIMAL, THERE WAS NEVER A CONSECUTIVE TWO-YEAR INTERRUPTION OF OIL PRODUCTION, AND APPELLEES' EXPERT WITNESS CONFIRMED APPELLANT'S PRODUCTION COSTS WERE MINIMAL.

{¶34} Appellant's fourth assignment of error states:

> THE TRIAL COURT ERRED BY GRANTING APPELLEES' MOTION FOR SUMMARY JUDGMENT ON THE AMENDED COMPLAINT WHEN APPELLANT'S EVIDENCE OF UNINTERRUPTED OIL PRODUCTION AND PAYMENT OF TAXES THEREON CREATES A MATERIAL ISSUE OF FACT.

{¶35} Appellant contends the trial court should have granted its motion for summary judgment because it presented evidence that the Wells are producing in paying quantities. It points out that Appellees' own expert agreed that the operating costs of the Wells are minimal. (Theirl Dep. Ex. 2). For these same reasons, it asserts the trial court should have denied Appellees' motion for summary judgment.

{¶36} The term "paying quantities" is defined as 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). Whether the production is in paying quantities is left to the good faith judgment of the lessee. *See Hupp v. Beck Energy Corp*., 7th Dist. Monroe Nos. 12 MO 6, 13 MO 2, 13 MO 3, 13 MO 11, 2014-Ohio-4255, ¶ 102–103. The party who asserts the claim that the well is not producing in paying quantities carries the burden of proof. *Positron Energy Resources, Inc. v. Weckbacher*, 4th Dist. Washington No.

07CA59, 2009-Ohio-1208, ¶ 19, see also *Weisant v. Follett*, 17 Ohio App. 371 (7th Dist. 1922). In a paying quantities analysis, the reviewing court looks to the direct operating costs and excludes any indirect operating costs that do not contribute to the production of oil or gas. *Hogue v. Whitacre*, 7th Dist. Monroe No. 16 MO 0015, 2017-Ohio-9377, ¶ 27. "Profitability, under the income minus operating expenses equation, is the standard in Ohio." *Paulus v. Beck Energy Corp*., 7th Dist. Monroe No. 16 MO 0008, 2017-Ohio-5716, 94 N.E.3d 73, ¶ 68.

{¶37} While the general rule in a paying quantities analysis is that the party who asserts the claim that the well is not producing in paying quantities carries the burden of proof, in this case the trial court shifted the burden of proof due its spoliation of evidence finding against Appellant. Thus, the burden was on Appellant to prove that the Wells were producing in paying quantities.

{¶38} In support, Appellant cites to its president's affidavit where Crum stated: "Like most shallow oil & gas wells there has been little maintenance, repair or replacement needed on the oil & gas wells on the Hall, Weber and Ackerman Leases and therefore they have had minimal associated costs and expenses, so the sale of the production of the oil & gas they produced has exceeded the cost to maintain their production for every year CGO has operated the oil & gas wells on the leases since approximately 1999." (Crum Aff. ¶ 34). Appellant also cites to Appellees' expert who opined that: "Based on my observations of the wells and equipment that was inspected on August 3, 2018, I agree with Troy K. Harmon that there has been minimal maintenance, repair, or replacement on the three wells and associated equipment." (Theirl Depo. Ex. 2, p. 2).

{¶39} Appellant also cites to a production report from Ergon Oil Purchasing, Inc. which indicates 19 haul dates from 1999 to 2018. (McCormick Aff. Ex. A). The report indicates that various quantities of barrels were purchased in each year from 1999 to 2018, ranging from purchases of six to 83 barrels. (McCormick Aff. Ex. A). No barrels were purchased in 2006, 2008, 2011, 2013, and 2016. (McCormick Aff. Ex. A).

{¶40} On the other hand, Appellees point to Appellant's admission that, "Appellant is unable to calculate a precise mathematical amount to the penny of how much profit it has made from the subject leases over the years." (Appellant's Brief, p. 14). Further, Appellees point to Crum's deposition where he states that Appellant cannot calculate any

profit for any given year. (Crum Depo. Vol. II 137). Specifically, when asked how much profit each of the Wells generated Crum testified, "Dollars and cents, I cannot tell you." (Crum Depo. Vol. II 137). Crum also stated that he comingled the Wells' production with each other and with other wells. (Crum Depo. Vol. II 135-136, 218-219).

{¶41} Appellant cites to several cases from this Court that it asserts are akin to this case, in which the surface owner failed to produce any evidence to contest production in paying quantities. In each of the cases cited by Appellant, however, the lessee provided mathematical evidence of its operating expenses and its production sales. *See Ullman v. Whitacre Enterprises, Inc*., 7th Dist. Monroe No. 19 MO 0025, 2021-Ohio-4656, reconsideration denied, 7th Dist. Monroe No. 19 MO 0025, 2022-Ohio-1447; *Neuhart v. TransAtlantic Energy Corp*., 7th Dist. Noble No. 17 NO 0449, 2018-Ohio-4099; *Kraynak v. Whitacre*, 7th Dist. Monroe No. 17 MO 0014, 2018-Ohio-2784; *Hogue v. Whitacre*, 7th Dist. Monroe No. 16 MO 0015, 2017-Ohio-9377. Thus, the trial court and this Court were able to take the numbers provided and calculate whether income minus operating expenses resulted in a profit in those cases.

{¶42} Such is not the case here. Appellant has not provided the costs of the operating expenses for each of the Wells or the amount of income generated from each Well. It has only provided testimony that the operating expenses were "minimal" and that certain numbers of barrels of oil were purchased in various years. Appellant has not provided numbers to go along with this "evidence" of operating costs and income so that we can perform a mathematical calculation. The Ohio Supreme Court uses a mathematical formula to define paying quantities. *Talbott v. Condevco, Inc*., 7th Dist. Monroe No. 19 MO 0007, 2020-Ohio-3130, ¶ 38, citing *Blausey*, 61 Ohio St.2d at 255-256. Without some evidence of production and operating costs, we cannot mathematically determine whether the Wells were producing in paying quantities.

{¶43} Moreover, the trial court placed the burden of proof on Appellant in this case. Thus, it was imperative for Appellant to provide mathematical evidence from which the trial court could determine if its income exceeded its operating expenses for each of the Wells.

{¶44} Based on the above, the trial court properly granted Appellees' summary judgment motion and properly denied Appellant's summary judgment motion.

{¶45} Accordingly, Appellant's third and fourth assignments of error are without merit and are overruled.

{¶46} Appellant's fifth assignment of error states:

> THE TRIAL COURT ERRED BY FAILING TO FOLLOW THE SEMINAL HOLDING OF *BURKHART FAMILY TRUST V. ANTERO RES. CORP*., 2016-OHIO-4817 (7TH APP. DIST., 2016) THAT THE LESSEE HAS "THE BURDEN TO PROVE THAT THE WELLS ARE NO LONGER PROFITABLE" AND SHIFTING THE BURDEN OF PROOF TO APPELLANT.

{¶47} In *Burkhart Family Tr. v. Antero Resources Corp*., 7th Dist. Monroe No. 14 MO 0019, 2016-Ohio-4817, ¶ 13, this court discussed which party bears the burden of proving if a well is producing in paying quantities or not:

> As stated by the Fourth District, "[t]he burden of proof question is not controlled by substantive oil and gas law, but rather procedure." *Positron Energy Resources, Inc*., 4th Dist. No. 07CA59, 2009-Ohio-1208, 2009 WL 690583, ¶ 18. The party who asserts a claim carries the burden of proof. *Id*. at ¶ 19. See also *Weisant v. Follett*, 17 Ohio App. 371 (7th Dist.1922) (the plaintiff held the burden of proving that the well was not producing in paying quantities); *Moore v. Adams*, 5th Dist. No. 2007AP090066, 2008-Ohio-5953, 2008 WL 4907590 (the plaintiff held the burden of proving nonproduction).

{¶48} Here, Appellant argues the trial court erred in shifting the burden to it to prove that the Wells were profitable.

{¶49} On July 22, 2021, Appellees filed a motion for spoliation of evidence asserting Appellant destroyed its notes on how it calculated the oil and gas production for the Wells. As relief, Appellees requested the trial court shift the burden to Appellant to prove the existence of paying quantities.

{¶50} On September 9, 2021, the trial court granted Appellees' motion. The trial court noted that on April 22, 2021, Appellees deposed Appellant's president Crum who

testified that he had destroyed, and continued to destroy, business records material to one or more of Appellees' claims. Crum stated that he destroys all notes and records relating to Appellant's calculations regarding how much gas the Wells produce. He also stated that he comingles the Wells' gas production with that of other wells from other leaseholds. Crum went on to state that he calculates the Wells' gas production at least once a year and then destroys those records. These practices continued after Appellees demanded release of the Leases and after Appellees filed this lawsuit. Appellant never provided Appellees with the opportunity to review these records.

{¶51} Appellant argues that Crum's destruction of records only pertained to records of natural gas production, not oil production. It goes on to argue it has asserted that the Leases are held by production in paying quantities of oil, not natural gas.

{¶52} On the other hand, Appellees point out that Appellant's second amended counterclaim asserts that the Leases are held by continuous production in paying quantities of "oil and/or gas." Thus, Appellant did not limit its counterclaim to oil production but also included natural gas production. Moreover, Appellees argue that because Appellant asserted a counterclaim, the burden was on it to prove paying quantities in order to prove its claim.

{¶53} An appellate court reviews a trial court's ruling on a motion for sanctions for the spoliation of evidence under an abuse of discretion standard. *Penix v. Avon Laundry & Dry Cleaners*, 8th Dist. Cuyahoga No. 91355, 2009-Ohio-1362, ¶ 38.

{¶54} The proponent of a Civ.R. 37 motion for sanctions for spoliation of evidence must establish that (1) the evidence in question is relevant, (2) the offending party had an opportunity to examine the unaltered evidence, and (3) even though the offending party was put on notice of impending litigation, this evidence was intentionally or negligently destroyed or altered without providing an opportunity for inspection by the proponent. *Simeone v. Girard City Bd. of Edn.*, 171 Ohio App.3d 633, 2007-Ohio-1775, 872 N.E.2d 344, ¶ 69. "If the court finds that relevant evidence was, indeed, destroyed, then the court has the power to fashion a just remedy." *Id*.

{¶55} As the Eleventh District has explained:

> Even if the court finds that the evidence was not deliberately destroyed, "negligent or inadvertent destruction of evidence is sufficient to trigger

> sanctions where the opposing party is disadvantaged by the loss." *Id*. at 176, 704 N.E.2d 1280, citing *Farley Metals, Inc. v. Barber Colman Co*. (1994), 269 Ill.App.3d 104, 206 Ill.Dec. 712, 645 N.E.2d 964, 968. "[T]he intent of the spoliator in destroying or altering evidence can be inferred from the surrounding circumstances. In other words, intent can be inferred from the fact that the evidence was destroyed prior to the commencement of any litigation against the defendant and there is only a potential for litigation. Therefore, the [spoliator] is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action." *Cincinnati* at 9, citing *Hirsch*, 266 N.J.Super. 222, 628 A.2d at 1130.

Simeone v. Girard City Bd. of Edn., 171 Ohio App.3d 633, 2007-Ohio-1775, 872 N.E.2d 344, ¶ 71 (11th Dist.).

{¶56} In this case, the trial court determined that because Appellant could not provide the pertinent records because it destroyed them, the court could create an adverse inference against Appellant. It relied on *Vidovic v. Hoynes*, 11th Dist. Lake No. 2014-L-054, 2015-Ohio-712, ¶ 78, where the court explained: "'An adverse inference may arise where a party who has control of a piece of evidence fails to provide the evidence without satisfactory explanation. * * * Under those circumstances, the jury may draw an inference that would be unfavorable to the party who has failed to produce the evidence in question.' (Citations omitted.)" *Vidovic v. Hoynes*, 11th Dist. Lake No. 2014-L-054, 2015-Ohio-712, ¶ 78, quoting *Schwaller v. Maguire*, 1st Dist. Hamilton No. C-020555, 2003-Ohio-6917.

{¶57} The trial court found that as early as August 2017, Appellant had knowledge of this matter and the potential for litigation. And in September 2018, Appellant had knowledge when Appellees filed the instant lawsuit. Yet Appellant continued to destroy business records relevant to the subject of this lawsuit. Therefore, the court determined that Appellant spoliated evidence and, as a sanction, the court shifted the burden of proof on the production in paying quantities analysis to Appellant.

{¶58} Given Appellant's admitted and intentional destruction of evidence that goes to the main issue in this case, we cannot conclude that the trial court abused its

discretion in finding that Appellant spoliated evidence and in shifting the burden to Appellant to prove the Wells were producing in paying quantities.

{¶59} Accordingly, Appellant's fifth assignment of error is without merit and is overruled.

{¶60} Appellant's sixth assignment of error states:

> THE TRIAL COURT ERRED GRANTING APPELLEES' SUMMARY JUDGMENT ON THE FIRST AMENDED COMPLAINT BECAUSE THEY FAILED TO MEET THEIR BURDEN OF PROVING DAMAGES WERE AN ADEQUATE REMEDY BEFORE FORFEITURES OF THE LEASES COULD BE DECLARED.

{¶61} In its final assignment of error, Appellant argues Appellees were required to demonstrate that damages were an inadequate remedy before the court could order the Leases terminated.

{¶62} If the conditions of the secondary term of an oil and gas lease are not met, the lease terminates by its express terms and by operation of law and the mineral estate revests in the lessor. *Browne v. Artex Oil Co.*, 158 Ohio St.3d 398, 2019-Ohio-4809, 144 N.E.3d 378, ¶ 24. Thus, the expiration of a lease happens by operation of law. The court does not terminate the lease. It simply declares what the law has already accomplished. Therefore, it stands to reason that the lessor would not have to demonstrate that damages are an inadequate remedy before asking the court to declare that a lease has expired.

{¶63} Accordingly, Appellant's sixth assignment of error is without merit and is overruled.

{¶64} For the reasons stated above, the trial court's judgment is hereby affirmed. Robb, J., concurs.

D'Apolito, P.J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled 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 affirmed. Costs to be taxed against the Appellant.

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.