[Cite as *Rudolph v. Viking Internatl. Resouces Co., Inc.*, 2017-Ohio-7369.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

Victor H. Rudolph,	:	Case No. 15CA26
Plaintiff-Appellant,	:	
v.	:	DECISION AND JUDGMENT ENTRY
Viking International Resources Co., Inc., et al.,	:	
Defendants-Appellees.	:	**RELEASED: 08/11/2017**

APPEARANCES:

Michael D. Buell, Marietta, Ohio for Appellant.

Paul N. Garinger, Columbus, Ohio for Appellee Viking International Resources Co., Inc.

John E. Triplett, Jr., Marietta, Ohio for Appellees Stonebridge Operating Co. LLC and RJ Operating Co.

Harsha, J.

{¶1} Victor Rudolph sought a judgment declaring that the oil and gas lease on his property had expired by its own terms due to lack of production in paying quantities from 1998-2001. Rudolph also brought claims for abandonment and breaches of various implied covenants. Lessee Viking International Resources Co., Inc. sought summary judgment on all of Rudolph's claims on the grounds that they were barred by the applicable statutes of limitations and laches. The trial court granted Viking's motion, denied Rudolph's motion for partial summary judgment, and dismissed Rudolph's claims.

{¶2} Rudolph contends that the trial court erred when it determined that his declaratory judgment action and his claims for breaches of the implied covenants were barred by various statutes of limitations. The parties do not dispute that the well produced no oil or gas from 1998-2001. As a result, the lease expired by its own terms on December 31, 1999 after two years of non-production.

{¶3} We conclude that the trial court erred in finding that Rudolph's declaratory judgment claim was barred by the eight-year statute of limitations for written contracts in R.C. 2305.06. The applicable statute of limitations is the 21-year limitation for recovery of real estate in R.C. 2305.04. Rudolph filed his action in 2014, well within the 21-year period.

{¶4} Rudolph's three breach of implied covenant claims (develop the land, operate with care and diligence, and restore the surface) all arise from duties imposed by the lease and are based on non-production from 1998-2001. Those claims sound in contract and are subject to the statute of limitation in R.C. 2305.06 for actions on a written contract. Because those actions accrued on January 1, 2000, following the two-year non-production period, the 15-year statute of limitation in former R.C. 2305.06 applies, rather than eight-year statute of limitation that became effective in 2012. Rudolph had 15 years until January 1, 2015 to bring the breach of implied covenant claims. Because Rudolph filed his action in 2014, those claims are not barred by the statute of limitations.

{¶5} Rudolph also contends that the trial court misconstrued his allegation that he had not received royalty payments as a claim for unpaid royalties. He contends the allegation was not a separate cause of action but was alleged as factual support for his

abandonment claim. The trial court determined that "any claims" for insufficient royalties are barred by the four-year statute of limitation in R.C. 2305.041 governing calculation and payment of royalties. We find no separate cause of action for unpaid royalties in Rudolph's pleadings. However, there is no reversible error because Rudolph is not prejudiced by having a claim he never asserted barred by the applicable statute of limitations.

{¶6} In sum Rudolph's claims for declaratory judgment and breaches of the implied covenants are not barred by the applicable statutes of limitations; and the trial court's misconstruction of his royalty allegations is harmless error. We sustain Rudolph's first assignment of error accordingly.

{¶7} Next Rudolph contends that the trial court erred when it applied the doctrine of laches to bar his claims for declaratory judgment and breach of implied covenant to develop land. We agree because Viking failed to establish the essential elements of a laches defense to Rudolph's declaratory judgment claim. The lease automatically expired for lack of production and the leasehold interest automatically reverted to Rudolph without the necessity of filing any action or asserting any right until a justiciable issue arose in 2012. Therefore, Viking failed to establish the first element of a laches defense: unreasonable delay in asserting a right.

{¶8} Looking to Rudolph's claim for breach of implied covenant to develop the land, even if we assume that Rudolph's 14-year delay is unreasonable and inexcusable, Viking presented no evidence that it suffered material prejudice from the delay. We sustain Rudolph's second assignment of error.

{¶9} Next Rudolph contends that the trial court erroneously granted summary judgment to Viking on the abandonment claim because Viking presented no evidence of the intentions of the predecessor lessees during the years of non-production. Rudolph also argues that the trial court did not construe the evidence and inferences arising from the evidence in his favor and thus overlooked the existence of a genuine issue of material fact. Rudolph presented the affidavits of three witnesses containing facts that conflicted with Viking's summary judgment evidence. When Rudolph's evidence is construed most strongly in his favor it raises genuine issues of material fact concerning whether the well had been abandoned. However, because the lease terminated on December 31, 1999 and the leasehold interest automatically revested with Rudolph, his abandonment claim is arguably moot. But because the trial court dismissed Rudolph's claim for breach of the implied covenant to restore the surface (plug well/reclaim property) based on its erroneous determination of the abandonment claim, we reverse the trial court's dismissal of the breach of that implied covenant claim. We sustain Rudolph's third assignment of error.

{¶10} Rudolph also contends that the trial court erred when it addressed the merits of his claim for breach of implied covenant to operate with care and diligence. Rudolph argues that Viking sought judgment solely on the statute of limitations ground; the parties had presented no evidence or arguments on the underlying merits of this claim. Therefore, Rudolph contends that the trial court's sua sponte determination of the merits of that claim deprived Rudolph of due process.

{¶11} Under Rudolph's first assignment of error we held that the trial court improperly applied a four-year statute of limitations to bar his claim for breach of implied

covenant to operate with care and diligence and that the 15-year statute governing a written contract applied. However, the trial court alternatively decided this claim on its merits. But the record contains no evidence that the parties moved for summary judgment on the merits of this claim. Thus, the trial court erred in deciding this claim without affording Rudolph procedural due process. We sustain Rudolph's fourth assignment of error.

{¶12} Finally, Rudolph contends that the trial court erred when it denied his motion for summary judgment on his declaratory judgment action. The undisputed evidence in the record shows the well had no production from 1998 to 2001. Therefore, the lease expired by its own terms on December 31, 1999. The only arguments Viking made to contest summary judgment were its laches and statute of limitations defenses, which we have already determined do not bar Rudolph's declaratory judgment claim. We sustain Rudolph's fifth assignment of error.

{¶13} We reverse the trial court's judgment.

I. FACTS & PROCEDURAL HISTORY

{¶14} In 1994 Rudolph acquired land in Washington County, Ohio that was subject to an oil and gas lease granted by a previous owner on October 11, 1978. The lease term provided:

> TO HAVE AND TO HOLD * * * for the term of two years from the date hereof, and as much longer as oil, gas or gasoline can be produced in paying quantity, or the rental paid thereon, paying for or yielding to the lessor the one-eighth part of all oil produced * * * one-eighth of the surplus gasoline * * * or one-eighth proceeds * * * payable to the lessor semi-annually. Should a well be found producing gas only, then the lessor shall be paid * * * one-eighth (1/8) of field market price so long as gas is sold therefrom, payable quarterly when so marketed. * * * Provided that this lease shall become null and void unless a well shall be commenced on the premises within Twelve months from the date hereof,

> or unless lessee shall pay lessor at the rate of Two ($2.00) Dollars per acre/year in advance for each addition year such commencement of said well is delayed.

One well, the Quick #1 Well, was drilled and produced oil and/or gas in accordance with the primary term of the lease. After a series of conveyances not at issue, Stonebridge acquired the working interest in and operated the well and drilling unit. In 2003 Viking acquired the remaining leasehold interest, which included a 3.125% override interest. Rudolph retained the mineral rights, but transferred the surface rights to the real property in 2010.[1]

{¶15} In June 2012, Rudolph received an oil and gas division order from Stonebridge dated June 1, 2012. Because Rudolph believed the lease had terminated by its own terms due to nonproduction, he did not sign and return the order.

{¶16} On March 11, 2014, Rudolph filed a complaint against Viking, Stonebridge and others who may have an interest in the oil and gas lease, alleging that the well produced no oil or gas between 1998 and 2001, and therefore the lease expired by its own terms. Rudolph alleged that he had received no royalty payments for many years and the well produced no oil or gas from 1998 through 2001. He sought a declaratory judgment that the lease expired (count I) and brought claims for abandonment (count II) and breaches of the implied covenant to reasonably develop the premises for oil and gas purposes (count III), the implied covenant to operate the well with care and diligence (count IV), and the implied covenant to restore the surface by plugging the well and reclaiming the property (count V). For relief Rudolph sought a declaratory judgment ordering "forfeiture and cancellation" of the oil and gas lease and an order

[1] The Dormant Mineral Act, R.C. 5301.56, is not applicable here because the surface owner makes no claim that Rudolph has abandoned his fee interest in the minerals.

requiring the county recorder to endorse the lease "cancelled" to quiet title to the land. Rudolph also asked the court to order the lessees to remove personal property, plug the well and reclaim the property, or alternatively to award Rudolph his cost to do so.

{¶17} Viking filed a motion for summary judgment on all of Rudolph's claims arguing that: (1) Rudolph's declaratory judgment and breach of implied covenant claims were barred by the eight-year statute of limitations for written contracts in R.C. 2305.06; (2) alternatively, Rudolph's "13 year old production claims" "to enforce the alleged expiration" were barred by the doctrine of laches; (3) Rudolph's negligent well operation claim was barred by the four-year statute of limitations for negligence in R.C. 2305.09; (4) Rudolph's claim for unpaid royalties was barred by the four-year statute of limitations governing oil and gas royalties in R.C. 2305.041; and (5) Rudolph's abandonment claim and request for well plugging/damages should be dismissed as a matter of law because there is no disputed material issue of fact: the well production records showed continuous production since 2002.

{¶18} Viking argued that Rudolph's claims first accrued in 2001 after the 1998-2001 non-production period and thus were barred by the eight-year statute of limitations in R.C. 2305.06 for written contracts. Because the lack of production was in violation of the secondary term of the Lease, Viking claimed that "[s]uch an action upon a written agreement or contract must be brought within eight years, or by 2009." Viking submitted the affidavit of Jarrett Barnhouse, Viking's landman, the lease assignment documents, and the Ohio Well Completion reports for the well from 1990 to 2013, to establish both that Rudolph's causes of action accrued in 2001 for lack of production, and to provide

evidence that the well had not been abandoned.[2] The Barnhouse affidavit established Viking's 2003 assignment interest in the leasehold, stated that the well production records showed continuous production since 2002, and included the well production records from 1990 to 2013.

{¶19} In support of its laches argument Viking argued that Rudolph had an obligation to take "steps to enforce the alleged expiration" and that he waited for 13 years to do so. Viking claimed it was materially prejudiced because in 2003 it acquired its leasehold interest and it "would not have acquired an interest in an invalid lease, had Plaintiff timely asserted his alleged claim that the lease terminated for lack of production."

{¶20} In response Rudolph argued that Viking miscalculated the statute of limitation for written contracts because the 2012 amendment to R.C. 2305.06 provided a 15-year statute of limitation for claims accruing in 2001. Rudolph argued that 2016 was the deadline for his claims and his 2014 lawsuit was timely. Rudolph contended that the 15-year statute of limitation applied to all of his claims, including his declaratory judgment claim, because they were all premised on the lease. Rudolph also contended that Viking misinterpreted his allegation regarding unpaid royalties -- he was not making a claim for unpaid royalties, but alleging it as factual support for his abandonment claim.

{¶21} To refute Viking's laches claim Rudolph argued that when the lease expired due to lack of production, he was under no obligation to take any action; the

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[2] The Ohio Well Production Report Viking submitted in support of its motion omits records for 1999. However, the lack of production in 1999 is not disputed in the record. Barnhouse submitted the Ohio Well Completions Report and did not claim production occurred in 1999. The parties' motions concede a lack of production from 1998-2001 and Stonebridge, the well operator, admitted in its Answer that there was no production from 1998-2001.

lease terminated by its own terms. He submitted his affidavit and affidavits of the current surface owner, Keith Snider, and Rudolph's nephew, Robert Rudolph, to support his abandonment claim and show that there was no production after 2001, nor was there any reason to believe there was a dispute about the lease's termination until June 2012, when he received an oil and gas division order from Stonebridge.

{¶22} Victor Rudolph's affidavit stated that he graduated with a degree in petroleum engineering in 1984 and has been a registered professional petroleum engineer active in the industry from 1985 through 2013. Robert Rudolph's affidavit stated that he graduated in 2013 with a degree in petroleum and natural gas engineering, has worked since 2014 in drilling and completion, and has familiarity with oil and gas well operations. Keith Snyder's affidavit stated that he was the surface owner and had inspected the well area in 2012 and took photographs, which he attached to his affidavit. The affidavits provided evidence that (1) no royalties had been received since 1995; (2) the records on file with the Ohio Department of Natural Resources showed no production from 1998 – 2001; (3) the well area appeared overgrown with five to six-year old trees growing in the access road, (4) photographs showed that signage on the well identified Stonebridge as the operator, but when telephoned, Stonebridge said it did not operate the well and could not provide production records; (5) in 2013, when visually inspected, the well appeared shut down with no visible evidence of either production or a meter to measure production. Rudolph contends he had no reason to believe there was a dispute about the lease's expiration until June 2012, when he received an oil and gas division order from Stonebridge.

{¶23} Rudolph also challenged Viking's contention that it was materially prejudiced because it would not have acquired the leasehold interest in 2003 if Rudolph had filed his declaratory judgment action between 2001 and 2003. Rudolph pointed out that Viking had access to the ODNR well reports and could have seen that the lease had already expired for lack of production prior to the assignment. Rudolph also referred to lease documents Viking submitted with Barnhouse's affidavit that showed that Viking acquired approximately 550 leases[3] in the assignment that included his lease. Rudolph argued that "it strains credibility that [Viking] would not have purchased these five-hundred-fifty leases if [Rudolph] had filed suit * * * as to one of those approximately five-hundred-fifty leases." Rudolph argued that Viking failed to submit affidavit testimony or other evidence supporting its contention that it would not have purchased the 550 leases if it knew this one lease had expired, and that neither Viking nor Stonebridge submitted any evidence that they incurred expenses or suffered any financial detriment associated with well operations.

{¶24} Rudolph also challenged Viking's argument that it was entitled to summary judgment on his abandonment claim. Rudolph's affidavits provided evidence that the well was not in production since 1998, that Stonebridge denied having any knowledge of production operations, and that the well appeared abandoned. He argued that this evidence contradicted the well report Viking submitted and created a genuine issue of material fact on the abandonment claim.

[3] The lease assignment documents Barnhouse submitted with his affidavit appear to identify the number of wells assigned and is unclear about the number of leases associated with the approximately 550 wells. Viking did not refute Rudolph's initial characterization of "550" as the number of leases.

{¶25} Rudolph filed a partial motion for summary judgment on his declaratory judgment claim and argued that the undisputed facts show the well had no production from 1998 through 2001; as a result the lease expired on its own terms after the first two years of non-production. Rudolph asked the trial court to declare that the lease had expired by its own terms.

{¶26} Viking's response combined a reply in support of its motion and its memorandum opposing Rudolph's motion. However, Viking failed to respond to Rudolph's argument that the 2012 amendment to R.C. 2305.06 provided a 15-year statute of limitation to claims accruing in 2001. Instead, Viking focused exclusively on its laches argument to challenge the claims for declaratory judgment and breach of implied covenant to develop land. In response to Rudolph's argument that there were genuine issues of material fact on the abandonment claim, Viking argued that the well production records showed that production resumed in 2002 and "shows the intention of resuming ownership, possession, or enjoyment of co-defendant Stonebridge's interest in the subject oil and gas lease. * * * Reasonable minds can only conclude that co-defendant Stonebridge did not intend to abandon a well * * * ."

{¶27} Although Stonebridge was a party, it did not join in Viking's motion, file its own motion, oppose Rudolph's motion, or provide affidavits or other evidence to support or refute either Viking's or Rudolph's motions.

{¶28} In reply Rudolph contended that the doctrine of laches cannot revive an expired lease. Rudolph argued that Viking has not challenged the fact that at some point between 1998 and 2001 the lease expired by its own terms; rather Viking was attempting to use laches to bar Rudolph's declaratory judgment action and revive the

expired leasehold interest. Rudolph argued that even if the doctrine of laches were applicable, Viking had not established a laches defense. Rudolph contended that by 2001 he reasonably believed the lease had expired. He had no obligation to take any action when the lease expired and he had no reason to believe a dispute existed until 2012 when Stonebridge sent an oil and gas division order. Rudolph argued that "[t]his is not a case in which [Rudolph] played a 'game of gottcha.' He did not stand idly by watching Viking invest substantial resources in resuming and maintaining production for the well and subsequently claim the repairs were all for naught because the lease had expired."

{¶29} The trial court granted Viking summary judgment and dismissed Rudolph's claims. The trial court held that the claims related to the 1998-2001 non-production period (count I - declaratory judgment action and count III - breach of implied covenant to develop land), were contract claims and were barred by both the eight-year statute of limitation in R.C. 2305.06, which the court found expired in 2009, and the doctrine of laches. The trial court found no material factual dispute concerning whether Stonebridge or its predecessor-in-interest intended to abandon the lease and determined that the lease was not abandoned (count II – abandonment). Because the abandonment claim failed, the trial court held that Rudolph's breach of the implied covenant to restore the surface (count V - plug the well/reclaim the property) must also fail. The trial court held that Rudolph's claim for breach of the implied covenant to operate with care and diligence (count IV) was barred by the four-year statute of limitations in R.C. 2305.09 governing general negligence claims and it also should be dismissed on the merits because Rudolph failed to meet his burden of proof. And the trial court also found that

Rudolph had asserted an unpaid royalty claim but it was barred by the four-year statute of limitations in R.C. 2305.041.

II. ASSIGNMENTS OF ERROR

{¶30} Rudolph raises the following assignments of error:

> I. THE TRIAL COURT ERRED WHEN IT DETERMINED THAT COUNTS I, III, IV, AND V ARE BARRED BY THE VARIOUS STATUTES OF LIMITATIONS. [T.D. 49, 3-4, 7, 8].
>
> II. THE TRIAL COURT ERRED WHEN IT DETERMINED THAT THE DOCTRINE OF LACHES BARRED RUDOLPH FROM OBTAINING RELIEF. [T.D. 49, PP. 4-6].
>
> III. THE TRIAL COURT ERRED WHEN IT GRANTED APPELLEE'S MOTION FOR SUMMARY JUDGMENT AS TO THE SECOND COUNT IN THE COMPLAINT. [T.D. 49, PP. 6-7].
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> IV. THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT AS TO COUNT IV OF THE COMPLAINT. [T.D. 49, P. 8]
>
> V. THE TRIAL COURT ERRED WHEN IT DENIED RUDOLPH'S MOTION FOR SUMMARY JUDGMENT AS TO THE FIRST COUNT OF THE COMPLAINT. [T.D. 49, P. 10].

III. STANDARD OF REVIEW

{¶31} Appellate review of summary judgment decisions is de novo, governed by the standards of Civ.R. 56. *Vacha v. N. Ridgeville*, 136 Ohio St.3d 199, 2013-Ohio-3020, 992 N.E.2d 1126, ¶ 19. Summary judgment is appropriate if the party moving for summary judgment establishes that (1) there is no genuine issue of material fact, (2) reasonable minds can come to but one conclusion, which is adverse to the party against whom the motion is made and (3) the moving party is entitled to judgment as a matter of law. Civ.R. 56; *New Destiny Treatment Ctr., Inc. v. Wheeler*, 129 Ohio St.3d 39, 2011-

Ohio-2266, 950 N.E.2d 157, ¶ 24; *Chase Home Finance, LLC v. Dunlap*, 4th Dist. Ross No. 13CA3409, 2014-Ohio-3484, ¶ 26.

{¶32} The moving party has the initial burden of informing the trial court of the basis for the motion by pointing to summary judgment evidence and identifying the parts of the record that demonstrate the absence of a genuine issue of material fact on the pertinent claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996); *Chase Home Finance* at ¶ 27. Once the moving party meets this initial burden, the non-moving party has the reciprocal burden under Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue remaining for trial. *Dresher* at 293.

{¶33} This case involves the interpretation of a written contract, which is a matter of law that we review de novo. *Arnott v. Arnott,* 132 Ohio St.3d 401, 2012-Ohio-3208, 972 N.E.2d 586, ¶ 14, quoting *Saunders v. Mortensen,* 101 Ohio St.3d 86, 2004-Ohio-24, 801 N.E.2d 452, ¶ ("'[t]he construction of a written contract is a matter of law that we review de novo'"). "Our role is to ascertain and give effect to the intent of the parties, which is presumed to lie in the contract language." *Boone Coleman Constr., Inc. v. Piketon,* 2014-Ohio-2377, 13 N.E.3d 1190, ¶ 18 (4th Dist.), citing *Arnott* at ¶ 14. "Common words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument." *Alexander v. Buckeye Pipe Line Co.,* 53 Ohio St.2d 241, 374 N.E.2d 146 (1978), paragraph two of the syllabus, superseded by statute on other grounds; *Harding v. Viking Internatl. Resources Co., Inc.,* 2013-Ohio-5236, 1 N.E.3d 872, ¶ 12 (4th Dist.).

{¶34} In our context, "[t]he rights and remedies of the parties to an oil or gas lease must be determined by the terms of the written instrument" and "[s]uch leases are contracts, and the terms of the contract with the law applicable to such terms must govern the rights and remedies of the parties." *Harris v. Ohio Oil Co.,* 57 Ohio St. 118, 129, 48 N.E. 502 (1897); *Harding* at ¶ 11; *Bohlen v. Anadarko E & P Onshore, LLC*, 4th Dist. Washington App. No. 14CA13, 2014-Ohio-5819, *aff'd,* Slip Opinion No. 2017-Ohio-4025 (June 1, 2017).

IV. LAW AND ANALYSIS

A. Expiration of Lease on its Own Terms: No Production from 1998 to 2001

{¶35} The oil and gas lease contains a primary term of two years and a secondary term for "as much longer as oil, gas or gasoline can be produced in paying quantity, or the rental paid thereon * * *." The parties agreed that no rental payments were made and that the well produced no oil or gas from 1998 to 2001. The issues are whether the various statutes of limitations and/or the doctrine of laches bar Rudolph's claims.

1. Statute of Limitations

a. Count 1 – Declaratory Judgment

{¶36} We conclude that the trial court erred in finding that Rudolph's declaratory judgment claim was barred by the eight-year statute of limitations for written contracts in R.C. 2305.06. Although Rudolph argues that the applicable statute of limitations is the 15-year period in R.C. 2305.06, his assignment of error broadly raises the legal question of the appropriate statute of limitations. We conclude the applicable statute of

limitations is the 21-year limitation for recovery of real estate in R.C. 2305.04. Rudolph filed his action in 2014, well within the 21-year period.

{¶37} The oil and gas lease contains a habendum clause with a primary and secondary term. The primary term was for two years, with the lease becoming null and void if no well was drilled within twelve months unless extended by a delay rental payment per acre. The secondary term extends the lease for "as much longer as oil, gas or gasoline can be produced in paying quantity." "The term 'paying quantities,' when used in the habendum clause of an oil and gas lease, has been construed by the weight of authority to mean 'quantities of oil or gas sufficient to yield a profit, even small, to the lessee over operating expenses, even though the drilling costs, or equipping costs, are not recovered, and even though the undertaking as a whole may thus result in a loss.' " *Blausey v. Stein*, 61 Ohio St .2d 264, 266, 400 N.E.2d 408 (1980), quoting Annotation, 43 A.L.R.3d 8, 25 (1972); *see also Gardner v. Oxford Oil Co.*, 2013–Ohio–5885, 7 N.E.3d 510, ¶ 37 (7th Dist.).

{¶38} An oil and gas lease containing a habendum clause stating the lease shall remain in effect as long as oil or gas is produced in paying quantities automatically expires when no oil or gas is produced for two years or more:

> "Courts universally recognize the proposition that a mere temporary cessation in the production of a gas or oil well will not terminate the lease under a habendum clause of an oil and gas lease where the owner of the lease exercises reasonable diligence and good faith in attempting to resume production of the well. A critical factor in determining the reasonableness of the operator's conduct is the length of time the well is out of production. * * *
>
> A review of the reported cases reflects that while courts tend to hold the cessation of production temporary when the time periods are short, lessees have, for the most part, been held not to have proceeded

> diligently when the cessation from production exists for two years or more."

Lauer v. Positron Energy Resources, Inc., 4th Dist. Wash. No. 13CA39, 2014–Ohio–4850, ¶ 12, *quoting Wagner v. Smith*, 8 Ohio App.3d 90, 92–94, 456 N.E.2d 523 (4 Dist.1982); *see also Casto v. Positron Energy Resources, Inc*., 4th Dist. Washington No. 14CA39, 2016–Ohio–285, ¶ 16.

{¶39} According to Stonebridge's answer to the complaint and the ODNR well reports Viking submitted with Barnhouse's affidavit—no oil or gas was produced from the well from 1998 to 2001. The parties do not dispute the well lacked production for four years. Based on that evidence, the oil and gas lease expired by its own terms on December 31, 1999 because no oil or gas had been produced in paying quantities in 1998 and 1999. *See Hanna v. Shorts*, 163 Ohio St. 44, 49, 125 N.E.2d 338 (1955) (stating there can be no production in paying quantities if there is no production at all); *Lauer v. Positron Energy Resources, Inc.*, 4th Dist. Wash. No. 13CA39, 2014–Ohio–4850, ¶ 12.

{¶40} After the expiration of the primary term of the oil and gas lease, if the conditions of the secondary term are not met, the lease automatically expires. This occurred here when the well did not produce oil or gas for two consecutive years in 1998 and 1999. "The terminology utilized in the habendum clause ([e.g.,] "and as long thereafter as") is generally construed to create a determinable fee interest, such that the lessee's interest automatically terminates upon lessee's failure to satisfy any of the listed provisions which would serve to extend the terms of the lease. *In such a case, no affirmative action on the part of a lessor is required to formally terminate the lease; it expires on its owns terms.*" (Emphasis added.) *Tisdale v. Walla*, 11th Dist. Ashtabula

No. 94–A–0008, 1994 WL 738744, *4 (Dec. 23, 1994); *see also Am. Energy Servs. v. Lekan*, 75 Ohio App.3d 205, 212, 598 N.E.2d 1315 (5th Dist.1992) ("If after the expiration of the primary term the conditions of the secondary term are not continuing to be met, the lease terminates by the express terms of the contract herein and by operation of law and revests the leased estate in the lessor"). Therefore, after the well had no production for two or more years, the lease expired by its own terms, Rudolph did not have to take further action, i.e. the lessor ordinarily need not give the lessee notice and an opportunity to cure. Summers, *Oil & Gas*, Section 20:2 (Third Ed., 2016). The same general rule does not apply to actions for breach of an implied covenant. *Id.* at Section 22:3.

{¶41} Although termination of the lease under the habendum clause here occurs by operation of law and is automatic as it affects the parties, the landowner may need to resort to the courts to obtain complete relief, i.e. cancellation of the lease of record and removal of the cloud from the title. *See* Summers, at Section 19:1. Thus Rudolph's resort to a declaratory judgment action. *But also see* R.C. 5301.332 (providing a mechanism to clear any cloud on the title through notice and affidavit).

{¶42} Here, we must decide whether the applicable statute of limitations is: (1) the 8 or 15-year statute of limitation in R.C. 2305.06 for an action on a written contract, or (2) the 21-year statute of limitations for actions to recover title to or possession of real property in R.C. 2305.04. To determine the appropriate statute of limitations for Rudolph's declaratory judgment claim we look to the underlying nature or subject matter of his claim. "This court has previously held that, in determining which limitation period will apply, courts must look to the actual nature or subject matter of the case, rather

than to the form in which the action is pleaded. The grounds for bringing the action are the determinative factors, the form is immaterial." *Hambleton v. R.G. Barry Corp.,* 12 Ohio St.3d 179, 183, 465 N.E.2d 1298 (1984).

{¶43} When a lease expires because the leasehold does not produce in paying quantity, or as here, has no production at all, the failure *does not necessarily* give rise to a cause of action for breach of the lease. There is no violation of the lease or corresponding remedy for breach where production has ceased because the lessee has made a good faith determination that it is not economically reasonable to commercially operate the well due to the limited amount of oil or gas found, or the well simply has become depleted. *See Pottmeyer v. East Ohio Gas Co*., 62 N.E.3d 617, 2016-Ohio-1294, ¶ 40 (4th Dist.); *Bohlen v. Anadarko E & P Onshore, LLC*, 26 N.E.3d 1176, 2014 - Ohio- 5819, ¶ 21 (4th Dist.) ("It would be contrary to the joint economic interest of both a landowner and the lessee to continue drilling if it was no longer financially feasible. Under these conditions, the lease would end and the lessee's interest in the mineral rights would expire"), *aff'd*, Slip Opinion No. 2017-Ohio-4025 (June 1, 2017).

{¶44} Thus, Rudolph's declaratory judgment claim seeking a court order that the lease expired by its own term is not a contract "breach of lease" action; instead it is an action to quiet title. *See Chesapeake Exploration, LLC v. Buell,* 144 Ohio St.3d 490, 2015-Ohio-4551, 45 N.E.3d 185, ¶44 (an oil and gas lease creates a "vested, though limited, estate in the lands for the purposes named in the lease"); *Tisdale, supra,* (habendum clause generally construed to create a determinable fee interest); *contra, Potts v. Unglaciated Industries, Inc.,* 7th Dist. Monroe, 2016-Ohio-8559, ¶ 98, 113 (finding that a declaratory judgment claim seeking a judgment that a lease has expired

by its own terms for failure to produce in paying quantities "is a situation encompassed in the legislative mandate to apply the statute of limitations for a written contract in '[a]n action alleging breach with respect to any other issue that the lease or license involves * * *.' R.C. 2305.041 (excepting royalty payment issues, which have a shorter limitation period), citing R.C.2305.06").

{¶45} We conclude that Rudolph's declaratory judgment claim has the nature of an action to recover title to or possession of real property because oil and gas leases are unique and create a determinable fee interest:

> There is no question that oil and gas leases are unique, as they "seemingly straddle the line between property and contract: they are neither residential leases nor commercial contracts for the sale of goods." Keeling & Gillespie, *The First Marketable Product Doctrine: Just What Is the "Product"?*, 37 St. Mary's L.J. 1, 6 (2005). "Oil and gas leases are unusual in that they are not technically leases at all." Richardson, 46 Akron L.Rev. at 1144.
>
> There is general consensus among the states that an oil and gas lease creates a property interest, but there is disagreement about the nature of that property interest. Keeling & Gillespie, 37 St. Mary's L.J. at 7. Some states have held that it is a fee simple determinable "in which the lessee enjoys title to all of the oil, gas, and other minerals * * * as long as the lease remain in effect," while others have concluded that it is an incorporeal interest in the minerals "in which the lessee enjoys the exclusive right to take all of the oil, gas, and other minerals." *Id.*
>
> To resolve this question under Ohio law, we look to our courts for historical guidance on the characterization of an oil and gas lease in Ohio.
>
> We addressed a related question more than a century ago in *Harris v. Ohio Oil Co.*, 57 Ohio St. 118, 48 N.E. 502 (1897). We described an oil and gas lease as "more than a mere license" because it created a "vested, though limited, estate in the lands for the purposes named in the lease." *Id.* at 129–130, 48 N.E. 502.

Chesapeake Exploration, LLC v. Buell, 144 Ohio St.3d 490, 2015-Ohio-4551, 45 N.E.3d 185, ¶ 41-44. "The rights and privileges granted under an oil and gas lease, although

limited to the purposes of the lease, are sufficiently vast to affect the possession and custody of the mineral estate, even if not its ownership." *Id.* at ¶ 60. For his relief, Rudolph seeks his "title to said land be quieted * * *." He does not seek damages for termination under the habendum clause; he asks that his reversionary interest be recognized.

{¶46} Therefore we find that the 21-year statute of limitations for recovery of real property under R.C. 2305.04 is applicable to a declaratory judgment action filed by a party to an oil and gas lease seeking to declare the lease expired by its own terms due to lack of production in paying quantities. *See Schultheiss v. Heinrich Enterprises, Inc.*, 4th Dist. Washington No. 15CA20, 2016-Ohio-121, fn. 1 ("It appears that for Schultheiss's first declaratory judgment claim, which was in the nature of a quiet-title action, the applicable statute of limitations would have been the 21–year period set forth in R.C. 2305.04. *See Cox* at ¶ 59–62. Unlike her second claim, which was based on breach of implied covenants, her first claim was not for a breach of contract, but rather to confirm the termination of the lease that had already occurred by its express terms.").

{¶47} A declaratory judgment is a civil action and provides a remedy in addition to other legal and equitable remedies available. *In re Arnott,* 190 Ohio App.3d 493, 2010-Ohio-5392, 942 N.E.2d 1124, ¶ 17, citing *Aust v. Ohio State Dental Bd*. (2000), 136 Ohio App.3d 677, 681, 737 N.E.2d 605 (10th Dist. 2000). "A court may grant declaratory relief so long as it finds the action is within the spirit of the Declaratory Judgments Act, R.C. Chapter 2721, that a real and justiciable controversy exists between the parties, and that speedy relief is necessary to preserve rights that may

otherwise be impaired or lost." *Id.*, citing *Schaefer v. First Natl. Bank*, 134 Ohio St. 511, 18 N.E.2d 263 (1938), at paragraph three of the syllabus.

{¶48} Rudolph's need to bring a declaratory judgment action did not accrue until there was a justiciable controversy. "For a cause to be justiciable, there must exist a real controversy presenting issues which are ripe for judicial resolution and which will have a direct and immediate impact on the parties." *Id*. at ¶ 22, quoting *Stewart v. Stewart*, 134 Ohio App.3d 556, 558, 731 N.E.2d 743 (1999). "[I]n order for a justiciable question to exist, '[t]he danger or dilemma of the plaintiff must be present, not contingent on the happening of hypothetical future events * * * and the threat to his position must be actual and genuine and not merely possible or remote.' " *Id.* Thus, "[i]nherent in determining whether a complaint sets forth a justiciable issue is the question of ripeness." *Id*., quoting *Thomson v. Ohio Dept. of Rehab. & Corr*., 10th Dist. Franklin No. 09AP–782, 2010-Ohio-416, ¶ 10.

{¶49} Rudolph stated in his affidavit that he believed the lease expired on its own due to non-production from 1998 to 2001. His inspections of the well and inquiries to Stonebridge about production records confirmed this belief. He had no reason to believe a dispute existed until June 2012 when Stonebridge sent him an oil and gas division order.

{¶50} Viking argues that well production records are public records and a party is on constructive notice of their contents. Because the well production records from 2002 to 2013 show some production from the well, Viking argued that Rudolph had constructive knowledge in 2002 there was a dispute about the existence of the lease from these production records. Rudolph argued that the well production records from 2002 to 2013

are inaccurate and submitted affidavits to support his position that the well had no production after 1998. As noted above, for a declaratory judgment action to accrue, the controversy must be real, actual and genuine. The Fifth District Court of Appeals recently rejected a similar "constructive knowledge" argument and held that that filing a plat did not cause an action for title or possession to real property to accrue under R.C. 2305.04. The court held that filing a plat was not open and notorious enough to put a person on notice of an adverse claim. *Cox v. Kimble*, 5th Dist. Guernsey No. 13CA32, 2015-Ohio-2470, ¶ 60-62.

{¶51} Moreover, even if we use 2002 – the date production allegedly resumed according to the ODNR reports (the date "adverse possession" began of the leasehold interest in the minerals)– as the date the declaratory judgment action accrued, the time for his action would expire in 2023. Rudolph filed his declaratory judgment action in 2014 and would not be barred. Regardless of whether we use 2002 (the year production allegedly resumed) or 2012 (when Stonebridge sent the division order) to calculate the 21-year limitation date, Rudolph's declaratory judgment action is not barred because it was filed in 2014, well within the expiration of the 21-year limitation using either year.[4]

{¶52} Our finding that Rudolph's declaratory judgment claim is governed by the 21-year statute of limitations may appear to contradict *Schultheiss v. Heinrich Enterprises, Inc*., 4th Dist. Washington No. 15CA20, 2016-Ohio-121, ¶ 26 and the subsequent reconsideration entry of March 11, 2016. In *Schutheiss* we held that the

[4] A holder of a fee interest in minerals who fails to file an action to quiet title within the 21-year statute of limitations may risk losing the interest to the lessee through adverse possession. *See Natural Gas Pipeline Co. of American v. Pool,* 124 S.W.3d 188 (Tex. 2003) (lessees obtained adverse possession of mineral interests, in the form of fee simple determinable interests on same terms and conditions as original leases, after leases allegedly terminated because of nonproduction).

acceptance of free gas was not a bar to Schultheiss's assertion that the lease expired due to lack of production, and the lessees could not succeed on their affirmative defenses of laches and the statute of limitations. The lessees argued that Schultheiss's acceptance of free gas was inconsistent with her position that the lease expired by its own terms. We indicated that Schultheiss's declaratory judgment claim – like Rudolph's claim here – appeared to be governed by the 21-year period set forth in R.C. 2305.04. *Schultheiss* at fn. 1. However, Schultheiss's acceptance of free gas was not inconsistent with her position that the lease had expired. In other words, her use of her own gas did not create a judiciable controversy that would cause a declaratory judgment action to accrue. Unlike the June 2012 division order Stonebridge sent to Rudolph, which created a judiciable controversy – Schultheiss's use of gas she owned would not have put her or the lessees on notice that there was a dispute concerning the existence of the lease because she was entitled to use the gas whether the lease existed or not. Her use of gas did not create a judiciable controversy that would trigger the running of the 21-year statute of limitations. Therefore, her declaratory judgment action was not barred by the 21-year statute of limitation. *See Schultheiss* Reconsideration Entry, ¶23 ("Schultheiss's conduct neither warranted the application of laches nor contravened any statute of limitations.").

{¶53} Nonetheless, we agree that any language in *Schultheiss* that indicates there is no statute of limitation on actions to declare a lease has terminated by its own terms is incorrect. *See Potts,* 2016-Ohio-8559, ¶102-105*.* Likewise, our decision also incorrectly implies that the statute of limitations is an "equitable defense," when it is a statutory defense. *See Schultheiss,* at ¶ 26.

b. Count III – Breach of Implied Covenant to Reasonably Develop Land; Count IV – Breach of Implied Covenant to Conduct Well Operations with Reasonable Care and Diligence/Negligence; Count V – Breach of Implied Covenant to Restore the Surface/Failure to Plug Well/Reclaim the Property

{¶54} Rudolph contends that his claims for breach of implied covenant to reasonably develop land, failure to conduct well operations with reasonable care and diligence/negligence, and failure to plug well/reclaim property all arise out of the lease agreement and are breach of contract claims. Rudolph contends that the trial court incorrectly applied various statutes of limitations to bar these claims. Rudolph also contends that when he stated in his complaint that he had not received royalty payments for many years, he was simply making a factual allegation as evidence of lack of production; but the trial court mischaracterized it as a breach for failure to pay royalties and applied a four-year statute of limitations.

{¶55} Viking argued in its summary judgment motion that Rudolph's declaratory judgment and breach of implied covenant to develop were contract claims governed by R.C. 2305.06. Viking argued these claims accrued in 2001 and applied the eight-year statute of limitations to argue that the claims should have been brought by 2009. When Rudolph pointed to the provision in the 2012 amendment to R.C. 2305.06, which provided for a 15-year limitation on his claims, Viking had no response. On appeal for the first time Viking argues that Rudolph's contract claims first accrued – not in 2001 – but in 1995 when Rudolph stopped receiving royalty payments. Thus Viking claims that even if the 15-year statute of limitation applies, Rudolph's claims are barred because he waited 19 years to bring them in 2014. Because Viking failed to raise this argument before the trial court, Viking forfeited it and cannot raise it now. *Lauer v. Layco*

Enterprises, Inc., 4th Dist. Washington App. No. 12CA40, 2013-Ohio-1916, ¶ 11. Furthermore, the well report shows gas production for 1995-1997. Under the terms of the lease, a failure to make royalty payments for the 1995-1997 gas production would trigger an action for unpaid royalties, but would not cause the lease to automatically expire. It was the two-year non-production period, not the lack of royalty payments, that triggered the relevant statutes of limitations on Rudolph's contract claims.

{¶56} Stonebridge has also filed a brief making arguments that it failed to bring below. "It is axiomatic that a litigant's failure to raise an issue at the trial court level waives its right to raise that issue on appeal. Thus appellate courts generally will not consider any error a party failed to bring to the trial court's attention when the trial court could have avoided or corrected the error." *Id.* (citations omitted). Stonebridge did not file any motions or memoranda with the trial court, nor did it join with Viking in their assertions, and has forfeited these arguments on appeal. Therefore, we do not consider any of Stonebridge's arguments.

{¶57} As we did in analyzing Rudolph's declaratory judgment claim, to determine the appropriate statute of limitations for Rudolph's (1) breach of implied covenant to develop the land, (2) failure to conduct operations on lease the with care, diligence and with negligence, and (3) demand to plug the well/reclaim property, we look to the underlying nature or subject matter of his claim.

{¶58} Oil and gas leases contain several implied covenants, absent a valid disclaimer. *Alford v. Collins-McGregor Operation Co.*, 4th Dist. Washington No. 16CA9,2016-Ohio-5082, ¶ 14-15. "Since the 1800s, courts have recognized the existence of implied covenants in oil and gas leases." *Yoder v. Artex Oil Co*., 5th Dist.

Guernsey No. 14CA4, 2014–Ohio–5130, ¶ 45, citing Hall, *The Application of Oil & Gas Lease Implied Covenants in Shale Plays: Old Meets New,* 32 Energy & Min.L.Inst. (2011). "The most commonly recognized implied covenants are the covenant to drill a test well, the covenant to reasonably develop, the covenant of further exploration, the covenant to protect against drainage, the covenant to diligently market, and the covenant to restore the surface." *Id.* Additionally, there is "the covenant to conduct all operations that affect the lessor's royalty interest with reasonable care and due diligence." *Moore v. Adams*, 5th Dist. Tuscarawas No. 2007AP090066, 2008–Ohio–5953, ¶ 37. The Supreme Court of Ohio "has long adhered to the principle that absent express provisions to the contrary, a mineral lease includes an implied covenant to reasonably develop the land." *Ionno v. Glen–Gery Corp*., 2 Ohio St.3d 131, 132, 443 N.E.2d 504 (1983).

{¶59} Rudolph's claims allege breaches of the implied covenants in the oil and gas lease to (1) reasonably develop, (2) to conduct all operations that affect the lessor's royalty interest with reasonable care and due diligence, and (3) to restore the surface. Therefore, they are contractual in nature and are governed by the statute of limitations for oil and gas leases in R.C. 2305.041, which provides:

> With respect to a lease or license by which a right is granted to operate or to sink or drill wells on land in this state for natural gas or petroleum and that is recorded in accordance with section 5301.09 of the Revised Code, an action alleging breach of any express or implied provision of the lease or license concerning the calculation or payment of royalties shall be brought within the time period that is specified in section 1302.98 of the Revised Code. *An action alleging a breach with respect to any other issue that the lease or license involves shall be brought within the time period specified in section 2305.06 of the Revised Code.* (Emphasis added.)

Because none of these three claims are for breaches in the calculation or payment of royalties, but are for breaches of implied covenants, R.C. 2305.06 applies to them:

> Except as provided in sections 126.301 and 1302.98 of the Revised Code, an action upon a specialty or an agreement, contract, or promise in writing shall be brought within eight years after the cause of action accrued.

However, the statute of limitations for an action on a written contract was changed from 15 years to 8 years on September 28, 2012. Section 4 of the uncodified law underlying the amendment to R.C. 2305.06 provides:

> For causes of action that are governed by section 2305.06 of the Revised Code and accrued prior to the effective date of this act, the period of limitations shall be eight years from the effective date of this act or the expiration of the period of limitations in effect prior to the effective date of this act, whichever occurs first.

Here the trial court determined that Rudolph's breach of an implied covenant to reasonably develop the land accrued in 2001 and was governed by the eight-year statute of limitations for written contracts in R.C. 2305.06. However, because the trial court determined that the cause of action accrued prior to the effective date of the amendment to R.C. 2305.06, it should have used the 15-year statute of limitations and determined that Rudolph's claim for breach of an implied covenant to reasonably develop the land was not barred.[5] The trial court also erred in failing to recognize Rudolph's other two claims as breaches of implied covenants governed by the 15-year statute of limitation in R.C. 2305.06. Thus the statute of limitations did not expire until 2015 and Rudolph filed his action in 2014.

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[5] For causes of action that accrued before September 28, 2012, the trial court should have calculated the period of limitations by: (1) adding eight years to 2012, which equals 2020 and comparing it to (2) the 15-year period, which when added to the trial court's (incorrect) date of 2001, equals 2016. Because 2016 occurs before 2020, the court would have determined that the deadline for filing the action was 2016. But because we determine that the cause of action accrued January 1, 2000 – not 2001, the correct calculation is a 2015 deadline.

c. Failure to Pay Royalties

{¶60} Rudolph's claim for declaratory judgment contains an allegation that he "has received no payments for true royalties for many years." The trial court construed this allegation as a claim for "insufficient royalties, or lack of royalties" and determined that it was barred by the four-year statute of limitations in R.C. 2305.041 governing breaches in the calculation or payment of royalties. Rudolph contends the trial court erred – he is not asserting a claim for unpaid royalties. The record shows that Rudolph's complaint does not include a separate count for unpaid royalties and his request for relief does not specifically request damages for unpaid royalties. Rudolph argues that the trial court is barring his use of factual evidence of unpaid royalties to bolster his claims of nonproduction, abandonment, and breaches of implied covenants when it bars the non-existent royalty claim. We do not read the trial court's decision so broadly. A statute of limitations is a bar to a claim, not a rule that excludes evidence. There is nothing in the trial court's decision to suggest that Rudolph's evidence concerning unpaid royalties would not be admissible if it is relevant to his other claims.

{¶61} However, to the extent the trial court found a claim for unpaid royalties where the record supports Rudolph's contention that he asserted no such claim, there is no prejudice to Rudolph. The trial court's barring of this "non-existent" unpaid royalty claim is harmless error.[6]

{¶62} In sum, count I – declaratory judgment, seeks a declaration that the oil and gas lease expired by its own terms due to failure to produce in paying quantities. The unique nature of an oil and gas lease creates a determinable fee interest in real

[6] Interestingly, Rudolph did not assert a claim for conversion for the production that allegedly occurred in 2002 through 2013 after the termination of the lease.

estate. Therefore, the underlying nature is an action to recover real property governed by the 21-year statute of limitations in R.C. 2305.04, which would have run in 2033. Counts III, IV, and V of Rudolph's complaint are claims for breaches of the implied covenants. R.C. 2305.041 states that the statute of limitations for written contracts in R.C. 2305.06 applies, which under the facts here is 15 years and would have run in 2015. Because Rudolph filed his lawsuit in 2014, he clearly was not barred by the statute of limitations.

{¶63} We sustain Rudolph's first assignment of error.

2. The Doctrine of Laches as a Defense

{¶64} The trial court found that Rudolph's claims for declaratory judgment and breach of implied duty to develop the land were barred by laches because Rudolph knew that the well had no production from 1998 to 2001 but did not bring these claims for over 13 years. The trial court found that Viking was materially prejudiced because it would not have acquired an interest in an invalid lease if Rudolph had timely asserted these claims.

a. Count I – Declaratory Judgment

{¶65} Rudolph asserts that the trial court erred in finding that his declaratory judgment action was barred by laches because the lease termination was automatic, as was the self-executing reversion of rights to the lessor based on the express terms of the lease.

{¶66} Laches is an equitable doctrine that has been defined as "an omission to assert a right for an unreasonable and unexplained length of time, under circumstances prejudicial to the adverse party." *Connin v. Bailey*, 15 Ohio St.3d 34, 35, 472 N.E.2d 328

(1984) quoting *Smith v. Smith*, 107 Ohio App. 440, 443, 146 N.E.2d 454 (1957), affirmed, 168 Ohio St. 447, 156 N.E.2d 113 (1959). To successfully invoke the doctrine the party invoking it must establish by a preponderance of the evidence the following four elements: (1) unreasonable delay or lapse of time in asserting a right; (2) absence of an excuse for the delay; (3) knowledge, actual or constructive, of the injury or wrong; and (4) prejudice to the other party. *State ex rel. Meyers v. Columbus,* 71 Ohio St.3d 603, 605, 646 N.E.2d 173 (1995). Delay in asserting a right does not, without more, establish laches. Rather, the person invoking the doctrine must show that the delay caused material prejudice. *Connin*, 15 Ohio St.3d at 35–36, 472 N.E.2d 328; *Smith*, paragraph three of the syllabus.

{¶67} Viking cannot successfully establish a laches defense to Rudolph's claim for a declaration that the lease terminated for lack of production because the first element – an unreasonable delay in asserting a right – does not exist. This claim involves the expiration of an oil and gas lease and accompanying automatic and self-executing reversion of rights to the lessor. The lease expired automatically and as a matter of law by its own terms when the well failed to produce oil or gas in paying quantities from 1998 to 2001 and " 'no affirmative action' " on the part of the landowners was " 'required to formally terminate the lease.' " *Casto v. Positron Energy Resources, Inc.*, 4th Dist. Washington No. 14CA39, 2016–Ohio–285, at ¶ 21, quoting *Tisdale v. Walla*, 11th Dist. Ashtabula No. 94–A–0008, 1994 WL 738744, *4 (Dec. 23, 1994); *Am. Energy Servs. v. Lekan*, 75 Ohio App.3d 205, 212, 598 N.E.2d 1315 (5th Dist.1992) ("If after the expiration of the primary term the conditions of the secondary term are not continuing to be met, the lease terminates by the express terms of the contract herein

and by operation of law and revests the leased estate in the lessor"); *See* Summers, *supra*, indicating notice to the lessee is unnecessary here.

{¶68} *Schultheiss*, *supra*, correctly noted a leading oil and gas law treatise as observing, when the lease has terminated by operation of law, any delay by the lessor in asserting termination of the lease cannot give rise to the affirmative defense of laches:

> No cases have been found in which the court has found that the doctrine of laches is a defense to the lessor's claim that a lease has terminated pursuant to the special limitation in the habendum clause. Since the termination of a lease by operation of the limitation provision of the habendum clause is automatic, the lessor's delay in bringing suit appears immaterial. Any defense that the lessor has waived his right to assert termination of the lease would seem inapplicable.

3–6 Williams & Meyers, *Oil and Gas Law*, Section 604.7 (2014) (footnotes omitted.).[7]

b. Count III – Breach of Implied Covenant to Develop the Land

{¶69} Rudolph had a right to assert a breach of the implied covenant to develop the land but brought that claim 14 years after the cause of action accrued. Laches would be available as an affirmative defense to this breach of implied covenant claim. However, even if we assume that a 14-year delay is unreasonable and inexcusable, Viking presented no evidence that it suffered material prejudice from the delay or that any prejudice it allegedly suffered was caused by Rudolph.

{¶70} Viking argued that it was prejudiced because in 2003 it acquired an interest in the expired lease which it would not have done if Rudolph had asserted his declaratory judgment in 2001. The evidence Viking submitted shows that it acquired

[7] The determination of whether various equitable defenses are available in oil and gas lease disputes is highly fact intensive. *See* 2 Summers Oil and Gas, Section 20:4 (3d Ed.) (discussing estoppel and waiver in the context of termination under the "unless" drilling clause).

hundreds of leases in the 2003 transaction. Viking failed to submit an affidavit or other testimony to support its contention that it would not have acquired the interest in the leases if it had known one of the leases had expired. Viking did not explain its procedure or industry practice in determining the validity of the leases it purchases either individually or as a "package." Nor did Viking submit any evidence that it was financially prejudiced in any manner, that it suffered any financial losses because the lease expired, or that the price it paid for the assignment of leases was not already discounted to take into consideration the possibility that a few of the leases might be expired.

{¶71} And, even if Viking had established material prejudice, Viking did not show the prejudice was Rudolph's fault. The well production records – which Viking argues gives the public constructive knowledge of production activity – showed no production from 1998-2001. Any prejudice Viking suffered is attributable to Viking's own failure to determine the status of the lease prior to acquiring it.

{¶72} The trial court erred in granting Viking summary judgment on its laches defense to Rudolph's declaratory judgment and breach of implied covenant to reasonably develop the land. We sustain Rudolph's second assignment of error.

3. Abandonment Claim and Breach of Implied Covenant to Restore the Surface

{¶73} Rudolph contends the trial court erred when it granted summary judgment in Viking's favor on his abandonment claim. He argues that as the opposing party, he was entitled to have the trial court construe the record and all inferences that arise from it in his favor. *See Horsley v. Burton*, 4th Dist. Scioto No. 10CA3356, 2010-Ohio-6315, ¶ 12.

{¶74} Because we find that the lease expired by its own terms on December 31, 1999, Rudolph's abandonment claim is arguably moot and the error is harmless. However, in conjunction with the trial court's determination that the well had not been abandoned, it also determined that the lessees had no duty to restore the surface by plugging the well and reclaiming the property. In addressing Rudolph's first assignment of error, we found that this implied covenant claim is governed by the 15-year statute of limitations and is not time-barred. Therefore, we sustain Rudolph's third assignment of error insofar as the trial court's ruling on Rudolph's abandonment claim also resulted in the improper dismissal of his claim for breach of the implied covenant to restore the surface/plug the well.

{¶75} We sustain Rudolph's third assignment of error to that limited effect.

4. Breach of Implied Covenant to Operate with Reasonably Care and Diligence/Negligence

{¶76} Rudolph contends that the trial court erred in granting summary judgment on the merits of his claim that the defendants failed to conduct well operations with reasonable care and diligence/negligence. He argues that the parties did not move for summary judgment on the merits of this claim and submitted no evidence. He argues that the trial court's decision violated his procedural due process rights.

{¶77} Viking contends that Rudolph misinterprets the trial court's decision. According to Viking, the trial court did not grant Viking summary judgment on the merits of Rudolph's breach of implied covenant to operate with care and diligence. Rather, the language in the decision was in support of the trial court's dismissal of an unpaid royalty claim. Thus, Viking does not address the merits of Rudolph's fourth assignment of error.

{¶78} The trial court's decision consistently refers to Rudolph's "breach of implied covenant to operate well with reasonable care and diligence/negligence" as his "negligence claim." The first time the trial court refers to Rudolph's breach of implied covenant to operate with reasonable care and diligence is on page 7 of the decision. The trial court states, "Count IV of Plaintiff's complaint alleges that the Defendants were negligent in their operations of the leasehold. Under Ohio Law, general negligence claims are subject to a four (4) year statute of limitations. R.C. 2305.09." Then on the following page, after dismissing "any claims for insufficient royalties" as time barred, the trial court returns to its discussion of Rudolph's "negligence claim." The court states, "The Plaintiff cannot maintain a negligence claim based upon an allegation of inaccurate measurement without first meeting his burden of showing what the accurate measurement should have been. Based upon the Plaintiff's admission of a lack of any knowledge of how much gas was removed, such negligence claims must be dismissed as a matter of law." Decision, p. 8.

{¶79} We construe the trial court's decision as finding that Rudolph's claim for breach of implied covenant to operate with reasonable care and diligence is both barred by the statute of limitations, and alternatively, is dismissed on its merits as a matter of law due to Rudolph's failure to meet his burden of proof. Thus, the trial court's decision to grant Viking summary judgment on this claim was inappropriate. The record shows that none of the parties moved for summary judgment on the merits of this claim and the court should not have decided them without allowing Rudolph the opportunity to present evidence in support of it. *See Marshall v. Aaron*, 15 Ohio St.3d 48, 472 N.E.2d 335 (1984), syllabus; *HomEq Servicing Corp. v. Schwamberger*, 4th Dist. Scioto No.

07CA3146, 2008-Ohio-2478, ¶ 13-14 ("By acting in the absence of a pending motion, the trial court denied the Schwambergers due process because they did not have notice and an opportunity to contest a sua sponte disposition. * * * In instances where trial courts have granted summary judgment when neither party moved for it, we have reversed the trial courts' sua sponte disposal of the case."). We sustain Rudolph's fourth assignment of error.

5. Rudolph's Summary Judgment Motion for Declaratory Judgment

{¶80} Rudolph contends that the trial court erred in denying him summary judgment on his declaratory judgment claim that the lease expired by its terms due to no production from 1998 to 2001. The record shows that the well had no production from 1998 to 2001 and none of the parties contested this fact or presented any evidence refuting it. In Viking's opposition to Rudolph's motion, Viking relied upon this four-year non-production in making its laches and statute of limitations arguments. These two arguments were the only ones Viking made to oppose the Rudolph's motion. In addressing Rudolph's first and second assignments of error, we held that the 21-year statute of limitations in R.C. 2305.04 for recovery of real property governed Rudolph's declaratory judgment action and that Viking failed to prove the elements of laches. Therefore, there is no genuine issue of material fact; after two years of non-production the lease expired and the leasehold interest automatically reverted to Rudolph. *See Schultheiss*, 2016-Ohio-121, ¶19, 27. Rudolph is entitled to judgment in his favor on his declaratory judgment claim.[8]

[8] Our holding that Rudolph is entitled to summary judgment on his declaratory judgment does not make all his other assignments of error moot. He seeks different forms of relief, which if successfully proven, may entitle him to specific performance or monetary damages on his breach of implied covenant claims. Additionally, because the trial court dismissed Rudolph's claim to restore property (well plug/reclaim

{¶81} The trial court erred in denying Rudolph summary judgment on his declaratory judgment claim. We sustain Rudolph's fifth assignment of error.

V. CONCLUSION

{¶82} The trial court improperly entered summary judgment for Viking. The oil and gas lease contained a habendum clause that stated that the lease continued as long as there was production in paying quantities. The well had no production from 1998 through 2001. On December 31, 1999, after two years of non-production the lease expired by its own terms and the leasehold interest automatically reverted to Rudolph. Rudolph filed his lawsuit in March 2014. Rudolph's declaratory judgment action to have the court declare the lease expired and to quiet title is governed by the 21-year statute of limitations under R.C. 2305.04 and accrued in June 2012 when a judiciable controversy arose between the parties concerning the existence of the lease. It is not time barred. Rudolph's claims for breach of implied covenants are: (1) based on the 1998-2001 non-production period, (2) accrued January 1, 2000, (3) are governed by the statute of limitations for written contracts in R.C. 2305.06, which requires the application of a 15-year limitation to Rudolph's claims, and (4) are not time barred. Viking failed to establish a laches defense as a bar to any of Rudolph's claims. Although Rudolph's abandonment claim appears to be moot, the trial court improperly dismissed his claim for breach of the implied covenant to restore the land/plug the well when it determined his abandonment claim. The trial erred in sua sponte granting Viking summary

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property) based upon its incorrect determination of his abandonment claim, we must address Rudolph's third assignment of error contesting the trial court's decision on the abandonment claim even though our decision that his lease has expired seems to make his abandonment claim itself moot.

judgment on the merits of Rudolph's claim for breach of implied covenant to operate with care and diligence.

{¶83} Finally Rudolph is entitled to judgment in his favor on his declaratory judgment claim.

{¶84} We reverse the judgment and remand the case to the trial court to enter judgment in favor of Rudolph on his declaratory judgment claim and for further proceedings on the claims for breach of the implied covenants.

JUDGMENT REVERSED AND
CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS REVERSED and that the CAUSE IS REMANDED. Appellee shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Court of Common Pleas to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, J. & Hoover, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.