[Cite as *Potts v. Unglaciated Industries, Inc.*, 2016-Ohio-8559.]

STATE OF OHIO, MONROE COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

MARVIN POTTS, et al.,	)	CASE NO. 15 MO 0003
	)	
PLAINTIFFS-APPELLANTS,	)	
	)	
VS.	)	OPINION
	)	
UNGLACIATED INDUSTRIES, INC., et al.,	)	
	)	
	)	
DEFENDANTS-APPELLEES.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Monroe County, Ohio Case No. CVH 2013-064

JUDGMENT: Affirmed.

APPEARANCES:

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JUDGES:

Hon. Carol Ann Robb
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: December 30, 2016

[Cite as *Potts v. Unglaciated Industries, Inc.*, 2016-Ohio-8559.]
ROBB, J.

{¶1} Plaintiffs-Appellants Marvin Potts, Duane Potts, and Pam Potts appeal the declaratory judgment issued by the Monroe County Common Pleas Court finding the oil and gas lease held by Defendants-Appellees Unglaciated Industries, Inc. remains valid and enforceable. Contrary to Appellants' initial argument, the judgment is a final appealable order. Next, Appellants argue the trial court lacked jurisdiction to enter the declaratory judgment due to Unglaciated's failure to join a necessary party when it filed a counterclaim. This argument is without merit as the judgment did not affect the rights of the landowners whom Appellants claim should have been joined.

{¶2} Appellants alternatively argue Unglaciated was not entitled to summary judgment because it did not show production under the lease for the entire 112-year secondary term. They assert their claim is not subject to any statute of limitations. As for the years Unglaciated provided documentary evidence of production, Appellants say the production may not have been in "paying quantities" as there was no evidence of operating costs. Appellants conclude their failure to respond to the motion for summary judgment was irrelevant due to Unglaciated's failure to meet its initial summary judgment burden. However, we conclude Unglaciated met its summary judgment burden, and Appellants failed to meet their reciprocal burden. In accordance, the trial court's decision is affirmed.

STATEMENT OF THE CASE

{¶3} This case involves an oil and gas lease executed and recorded in 1896, whereby Nathaniel Moffett leased 159 acres of his land to T.J. Crawford "for a term and period of five years and as much longer as oil or gas is found in paying quantities thereon; yielding and paying to the lessor the one eighth part of all the oil produced and saved from the premises, delivered free of expense into tanker or pipe lines * * *." Leonard Hines acquired the rights in the lease. In 1962, Hines assigned the lease rights to the formations reaching down to the base of the Berea Sandstone to Walter Dye; the Hines estate assigned the remaining rights to Walter Dye in 1976. Walter and Janet Dye assigned the lease to Unglaciated by way of an assignment

recorded on February 27, 1989. The president and owner of Unglaciated is Chuck Dye, Walter Dye's son.

{¶4} At some point, the land subject to the lease was divided among various landowners. In 2012, Marvin Potts (and his wife Arla, who is no longer a party) sent a letter to Unglaciated's attorney raising issues with the lease. In 2013, suit was filed against Unglaciated by the following plaintiffs: Marvin and Arla Potts, who owned 19.46 acres; Duane and Pamela Potts, who owned 10.556 acres; David and Vicky Groves; Howard and Barbara Williams; Sam and Dorothy Rentz; and the Trustees of the Moffett-Fletcher U.M. Church.[1] The plaintiffs collectively owned approximately 90 acres of property subject to the lease.

{¶5} The complaint asserted claims for quiet title, declaratory judgment, slander of title, and conversion.[2] The complaint sought termination of the lease due to lack of production and breach of the lease or implied covenants. It alleged no production was reported to the ODNR. There was also a claim of lease forfeiture under R.C. 5301.332. The statutory forfeiture claim was based upon an affidavit of forfeiture recorded by Marvin and Arla Potts in 2012, which they believed was permissible due to the letter they sent to Unglaciated's counsel.

{¶6} Unglaciated filed a counterclaim for slander of title and for declaratory relief, alleging the lease remained valid. In August 2014, Unglaciated filed a motion for summary judgment. Factually, the motion said ten wells were drilled pursuant to the lease and at least one produced continuously since the expiration of the primary term of the lease. Unglaciated noted its predecessor lessee issued royalty payments to Pure Oil Company, who assigned its interest to Chevron. After assignment of the lease, Unglaciated received notice the royalty was assigned to Union Oil Company of California, who later assigned the royalty to Cherokee Minerals, L.P.

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[1] Various plaintiffs settled with Unglaciated by entering an amendment and ratification of the lease or chose not to appeal the trial court's ruling, leaving Marvin, Duane, and Pamela Potts as Appellants.

[2] Appellants also filed two claims for declaratory judgment against other defendants on a separate issue concerning ownership of the mineral interest. Default judgment was entered against all of those defendants, with the exception of Cherokee Minerals, L.P., who agreed to a consent entry.

{¶7} In case it was determined Cherokee had no right to the royalty, Unglaciated pointed out there was no language in the lease providing non-payment of royalties was grounds for cancellation. The statute of limitations for non-payment of royalties was four years. *See* R.C. 2305.041. In any event, Unglaciated argued a lessee is not bound by a change in royalty ownership absent written notice. Unglaciated also said any lack of compliance with ODNR reporting requirements is not a ground for cancelling the lease or conclusive evidence of non-production.

{¶8} Unglaciated asserted: it was undisputed there has been production since it was assigned the lease; 1991 was the date of assignment; and evidence shows its predecessor was also producing oil under the terms of the lease. Unglaciated claimed there can be no allegation of non-production prior to the applicable statute of limitations. The court was asked to apply the statute of limitations for contracts in R.C. 2305.06, with the amended eight-year limitations period. As to the statutory forfeiture claim, Unglaciated pointed to the failure to follow the procedures required by R.C. 5301.332. Appellants did not file a response to the summary judgment motion.[3]

{¶9} On February 10, 2015, the trial court entered judgment declaring the lease valid and enforceable. The court concluded "there are no genuine issues of material fact to be litigated from the Plaintiffs' Complaint or Defendants' counterclaim." The court ordered the clerk to forward the judgment to the recorder for the addition of a marginal notation on the recorded lease indicating the lease is valid and enforceable.

{¶10} On the termination claim, the court concluded the lease had not expired due to continuous production, pointing to evidence of: production since the assignment to Unglaciated; production since 1991 (more than 21 years prior to the

[3] Appellants were granted leave to obtain new counsel in February 2014 but did not secure new counsel until September 2014, after Unglaciated filed the motion for summary judgment. New counsel obtained an extension of time, allowing for further discovery. The response date was January 13, 2015. The non-oral hearing date was set for February 3, 2015. Appellants sought a fifteen-day extension on December 30, 2014. A status conference was held, and Appellants' counsel sought to withdraw. The court denied the motion for extension of deadlines in a January 6, 2015 entry.

filing of the complaint); and production by Unglaciated's predecessor under the terms of the lease (pointing to some evidence from 1950). The court found Unglaciated's contract statute of limitations argument moot due to the above undisputed evidence. In further support, the court noted royalty payments were made by the oil purchaser on behalf of Unglaciated. The court held payment of royalties to an incorrect party is not a ground for cancellation. The court also found a lessee's failure to comply with ODNR reporting requirements was not a ground for cancellation of the lease.

{¶11} Regarding the statutory forfeiture claim, the court found the notice of intent to declare a forfeiture failed to comply with various procedural mandates of R.C. 5301.332. In addition, the court found there was a producing well on the land and explained the statute only applies to leases "concerning lands upon which there are no producing or drilling oil or gas wells." The decision on the statutory forfeiture claim is not raised on appeal.

{¶12} The trial court concluded "there is no just reason for delay" and described the entry as "a final appealable order as defined by Civil Rule 54." Appellants say this language prompted their timely appeal, but they do not believe the entry is a final appealable order.

ASSIGNMENT OF ERROR ONE: FINAL APPEALABLE ORDER

{¶13} Appellants set forth four assignments of error, the first of which contends:

"THE TRIAL COURT ERRED WHEN IT FOUND THE FEBRUARY 10, 2015 JUDGMENT ENTRY TO BE A FINAL APPEALABLE ORDER."

{¶14} This assignment of error is essentially a motion to dismiss the appeal for lack of jurisdiction. In seeking dismissal of this appeal, Appellants argue there was no determination of their own claim for slander of title or Unglaciated's claim for slander of title. Slander of title is a tort claim. A person who claims slander of title must show: a statement disparaging the title was published; the statement was false; the statement was made with reckless disregard of its falsity; and this caused actual

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Appellants' third attorney filed notice of appearance after the non-oral hearing date (without moving for an extension).

or special damages. *See, e.g., Nye v. White-Rhoades,* 3d Dist. No. 9-15-04, 2015-Ohio-3719, ¶ 36; *Green v. Lemarr*, 139 Ohio App.3d 414, 433, 744 N.E.2d 212 (2d Dist.2000).

{¶15} Appellants allege a pending slander of title claim would render the order non-final under R.C. 2505.02, claiming the slander of title claims were inextricably intertwined with the resolved claims. Appellants note the mere incantation of Civ.R. 54(B) language cannot transform a non-final order into a final order. Even if the order qualifies as a final order, Appellants alternatively contend the trial court should not have added "no just reason for delay" language under the circumstances of this case, claiming judicial economy was not thereby promoted.

{¶16} Unglaciated responds the trial court's judgment rendered the slander of title claims moot. However, the two opposing slander of title claims do not involve the same analysis. We begin with Appellants' claim for slander of title.

{¶17} As Unglaciated emphasizes, the trial court's decision finding the lease remained valid means Unglaciated did not engage in slander of title when it recorded a document saying the lease remained valid. Even if a judgment in a multi-claim case does not expressly adjudicate a claim, the judgment can still be a final appealable order if the effect of the judgment is to render a claim moot or the judgment "effectively resolved" the claim. *See General Acc. Ins. Co. v. Insurance Co. of N. America*, 44 Ohio St.3d 17, 21, 23, 540 N.E.2d 266 (1989) (even if the trial court does not certify the entry with "no just reason for delay" language); *Wise v. Gursky*, 66 Ohio St.2d 241, 243, 421 N.E.2d 150 (1981).

{¶18} Appellants' slander of title claim was disposed of when the trial court declared the lease remained valid. *See State ex rel. Wright v. Ohio Adult Parole Auth.*, 75 Ohio St.3d 82, 86-87, 661 N.E.2d 728 (1996) (finding both claims were "in effect adjudicated" by the order). We also note the trial court stated there were no genuine issues of material fact left to be litigated from the complaint. We conclude Appellants incorrectly argue their own slander of title claim was still pending.

{¶19} A different analysis is warranted as to *Unglaciated's* slander of title claim, which was based upon the affidavit of forfeiture recorded by Marvin Potts.

Appellants urge the lease's continued validity would merely impact an element of Unglaciated's slander of title claim but would not *resolve* the claim. They point to the elements of reckless disregard and damages. Unglaciated posits its claim for slander of title was rendered moot when the trial court found the recorded affidavit of forfeiture was improper, positing the recordation of the trial court's entry acted to nullify the recorded affidavit of Marvin Potts: "Therefore, Unglaciated's title was no longer slandered." (Appellee's Brief at page 10, fn.2).

{¶20} This particular argument on mootness appears unfounded as applied to Unglaciated's slander of title claim. Besides seeking summary judgment on the continued application of the lease, Unglaciated also asked for summary judgment on its slander of title claim. The motion claimed Marvin Potts recorded an affidavit of forfeiture with reckless disregard for its falsity, which interfered with production and caused "damages in an amount to be determined for interference with contractual relationships."

{¶21} As Unglaciated recognized below, the fact title is no longer slandered does not mean a person cannot recover for the period when it was slandered. The ability to recover damages for slander of title claim does not disappear when one wins a declaratory judgment action finding the lease remains valid. The court's holding meant the statement published by Marvin Potts was false. In sum, a claim for slander of title is not eliminated because a court clears the title in favor of the same person who alleged slander of title. If they can show reckless disregard, then the party must show they were damaged by the prior slandered state of their title. Therefore, the same mootness argument applied to Appellants' slander of title claim does not apply to Unglaciated's slander of title claim as the latter claim was not essentially disposed of by the validation of the lease.

{¶22} However, at page 9 of its entry, the trial court concluded there were no genuine issues of material fact to be litigated with regard to the complaint *or the counterclaim*. From this, it could be said the court ruled against Unglaciated on the other elements of its slander of title claim. On the other hand, the trial court previously stated at page 2: "Unglaciated's Count for slander of title has been

voluntarily dismissed without prejudice." This statement appears to be the trial court's memorialization and granting of Unglaciated's prior request to voluntary dismiss its slander of title claim. Neither party discusses or contests this finding by the trial court or its effect on rendering the judgment final.

{¶23} It should be pointed out a party can voluntarily dismiss "all claims" by filing a notice of voluntary dismissal or a stipulation of dismissal. Civ.R. 41(A)(1)(a)-(b). However, a movant cannot use these provisions to dismiss only one claim against a party where more than one claim was asserted against the party. *See Pattison v. W.W. Grainger, Inc.*, 120 Ohio St.3d 142, 2008-Ohio-5276, 897 N.E.2d 126. In *Pattison*, the trial court ruled on some claims asserted by a plaintiff against a defendant but did not certify an appealable order with Civ.R. 54(B) language. The Court prohibited the plaintiff from attempting to create a final order by voluntarily dismissing without prejudice the remaining claims against the same defendant.

{¶24} Essentially, a party cannot manufacture final appealable orders by dismissing only some claims against one party in order to bypass the trial court's gatekeeper function bestowed by Civ.R. 54(B). In this case, the docket does not indicate Unglaciated improperly attempted to voluntarily dismiss its slander of title claim by filing a notice of dismissal under Civ.R. 41(A)(1).

{¶25} Besides governing a voluntary dismissal by a party or by stipulation, Civ.R. 41(A) also governs a voluntary dismissal by order of the court. Civ.R. 41(A)(2) provides: "Except as provided in division (A)(1) of this rule, a claim shall not be dismissed at the plaintiff's instance except upon order of the court and upon such terms and conditions as the court deems proper." Notably, division (A)(2) uses "a claim" in the singular, as opposed to the use of "all claims" in division (A)(1). In addition, this division does not require a filing by the party but requires only an order of the court "at the plaintiff's instance" (which can be oral).

{¶26} *Pattison* did not involve a court granting a request to dismiss a claim. The *Pattison* Court was concerned with parties turning interlocutory orders into final appealable orders without obtaining the trial court's Civ.R. 54(B) certification. The certified question in *Pattison* was: "In a case where a plaintiff has asserted multiple

claims against a single defendant and some of those claims have been ruled upon *but not converted into a final order with Civ.R. 54(B)*, can the plaintiff create a final order by voluntarily dismissing pursuant to Civ.R. 41(A) the remaining claims asserted against that defendant?" (Emphasis added.) *Pattison*, 120 Ohio St.3d 142 at ¶ 10.

{¶27} Here, the trial court added "no just reason for delay" language, cited Civ.R. 54, and expressed the entry was "a final appealable order." (Feb. 10, 2015 J.E. at 9.) If the slander of title claim was voluntarily dismissed properly, then Civ.R. 54(B) language was not required as no claims remained pending. The trial court may have added Civ.R. 54(B) certification to its entry for good measure, possibly due to perceived procedural questions as to the voluntary dismissal of Unglaciated's slander of title claim.

{¶28} Even without a voluntary dismissal of the slander of title claim, the trial court could properly add Civ.R. 54(B) language to its order to create a final appealable order under the facts of this case. Civ.R. 54(B) provides:

> When more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third-party claim, and whether arising out of the same or separate transactions,[[4]] or when multiple parties are involved, the court may enter final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay. In the absence of a determination that there is no just reason for delay, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the

[4] The phrase, "whether arising out of the same or separate transactions," was added to Civ.R. 54(B) on July 1, 1992 to clarify the rule's applicability. According to the accompanying Staff Note, this was added in response to *Chef Italiano Corp. v. Kent State University*, 44 Ohio St.3d 86, 541 N.E.2d 64(1989) to clarify how the rule applies to a judgment on less than all of the claims arising out of the same transactions (as well as those arising out of separate transactions).

entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

{¶29} As Appellants point out, Civ.R. 54(B) is not the first step in determining if a trial court's judgment is a final appealable order. *See General Acc. Ins. Co. v. Ins. Co. of N. America*, 44 Ohio St.3d 17, 21, 540 N.E.2d 266 (1989). First, the order must be final within the requirements of R.C. 2505.02. *Id.* If the order meets the criteria of R.C. 2505.02, then the court ascertains whether Civ.R. 54(B) was applicable and whether it was properly applied. *Id.* at 22.

{¶30} Appellants cite cases applying R.C. 2505.02(B)(1), which provides an order is final if it "affects a substantial right in an action that in effect determines the action and prevents a judgment." Appellants assert the claims concerning the continued validity of the lease were "inextricably intertwined" with the slander of title claim, making the order non-final. Notably, this is not a situation where judgment is entered against an appellant on one of his claims but he could still recover the same relief on his other claim utilizing the same facts. *Compare Schwab v. Foland*, 5th Dist. No. 2007 AP 110073, 2008-Ohio-4061, ¶ 15-20 (order did not determine the action and prevent judgment because judgment against appellant on some of his claims did not prevent him from recovering on other claims which stemmed from the same conduct and sought the same relief).

{¶31} Appellants sought a declaratory judgment. This and all remaining claims asserted by Appellants were disposed of by the trial court's order. Unglaciated's counterclaim sought a declaratory judgment as well. The court declared the lease remained valid (as it was not subject to statutory forfeiture and had not expired) and ordered recordation of the court's entry.

{¶32} The underlying question of lease validity was an element of the slander of title action, but it did not answer the additional elements of the claim. As aforementioned, a slander of title claim involves damages caused by the publication of a disparaging false statement as to title in reckless disregard of its falsity. Unglaciated's allegation of a slandered title involved a separate and distinct claim, which required proof of reckless disregard for the statement's falsity and damages

caused by the publication. The same relief was not involved in the declaratory judgment claim as was requested in the slander of title claim; this is not a case with different legal theories asserted in order to reach the same requested recovery. *See, e.g., LaMusga v. Summit Square Rehab, L.L.C.*, 2d Dist. No. 26641, 2015-Ohio-5305, 43 N.E.3d 504, ¶ 31 (in the context of Civ.R. 54(B), "claim" refers to a set of facts giving rise to legal rights, not to the various legal theories of recovery based upon those facts; multiple claims exist if a separate and distinct recovery is possible on each claim).

{¶33} Regardless, "Since this is an action for declaratory judgment we are not concerned with the first part of R.C. 2505.02 * * *." *General Acc.*, 44 Ohio St.3d at 21. Pursuant to R.C. 2505.02(B)(2), an order is final if it "affects a substantial right made in a special proceeding." A "substantial right" is when a person is entitled to protect or enforce pursuant to the federal or state constitution, a statute, the common law, or a rule of procedure. R.C. 2505.02(A)(1). A "special proceeding" is defined as "an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity." R.C. 2505.02(A)(2). A declaratory judgment action is a special proceeding. *See General Acc.*, 44 Ohio St.3d at 22. In defining the force and effect of declaratory judgments, R.C. 2721.02(A) provides: "The declaration has the effect of a final judgment or decree."

{¶34} The declaration of continued lease validity in favor of Unglaciated (and denying Appellants' opposing requested declaration) affected a substantial right. *See General Acc.*, 44 Ohio St.3d at 21 (noting the immediate consequences of a declaration of a duty to defend). The entire declaratory action was resolved by the trial court's order. Moreover, the immediate consequence of the trial court's order permitted continued operations on the land and affected title. Additionally, the entry was ordered to be recorded.

{¶35} The trial court's order, finding the lease remained valid, is final under R.C. 2505.02. Accordingly, the court's addition of Civ.R. 54(B) language was not an impermissible attempt to issue a "mystical incantation which transforms a non-final order into a final appealable order." *See Wisintainer v. Elcen Power Strut Co.*, 67

Ohio St.3d 352, 354, 617 N.E.2d 1136 (1993). Rather, even if we were to assume the order was not appealable in and of itself without Civ.R. 54(B) language, the trial court merely exercised the choice to "transform a final order into a final appealable order." *See id.*

{¶36} This leads to the other subject briefly touched upon by Appellants. They assert the trial court's decision to add Civ.R. 54(B) language would not serve judicial economy. The decision to add "no just reason for delay" language is "essentially a factual determination—whether an interlocutory appeal is consistent with the interests of sound judicial administration, i.e., whether it leads to judicial economy." *Wisintainer*, 67 Ohio St.3d at 354. Trial judges "stand in an unmatched position to determine whether an appeal of a final order dealing with fewer than all of the parties in a multiparty case is most efficiently heard prior to trial on the merits." *Id.* at 354-355 (the trial court can best determine how the court's and parties' resources may most effectively be utilized). "The trial court has seen the development of the case, is familiar with much of the evidence, is most familiar with the trial court calendar, and can best determine any likely detrimental effect of piecemeal litigation. More important than the avoidance of piecemeal appeals is the avoidance of piecemeal trials." *Id.*

{¶37} When an appellate court reviews the trial court's decision to issue Civ.R. 54(B) certification, it shall not substitute its judgment for the trial court where some competent and credible evidence supports the decision. *Id.* at 355 (this decision is entitled to the same presumption of correctness as other factual findings). *Id.* A trial court should avoid mechanical application of the rule. *Id.* However, where the record indicates the interests of sound judicial administration could be served by finding "no just reason for delay," the trial court's certification determination must stand. *Id.* The trial court's certification need not be the most likely route to judicial economy but merely one route which might lead there. *Id.*

{¶38} The trial court could rationally conclude the addition of a Civ.R. 54(B) certification to its order containing a declaratory judgment was one route to judicial economy in this case, especially where the party who filed the slander of title claim

did not wish to proceed on the claim. For the various foregoing reasons, the trial court's February 10, 2015 judgment is a final appealable order. Appellants' motion to dismiss their own appeal is denied, and this assignment of error is overruled.

ASSIGNMENT OF ERROR TWO: NECESSARY PARTIES

{¶39} Appellants' second assignment of error provides:

"THE FEBRUARY 10, 2015 JUDGMENT ENTRY IS VOID AB INITIO BASED ON AN UNWAIVABLE JURISDICTIONAL DEFECT RESULTING FROM THE FAILURE TO JOIN ALL NECESSARY AND INDISPENSABLE PARTIES."

{¶40} Appellants' declaratory judgment action urged the lease was: terminated due to lack of production and breach of covenants and duties; forfeited; and no longer valid and legally binding. Unglaciated's counterclaim for declaratory judgment sought a declaration the lease was not forfeited or otherwise terminated due to continuous production on the property and the lease continued to be valid and in full force and effect. In discovery requests, Unglaciated was asked to identify the wells which produced under the lease over the past 10 years.

{¶41} Unglaciated responded: "there are currently two (2) oil and gas wells located on the property currently owned by Marvin Potts, one (1) well currently located on the property currently owned by Defendants Williams *and two (2) other wells located on property currently owned by William Gallagher, who is not a party to this litigation*." (Emphasis added.) (Req. for Admission 9; Interrogatory 3.) In stating the oil storage tanks were located on the leasehold premises, Unglaciated specified: "one of the tanks in which oil is stored is located on Plaintiffs Marvin and Arla Potts property * * * *a separate oil storage tank is located on land covered by the Lease owned by the Gallagers, who are not parties to this action*." (Emphasis added.) (Req. for Admission 23; Interrogatory 16.) When asked if outside oil was stored with the leasehold oil, Unglaciated stated: "*the well located on the Gallagher property is covered by the Lease*." (Emphasis added.) (Interrogatory 17.)

{¶42} These responses show an owner of land subject to the lease was not joined as a party to the action. Appellants urge the lacking party was necessary, claiming he had a material interest in the lease and was prejudiced by the declaratory

judgment which was recorded in the margin of the lease. Appellants say Unglaciated's counterclaim was not limited to the plaintiffs' property as it referred to the premises encumbered by the lease. Appellants characterize the failure to join Gallagher as a jurisdictional defect rendering the judgment void. *See, e.g., City of Cincinnati v. Whitman*, 44 Ohio St.2d 58, 60, 337 N.E.2d 773 (1975) (stating an injunction entered in a declaratory judgment action was "void" where the trial court lacked jurisdiction to issue the injunction due to the failure to join a necessary party).

{¶43} Unglaciated agrees the failure to join a necessary party in a declaratory judgment action is a jurisdictional defect, which is not waived by the failure to raise it below. Unglaciated does not dispute Gallagher's status as an owner of land subject to the lease. In fact, it appears there are other unjoined parties who own land subject to the lease: "[Appellants'] position ignores the fact that other surface owners of the Lease *voluntarily* did not join in an action to cancel an oil and gas lease that was valid." (Appellee's Brief at page 13). Unglaciated concludes the landowners who elected not to participate in this litigation were not necessary parties.

{¶44} Unglaciated points out the statutory forfeiture issue was between itself and Marvin and Arla Potts, who claimed to have provided notice under the statute and who recorded the affidavit of forfeiture. As to the separate declaration that the lease did not expire due to production, Unglaciated urges the absence of a landowner did not prevent the court from rendering an effective judgment between Unglaciated and Appellants. It claims a non-party is not indispensable merely because his presence would avoid multiple suits. *See Layne v. Huffman*, 43 Ohio App.2d 53, 57, 333 N.E.2d 147 (10th Dist.1974), quoting Staff Note to Civ.R. 19 ("An 'indispensable' party may be one who might expose the defendant to the threat of multiple liability as distinguished from the threat of multiple litigation"), affirmed by 42 Ohio St.2d 287, 327 N.E.2d 767 (1975).

{¶45} Unglaciated believes the trial court held the lease was valid and enforceable with respect to only those who contested its validity. For instance, the trial court's factual findings defined the plaintiffs' parcels as the "Property" and the 159 acres covered by the lease as the "Leased Premises." Still, the trial court also

ruled: "this Court holds that the Lease, now held by Unglaciated, is valid and enforceable as to all formations held thereunder."

{¶46} Unglaciated emphasizes any non-party's status remained the same before and after the court's judgment. In other words, production was occurring under a recorded lease covering 159 acres before the judgment, and the court's entry permitted this production to continue. Unglaciated concludes the trial court's judgment did not affect or prejudice the non-party landowner as he can file suit later to have the lease cancelled if he so desires.

{¶47} Joinder of a party necessary for a just adjudication is provided under Civ.R. 19(A), which states a person subject to service "shall be joined as a party" 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. * * *

If joinder is not feasible, the court can determine whether the action can still proceed, i.e., whether the party is in fact indispensable. Civ.R. 19(B) (listing factors).

{¶48} In a standard lawsuit, 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); Civ.R. 12(H)(2) (the defense can be raised at a trial on the merits). Appellants filed the initial suit to cancel the lease and did not raise the issue of joinder of necessary parties until appeal. However, the parties sought a declaratory judgment on the continued application of the lease. When declaratory relief is sought under Chapter

2721, the governing statute provides: "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).

{¶49} The Ohio Supreme Court describes the absence of a necessary party in a declaratory judgement action as a jurisdictional defect, which precludes a trial court from rendering a proper declaratory judgment and cannot be waived. *Gannon v. Perk*, 46 Ohio St.2d 301, 310-311, 348 N.E.2d 342 (1976). *See also Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 2006-Ohio-954, 846 N.E.2d 478, ¶ 99-100. This has been described as a lack of jurisdiction to proceed to judgment, rather than a complete lack of jurisdiction over the action as initiated. *See Plumbers & Steamfitters Local Union 83 v. Union Local Sch. Dist. Bd. of Edn.*, 86 Ohio St.3d 318, 323, 715 N.E.2d 127 (1999) (therefore, joinder can be accomplished by amendment to a pleading under Civ.R. 15).

{¶50} "[W]hether a nonparty is a necessary party to a declaratory-judgment action depends upon whether that nonparty has a legally protectable interest in rights that are the subject matter of the action." *Rumpke Sanitary Landfill, Inc. v. State*, 128 Ohio St.3d 41, 2010-Ohio-6037, 941 N.E.2d 1161, ¶ 14-15. A nonparty's mere practical interest in the subject matter does not rise to the level of a legal interest. *Id.* at ¶ 15.

{¶51} For example, the Supreme Court concluded adjacent landowners were not necessary parties to a declaratory judgment action on the constitutionality of a township zoning ordinance as it applied to a property owner who wished to build an apartment building in a single-family neighborhood. *Driscoll v. Austintown Assoc.*, 42 Ohio St.2d 263, 273, 328 N.E.2d 395 (1975). By comparison, in a case where the union and the city sought to declare whether temporary employees (who did not take civil service examinations) could continue to be employed after lay-offs in the police and fire departments, the temporary employees were considered necessary parties (without whom the declaratory judgment affecting their interests should not have been rendered). *Gannon*, 46 Ohio St.2d at 311. Their interest in the litigation and

the prejudice resulting from their absence was apparent as they were laid off as a result of the declaratory judgment. *Id.*

{¶52} Although not cited by the parties, an oil and gas statute provides guidance on joinder. Pursuant to R.C. 5301.10,

> The plaintiff in an action to cancel a lease or license mentioned in section 5301.09 of the Revised Code,[[5]] or in any way involving it, in order to finally adjudicate and determine all questions involving such lease or license in such action, need only make those persons defendants, so far as such lease or license is involved, who claim thereunder and are in actual and open possession, and those who then appear of record, or by the files in such office, to own or have an interest in such lease or license. If there is no claimant in actual and open possession, and no persons whose interest appears of record or file, then so far as such lease or license is involved, it will only be necessary to make the original lessee or licensee defendant in order to finally adjudicate and determine all questions concerning such lease or license.

Although the second sentence concerns the proper defendant where a plaintiff sues the lessee, the first sentence instructs a plaintiff whom to include as a defendant in an action to cancel the lease *or* "in any way involving it." *See, e.g., POI Energy, Inc. v. James Drilling Corp.*, 782 F.2d 1043 (6th Cir.1985) (applying it to lessors).

{¶53} In *POI*, the new lessee of several Ohio parcels of land (POI) sued the old lessee (JDC) seeking a declaration that the JDC leases expired due to a failure to commence drilling. The lessors of these parcels were not named in the complaint. In addition, the JDC leases had been unitized, which gave adjacent landowners a right to a share of the royalties from oil or gas drilled by JDC on the disputed land. These

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[5] R.C. 5301.09 provides all oil and gas leases shall be recorded and "[w]henever any such lease is forfeited for failure of the lessee, the lessee's successors or assigns to abide by specifically described covenants provided for in the lease, or because the term of the lease has expired, the lessee, the lessee's successors or assigns, shall have such lease released of record * * *."

adjacent lessors were not named in the complaint. The Sixth Circuit affirmed the dismissal of a federal case due to diversity issues. In doing so, the court concluded there was a failure to join indispensable parties, both: the lessors of the parcels involved in the new leases; and the lessors of adjacent land covered by the JDC leases. *Id.*, citing Fed.Civ.R. 19(a) and R.C. 5301.10

{¶54} In an Ohio suit by landowners to cancel a lease, a discovery response disclosed a nonparty held an overriding royalty interest in the lease. The Fourth District reversed the entry of summary judgment and remanded to ascertain the nonparty's status, relying on R.C. 5301.10. *Holland v. Gas Ents. Co.*, 4th Dist. No. 14CA35, 2015-Ohio-2527, ¶ 13, 18. In addressing a waiver argument, the court did not refer to the declaratory judgment joinder law. Nevertheless, in disposing of the waiver issue, the court ruled R.C. 5301.10 provides for joinder as a condition precedent to the adjudication. *Id.* at ¶ 16. The court alternatively ruled the matter was not waived (as the defense was in the answer and the nonparty's status was mentioned in response to summary judgment). *Id.* at ¶ 17.

{¶55} Here, we have a declaratory action to cancel the lease by landowners and an opposing action to declare the lease valid due to production from the leasehold premises. The trial court's ruling dealt with one lease signed by one original lessor. Unglaciated's discovery responses showed Gallagher, the nonparty, owned land covered by the same lease which was the subject of the declaratory judgment action. This nonparty did not make a claim under the lease. *See* R.C. 5301.10. According to this statute, the non-party must be joined before the judgment if he "then appear[ed] of record, or by the files in such office, to own or have an interest in such lease." *Id.* To effect jurisdiction, a practical interest in the subject matter of the suit would not be sufficient; the non-party must have "a legally protectable interest in rights that are the subject matter of the action." *Rumpke*, 128 Ohio St.3d 41 at ¶ 14-15.

{¶56} We note the lack of clarity as to whether Gallagher and any other nonparty landowner owned only the surface or both the surface and the minerals. There is no affirmative showing in the record as to this subject. *See, e.g., Auto*

Owners Ins. Co. v. Howard, 3d Dist. No. 1-86-38 (Sep. 29, 1987). Appellants did not respond to the motion for summary judgment. We also note a different claim in this litigation against other defendants (unrelated to Unglaciated) disposed of issues Appellants raised as to their ownership of the minerals. *See* fn.2, supra. Unglaciated's brief describes the nonparty owner of the leased premises as a surface owner. Appellants' reply brief does not refute or add to this description.[6]

{¶57} In any event, we agree with Unglaciated's argument that the trial court's judgment did not result in prejudice to any nonparty owner; their current position and interests were not "affected" by the declaratory judgment. *See* R.C. 2721.12 ("When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration."). Appellants emphasize the court ordered its decision to be recorded on the margin of the recorded lease without limiting the recordation to Appellants' property. Yet, this could be attributed to the affidavit of forfeiture filed by Potts, which the court invalidated and which decision was not appealed.

{¶58} As Unglaciated concedes, a nonparty owner, such as Gallagher, can file suit later, without being restricted by res judicata. This was not a ruling as to a nonparty's rights, which stayed the same after the trial court's declaration. The particular ruling was issued in a case between Appellants and Unglaciated. (We note some of the original parties, who were Appellants' co-plaintiffs, settled with Unglaciated.)

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[6] A surface owner's land is encumbered by a lease. *Chesapeake Exploration, L.L.C. v. Buell*, 144 Ohio St.3d 490, 2015-Ohio-4551, 45 N.E.3d 185, ¶ 60, 61, 66 (oil and gas lease affects possession and custody of both the mineral and the surface estate and binds successors), citing *Eisenbarth v. Reusser*, 7th Dist. No. 13 MO 10, 2014-Ohio-3792, 18 N.E.3d 477, ¶ 30. The lease, which was executed prior to severance of the minerals, provides the lessee with a right-of-way and the right to lay pipes and use water; a well and storage tank were located on Gallagher's property. *See* R.C. 5301.10 (appeared of record to have interest in lease). Nevertheless, the subject matter of the action involved whether the lease was held by production, not whether provisions affecting the surface were violated. *See also* R.C. 1509.27 (pooling statute requires notice to "mineral rights owners," and order must contain a permit application); R.C. 1509.06(A)(3) (permit application must identify "persons holding the royalty interest").

{¶59} In adopting Unglaciated's position, we considered whether the Supreme Court would have found a lack of jurisdiction (due to the failure to join the temporary employees) if the trial court decision had permitted the temporary employees to continue working. *Gannon*, 46 Ohio St.2d at 311. The fact pattern in *Gannon* involved a declaratory judgment favoring the union and forcing the termination of nonparties. Significantly, the Supreme Court emphasized "the prejudice which has ensued to these temporary employees in their absence as parties to the instant action." *Id.* (their continued employment was the subject matter of the suit which resulted in their termination).

{¶60} In the case at bar, we find no prejudice ensued to any nonparty landowner with an interest in the lease. The trial court maintained the status quo of Unglaciated producing under the lease. The interest of the nonparty landowner was not affected by the declaratory judgment in a manner that would deprive the trial court of jurisdiction to rule on issues presented to it by these parties. Accordingly, this assignment of error is overruled.

ASSIGNMENTS OF ERROR THREE & FOUR: SUMMARY JUDGMENT

{¶61} Appellants' third and fourth assignments of error provide:

"THE TRIAL COURT INCORRECTLY SHIFTED THE BURDEN OF PROOF TO APPELLANT CONCERNING THE LACK OF SUFFICIENT PRODUCTION BY APPELLEE FROM 1896 TO PRESENT."

"THE TRIAL COURT INCORRECTLY DETERMINED THAT NO GENUINE ISSUE OF MATERIAL FACT EXISTED REGARDING THE CONTINUED FORCE AND EFFECT OF THE 1896 LEASE."

{¶62} A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part of the claim, counterclaim, cross-claim, or declaratory judgment action. Civ.R. 56(A). Likewise, a party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary

judgment in the party's favor as to all or any part of the claim, counterclaim, cross-claim, or declaratory judgment action. Civ.R. 56(B).

{¶63} As Unglaciated filed a counterclaim and a request for declaratory judgment, Unglaciated could seek summary judgment under Civ.R. 56(A). As Appellants filed a claim and asked for a declaratory judgment against Unglaciated, Unglaciated could also seek summary judgment under Civ.R. 56(B). In addressing the validity of the lease, Unglaciated's motion for summary judgment refers frequently to the allegations in the plaintiffs' complaint. In accordance with Civ.R. 56(C), pleadings can be considered.

{¶64} Summary judgment can be granted where there remains no genuine issue of material fact for trial and where, after construing the evidence most strongly in favor of the non-movant, reasonable minds can only conclude the moving party is entitled to judgment as a matter of law. *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, 850 N.E.2d 47,¶ 10, citing Civ.R. 56(C). The burden of showing there is no genuine issue of material fact initially falls upon the party who files for summary judgment. *Id.*, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 294, 662 N.E.2d 264 (1996).

{¶65} Thereafter, the non-movant may not rest upon mere allegations or denials in the party's pleadings but must respond, through affidavit or as otherwise provided in the rule, by setting forth specific facts showing there is a genuine issue of material fact for trial. *Id.*, citing Civ.R. 56(E). If the non-movant does not so respond, summary judgment, if appropriate, shall be entered against him. Civ.R. 56(E). Although courts are cautioned to construe the evidence in favor of the nonmoving party, summary judgment is not to be discouraged where a non-movant fails to respond with proper evidence. *See Leibreich v. A.J. Refrigeration, Inc.*, 67 Ohio St.3d 266, 269, 617 N.E.2d 1068 (1993).

{¶66} Appellants argue their reciprocal burden as the non-movant never arose because Unglaciated failed to meet its initial burden as the party moving for summary judgment. Appellants contend Unglaciated had the burden to show its production was "in paying quantities" and failed to meet this burden. They believe it was insufficient to merely show the revenue Unglaciated received from oil purchasers

after royalties were paid. Appellants claim Unglaciated was required to specifically assert a profit was made or establish the operational expenses.

{¶67} Appellants also contend Unglaciated was required to show production from the day after expiration of the primary term through the present day with no gaps in production. They do not believe the movant's burden was met merely by evidence of production after Unglaciated was assigned the lease. They assert a lifeless lease cannot be revived and posit no statute of limitations applies. They emphasize production was not reported to the ODNR as shown by ODNR production records (which Unglaciated mentioned in its own motion for summary judgment).

{¶68} Unglaciated says it presented evidence of production in paying quantities since it was assigned the lease. Unglaciated concludes the burden shifted to Appellants, who failed to respond to summary judgment, noting the non-movant cannot rest on the mere allegations or denials in the pleadings. Unglaciated urges it was only required to show production for the eight years prior to the date Appellants filed the complaint, citing the contract statute of limitations contained in R.C. 2305.06.

{¶69} Unglaciated obtained the lease by an assignment executed by Walter and Janet Dye, which was recorded on February 27, 1989. The plaintiff's amended complaint said ten wells were drilled under the lease. Appellants' discovery requests asked for evidence of production from the last ten years. A production report was provided showing the production from 2001-2013. Unglaciated disclosed there were two oil and gas wells located on property owned by Marvin Potts, one well on the Williams property, two wells on the Gallagher property, and oil storage tanks on the property of Marvin Potts and Gallagher.

{¶70} Records were submitted showing payments by oil purchasers over the years. For instance, the history from Ergon Oil for the years spanning 2001-2013 showed the number of barrels purchased and the amount paid. By way of further example, receipts from American Refining Group were submitted, showing payments for oil purchases in the mid- to late-1990's. Discovery responses explained the oil purchasers paid the royalty owner on behalf of Unglaciated and this 1/8 royalty payment was deducted prior to Unglaciated's receipt of the revenue contained in the

records. The purchasing revenue history from Ergon Oil confirmed this. An owner of Cherokee submitted an affidavit attesting, after Cherokee bought the royalty in 2009, it consistently and continuously received royalty payments from the oil purchaser. He also attested he had knowledge "Unglaciated's predecessor-in-title (Walter Dye) produced oil from the property that is subject to the Lease."

{¶71} Unglaciated's president, Chuck Dye, submitted an affidavit reporting: Unglaciated has continually operated and maintained at least one of the wells under the lease; at all times after being assigned the lease, Unglaciated and its predecessor in title (Walter Dye) continuously produced oil from the property subject to the lease and paid royalties to the party who claimed title to the royalty (Pure Oil Company, then Union Oil Company, then Cherokee Minerals, L.P.); and Unglaciated sold the oil produced to at least three different purchasers.

{¶72} Appellants do not contest the trial court's utilization of the exhibits attached to the summary judgment motion. Many were previously provided in response to discovery requests. Chuck Dye verified the discovery documents were true. Furthermore, since Appellants did not respond to the summary judgment motion, they did not object to the form of the summary judgment evidence presented to the trial court by Unglaciated.

{¶73} A court may consider evidence other than the evidence listed in Civ.R. 56 when there is no objection. *State ex rel. Gilmour Realty, Inc. v. Mayfield Heights*, 122 Ohio St.3d 260, 2009-Ohio-2871, 910 N.E.2d 455, ¶ 10, 17 (unsworn and unauthenticated exhibits attached to trial briefs are properly considered in ruling on a summary judgment motion where no objection is lodged to the nature of the evidence); *State ex rel. Spencer v. East Liverpool Planning Comm.*, 80 Ohio St.3d 297, 301, 685 N.E.2d 1251 (1997); *Rosenow v. Shutrump & Assoc.*, 163 Ohio App.3d 500, 2005-Ohio-5313, 839 N.E.2d 82, ¶ 5 (7th Dist.); *Discover Bank v. Damico*, 11th Dist. No. 2011-L-108, 2012-Ohio-3022, ¶ 14-15 (failure to comply with Civ.R. 56(E)'s requirement of personal knowledge for affidavits is waived by non-movant's failure to object to the affidavit in response to a request for summary judgment). For these reasons, this form of the summary judgment evidence is acceptable.

{¶74} As to the lack of ODNR production records for the property, Unglaciated's summary judgment motion urged the failure to report production to ODNR had no legal effect on the validity of the lease. This argument was presented in response to the suggestion in plaintiffs' complaint that the lack of ODNR production records presented a claim for lease termination in itself. Discovery responses explained: Unglaciated's ownership of the wells was not registered with ODNR; the registration requirements were in the process of being satisfied; and ODNR well inspectors had knowledge of the circumstances surrounding the wells drilled under the lease. The affidavit of Unglaciated's president attested the wells were drilled prior to the time ODNR began assigning API well numbers. The trial court's judgment simply observed the mere lack of reporting to ODNR is not a claim in itself. Appellants expressly do not dispute this finding but believe the court improperly shifted the burden by mentioning the records.

{¶75} However, Unglaciated read the complaint, explained why ODNR's records do not show production, and provided undisputed evidence it continuously produced oil under the lease. Specifically, Unglaciated established by affidavit continuous production from the leasehold since assignment of the lease; documentary evidence was also presented in support of the claim. In addition, the failure to file production records with ODNR does not mean oil was not produced. *Mobberly v. Wade*, 7th Dist. No. 13 MO 18, 2015-Ohio-5287, 44 N.E.3d 313, ¶ 16. *See also Burkhart Family Trust v. Antero Resources Corp.*, 7th Dist. No. 14 MO 0019, 2016-Ohio-4817, ¶ 23.

{¶76} Appellants urge, in order to meet the initial burden in moving for summary judgment, Unglaciated was required to provide evidence of production for the entire 112-year secondary term and had to detail how the production was "in paying quantities." In determining whether a lease extended into its secondary term, the Ohio Supreme Court has stated:

> Where an owner of land leases all the oil and gas and their constituents in and under that land for a period of five years and so much longer thereafter as oil, gas or their constituents are produced from said land

> in paying quantities and where such period of five years has expired, the lessee, who contends that the term of such lease extended beyond the end of such five-year period, must allege and prove * * * (b) that oil, gas or their constituents were produced in paying quantities from said land within and beyond said five-year period * * *.

Hanna v. Shorts, 163 Ohio St. 44, 125 N.E.2d 338 (1955), ¶ 1 of syllabus (in a declaratory action brought *by lessor* to have lease declared expired).

{¶77} In this case, there is evidence the lease extended into its secondary term. The primary term ended in 1901. In 1903, the lessor transferred a mineral interest and specifically referred to transferring part of his interest in this lease, which is evidence the original lessor agreed the lease had not expired in 1903. Regardless, the complaint does not claim the lease never entered its secondary term. *See* fn.9, infra. Once a lease enters the secondary term, Appellants suggest there is oil and gas law against them on the topic of burdens.[7] Appellants posit we need not concern ourselves with burdens in oil and gas law as the burden should rest with the party asserting the claim. *Citing Positron Energy Resources, Inc. v. Weckbacher*, 4th Dist. No. 07CA59, 2009-Ohio-1208, ¶ 19 (as a party who asserts the claim has the trial burden, a lessee who sought declaration of lease validity had the burden at trial to show production).

{¶78} Yet, Appellants too asked for a declaration on the validity of the lease; both sides filed opposing claims on the same topic. Appellants were the plaintiffs in a declaratory action, and this portion of the action was also before the trial court in ruling on summary judgment.

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[7] *See, e.g., T.W. Phillips Gas & Oil Co. v. Jedlicka*, 615 Pa. 199, 208, 42 A.3d 261, 267 (2012) (party seeking to terminate the oil and gas lease has the burden of proof); *Bargsley v. Pryor Petroleum Corp.*, 196 S.W.3d 823, 829 (Tex. App.2006) (improper to place burden to prove land was producing in paying quantities on prior lessee in action by new lessee); *Maralex Resources, Inc. v. Gilbreath*, 134 N.M. 308, 316, 76 P.3d 626, 634 (2003) ("the burden generally falls on the party seeking to terminate a mineral lease to prove that there was no production"). *See also Weisant v. Follett*, 17 Ohio App. 371, 381 (7th Dist.1922) (stating the lessor has the burden, by clear and convincing evidence, to demonstrate a lessee's production violates an implied covenant to reasonably develop and also discussing paying quantities).

{¶79} This is a summary judgment case involving the issue of whether the movant's initial burden was met. *See Mauger v. Positron Energy Resources, Inc.*, 5th Dist. No. 14AP0001, 2014-Ohio-4613, ¶ 41 ("Pursuant to the dictates of Civ.R. 56, each party has a corresponding burden of proof as to the production or non-production of oil and gas"). In reviewing summary judgment, trial burdens are relevant. For instance, a defendant non-movant would have the burden to set forth his affirmative defenses in a response to a motion for summary judgment. *See, e.g., PNC Mtge. v. Garland*, 7th Dist. No. 12MA222, 2014-Ohio-1173, ¶ 24. The case presented in a non-moving plaintiff's complaint is significant:

> "[A] party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. However, if the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party."

Vahila v. Hall, 77 Ohio St.3d 421, 429, 674 N.E.2d 1164 (1997), quoting *Dresher*, 75 Ohio St.3d at 293.

Unglaciated's Evidence of Production

{¶80} As aforementioned, Appellants urge it was irrelevant they failed to response to summary judgment because the movant had the initial burden to show the production was in paying quantities. Appellants believe Unglaciated's evidence of its production was insufficient.

{¶81} Initially, we note Appellants' amended complaint did not allege a lack of production *in paying quantities*. For instance, the amended complaint alleged Unglaciated failed to report production to ODNR and produced no oil or gas from any well on the leased premises. Appellants' corresponding prayer for relief asked for a declaration that the lease terminated due to lack of production (and breach of covenants and duties).[8] As the plaintiff alleged Unglaciated failed to produce from any well, Unglaciated framed its motion for summary judgment to counter this allegation. This is not to say the plaintiffs waived an argument by failing to specify it in the complaint. Nonetheless, in meeting an initial summary judgment burden, a movant need not anticipate the other party's unvoiced arguments and raise them for the non-movant.

{¶82} We recognize Unglaciated's counterclaim contained a factual introduction which said Unglaciated "continued to have production in paying quantities" since it was assigned the lease. Appellants' reply to the counterclaim denied this allegation. Appellants suggest Unglaciated was obliged to establish this allegation in moving for summary judgment due to its use of the allegation as both a defense to the complaint and as a counterclaim for a declaratory judgment in opposition to the one requested by Appellants. The allegations of a counterclaim for declaratory judgment could be moot if summary judgment is proper on a complaint for declaratory judgment. There are risks in failing to respond to a summary judgment motion. In any event, Unglaciated produced evidence of its continuous production in paying quantities.

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[8] The amended complaint claimed the lease terminated as to some or all of the premises due to a breach of covenants and/or duties implied by law on oil and gas leases. However, Unglaciated would not have been aware of what unnamed theory of breach should be countered in their summary judgment motion. In any event, no implied covenant theory is briefed on appeal.

{¶83} The affidavit of Unglaciated's president attested to Unglaciated's continual operation of a well under the lease with continuous production of oil (and the payment of royalties) since assignment of the lease. This assignment was recorded in 1989. The affiant explained oil was sold to three separate purchasers since Unglaciated acquired the lease. The affiant also attested to continuous production of oil (and royalty payments) by Unglaciated's predecessor, Walter Dye, the affiant's father who held an interest in the lease since at least 1962. (In fact, based upon the money he earned on production from the lease, Walter Dye received loans from a bank which held the lease to secure his loans.)

{¶84} There was evidence of the barrels produced from the leasehold, the price received per barrel, and the amounts paid by the oil purchasers to the 1/8 royalty interest and to the working interest. From early 2001 to early 2013, one purchaser bought 3,111.55 barrels of oil produced from the leasehold premises. The following is a review of the amounts this oil purchaser paid to the working interest (after paying the 1/8 royalty interest) on this 159-acre leasehold: $10,133.43 in 2001; $2,308.08 in 2002; $1,672.20 in 2003; $4,847.24 in 2004; $10,139.43 in 2005; $16,579.42 in 2006; $18,998.99 in 2007; $32,120.71 in 2008; $10,570.74 in 2009; $15,053.24 in 2010; $23,820.44 in 2011; over $28,000 in 2012; and over $5,000 for the first few months of 2013. There is also evidence of revenue received from another purchaser from 1995 through 1999.

{¶85} 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. Nos. 12 MO 6, 13 MO 2, 13 MO 3, 13 MO 11, 2014-Ohio-4255, 20 N.E.3d 732, ¶ 102-103 (7th Dist.). Appellants point out the affidavit of Unglaciated's president did not specifically use the phrase in the lease: "found in paying quantities." *Compare Cotton v. Upham Gas Co.*, 5th Dist. No. 86-CA-20 (Mar. 6, 1987) (appellant's testimony he was producing oil and gas in paying quantities was sufficient even in the absence of economic records on profits; paying quantities must be from the standpoint of the lessee's good faith judgment). As to the documentary evidence, Appellants insist Unglaciated was required to produce evidence of its profit or its operating expenses (in order to

calculate profit), relying on the Ohio Supreme Court's *Blausey* case. They believe it was not sufficient to merely provide evidence of the revenue paid by oil purchasers (after payment to the royalty interest).

{¶86} In *Blausey*, the trial court found the lessee's gross receipts over a six-year period ($2,220.28) were exceeded by his operating costs over the period ($3,741.04); the trial court included the value of the lessee's labor (valued at $2,887.50) in the operating costs. The Supreme Court described the well as "intermittently" and "only marginally productive." *Blausey v. Stein*, 61 Ohio St.2d 264, 266, 400 N.E.2d 408 (1980). The determination of whether the well produced in paying quantities hinged upon whether the value of the lessee's own labor must be treated as an operating expense. *Id.* at 266.

{¶87} The Ohio Supreme Court defined "paying quantities" as those "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." *Id.* at 265-266. The Court concluded the lessee's own labor should not have been included as an operating expense and held the well was producing in paying quantities. *Id.* at 266.

{¶88} "While not conclusive evidence, royalty payments can be evidence of production in paying quantities." *RHDK Oil & Gas, L.L.C. v. Dye*, 7th Dist. No. 14 HA 0019, 2016-Ohio-4654, ¶ 30 (where affiants also attested the well remained profitable). *See also Burkhart Family Trust v. Antero Resources Corp.*, 7th Dist. No. 14 MO 0019, 2016-Ohio-4817, ¶ 28. Here, there is not only evidence of the royalties paid, there is evidence of the revenues paid to Unglaciated by the oil purchaser after the royalty payments were distributed. This evidence of payment to the royalty interest and to the working interest supports a conclusion the property would not be considered an "intermittent" or a "marginally" productive leasehold during the time period covered by the evidence. *Compare Blausey*, 61 Ohio St.2d at 264, 266.

{¶89} We conclude Unglaciated provided sufficient summary judgment evidence of its production. If Appellants believed there was a genuine issue of

material fact as to whether this production was "in paying quantities," a response with summary judgment evidence was required. Discovery requests could have been made for operating expenses to obtain the financial details on profitability, however marginal. By failing to respond to summary judgment, Appellants did not meet their reciprocal summary judgment burden to provide evidence establishing a genuine issue of material fact as to whether the continuous production by Unglaciated was in paying quantities.

Statute of Limitations

{¶90} Even if there was production in paying quantities by Unglaciated, Appellants posit Unglaciated was required to show continuous production in paying quantities for each of the 112 years between the end of the primary term in 1901 and the filing of the complaint in 2013. Again, the affidavit of Chuck Dye, Unglaciated's president, asserted continuous production since assignment to Unglaciated. Said assignment was executed in 1988 and recorded in 1989. The affidavit also attested to continuous production by Unglaciated's predecessor and the affiant's father, Walter Dye. As Walter Dye received an interest in the lease in 1962, Appellants point out Walter Dye had a predecessor in interest (Hines) and no evidence was provided as to production under Hines.

{¶91} We note the *memorandum* in support of summary judgment asserted at least one of the wells produced continuously *since the expiration of the primary term* of the lease. As Appellants failed to respond to the motion for summary judgment, no objection was entered to the statement. Still, this was merely a statement of counsel. The aforementioned waiver-as-to-form-of-evidence analysis has not been applied to statements of counsel in a motion. In any event, Appellants urge there is no mention of continuous production *in paying quantities* for the entire time frame

{¶92} In setting forth the declaratory judgment claim against Unglaciated, Appellants' amended complaint alleged Unglaciated failed to report production to

ODNR and Unglaciated produced no oil or gas from any well it owns on the leased premises. There was no reference to a failure by Unglaciated's predecessors.[9] As aforementioned, a summary judgment movant need not anticipate the other party's unvoiced arguments and raise them for the non-movant. There was no indication Appellants contested production by Unglaciated's predecessors; this contention is specified for the first time on appeal. We also note Appellants' discovery requests only sought Unglaciated's production information for the past ten years.

{¶93} As Appellants' amended complaint alleged this particular defendant failed to produce from any well, Unglaciated met its initial summary judgment burden by showing it produced oil from the premises since assignment. The burden then shifted to the non-movant to produce evidence the lease expired prior to this production. Again, this is not to say the plaintiffs waived the issues by failing to specify them in the complaint; rather, we are outlining the movant's *initial* summary judgment burden in order to shift the summary judgment burden to the non-movant based on content of the complaint. Failing to respond to a summary judgment motion entails risks.

{¶94} In any event, Unglaciated argues it properly invoked a statute of limitations to limit the period during which it was obligated to show production. Appellants failed to respond to summary judgment and thus failed to present the argument now raised on appeal: no statute of limitations applies to claims asserting a lease expired for lack of production in paying quantities.

{¶95} Unglaciated contends it only had an obligation to set forth evidence of production from 2005-2013, the eight years preceding the April 2013 complaint, citing the statute of limitations for written contracts, R.C. 2305.06. This was its position in the summary judgment motion as well. The trial court ruled the argument as to the

[9] Appellants believe their amended complaint alluded to a claim of failure to produce by Unglaciated's predecessors by stating: "By its own express terms, the Lease had terminated due to the expiration of its primary and secondary terms." *Citing* Amended Complaint at ¶ 54. The reference to the primary term expiring is not enlightening as a lease in its secondary term has an expired primary term. After the primary term expires, the lease either expires or continues into the secondary term due to production; the secondary term cannot expire unless it began. Likewise, the counterclaim dealt with Unglaciated's own production.

statute of limitations for written contract was moot because Unglaciated submitted uncontradicted evidence of continuous production since 1991. Notably, this date was more than 21 years before the action was filed. The trial court apparently applied the 21-year statute of limitations for recovering title to or possession of real property. *See* R.C. 2305.04 ("An action to recover the title to or possession of real property shall be brought within twenty-one years after the cause of action accrued * * * ").

{¶96} Pursuant to R.C. 2305.06, "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." Even if Unglaciated is correct in citing the contract statute of limitations, we must explain why the period of limitations under R.C. 2305.06 would not be eight years. The statute of limitations for an action on a written agreement was changed from 15 years to 8 years on September 28, 2012. *See* former and current R.C. 2305.06. 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.

In accordance, if this statute of limitations governs the time period within which Appellants can claim a lack of production, then the relevant period is the 15-year period leading up to the 2013 complaint, which period begins in 1998.

{¶97} Although not cited by the parties, it is important to consider the provisions in R.C. 2305.041:

> 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,[10] 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.[11] *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.)

This oil and gas lease statute instructs the statute of limitations for contracts, R.C. 2305.06, governs an action alleging a breach with respect to any issue the lease involves (except calculation or payment of royalties).

{¶98} Appellants urge the statute of limitations in R.C. 2305.06 is inapplicable. Although they titled their declaratory judgment claim as one for "Breach of Lease," they posit their claim of lease expiration does not actually involve breach. They assert the failure to produce in paying quantities in the past is not a breach of the lease. They believe if a failure to produce in paying quantities causes automatic expiration of the lease, then there can be no statute of limitations barring a claim of past non-production.

{¶99} If the conditions of the secondary term are not met, then the lease terminates by the express terms of the contract and by operation of law and revests the leased estate in the lessor. *Chesapeake Exploration, L.L.C. v. Buell*, 144 Ohio St.3d 490, 2015-Ohio-4551, 45 N.E.3d 185, ¶ 77, citing *Tisdale v. Walla*, 11th Dist. No. 94-A-0008 (Dec. 23, 1994) and *Am. Energy Servs., Inc. v. Lekan*, 75 Ohio App.3d 205, 212, 598 N.E.2d 1315 (5th Dist.1992). The cited *Tisdale* case also stated: "the lessee's interest automatically terminates upon lessee's failure to satisfy

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[10] As set forth in a prior footnote, R.C. 5301.09 instructs that all oil and gas leases shall be recorded. It also provides: "[w]henever any such lease is forfeited for failure of the lessee, the lessee's successors or assigns to abide by specifically described covenants provided for in the lease, or because the term of the lease has expired, the lessee, the lessee's successors or assigns, shall have such lease released of record * * *."

[11] Pursuant to R.C. 1302.98, an action for breach of a contract for sale must be commenced within four years after the cause of action accrued, and the cause of action accrues when the breach occurs, regardless of a lack of knowledge of the breach. R.C. 1302.98(A)-(B).

any of the listed provisions which would serve to extend the term 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 own terms." *Tisdale*, 11th Dist. No. 94-A-0008.

{¶100} In determining the expiration of a lease was not a savings event under the Dormant Mineral Act due to the lack of recordation, the *Buell* Court referred to the "automatic expiration and reversion of rights under the terms of an oil and gas lease." *Buell*, 144 Ohio St.3d 490 at ¶ 72. The Court stated: "It is self-evident that the termination or expiration of a lease returns the lessor and the mineral estate to the status quo prior to the lease. Upon expiration, the lessee loses his status as lessee by virtue of the terms of the agreement and no longer has an exclusive, vested right to the mineral estate." *Id.* at ¶ 73. "Thus, the expired or terminated lease no longer affects the lessor's title in the mineral estate." *Id.* at ¶ 73.

{¶101} Nevertheless, these cases do not analyze the statute of limitations issue. The fact an act or omission is alleged to have occurred, which would cause a lease to expire automatically and by operation of law, does not eliminate the application of a specific statute of limitations.[12] Although the Supreme Court in *Buell* characterized the expiration of lease as automatic, this does not bar the use of a statute of limitations for determining whether the alleged expiration actually occurred due to a breach of the covenants made under the lease. Where a civil suit is filed after production occurred for many years and the suit alleges a possible lack of production at some unknown time in the past, the legal statutes providing limitations on civil actions come into play; whether equitable limitations can arise is a different question.

{¶102} The Fourth District ruled there is no statute of limitations in cases involving the expiration of a lease due to non-production. The court initially found waiver of the statute of limitations and laches defenses. *See Schultheiss v. Heinrich*

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[12] The alleged date the estate transferred by operation of law is the date the statute of limitations begins to run. *See, e.g., Stein v. White*, 109 Ohio St. 578, 143 N.E. 124 (1924) (adverse possession "statute does not begin to run against the remainderman until the life estate has terminated"); *Noble v. Tyler*, 61 Ohio St. 432, 441, 56 N.E. 191 (1900) (when the life tenant died, possession of the estate immediately transferred to the remainderman "by operation of law").

Ents. Inc., 4th Dist. No. 15CA20, 2016-Ohio-121, ¶ 21-22. The court alternatively found it "questionable" whether those affirmative defenses applied. The court concluded the "equitable defenses" of statute of limitations and laches "even if they had been properly raised—do not apply in this context." *Id.* at ¶ 26.

{¶103} The Fourth District pointed to the case law providing the lease automatically expires on its own terms if the conditions of the secondary term are not met after the expiration of the primary term of the oil and gas lease. *Id.* at ¶ 23 (no affirmative action on the part of a lessor is required to formally terminate the lease). The court cited an oil and gas law treatise for the following proposition: when the lease terminated by operation of law, any delay by the lessor in asserting termination cannot give life to the affirmative defenses of laches or the statute of limitations. *Id.* at ¶ 24, quoting 3-6 Williams & Meyers, Oil and Gas Law, Section 604.7 (2014). Yet, the cited portion of the treatise speaks of waiver via laches. It does not refer to the applicability of a state's statute of limitations. Nor do the out-of-state cases cited by the Fourth District. *See Schultheiss*, 4th Dist. No. 15CA20 at ¶ 25.

{¶104} The Fourth District also said the Fifth District rejected a statute of limitations claim after the conditions of the secondary term were breached. *Schultheiss*, 4th Dist. No. 15CA20 at ¶ 26, citing *Cox v. Kimble*, 5th Dist. No. 13 CA 32, 2015-Ohio-2470, ¶ 56-66. However, in *Cox*, there was no production from any tract but the first, and the lease provided that if the conditions of the secondary term were not met, then the lease terminated by operation of law as to the acreage not included in the "first well tract." *Cox*, 5th Dist. No. 13 CA 32 at ¶ 63. The Fifth District rejected the arguments concerning the 21-year statute of limitations due to a lack of adverse possession by the lessee for 21 years, not due to a belief there is no statute of limitations. *See id.* at ¶ 46-55 (failed to prove elements of adverse possession); ¶ 60-62 (21-year statute of limitations did not begin to run until cause of action accrued, which required overt act of possession by lessee).

{¶105} The Fourth District's *Schultheiss* holding originally could have been viewed as dicta as they first ruled the matter was waived by the lessee. However, on March 11, 2016, the court granted reconsideration in part, recognizing the lessee did

not waive the defenses of statute of limitations and laches. *See Schultheiss*, 4th Dist. No. 15CA20 at ¶ 6, 11 (reconsideration granted in part and denied in part). Although the lessee did not raise the defenses in the answer or seek to amend the answer, the court agreed the defenses were placed at issue by implied consent as the lessee raised them in the motion for summary judgment and the landowner did not argue the lessee waived them. *See id.* at ¶ 6, 11-12.[13] The Fourth District then refused to reconsider its holding that no statute of limitations applied because the lease automatically expired due to a lack of production from 1977 to 1981. *Id.* at ¶ 13-18. (One judge, who signed the prior decision, dissented to the denial of reconsideration on this issue).

{¶106} The April 25, 2016 memorandum in support of jurisdiction filed in the Ohio Supreme Court urged: every claim must be subject to a statute of limitations; the Fourth District's decision violates public policy; the holding affects leases all over the state and requires a lessee to keep records forever; a landowner should be time-barred for failure to eject a lessee; a claim of lease termination due to non-production is a unique claim, which should be subject to the statute of limitations for written contracts or the ten-year catch-all statute.

{¶107} The amicus memorandum in support of jurisdiction pointed to the position in Texas. The Texas Supreme Court applied the state's real property statute of limitations to bar a lessor from arguing past lapses in production caused a lease to expire. *See Natural Gas Pipeline Co. of Am. v. Pool*, 47 Tex. Sup. Ct. J. 153, 124 S.W.3d 188 (2003). The Texas Supreme Court held the statute of limitations entitled the lessee to maintain those rights granted under the lease; the lessee would not retain the mineral interest but merely retained the ability to continue performing under the terms of the lease, which could again be subject to expiration. *Id.*

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[13] In this case, Unglaciated did not raise statute of limitations as a defense in the answer. However, it was not clear the plaintiffs were asserting the lease expired due to non-production of Unglaciated's predecessors. Unglaciated's motion for summary judgment used the statute of limitations to frame its burden on how far back it had to show production in order to meet its initial summary judgment burden. Appellants failed to respond to the motion and do not raise waiver on appeal.

{¶108} The Ohio Supreme Court initially declined to exercise jurisdiction. *Schultheiss v. Heinrich Ents., Inc.*, 146 Ohio St.3d 1431, 2016-Ohio-4606, 52 N.E.3d 1205. A motion for reconsideration was filed. The movant asserted the failure to apply any statute of limitations would lead to absurd results; "ancient gaps in production" could put companies out of business. On August 31, 2016, the Ohio Supreme Court reconsidered its declination of jurisdiction but only agreed to address a proposition of law dealing with the defense of estoppel. *Schultheiss v. Heinrich* Ents., Inc., 146 Ohio St.3d 1494, 2016-Ohio-5585, 57 N.E.3d 1172 (three justices would have accepted jurisdiction over all propositions; and three justices would have accepted jurisdiction over no proposition and dissented to reconsidering the prior denial of jurisdiction). As the Court did not accept the propositions relating to the statute of limitations, *Schultheiss* will not be directly on point to the one at bar.

{¶109} We note, while insisting the lessee must show production in paying quantities throughout the entire secondary term, Appellants recognize temporary cessations in production are acceptable. *See, e.g., Dennison Bridge Inc. v. Resource Energy, Ltd.*, 7th Dist. No. 14HA21, 2015-Ohio-4736. This is notable because, under Appellants' theory, a lessor would have an unlimited amount of time after a cessation and resumption in production to sue and claim the cessation lasted too long to be temporary. Under this theory, where a 1904 lessor was satisfied a broken wellhead was fixed in a diligent manner by the lessee, a 2013 successor mineral owner could argue the 1904 cessation in production should be viewed as more than temporary causing the lease to automatically expire with no constraints of a statute of limitations

{¶110} Yet, R.C. 2305.03 specifically provides a civil action may be commenced only within the period prescribed in R.C. 2305.04 to 2305.22, unless a different limitation is prescribed by statute. The legislature even provided for a catch-all limitations period of ten years for those causes of action found to fall outside of any specific statute. R.C. 2305.14. However, a special statute of limitations governs oil and gas leases.

{¶111} Pursuant to R.C. 2305.041, "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 [the written contract statute of limitations]." In a case cited by Appellants, the court said the lease expires upon non-production and equated the lack of production with "breach[ing] the express terms of the lease * * *." *Moore v. Adams*, 5th Dist. No. 2007AP090066, 2008-Ohio-5953, ¶ 29. *See also Interstate Petroleum Co. v. Young*, 11th Dist. No. 2011-T-0090, 2013-Ohio-1943, 992 N.E.2d 468, ¶ 45-47 (framing the failure to continuously produce under a clause of an oil and gas lease as the breach of an express term).

{¶112} The entire purpose behind a statute of limitations is to eliminate the burden a stale claim puts upon a party and to recognize evidence is unlikely to exist on events occurring in the distant past. A statute of limitations: (1) ensures fairness to the defendant; (2) encourages prompt prosecution of claims; (3) suppresses stale and fraudulent claims; and (4) avoids the inconveniences caused by delay such as the absence of proof in older cases. *Flagstar Bank, F.S.B. v. Airline Union's Mtge. Co.*, 128 Ohio St.3d 529, 2011-Ohio-1961, 947 N.E.2d 672, ¶ 7.

{¶113} Where a lease is in production, a prior period of alleged non-production or insufficient production is a situation encompassed in the legislative mandate to apply the statute of limitations for a written contract in "[a]n action alleging a 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. Pursuant to R.C. 2305.06 and its uncodified law as applied to this case, the statute of limitations is 15 years. We refer to the prior section on the evidence of production in paying quantities. The affidavits and unobjected-to documentary evidence (on revenues received after royalties were paid) presented in moving for summary judgment were sufficient to meet the initial burden of showing continuous production in paying quantities in the 15 years prior to the filing of the complaint.

{¶114} Even utilizing the 21-year statute of limitations applied by the trial court, Unglaciated presented the affidavit of its president attesting to its continual

operation of a well under the lease with continuous production of oil since assignment in 1989. He also attested to continuous production during the time his predecessor-father owned the lease; this predecessor held an interest in the lease since at least 1962. An affidavit need not use "magic words" in order for a movant to meet its initial burden. Considering the affidavit in combination with the documentary evidence for the most recent periods, Unglaciated satisfied its initial burden of presenting "some evidence" which affirmatively demonstrated the claim in Appellants' complaint was unsupported. *See Vahila v. Hall*, 77 Ohio St.3d 421, 429, 675 N.E.2d 1164 (1997), quoting *Dresher v. Burt*, 75 Ohio St.3d 280, 284, 662 N.E.2d 264 (1996). The burden would have shifted to Appellants under the 21-year statute of limitations as well.

{¶115} Finally, there are risks in failing to respond to a summary judgment motion, especially under the particular circumstances in this case. We reiterate our prior observations: the complaint generally alleged a failure to produce from a well; the complaint failed to allege production was not in paying quantities; the complaint only alleged *Unglaciated* failed to produce, giving no indication Appellants were contesting the entire 112-year secondary term and production by predecessor-lessees; Unglaciated set forth evidence its production was in paying quantities; Unglaciated provided an affidavit attesting to continuous production by its predecessor; and Appellants sought to have the lease terminated for lack of production but failed to respond to the motion for summary judgment. We conclude, in moving for summary judgment, Unglaciated was not required to establish production or production in paying quantities for the entire 112-year secondary term of the lease.

{¶116} For all of the foregoing reasons, Appellant's assignments of error are overruled, and the trial court's judgment is affirmed.

Donofrio, P.J., concurs.

DeGenaro, J., concurs.