



Jul 16, 2021

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Authors:

[Christopher W. Rogers](#)

Browne v. Artex Oil Part II: No Production Reports? No Problem.

[1] In what should be the final chapter of a lease-busting lawsuit [2] that started in 2014, the Fifth District Court of Appeals affirmed the trial court's grant of summary judgment in favor of the lessee/operator, Artex Oil, agreeing that its affidavits and deposition testimony were sufficient to prove the Mercer No. 1 well was producing between 1993 and 1999 ("*Browne I*").[3] [Browne v. Artex Oil Part II](#) is not game-changing, but serves as further proof that evidence of production in paying quantities does not lie entirely in production reporting to Ohio's Department of Natural Resources (ODNR), but also in the testimony of people with first-hand knowledge.

Browne involved an 86-acre tract of land located in Guernsey County, that was subject to a 1975 oil and gas lease to Mammoth Production Company (the "Lease").[4] The Lease contained a typical habendum clause setting forth a secondary term for as "long thereafter as oil or gas, or either of them, is produced by lessee from said land." [5] One well, the Mercer No. 1 well, was drilled on the property in 1977.[6] Artex Oil operated the well from 1999 to 2014, and its records showed the well produced 1,771.49 barrels of oil and generated gross revenue of more than \$100,000.[7]

Prior to 1999, the Lease and Mercer well were owned and operated by Mammoth Production, who originally drilled the well.[8] Johnson Oil and Gas purchased it in 1997 and operated it until 1999.[9] However, Carl Brazell, Jr. personally pumped the Mercer well from 1978 to 1999.[10] The Brownes acquired the property in 2012 and sued two years later. They asserted a declaratory judgment action, quiet title action, conversion, and unjust enrichment claims all on the grounds that the Lease expired for failure to produce in paying quantities prior to 1999.[11]

As you may recall, the Fifth District's 2018 decision in *Browne* ("*Browne I*") applied a 15-year statute of limitations and held that from 1999 to 2014, the Mercer well produced in paying quantities. [12] The Brownes appealed this decision to the Ohio Supreme Court,

which accepted and decided only the question of the appropriate statute of limitations—15 or 21-years.^[13] Our article on that decision can be found [here](#). The case was remanded back to the Guernsey County Court of Common Pleas which, applying a 21-year limitation, focused on whether the Mercer No. 1 had produced in paying quantities during the six years between 1993 and 1999.^[14]

The trial court once again found in favor of Artex Oil, granting its motion for summary judgment that the Mercer No. 1 well was producing in paying quantities for this six-year period, denying the Plaintiffs' motion for summary judgment.^[15] Plaintiffs appealed, and the Fifth District affirmed.

The Fifth District engaged in a thorough analysis of Artex's evidence of the Mercer No. 1 well's production during this time period. Namely:

- Deposition testimony that there never was a time of more than two years when the well was not pumped or produced, and when Mammoth owned the well about a tank of oil was sold each year;
- An affidavit that, based on review of the ODNR records, the well was producing from at least 1991 until 1997;
- An opinion that the Mercer well produced oil between 1981 and 1999;
- Witness testimony that there was no indication from the condition and appearance of the well equipment that the well had not been producing;
- Deposition testimony that Mammoth never received a complaint that the well was not producing;

The Fifth District agreed with the trial court that this was significant evidence that the Mercer well was producing in paying quantities from 1993 to 1999.^[16] The burden then shifted to the Brownes to prove otherwise. To this end, they proffered:

- An ODNR Completions Report showing a gap in reported production for the Mercer well from 1981 to 1999;
- A "Chief's Order" from ODNR ordering Mammoth to suspend production for failure to provide their insurance policy;

- A production graph of no oil production from 1981 to 1996;
- Probate documents of Samuel Garfield, owner of Mammoth, who died in 1981 where the estate tax return listed the value of Mammoth as “nil;”
- The probate documents of Elnora Garfield, Samuel’s wife, who died in 1985;
- Guernsey County Tax Auditor’s records for 1997–1999 wherein Mammoth listed only one well as producing at the end of the year, but not providing any production information;
- The affidavit of Lori Johnson, who was married to Johnson Oil and Gas owner, stating, in part, that there was no commercial production in 1997 or 1998;
- The lack of “run tickets” or evidence of the “legal tender of oil.”
[\[17\]](#)

Just as the trial court was not persuaded by this evidence, neither was the Fifth District, which, in summary, had this to say:

- The failure to report production is not the same as reporting “O” production;
- Failure to abide by the Chief’s Order does not strip a lessee of its lease rights;
- The production graph is simply another form of the ODNR well completion report;
- Neither set of Garfield estate documents is relevant because they don’t align with the relevant time period (1993–1999);
- The tax auditor’s records say nothing about actual production and are therefore irrelevant;
- Lori Johnson filed another affidavit clarifying that her prior affidavit was simply stating she does not have any knowledge of whether the Mercer well was producing or not; and
- Run tickets are not required—production records and affidavits can also prove continuous production.[\[18\]](#)

What does *Browne II* tell us? First, it says the question of production in paying quantities is a boots-on-the-ground inquiry. It is concerned with first-hand evidence related to the well(s) in question—not what the ODNR well completions report shows (or

doesn't show), and not with technical infractions of ODNR producer requirements. The burden of proof rests with the landowner to prove lack of production in paying quantities—not with the producer to show continuous production. A simple lack of production reporting should not be the sole basis of a lawsuit.^[19]

Second, it tells us that, for producers, keep your records and report your production. Had Mammoth and Johnson Oil and Gas simply reported production from the Mercer well from 1977 through 1999, the Brownes' inquiry would have been over quickly and a seven-year battle over whether a lack of production reporting meant "0" production could have been avoided.

For more information, please contact [Christopher Rogers](#) or any attorney in Frost Brown Todd's [Oil & Gas](#) industry team.

^[1] No problem, as the title of this article intimates, so long as you have first-hand affidavit and testimonial evidence that otherwise proves the well was producing in paying quantities.

^[2] Plaintiffs/Appellants have the right to appeal, of course, but this author doubts any issues arising out of this decision meet the requirements for a jurisdictional appeal to the Ohio Supreme Court. See Ohio S. Ct. Prac. R. 5.02(A)(3) (requiring that the jurisdictional appeal involve a matter of "public or great general interest.")

^[3] *BARRY BROWNE, ET AL v. ARTEX OIL COMPANY, ET AL.*, 5th Dist. Guernsey No. 21CA000002, 2021-Ohio-2239 (5th Dist.) ("*Browne II*").

^[4] *Browne II* at ¶¶ 2, 3.

^[5] *Id.*

^[6] *Id.* at ¶ 3.

^[7] *Id.* at ¶ 4.

^[8] *Browne II*, ¶ 3.

^[9] *Id.*, ¶ 36.

^[10] *Id.* at ¶ 33.

^[11] *Id.* at ¶ 4.

[12] *Browne v. Artex Oil Co.*, 5th Dist. No. 17 CA 20, 2018-Ohio-3746, 116 N.E.3d 687, *cause dismissed*, 153 Ohio St.3d 1483, 2018-Ohio-3867, 108 N.E.3d 81 (2018), *and appeal allowed*, 153 Ohio St.3d 1485, 2018-Ohio-3867, 108 N.E.3d 82 (2018), *reconsideration denied*, 154 Ohio St.3d 1425, 2018-Ohio-4543, 111 N.E.3d 22 (2018), *and rev'd and remanded*, 2019-Ohio-4809 (Ohio)

[13] *See Browne v. Artex Oil Co.*, 158 Ohio St.3d 398, 2019-Ohio-4809, 144 N.E.3d 378 (Holding 21-year limitations period applied to claim of lease termination due to lack of production in paying quantities).

[14] *Browne II*, ¶¶ 14, 16.

[15] *Id.*, ¶ 15.

[16] *Id.*, ¶ 47.

[17] *Id.*, ¶¶ 48-60.

[18] *Id.*

[19] The author is not suggesting this was the only basis for the Plaintiffs' lawsuit.

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