IN THE COURT OF APPEALS
4TH APPELLATE DISTRICT
205 PUTNAM STREET
MARIETTA, OH 45750

GARY D MARSHALL et al vs. BEEKAY COMPANY et al

TO : ATTY ROBERT L BAYS
501 AVERY STREET, P.O. BOX 48
PARKERSBURG WV 26102

CASE NO. 14CA000016

PURSUANT TO APPELLATE RULE 22-B, YOU ARE HEREBY NOTIFIED THAT A DECISION AND JUDGMENT ENTRY, COPY HERETO ATTACHED, HAS BEEN FILED IN SAID COURT OF APPEALS IN THE ABOVE STYLED ACTION ON **01/14/15**

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PAPERS ATTACHED:

DECISION AND JUDGMENT ENTRY DATED: **01/14/15**

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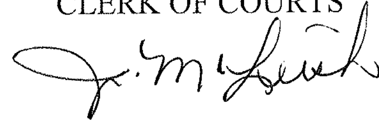

DEPUTY

DATED 01/16/15

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ATTY KRISTI KRESS WILHELMY
ATTY KRISTOPHER O JUSTICE
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WASHINGTON CO. OHIO

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

GARY D. MARSHALL, et al.,	:	
	:	
Plaintiffs-Appellants,	:	Case No. 14CA16
	:	
vs.	:	
	:	DECISION AND JUDGMENT
BEEKAY COMPANY, et al.,	:	ENTRY
	:	
Defendants-Appellees.	:	

APPEARANCES:

David C. Barrett, Jr., Troy A. Callicoat, Kristi Kress Wilhelmy, and Amanda J. Stacy, Barrett, Easterday, Cunningham & Eselgroth LLP, Dublin, Ohio, for Appellants.[1]

Robert L. Bays and J. Breton McNab, Bowles Rice LLP, Parkersburg, West Virginia, for Appellees, Beekay Company, et al.[2]

Matthew C. Carlisle and Kristopher O. Justice, Theisen Brock LPA, Marietta, Ohio, for Appellees, Sandbar Oil and Gas Co., et al.[3]

McFarland, J.

{¶1} This is an appeal by Gary D. and Cora A. Marshall, Appellants herein, of the trial court's summary judgment decision in favor of Appellees,

[1] Appellants consist of Gary D. and Cora A. Marshall.
[2] Appellees Beekay Company, et al. consists of Barron Ulmer Kidd, Barron Kidd, unknown heirs, devisees, executors, administrators, next of kin and assigns of Barron Kidd, Jane Dupont Kidd, Beekay Company, C.R. Smith, unknown heirs, devisees, executors, administrators, next of kin and assigns of C.R. Smith, and H.G. Wellington, Sr., hereinafter referred to as "Appellees."
[3] Appellees Sandbar Oil and Gas Co., et al. consists of Kirk Lafferre, dba Sandbar Oil and Gas Co. and Sandbar Oil and Gas Co., hereinafter referred to as "Sandbar." Sandbar has not filed a brief or otherwise participated on appeal.

Beekay Company, et al. and Sandbar, which determined that the original oil and gas leases at issue are still valid and in full force and effect as to all depths and all formations. On appeal, Appellants contend that the trial court erred 1) because it failed to recognize Appellees have not reasonably developed their oil and gas interests since the 1960 agreement; 2) because it failed to recognize Appellees have not marketed their oil and gas interests since the 1960 agreement; 3) because it failed to recognize Appellees have breached the implied covenant of reasonable development and marketing of oil and gas by failing to develop or market any of the oil and gas contained in the deep rights; 4) by failing to recognize that through Appellees' failure to explore, develop and produce oil and gas from the deep rights following the 1960 assignment, Appellees have abandoned all interests they may have had in the deep rights; 5) by failing to recognize Appellants have no adequate remedy at law for breach of the implied covenant of reasonable development and marketing of oil and gas due to Appellees' abandonment of their interests; and 6) by failing to recognize the oil and gas leases are no longer valid or enforceable as to the deep rights.

{¶2} In light of our determination that the continuous production in paying quantities of fifteen shallow wells operated by Sandbar holds the deep rights as to Appellees, we reject the premise upon which all of

Appellants' arguments are based, which is that the 1960 assignment of the shallow rights created a new obligation on the part of the Appellees to reasonably develop the deep rights, which they reserved. As such, and because the relevant facts are not in dispute, we further conclude that there exists no genuine issue of material fact precluding judgment, as a matter of law, in favor of Appellees. Thus, Appellants' assignments of error, all of which essentially deal with the trial court's grant of summary judgment, are overruled. Accordingly, the decision of the trial court is affirmed.

FACTS

{¶3} Appellants are the current owners of ninety-nine acres of land in Liberty Township, Washington County, Ohio. The acreage is broken down into two different forty acre tracts and a nineteen acre tract. The tracts are collectively subject to two oil and gas leases. The first lease, known as the Miller lease, was executed in 1901 by Appellants' predecessors in title, Charles, Ida, Edward, and Rosa Miller, and granted oil and gas rights to all depths under the said acreage to The Consolidated Oil and Mining Company. The second lease, known as the Burton lease, was executed in 1904 by Appellants' predecessors in title, Hammond and Caroline Burton, and granted oil and gas rights to all depths under the said acreage to The Consolidated Oil and Mining Company.

{¶4} The ownership of the land interests changed over the years and in 1960, Appellees were the owners of all of the oil and gas rights in and under Appellants' property. In 1960, Appellees assigned the shallow rights only to Long Run Oil Company, but reserved the deep rights unto themselves and still own them today. Eventually, Sandbar came into ownership of the shallow rights and at the time this lawsuit was filed was operating fifteen shallow wells on Appellants' acreage, which had continuously been producing in paying quantities.

{¶5} On September 12, 2013, Appellants filed a complaint naming Appellees and Sandbar as defendants, claiming Appellees had violated the implied covenants of the leases by failing to reasonably explore and develop from the excepted and reserved oil and gas formations. Appellants also claimed Appellees had abandoned their reserved interests. As such, Appellants sought a declaratory judgment finding the oil and gas leases terminated as to the deep rights, specifically all oil and gas formations found below the Germantown Sand, found at approximately 1200 feet below the surface.

{¶6} All parties, including Sandbar, moved the court for summary judgment. The trial court ultimately denied Appellants' motion for summary judgment, but granted summary judgment in favor of Sandbar, with respect

to its continuous production of the shallow rights, which was not disputed. The trial court also granted summary judgment in favor of Appellees, holding that Sandbar's continuous production in paying quantities satisfied the language of the original leases and that both leases remained valid and in full force and effect as to all depths and all formations. It is from this decision that Appellants now bring their timely appeal, setting forth the following assignments of error for our review.

ASSIGNMENTS OF ERROR[4]

"I. THE TRIAL COURT ERRED BECAUSE IT FAILED TO RECOGNIZE APPELLEES HAVE NOT REASONABLY DEVELOPED THEIR OIL AND GAS INTEREST SINCE THE 1960 AGREEMENT.

II. THE TRIAL COURT ERRED BECAUSE IT FAILED TO RECOGNIZE APPELLEES HAVE NOT MARKETED THEIR OIL AND GAS INTERESTS SINCE THE 1960 AGREEMENT.

III. THE TRIAL COURT ERRED BECAUSE IT FAILED TO RECOGNIZE APPELLEES BREACHED THE IMPLIED COVENANT OF REASONABLE DEVELOPMENT AND MARKETING OF OIL AND GAS BY FAILING TO DEVELOP OR MARKET ANY OF THE OIL AND GAS CONTAINED IN THE DEEP RIGHTS.

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[4] Appellants' brief was required, pursuant to App.R. 16(A)(3) and (4) to include "[a] statement of the assignments of error presented for review, with reference to the place in the record where each error is reflected[,]" as well as "[a] statement of the issues presented for review, with references to the assignments of error to which each issue relates." Appellants' brief does not do so. Instead, Appellants' brief contains a law and argument section labled A-F, a statement of assignments of error numbered I-IV, and a statement of issues labeled A-E. We utilized the arguments labeled A-F contained in the body of Appellants' brief as the assignments of error, and renumbered them as assignments of error I-VI.

IV. THE TRIAL COURT ERRED BY FAILING TO RECOGNIZE THAT THROUGH APPELLEES' FAILURE TO EXPLORE, DEVELOP AND PRODUCE OIL AND GAS FROM THE DEEP RIGHTS FOLLOWING THE 1960 ASSIGNMENT, APPELLEES HAVE ABANDONED ALL INTERESTS THEY MAY HAVE HAD IN THE DEEP RIGHTS.

V. THE TRIAL COURT ERRED BY FAILING TO RECOGNIZE APPELLANTS HAVE NO ADEQUATE REMEDY AT LAW FOR THE BREACH OF THE IMPLIED COVENANT OF REASONABLE DEVELOPMENT AND MARKETING OF OIL AND GAS DUE TO APPELLEES' ABANDONMENT OF THEIR INTERESTS.

VI. THE TRIAL COURT ERRED BY FAILING TO RECOGNIZE THE OIL AND GAS LEASES ARE NO LONGER VALID OR ENFORCEABLE AS TO THE DEEP RIGHTS."

SUMMARY JUDGMENT STANDARD

{¶7} All of the assignments of error raised by Appellant deal with the trial court's grant and denial of competing motions for summary judgment. Appellate courts review trial court summary judgment decisions de novo. *Grafton v. Ohio Edison Co.*, et al., 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Accordingly, appellate courts must independently review the record to determine if summary judgment is appropriate. In other words, appellate courts need not defer to trial court summary judgment decisions. See *Brown v. Scioto Cty. Bd. of Commrs.*, 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993); *Morehead v. Conley*, 75 Ohio App.3d 409, 411-412, 599 N.E.2d 786 (4th Dist.1991). Thus, to determine whether a trial court

properly awarded summary judgment, an appellate court must review the Civ.R. 56 summary judgment standard as well as the applicable law.

{¶8} Civ.R. 56(C) provides: "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor."

{¶9} Accordingly, trial courts may not grant summary judgment unless the evidence demonstrates that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and after viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the

party against whom the motion for summary judgment is made. See, e.g., *Vahila v. Hall*, 77 Ohio St.3d 421, 429-430, 674 N.E.2d 1164 (1997).

OIL AND GAS CONTRACT LAW

{¶10} With respect to oil and gas leases, the Supreme Court of Ohio stated in *Harris v. Ohio Oil Co.*, 57 Ohio St. 118, 129, 48 N.E. 502 (1897) as follows: "The rights and remedies of the parties to an oil or gas lease must be determined by the terms of the written instrument, and the law applicable to one form of lease may not be, and generally is not, applicable to another and different form. Such leases are contracts, and the terms of the contract with the law applicable to such terms must govern the rights and remedies of the parties." *Moore v. Adams*, 5th Dist. Tuscarawas No. 2007AP090066, 2008-Ohio-5953, ¶ 21 (internal citations omitted); *Maverick Oil & Gas, Inc. v. Barberton City School Dist. Bd. of Edn,* 171 Ohio App.3d 605, 872 N.E.2d 322, ¶ 12 (9th Dist.2007) (citing *Harris v. Ohio Oil Co.*, supra, for the proposition that "[a]n oil and gas lease is governed by contract law."); See also, 68 Ohio Jur.3d Mines and Minerals §23("[i]n determining the rights and duties of the parties to a mineral lease, the basic rules governing the construction of contracts apply as do the substantive rules.").

{¶11} The construction of written contracts and instruments of conveyance is a matter of law. *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio

St.2d 241, 374 N.E.2d 146, paragraph one of syllabus (1978), superceded by statute on other grounds. Common words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument. Id. at paragraph two of the syllabus. Words and phrases used must be given their natural and commonly accepted meaning, where they possess such meaning, to the end that a reasonable interpretation of the contract consistent with the apparent object and plain intent of the parties may be determined. *Gomolka v. State Auto. Mutl. Ins. Co.*, 70 Ohio St.2d 166, 167-168, 436 N.E.2d 1347 (1982).

{¶12} Like most oil and gas leases, the leases at issue both contained granting clauses and habendum clauses. The granting clause in both the Miller lease and the Burton lease granted "all the oil and gas in and under" the acreage at issue. The habendum clauses in both leases contained primary and secondary terms. The habendum clause in the Miller lease was "for the term of two years from the date hereof and as much longer as oil or gas is found in paying quantities[.]" The habendum clause in the Burton lease was "for the term of one years [sic] from the date hereof and as much longer as oil or gas is found in paying quantities[.]" "[T]he habendum clause is 'two-tiered.' The first tier, or primary term, is of definite duration * * * . The

second tier is of indefinite duration and operates to extend the Lessee's rights under the lease so long as the conditions of the secondary term are met." *Hupp v. Beck Energy*, -- N.E.3d --, 2014-Ohio-4255, ¶ 87 (7th Dist.); citing *Am. Energy Serv. v. Lekan*, 75 Ohio App.3d 205, 212, 598 N.E.2d 1315 (5th Dist. 1992).

{¶13} "Unless prohibited by some statutory provision or by the terms of the mining lease itself, the lessee may sublease [footnote omitted] or assign the leasehold or a part of it." 68 Ohio Jur.3d Mines and Minerals §59. The leases at issue herein have been assigned several times. None of the parties have objected to any of the assignments and as such, the validity of any of the assignments in the chain of title is not at issue. Instead, Appellants contend that when Appellees assigned away the shallow rights in 1960 and reserved all deep rights from below the base of the Germantown Sand formation and below, that the deep rights reservation divided the mineral interest and created an obligation on the part of Appellees, under the language of the original leases, to reasonably develop the deep rights. Thus, Appellants argue that Appellees cannot rely upon the shallow production by Sandbar to continue to encumber the deep rights. Because all of Appellants' arguments hinge on the premise that production of the shallow rights by Sandbar does not hold the deep rights as to Appellees, our determination of

that issue will essentially determine the outcome of Appellants' appeal. Stated another way, in our view, we must determine whether continuous production in paying quantities by Sandbar from the shallow wells holds the deep rights on behalf of Appellees, or whether the 1960 assignment severed the leases and created a new leasehold with a separate implied covenant to reasonably develop the deep rights.

ASSIGNMENT OF ERROR VI

{¶14} Because our resolution of Appellants' sixth assignment of error will essentially dispose of Appellants' appeal, we address it first, out of order. In their sixth assignment of error, Appellants contend that the trial court erred by failing to recognize the oil and gas leases are no longer valid or enforceable as to the deep rights. In setting forth this argument, Appellants contend that the 1960 assignment "essentially broke the oil and gas estate into two different distinct pieces – shallow and deep." Appellants then argue that it logically follows that "[b]oth pieces were then bound, in their own right, to the terms of the leasehold[,]" meaning that "the lessee of the Shallow Rights needed to produce the shallow formations in paying quantities[,]" and "[t]he lessee of the Deep Rights had the concurrent obligation to produce the deep formations in paying quantities." For the reasons that follow, we disagree with Appellants' contentions.

{¶15} As set forth above, Sandbar is the current title holder to the shallow rights which were the subject of an earlier assignment in 1960, whereby Appellees assigned the shallow rights under the original Miller and Burton leases to Long Run Oil Company and reserved the deep rights under both leases for themselves. Further, it is not disputed that there have been fifteen shallow wells on the acreage at issue, which are currently operated by Sandbar and which have been and are still producing in paying quantities. Appellants have not sought forfeiture as to Sandbar's shallow rights and acknowledge the shallow production. Further, Appellants do not challenge the trial court's grant of summary judgment in favor of Sandbar with regard to the enforceability and validity of the leases as to Sandbar with respect to the shallow production.

{¶16} In *Popa, et al. v. CNX Gas Company, LLC, et al.*, 2014 WL 3749415, (N.D. Ohio Jul. 30, 2014) (No. 4:14CV143) the court noted that "Ohio courts have not dealt extensively with the issue of determining whether or not assignments sever leases[.]" The *Popa* court was faced with the question of whether an assignment of the shallow rights and retention of the deep rights severed the lease and created different leases. Id. In *Popa*, the habendum clause at issue provided that "the lease extends so long as the lessee finds oil or gas 'on the premises[,]' " and did not provide a depth

restriction. *Popa* at *5. While the rights to all depths were granted in the original lease to the original lessee, the lessee then subsequently assigned the shallow rights. At the time the suit was filed, the shallow rights were held by two wells owned by D&L Energy and Everflow Eastern Partners L.P. Id. at *2. The D&L Energy shallow well was not producing but the Everflow shallow well was producing. 50% of the deep rights were owned by CNX Gas Company and the other 50% were assigned by CNX to Hess. Id. Thus, different entities owned the shallow rights and the deep rights. Further, it was undisputed in *Popa* that the Everflow shallow well was the only producing well and that no party was operating a well that was producing oil or gas from the deep rights owned by CNX or Hess. Id.

{¶17} Similar to Appellants herein who raise a claim for abandonment, Popa argued that the lease had expired with respect to CNXs' and Hess' interests (deep rights only) because they had not "produced or engaged in any activity listed in the habendum clause." Id. at *5. Again, much like Appellants herein, Popa's argument was based upon the premise that the "deep rights were not part of the development unit held by the shallow Everflow well." Id. On facts very similar to the facts sub judice, the court disagreed with Popa and determined that the CNX and Hess interests had "not expired because the assignment did not sever the Lease."

Id. at *6. The court further held that "[t]he Everflow production on the unitized property holds the entire unitized property under the lease." Id. Although there is no unitization issue sub judice, the reasoning is still applicable. Ultimately, the *Popa* court held that 1) production within the development unit holds the entire lease; 2) because there was production from the shallow Everflow well there was no lack of production; and 3) the parties were bound by the terms of the original lease. Id. at *9.

{¶18} We find the reasoning in *Popa* to be persuasive to the case presently before us. Much like in *Popa*, the rights granted in the original Miller lease were for "all the oil and gas in and under" the acreage at issue "for the term of two years from the date hereof and as much longer as oil or gas is found in paying quantities[.]" Likewise, the rights granted in the original Burton lease were for "all the oil and gas in and under" the acreage at issue "for the term of one years [sic] from the date hereof and as much longer as oil or gas is found in paying quantities[.]" Thus, rights were granted to all depths as long as oil or gas was found in paying quantities.

{¶19} Further, much like in *Popa*, the shallow and deep rights in the case presently before us eventually came to be owned by two different parties. Although Appellees assigned the shallow rights to Sandbar's predecessor in interest in 1960, they reserved the deep rights unto

themselves and still own them today. As in *Popa*, there has been and still is current production in paying quantities from the shallow wells only and there has been no exploration or production of the deep rights. It would thus follow, based upon the reasoning set forth in *Popa,* that Sandbar's production in paying quantities from the shallow wells holds the entire lease, even as to Appellees' deep rights, and that such production by Sandbar constitutes finding oil and gas in paying quantities for purposes of the original lease, to which all parties are still bound.

{¶20} We believe this result is also in line with the reasoning set forth in *Gardner v. The Oxford Oil Co.*, 7 N.E.3d 510, 2013-Ohio-5885, which was relied upon by the *Popa* court. The *Gardner* court determined that an original oil and gas lease as to all depths expired where Oxford Oil assigned Gardner, the land owner, the shallow rights and retained the deep rights, because Gardner then failed to commence operation of the sole well on the property. Id. at ¶ 2. Although *Gardner* is somewhat factually different in that the landowner, rather than an oil company, was assigned the shallow rights, it is still analogous in that the shallow rights were assigned while the deep rights were reserved. However, even under this scenario, the *Gardner* court reasoned that the assignment "did not constitute a new, separate

conveyance or contract. Rather, the deep rights retained by Oxford Oil remained subject to the terms of the original lease agreement." Id.

{¶21} We further find persuasive the case of *Clark, et al. v. Wolfcale, et al.*, 5th Dist. Ashland No. CA-648, 1977 WL 201058. In *Clark*, the appellants brought suit after more than fifty wells were drilled and had nearly exhausted all oil and gas from the surface of the land down to the Berea Sands layer. There was no subsequent development below the Berea Sands layer at the time of the lawsuit. The appellants claimed "that the oil and gas lease is of such a nature as to admit of the concept of abandonment by horizontal strata as distinguished from abandonment of a certain vertical portion of the real estate." Id. at *1. The court characterized the "thrust of the appeal" to be that the court "should establish as a legal principal that this lease had been abandoned horizontally[.]" Id. The *Clark* court ultimately rejected the appellants' claim, reasoning as follows:

> "What this appeal boils down to is an ingenius attempt to find a way to get out from under an old oil and gas lease which in light of the changed circumstances respecting the price of oil is now economically disadvantageous to the land owner.
> However ingenuously this argument has been developed and how resourcefully it has been researched and how strenuously it

> has been urged, it is totally without support in Ohio law and this court declines to blaze the trail." Id. at *3.

Although the *Clark* case is factually distinguishable from the case presently before us, we find the sentiment of the trial court to be applicable. Although it is easily understood why Appellants seek a forfeiture of Appellees' leasehold as to the deep rights, we find no authority to support such a forfeiture. Rather, based upon the foregoing general oil and gas principles and recent case law, we cannot conclude that the trial court erred in determining that no genuine issue of material fact exists with respect to the validity and enforceability of Appellees' leasehold interest in the deep rights of the subject property, and that reasonable minds could come to no other conclusion. As such, the decision of the trial court, which essentially determined the 1960 assignment of the shallow rights did not sever the original leasehold, and that Appellees' deep rights are held by the shallow production in paying quantities of Sandbar, is affirmed. Accordingly, Appellants' sixth assignment of error is overruled.

REMAINING ASSIGNMENTS OF ERROR I-V

{¶22} Appellants' remaining assignments of error are all based upon the premise that the 1960 assignment of the shallow rights severed the lease and created a separate implied covenant upon the part of Appellees to

reasonably develop the deep rights, as well as the further premise that Appellees may not rely on Sandbar's shallow production in paying quantities to hold Appellees' interest in the deep rights. Additionally, in Appellants' supplemental authority, which was filed at the direction of this Court, Appellants argue that *Popa* is inapplicable because it involved a claim of an expired lease, rather than a claim of abandonment, which is raised in the present case. However, in light of our rejection of the premise upon which Appellants' arguments are based, we hereby overrule Appellants' remaining assignments of error. Further, we find an argument regarding expiration versus abandonment to be a distinction without a difference as it relates to the present matter and adhere to our decision to rely on *Popa* as guidance.

{¶23} Considering that our determination that Sandbar's shallow production in paying quantities holds the deep rights as to Appellees, it cannot be said that Appellees abandoned their interests in the deep rights. Because we reject Appellants' argument that the 1960 assignment of the shallow rights created a separate obligation for Appellees to reasonably develop the rights, Appellees' rights were protected by Sandbar's continuous production. The obligation to reasonably develop was met by Sandbar's

shallow production and there was no duty to further develop as long as gas and oil were being found in paying quantities.

{¶24} Having found no merit in the assignments of error raised by Appellants and having determined that there exists no genuine issue of material fact and that reasonable minds can come to but one conclusion, that conclusion being adverse to Appellants, Appellees are entitled to judgment as a matter of law. Accordingly, the decision of the trial court granting summary judgment in favor of Appellees is affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that costs be assessed to Appellants.

The Court finds there were reasonable grounds for this appeal.

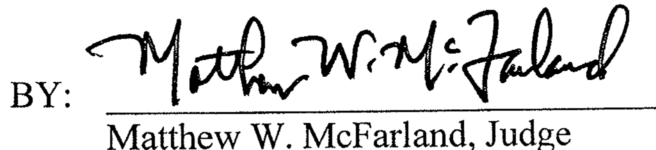
It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court to carry this judgment into execution.

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

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

Hoover, P.J.: Concurs in Judgment Only.
Harsha, J.: Concurs in Judgment and Opinion.

For the Court,

BY: 
Matthew W. McFarland, Judge

NOTICE TO COUNSEL

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