

ORIGINAL

# In the Supreme Court of Ohio

RONALD M. SNYDER, *et al.*,

Plaintiffs-Appellants,

v.

OHIO DEPARTMENT OF  
NATURAL RESOURCES, *et al.*,

Defendants-Appellees.

: Case No. **12-1723**

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On Appeal from the Jefferson County Court  
of Appeals, Seventh Appellate District  
(Ct. App. Case No. 11 JE 27)

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**MEMORANDUM IN SUPPORT OF JURISDICTION  
OF PLAINTIFFS-APPELLANTS RONALD M. SNYDER AND STEVEN W. NEELEY**

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FILED  
OCT 11 2012  
CLERK OF COURT  
SUPREME COURT OF OHIO

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## STATEMENT OF PUBLIC AND GREAT GENERAL INTEREST

The Court should exercise jurisdiction over this appeal because it presents an important issue that is central to a crucial public policy of this State: maximizing the use of Ohio's coal resources. R.C. 1551.31. The dispute between the parties centers on a 1944 deed by which owners of approximately 650 acres of land in Jefferson County, Ohio, conveyed the property to the State of Ohio but reserved to themselves "all mineral rights," expressly including "reasonable surface right privileges." The deed was drafted by the State of Ohio, and it is materially identical to other deeds for thousands of acres of property in this coal-rich region. This appeal is of particular importance because it gives the Court the opportunity to clarify the contract rights of many Ohio surface and mineral owners and thereby effectuate and promote Ohio's public policy of utilizing its abundant and valuable coal reserves.

Appellants own the coal estate (and all other mineral rights), together with all "reasonable surface right privileges," for the 650 acres of land that is directly at issue in this case. On approximately 10 percent of that land, Appellants proposed to surface mine and auger mine over 300 tons of coal, with an estimated value in excess of \$11 million, that cannot practically be produced by any other mining methods. The coal is located on rugged and undeveloped terrain that includes and is adjacent to other land that has been surface mined and reclaimed in the past. It is undisputed that the mining proposed by Appellants is limited and temporary, and that it will not irreparably damage or significantly impact wildlife or wildlife habitats.

Appellee Ohio Department of Natural Resource ("ODNR") now owns the surface of this property, subject to Appellant's "reasonable surface right privileges," and it has taken the position that Appellants do not have the right to mine any portion of the 650 acres by these methods, whether they seek to mine on 65 acres or on 65 square feet. ODNR sought, and has now received from the lower courts, an unprecedented ruling that "[i]n order for the Grantor to

reserve the right to strip mine he must expressly reserve that particular right....” (Trial Ct. Op. & Ord. at 2.) As a result, any production of Appellants’ substantial and valuable coal estate - and the coal estates of many other Ohioans with similar deeds - has been rendered impossible. This ruling is a material and improper departure from the prior decisions of this Court. It unlawfully deprives Appellants of a “reasonable surface right” under the deed merely because the deed does not specifically mention surface and auger mining methods, and thus destroys the value of the coal estates under the deed and untold other deeds merely because the parties did not anticipate the lower courts’ *ex post facto* requirement that they had to “expressly reserve that particular right....” (Id.)

This Court has twice declined to hold that a deed that conveys or reserves a coal estate must specifically mention “surface mining,” or use any other magical language, in order to convey or reserve the right to surface mine. See *Skivolocki v. East Ohio Gas Co.*, 38 Ohio St.2d 244 (1974); *Graham v. Drydock*, 76 Ohio St.3d 311, 1996-Ohio-393. Instead, the Court held that a deed must be considered as a whole to determine whether the owner of the coal estate has the right to surface mine, and this specifically includes such factors as whether the deed contains language peculiarly applicable to deep mining techniques or language that is incompatible with surface mining. *Skivolocki*, 38 Ohio St.2d at syllabus paragraph 3; *Graham*, 76 Ohio St.3d at 318. The Court also recognized the importance of extrinsic evidence in this analysis, including evidence of the general state of knowledge about surface mining at the time of the deed. In each case, this Court applied established rules of contract construction and concluded that “[a] deed which severs a mineral estate from a surface estate” and “which conveys the right to use the surface incident to mining coal, in language peculiarly applicable to deep mining techniques,

does not grant the right to remove coal by strip mining methods....” *Skivolocki*, 38 Ohio St.2d at syllabus ¶ 3; *Graham*, 76 Ohio St.3d at 318.

The court of appeals decision departs from this Court’s holdings and effectively declares as a matter of law that failure of a deed to “expressly reserve” the right to “surface mine” means that the parties did not intend for surface mining to be allowed. *Synder v. ODNR*, 7th Dist. No. 11 JE 27, 2012-Ohio-4039, ¶ 2 (time-stamped copy attached as Appendix A). In so holding, the court rendered the reservation of “reasonable surface right privileges” mere surplusage, and usurped the well-established role of the trier-of-fact as the determiner of what is “reasonable.”

Coal is one of Ohio’s best, most abundant energy resources. R.C. 1551.31(A). The Ohio Revised Code specifically created the Ohio Coal Development Office to promote research, development, production and use of Ohio coal. R.C. 1551.30-1551.32, 1555.01-1555.18. It is imperative for Ohio to have a “strong, viable coal industry in order to create and preserve jobs and improve the economy.” R.C. 1551.31(E). This Court and other Ohio courts also recognize the importance of developing Ohio’s coal and other natural resources. See, e.g., *E.C. Redman v. Ohio Dep’t of Indus. Relations*, 10th Dist. Nos. 93APE12-1670 and 93APE12-1671, 1994 Ohio App. LEXIS 3953, at \*21 (“the state also has a legitimate interest in the efficient and effective development of Ohio coal reserves.”); *Newbury Township Bd. of Trustees v. Lomak Petroleum*, 62 Ohio St.3d 387, 389 (1992) (“[i]t is the public policy of the state of Ohio to encourage oil and gas production....”). These policies are undermined by the lower court’s unsupported narrow reading of the 1944 deed.

## STATEMENT OF THE CASE AND FACTS

### **A. Appellants Own The Mineral Rights To 651.43 Acres, Along With The “Rights Of Ingress And Egress And Reasonable Surface Right Privileges.”**

The State of Ohio acquired a 651.43-acre tract of undeveloped real property situated in Brush Creek Township, Jefferson County, Ohio by a deed dated April 6, 1944 (hereinafter, “1944 Deed”). (Pls’ Amend. Compl. at ¶¶ 2, 6 & Ex. A.) The Brush Creek Wildlife Area is approximately 4,131 acres. (April 11, 2004 Dep. of Jeffrey Herrick (“Herrick Dep.”) Ex. 2; Aff. Of Dennis Hosack (“Hosack Aff.”) at ¶ 7 & “Description”.)

The 1944 Deed was drafted by the State of Ohio and severed the mineral estate from the surface estate with the following reservation: “[t]he Grantors reserve all the mineral rights, including rights of ingress and egress and reasonable surface right privileges.” (Pls’ Amend. Compl., Ex. A.) The 1944 Deed does not refer directly or indirectly to deep mining, and does not expressly or impliedly limit the development and production of the mineral rights to deep mining methods. (Id.; Defs’ MSJ, Ex. H.) The 1944 Deed also does not describe any intended use of the surface, much less any use that would be inconsistent with surface mining. (Id.)

Plaintiffs-Appellants Ronald Snyder and Steven W. Neeley (“Appellants”) are the sole owners of the mineral rights in the property. (Pls’ Amend. Compl. at ¶¶ 8 & Ex. B; Affidavit of Ralph E. Six (“Six Aff.”) at ¶ 8, Ex. 1 to Pls’ Response to MSJ.)

### **B. The Parties To The 1944 Deed Intended That The “Reasonable Surface Right Privileges” Reserved Would Include The Right To Surface Mine Coal.**

In 1944, coal production by surface mining was growing dramatically in Jefferson County – from under 7% of total coal produced in 1914 to approximately 38% in 1944, when the 1944 Deed was signed. Douglas L. Crowell, *History of the Coal-Mining Industry in Ohio* (hereinafter, “*History*”) at 184 & 185 (ODNR, Division of Geological Survey 1995).

While surface mining was becoming the dominant method of coal mining in Jefferson County, the State of Ohio drafted and entered into eight deeds to acquire land from individual Ohioans in Jefferson County, Ohio. (Defs' MSJ at 2 & Exs. A-H.) The State handled the preparation of these deeds, each of which reserved for the landowners "all mineral rights, including rights of ingress and egress and reasonable surface right privileges." (Id.; Herrick Dep. at 57-58.) One of those deeds is the 1944 Deed. (Id., Ex. H; Pls' Amend. Compl. Ex. A.)

The property subject to the 1944 Deed remains unimproved and "rugged." (Herrick Dep. Ex. 2; Hosack Aff. at ¶ 7 & "Description".) It is also large, spanning 651.43 acres of varying topography. (Id.; Deposition of Timothy R. Miller ("Miller Dep.") at Ex. 16.) Under the circumstances in 1944, including "the nature of the Property, the unregulated but prevalent practice of surface mining at the time, and the language of the Deed," it is reasonable to conclude that "the parties to the Deed intended that surface mining was among the 'reasonable surface right privileges' reserved to" Appellants. (Affidavit of Geoffrey B. Mosser ("Mosser Aff.") at ¶ 10, Ex. 3 to Pls' Resp to MSJ.) Indeed, before 1944, the grantors had previously surface mined coal from the property. (Six Aff., at ¶ 5.) When the 1944 Deed was presented to them for signature, the State assured the sellers that their "reasonable surface right privileges" would include the continuing right to surface mine coal from the Property. (Id.)

**C. Despite Appellants' Reasonable And Limited Proposed Mining Activity, The Ohio Department Of Natural Resources Refused Appellants' Rights To Surface Mine.**

Appellants proposed to surface mine and auger mine a reasonable portion of the property, representing approximately ten percent (10%) of the Property's acreage and representing less than three percent (3%) of the Brush Creek Wildlife Area. ODNR rejected Appellants' limited proposal and advised them that it would not allow any surface mining on the Property. (Pls' Amend. Compl. ¶ 11; Six Aff. ¶ 7.) Appellants then filed this action and sought a declaratory

judgment that Appellants are permitted to temporarily surface mine and auger mine a small portion of the property.

Appellants seek only to temporarily and reasonably surface mine and auger mine approximately ten percent (10%) of the property's acreage. It is estimated that mining about 65 acres of the total 651-acre property will produce approximately \$11 million worth of commercially valuable coal. (Affidavit of Gregory J. Honish ("Honish Aff.") at ¶¶ 2-5 & 11-13, Ex. 4 to Pls' Resp to MSJ.) However, that coal cannot reasonably be recovered by deep mining methods and is reasonably recoverable only by surface and auger mining. (Miller Dep. at 49-53, 55 & Ex. 16; Honish Aff. at ¶¶ 11-13.) Because Appellants proposed mining is limited to 65 acres of the 651 acres of the Property which is part of the Brush Creek Wildlife Area's 4,131 acres, approximately 90% of the Property and approximately 97% of the Brush Creek Wildlife Area will not be surface mined. (Herrick Dep. Ex. 2; Hosack Aff. at ¶ 7 & "Description" for 4,131 acres.)

Once mined, the property will be returned to pre-mining or better land uses. See <http://www.ohiodnr.com/mineral/mining/tabid/10404/default.aspx> (Ex. 5 to Pls Resp to MSJ.) Appellants proposed surface and auger mining will not destroy the hunting and other recreational uses of the property and Brush Creek Wildlife Area because the "wildlife habitat could be rehabilitated in a reasonable amount of time." (Hosack Aff. at ¶ 9.) In fact, land within the Brush Creek Wildlife Area and near the property has previously been strip-mined and reclaimed. (Herrick Dep. at 40, 42, 44, 49, 65 & Ex. 2; Deposition of Jeffrey Janosik ("Janosik Dep.") at 43-45 & Ex. 2 (pink and green highlighting)). That reclaimed land "will greatly enhance the surrounding habitat and be intensely utilized by wild turkey as well as other forest wildlife that benefit from openings." (Janosik Dep. at 33-34 & Ex. 4.)

Lastly, Appellants proposal to temporarily surface and auger mine a small part of the property will “strike a reasonable balance” between energy, economic and “environmental security” under ODNR’s and Ohio’s policy of promoting coal use. *See History* at iv. Despite Appellants’ limited and reasonable surface and auger mining plan was rejected by ODNR, which advised them that it would not allow any surface mining on the property. (Pls’ Amend. Compl. ¶ 11; Six Aff. ¶ 7.)

**D. The Lower Courts’ Decisions.**

The trial court held that the right to surface mine the property must be “expressly reserved” and that even the limited surface mining proposed by Appellants would result in “catastrophic destruction of the surface.” (Tr. Ct. Op. & Ord. at 2.) The trial court also rejected, as “inadmissible hearsay,” the extensive evidence presented by Appellants as to the language of the 1944 Deed, the intention of the parties, and the reasonableness of Appellants’ proposed mining plan. (Id., at 3.) On appeal, the Seventh Appellate District affirmed the trial court’s holding. *Snyder v. ODNR*, 7th Dist. No. 11 JE 27, Judgment Entry (time-stamped copy attached as Appendix B). The appellate court saw “no positive indication that the right to strip mine was intended” and held that Appellants’ “reasonable surface right privileges” cannot include any surface mining “as a matter of law,” based solely upon its interpretation of the language in the 1944 Deed. *Snyder*, 2012-Ohio-4039 at ¶ 32.

## ARGUMENT

### **Proposition of Law No. 1:**

The owner of a mineral estate has the right to extract the coal by reasonable surface and auger mining under a deed that grants or reserves “all mineral rights,” together with “reasonable surface right privileges,” and contains no language that prohibits those mining methods or that describes mining activities in language that is unique to deep mining methods.

The court of appeals held that because the 1944 Deed had no express indication that the right to surface mine was intended, in conjunction with “special rules” set forth in surface mining precedent, the 1944 Deed language precluded surface mining. *Snyder*, 2012-Ohio-4039 at ¶ 2, 32. In reaching this conclusion, the court of appeals misapplied this Court’s surface mining precedent. Ohio law requires no magic language, such as the words “surface mine” or “strip mine,” for the right to surface or strip mine to exist. Twice, this Court could have easily created this bright-line rule but declined to so do. See *Skivolocki*, 38 Ohio St.2d 244 (not requiring an “express” reservation of the right to strip mine); *Graham*, 76 Ohio St.3d 311 (same). Rather, under *Skivolocki* and *Graham*, a party seeking the right to surface mine a mineral interest must simply show **some** expression that the parties intended to include the right to surface mine. *Skivolocki*, 38 Ohio St.2d at syllabus ¶¶ 1-2; *Graham*, 76 Ohio St.3d at 313-14, 318.

In *Skivolocki*, this Court examined whether a mineral estate owner had the right to strip mine under a deed that contained the following language:

... Together will all necessary rights of way under said premises and through the coal aforesaid for the purposes of removing and shipping said coal and coal from adjacent lands, and the right to construct and maintain ***all necessary air shafts*** . . . and the right to lease and operate for oil and gas. *Moreover it is agreed that for any and all surface used by the grantee, its successors and assigns, it or they shall pay at the rate of fifty dollars per acre.* Hereby granting also to the grantee, its successors and assigns the right to use the ***shaft now on said premises as an airshaft or manway for the benefit of grantees coal workings in the coal fields of which said premises are a part.***

Id. at 246 (emphasis added). Based on this deed language, the mineral estate owner took the position that it had the right to surface mine the coal “in all the land included in the metes and bounds description with the exception of two acres around the house” including land adjacent to a gas line. (Br. of Skivolocki Appellant at 5, Ex. 6 to Pls Resp to MSJ); *Skivolocki*, 38 Ohio St.2d at 247. This Court explained that the right to surface mine is not implicit in the ownership of a severed mineral estate, but rather depends on the “intent of the parties [with respect to the right to strip mine] at the time the deed was drawn.” 38 Ohio St.2d at 248. In examining the intent of the parties, this Court examined whether the deed was couched in language particularly applicable to deep mining, and whether the deed was executed prior to the time that strip mining techniques were employed in the area. *Skivolocki*, 38 Ohio St.2d at 251. Based on these factors, the Court held that “[a] deed which severs a mineral estate from a surface estate, and which conveys the right to use the surface incident to mining coal, in language peculiarly applicable to deep mining techniques, does not grant the right to remove coal by strip mining methods.” 38 Ohio St.2d at syllabus paragraph 3.

Twenty-two years after *Skivolocki*, this Court again considered whether a deed that severed a mineral estate from a surface estate reserved the right to remove the minerals by surface mining. *Graham*, 76 Ohio St.3d 311. The *Graham* deed stated:

There is reserved and excepted from this conveyance all of the minerals of whatsoever nature and description, including oil, gas and salt water together with the right and privilege of entering in, on, or under said premises for the purpose of exploring for, testing, mining and removing the same, and of making, constructing, driving, opening and maintaining any **entries, passages, airways, shafts or slopes** thereon and thereunder, or for drilling for and producing oil, gas, or salt water or their constituents thereof, with the right to enter in and upon said premises, place and use proper equipment for drilling **outlets for mine water**, and the rights to occupy that portion of said surface necessary for said **shafts, slopes**, tanks and/or pipe lines and the right to convey and/or **transport any or all of said minerals contained in and under said lands, on, in and under adjacent lands**, in, on or under said demised premises, . . . .

Grantee, for herself, her heirs, successors and assigns, covenants and agrees that in the event it becomes advisable and/or necessary for Grantor, its successors or assigns, to use and occupy any of the surface of said demised premises, not to exceed 5 acres in extent, for the purpose of the *installation of a mine plant or facilities in connection therewith*, . . . .

Id. at 314-15 (emphasis added). In analyzing whether the mineral owner had the right to surface mine, this Court found that the *Graham* deed, like the deed in *Skivolocki*, was couched in language peculiarly applicable to deep-mining techniques. *Graham*, 76 Ohio St.3d at 316-17. Noting that the reservation clauses provided for the “use” of the surface for such things as the installation of a mine plant or facilities, this Court reasoned that surface mining was not intended in the deed because “it would be unnecessary to make such a reservation if the mineral estate included the right to operate machinery everywhere on the property whose purpose was to scrape away the entire surface in pursuit of shallow veins of coal.” Id.

This Court also noted that the deed expressed “the clear expectation by both parties that the surface of the land will be used for farming,” a use the court found “entirely incompatible” with the removal of the surface by strip mining. Id. at 316. Based on this deed language, this Court reasoned that removal of the minerals via surface or strip mining was not contemplated by the original parties of the deed. Id. at 317-18. Again, as in *Skivolocki*, the Court held that a deed which contains language “peculiarly applicable to deep-mining techniques,” does not grant or reserve to the mineral owner the right to remove minerals by strip-mining methods. Id. at 138.

Here, the court of appeals misapplied the *Skivolocki* and *Graham* precedent in order to fashion “special rules of construction” for mineral rights deeds requiring an express indication that surface mining was intended for there to be a right to surface mine. *Snyder*, 2012-Ohio-4039 at ¶¶ 15, 32. But this Court never held that a deed must expressly state the right to surface mine or give some “positive indication” that the parties intended to surface mine. Rather, this Court focused on the intent of the parties to the deeds and determined in both

*Skivolocki* and *Graham* that the intent to surface mine was not present because the deeds contained language particularly applicable to deep mining techniques. *Skivolocki*, 38 Ohio St.2d at syllabus paragraph 3; *Graham*, 76 Ohio St.3d at 138. The court of appeals also misapplied cases concerning the “right to use” the surface to the 1944 Deed. *Snyder*, 2012-Ohio-4039 at ¶¶ 29-31. In doing so, the court further improperly extended restrictions on agreed contract rights – and further hindered production of Ohio’s valuable coal resources – because the reservation of “reasonable surface right privileges” in the 1944 Deed, and the others like it, are not limited only to the right to “use” the surface.

Finally, the court of appeals relied upon case-specific findings from *Skivolocki* to create a generalized rule of law that will significantly limit rights to surface mine coal in Ohio. Specifically, the court of appeals held that any “strip mining ‘necessarily and unavoidably causes a total disruption of the surface estate.’” *Snyder*, 2012-Ohio-4039 at ¶¶ 28-30 (citing *Skivolocki*, 38 Ohio St.2d at 249, fn.1). In *Skivolocki*, the mineral rights owner sought to strip mine the entire property and it was true as a factual matter that the proposed strip mining in that case would result in “total disruption of the surface estate.” But this Court never has held this to be true as a matter of law, and it is not true in this case, where only a fraction of the property would be mined and would be reclaimed and any disruption would be neither permanent nor total.

The court of appeals further reasoned that under *Burgner v. Humphrey* 41 Ohio St. 340 (1884), surfacing mining was prohibited as a matter of law because “reasonable surface right privileges” do not “expressly” or “positive[ly]” include surface mining. 2012-Ohio-4039 at ¶ 26. However, *Burgner* was decided prior to the advent of surface mining for coal. *Graham*, 76 Ohio St.3d at 315. *Burgner* stands for the proposition that the mineral owner has an “obligation to protect the superincumbent soil” when there is a grant or conveyance of the surface reserving

minerals, and a presumption arises that the owner of the minerals is not to injure the owner of the soil above. *Graham*, 76 Ohio St.3d 317, citing *Burgner* 41 Ohio St. at 352-53. Under the facts of this case, Appellants would not permanently “injure” all of surface property by their proposed surface mining plan, rather, the plan would only affect about 10% of the property, and their actions are limited by a reasonableness standard set forth in the deed. Further, under the facts of this case, Appellants would remedy any “injury” to the property by reclamation, as outlined in the plan. Lastly, reclamation was not contemplated at the time that *Burgner* was decided.

The rule set forth by the court of appeals creates a rule that this Court never intended under *Skivolocki* and *Graham*. Under the court of appeals holding, deeds that fail to “expressly reserve” or positively indicate the right to surface mine will be construed *per se* to prohibit surface mining. This not only contradicts the holdings in *Skivolocki* and *Graham*, it is also contrary to Ohio’s public policy of promoting the use of Ohio’s coal through both underground and surface mining of Ohio’s coal resources. In contrast to the deed language in *Skivolocki* and *Graham*, the 1944 Deed does not use words such as shafts, slopes, mine plants, or mine facilities that are particularly applicable to deep mining. Because the 1944 Deed lacks such language particularly applicable to deep mining, the 1944 Deed states an intent to afford surface rights broader than those at issue in *Skivolocki* and *Graham*. Notably, no language in the deed suggests that surface mining was not intended by the parties and further, no language in the deed suggests that coal extraction was limited to deep mining techniques. The other circumstances surrounding the 1944 Deed show the parties intended to permit surface mining. Notwithstanding, the court of appeals erroneously concluded that the lack of a positive indication to surface mine shows that the parties did not intend to surface mine. *Snyder*, 2012-Ohio-4039 ¶ 32.

**Proposition of Law No. 2:**

Extrinsic evidence may properly be considered by the trier of fact in determining whether a deed that grants or reserves “all mineral rights,” together with “reasonable surface right privileges,” includes the right to extract the coal by reasonable surface and auger mining.

As noted above, this Court’s decisions in *Skivolocki* and *Graham* establish that in determining whether the owner of a coal estate has the right to surface mine, surrounding circumstances must be considered unless the deed expressly references that surface mining is allowed or that it is prohibited. Such extrinsic evidence may include evidence of what mining techniques were in use at the time of the deed; expert testimony of the meaning of terms used in instruments that may have specific meanings in context and in an industry or practice; and, evidence of the parties’ contemporaneous statements and actions. E.g., *Belville Mining Co. v. United States*, 999 F.2d 989 (6<sup>th</sup> Cir. 1993), cited with approval by this Court in *Graham*. Appellants presented evidence of all of these types, and demonstrated through this evidence that “reasonable surface right privileges” in the 1944 Deed means, and should be construed to mean, that surface and auger mining is permitted. However, the trial court refused to consider this evidence and, as a result of this error, reached an incorrect interpretation of the 1944 deed.

**Proposition of Law No. 3:**

Under a deed that grants or reserves “all mineral rights,” together with “reasonable surface right privileges,” whether the owner of a mineral estate has the right to extract the coal by reasonable surface and auger mining is a question of fact that cannot be determined by summary judgment where the evidence presents a genuine dispute of material fact on that issue.

In its opinion, the court of appeals concluded that surface mining is clearly more than the exercise of a “reasonable surface right privilege” and held that “although the word ‘reasonable’ can be a question of fact in some situations, it is a question of law in this case.” *Snyder*, 2012 Ohio 4039 at ¶¶ 30-31. In reaching its conclusion, the court of appeals relied on “special rules of

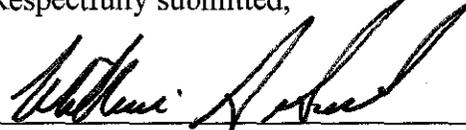
construction” and “special principles” from cases that addressed the balance of rights between mineral owners and surface owners. *Snyder*, 2012-Ohio-4039 at ¶ 15, 29. However, holding that “reasonable surface right privileges,” without express reference to surface mining, *per se* precludes surface mining as a matter of law is inconsistent with the “special principles” from *Skivolocki* and *Graham* the court of appeals relied upon in making its determination. Although both cases concluded in those cases that the relevant deed language did not permit surface mining, central to both cases’ holdings was the fact that the deeds contained language that was particularly applicable to underground mining. *Skivolocki*, 38 Ohio St.2d at syllabus paragraph 3; *Graham*, 76 Ohio St.3d at 318. The 1944 Deed, and the other Jefferson County deeds, contain no language that is applicable only to underground or deep mining.

Reasonableness is a question of fact unsuitable for summary judgment when more than one course of conduct is reasonable under the circumstances. *Tincher v. Interstate Precision Tool*, 2002-Ohio-3311, ¶¶ 12, 15 (Ohio App. Ct. 2nd Dist.). Where, as here, there are complicated facts as to whether a particular land usage is reasonable, reasonableness is a question of fact not suitable for resolution on summary judgment. *Delta Fuels, Inc. v. Consol. Envtl. Servs.*, 2012-Ohio-2227 ¶ 30, 969 N.E.2d 800 (Ohio Ct. App., 6th Dist.). “A use reasonable under one set of facts may be unreasonable under another.” *Delta*, 2012-Ohio-2227, ¶ 30, citing *Soukup v. Republic Steel Corp.*, 78 Ohio App. 87, 102 (8th Dist. 1946). Thus, under the facts of this case, it was error for the court to conclude as a matter of law that strip mining was more than the exercise of a “reasonable” surface right privilege. Rather, the fact-specific inquiry is specifically reserved for the trier of fact and is inappropriate for summary judgment.

**CONCLUSION**

For the reasons set forth above, Appellants request that the Court accept this case for review and reverse the decision of the Seventh District.

Respectfully submitted,



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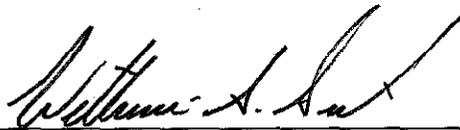
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that, on 17<sup>th</sup> of October 2012, a true and correct copy of the foregoing *Memorandum In Support Of Jurisdiction* was served by regular U.S. mail, postage prepaid, on the following:

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**APPENDIX**

- A. Opinion of the Seventh District Court of Appeals (Aug. 27, 2012)
- B. Judgment Entry of the Seventh District Court of Appeals (Aug. 27, 2012)

COURT OF APPEALS  
JEFFERSON COUNTY, OHIO  
AUG 27 2012  
JOHN A. CORRIGAN  
CLERK

STATE OF OHIO, JEFFERSON COUNTY  
IN THE COURT OF APPEALS  
SEVENTH DISTRICT

RONALD SNYDER, et al., )  
 )  
 PLAINTIFFS-APPELLANTS, )  
 )  
 VS. )  
 )  
 OHIO DEPARTMENT OF NATURAL )  
 RESOURCES, et al., )  
 )  
 DEFENDANTS-APPELLEES. )

CASE NO. 11 JE 27

OPINION

CHARACTER OF PROCEEDINGS:

Civil Appeal from Common Pleas Court,  
Case No. 09CV243.

JUDGMENT:

Affirmed.

APPEARANCES:

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JUDGES:

Hon. Joseph J. Vukovich  
Hon. Cheryl L. Waite  
Hon. Mary DeGenaro

Dated: August 27, 2012

APPENDIX  
A

VUKOVICH, J.

{¶1} Plaintiffs-appellants Ronald Snyder and Steven Neeley appeal the decision of the Jefferson County Common Pleas Court which granted summary judgment in favor of defendants-appellees the Ohio Department of Natural Resources and the State of Ohio and thus disposing of the declaratory judgment action filed by appellants.

{¶2} The issue on appeal is whether strip mining on the state's land is permissible where the language of the deed provides, "The Grantors reserve all mineral rights, including rights of ingress and egress and reasonable surface right privileges." As the case law in Ohio requires the deed reserving mineral rights to clearly show the intent to allow strip mining, it appears the above language does not grant the right to strip mine the property.

{¶3} The other issue raised concerns whether the court properly declared the parties' respective rights when it granted summary judgment in the declaratory judgment action. Because the court filed not only a judgment entry but also a separate opinion, the declaration of rights is ascertainable. Accordingly, it seems that judgment was properly entered in favor of the state, and the trial court's decision can be affirmed.

#### STATEMENT OF THE CASE

{¶4} In 1944, the grantor sold over 651 acres located in Brush Creek Township to the State of Ohio. This property became part of the Brush Creek Wildlife Area, which is overseen by the Ohio Department of Natural Resources (ODNR). Regarding the reservation of mineral rights, the only pertinent language in the deed states: "The Grantors reserve all mineral rights, including rights of ingress and egress and reasonable surface right privileges."

{¶5} In 2000, Ronald Snyder and Ralph Six received these mineral rights upon a Sheriff's Deed in Partition. They later met with ODNR to discuss their desire to strip mine part of the property. When ODNR refused to allow strip mining (also

called surface mining) on the property, the two mineral rights owners filed a complaint against the state and ODNR seeking a declaratory judgment.

{¶16} Their complaint stated that the property contains valuable coal reserves which are thinly layered, making the only practicable method of extracting the coal by "surface mining and auger mining in a surface mining area." The complaint asked for a declaration that the "reasonable surface right privileges" language in the deed allowed them to strip mine a reasonable portion of the property. They asked for a declaration that approximately 10% of the property would be a reasonable portion of the property to surface mine.

{¶17} The complaint was voluntarily dismissed and refiled in May of 2009. Thereafter, Steven Neely was substituted as a party in place of Mr. Six. The state filed a motion for summary judgment in June of 2011, urging that case law requires a mineral rights reservation to include clear language if the right to destroy the surface is to be transferred as surface mining is inconsistent with the surface owner's rights.

{¶18} On September 7, 2011, the trial court ruled in favor of the state, granting summary judgment and dismissing the case with prejudice. The trial court held that the right to strip mine must be clearly expressed in the reservation of mineral rights. The court stated that the reservation of "reasonable surface right privileges" is not ambiguous as to whether strip mining is permitted, even if it could be ambiguous regarding other surface rights, because strip mining entails a catastrophic disruption to the surface. Thus, the court found that the extrinsic evidence presented by the plaintiffs in their response to summary judgment could not be used. The court alternatively stated that the evidence relied on to show the parties' intent at the time of the deed was inadmissible hearsay in any event.

{¶19} On September 26, 2011, the trial court filed a final judgment entry granting the State's motion for summary judgment and dismissing the case with prejudice based upon the opinion the court previously rendered. The plaintiffs-appellants filed a notice of appeal on October 25, 2011. This court ordered appellants to file a jurisdictional memorandum as to why they failed to appeal from

the September 7 order. Appellants responded citing case law and the local rules of court. On December 27, 2011 this court found that the appeal was timely filed.

{¶10} The table of contents in appellants' brief lists numerous arguments, some of which could be construed as assignments of error, although not labeled as such. Moreover, the listed arguments are overlapping and mostly concern one issue: whether the deed is ambiguous as to strip mining. If we agree with appellants and find the deed ambiguous, they ask us to resolve which party should have the language construed in their favor and argue that the trial court improperly stated that the extrinsic evidence on the parties' intent was inadmissible hearsay. Finally, there is an issue with the form of the court's entry as appellants do not believe it clearly declares the rights as required in a declaratory judgment action. We thus separate our analysis into these three sections.

#### DOES DEED CLEARLY IMPORT RIGHT TO STRIP MINE?

{¶11} Appellants acknowledge that Ohio case law requires some expression of the right to strip mine in a mineral rights reservation. Appellants note, however, that this law does not require the deed to expressly include the words "strip mine" or "surface mine" as "magic language" before strip mining is permissible under a grant of mineral rights. Appellants argue that the deed's language is ambiguous and that what activity constitutes the exercise of "reasonable" surface right privileges is a question of fact as it is susceptible to more than one interpretation since a reasonable person could construe it as allowing strip and auger mining on a small, reasonable portion of the property.

{¶12} The state counters that it is established law that there must be a clear expression of the intent to reserve the right to strip mine in a mineral rights reservation. See *Graham v. Drydock Coal Co.*, 76 Ohio St.3d 311, 667 N.E.2d 949 (1996); *Skivolocki v. East Ohio Gas Co.*, 38 Ohio St.2d 244, 313 N.E.2d 374 (1974). The state concludes that a reasonable person could not construe the deed to allow total destruction of a considerable portion of the surface through strip mining merely because it permits reasonable surface right privileges incident to mining, which privileges exist by law in any case.

{¶13} Appellants attempt to distinguish *Skivolocki* and *Graham* from their case. Appellants note that the *Skivolocki* deed was written prior to the use of strip mining in that county and contained language peculiar to deep mining. Appellants acknowledge, however, that the *Graham* case refused to distinguish *Skivolocki* on the basis that the *Graham* deed was drafted after the advent of strip mining. Appellants then argue that *Graham* is distinguishable by noting that the *Graham* deed involved language peculiar to deep mining and the deed revealed that the surface use was farming, which is inconsistent with strip mining, whereas the deed here did not reveal that the land would be used as a wildlife preserve.

{¶14} If a deed is clear and unambiguous, then its interpretation is a matter of law subject to de novo review. See *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108, 652 N.E.2d 684 (1995). See also *Graham*, 76 Ohio St.3d at 313. The intent of the parties resides in the language they chose in the deed. *Graham*, 76 Ohio St.3d at 313. Extrinsic evidence is not admissible to show intent where the language is clear and unambiguous. *Id.* at 314. An ambiguous provision is one that has more than one reasonable interpretation. *Hacker v. Dickman*, 75 Ohio St.3d 118, 119-120, 661 N.E.2d 1005 (1996).

{¶15} In deeds involving mineral rights, the Supreme Court of Ohio has developed special rules of construction where the right to destroy the surface is claimed by the owner of the mineral rights. In 1884, the Ohio Supreme Court stated that it was well-settled that when mineral rights are severed from the surface, the owner of the mineral rights is entitled to only so much of the minerals he can get without injury to the superincumbent soil unless the language of the instrument "clearly imports" that it was the intention of the surface owner to part with the right of subjacent support. *Burgner v. Humphrey*, 41 Ohio St. 340, 352 (1884). The same obligation to protect the surface exists whether there is a conveyance of the surface retaining the minerals (as in the case at bar) or whether there is a conveyance of the minerals retaining the surface. *Id.* at 352-353.

{¶16} In *Burgner*, the owner of the mineral rights mined coal underground and removed all support from under the surface causing subsidence. The Court declared

that the owner of the surface had the natural right to use his land "in the situation in which it was placed by nature" and thus had the right to have the surface integrity maintained notwithstanding the grant of mineral rights to another. *Id.* A clause that the owner of the mineral rights can remove "all the mineral coal" does not mean that it can be taken away without regard to the effect of its removal upon the overlying soil. *Id.* at 354-355. The Court concluded that the intention to dispense with subjacent support should be "manifested by clear and unequivocal language" in the deed. *Id.* at 354. The surface owner's waiver of the right to surface support must appear by express grant or the deed must "clearly import such release." *Ohio Collieries Co. v. Cocks*, 107 Ohio St. 238, syllabus, 140 N.E. 356 (1923).

{¶17} In *Skivolocki*, a 1901 deed granted mineral rights, including the right to construct air shafts. *Slivolocki v. East Ohio Gas Co.*, 38 Ohio St.2d 244, 313 N.E.2d 374 (1974). The deed also stated "for any and all surface used" the mining company shall pay fifty dollars per acre. *Id.* at 246. The mining company, in pursuing strip mining on the land, argued that this clause granted the unqualified right to use the surface in any manner for the stated price or constituted a waiver a subjacent support. *Id.* at 247.

{¶18} The Court expressed that the right to strip mine and the right to subjacent support for the surface cannot co-exist. *Id.* at 248. The Court stated that a waiver of subjacent support is a prerequisite to finding a right to strip mine, but even such a waiver is not per se conclusive of the right to strip mine. *Id.* Strip mining "necessarily and unavoidably causes total disruption of the surface estate." *Id.* at 248-249.

{¶19} Notably, unless contrary language is used, a mineral estate carries with it the right to use as much of the surface as may be "reasonably necessary to reach and remove the minerals." *Id.* at 249, fn.1, citing 54 American Jurisprudence 2d, Section 389. Still, this "right to use" does not include the right to destroy it by strip mining. *Id.* at 249, fn.1, 251.

{¶20} The *Skivolocki* Court expressed that the mineral estate has a heavy burden of showing the right to strip mine and found that the company did not meet its

burden of proof at trial. *Id.* at 251. The Court noted that the 1901 deed had language peculiarly applicable to deep mining and evidence showed that strip mining was not used in that county until 1917. *Id.* at 251. The Court found that the \$50 per acre charge for use of the surface did not provide a right to strip mine because reasonable use of the surface is already a right incident to mining and such right does not include the right to destroy the surface. *Id.* The Court concluded that strip mining was not permissible under the language of that deed.

{¶21} The most recent case cited by the parties is an expansion and clarification of *Skivolocki*. See *Graham v. Drydock Coal Co.*, 76 Ohio St.3d 311, syllabus, 667 N.E.2d 949 (1996). The deed in *Graham*, drafted years after strip mining became prevalent, granted "all" mineral rights, the right to enter in, on, and under the land for testing, mining, and removing minerals, the right to occupy that portion of the surface necessary for shafts, slopes, and tanks, and the right to use up to so many acres of the surface for a mine plant. The deed also provided damages for destruction of crops and fencing.

{¶22} The *Graham* Court held that the language, "all mineral rights" is insufficient to grant or reserve the right to strip mine. *Id.* at 316. The Court expressed that the deed's provision for damages to crops and fences and its mention of the use of the surface for roads or buildings would be unnecessary if the deed reserved the right to remove the entire surface by strip mining. *Id.* at 316-317. The Court pointed out a "patent incompatibility" of strip mining with separate ownership of the surface of the land. *Id.* at 317. The Court thus upheld the trial court's *grant of summary judgment* holding that there was no right to strip mine provided in the deed as a matter of law. In doing so, the Court concluded:

{¶23} "A deed which severs a mineral estate from a surface estate, and which grants or reserves the right to use the surface incident to mining coal, in language peculiarly applicable to deep-mining techniques, whether drafted before or after the advent of strip mining, does not grant or reserve to the mineral owner the right to remove coal by strip-mining methods." *Id.* at syllabus.

{¶24} The *Graham* Court characterized this as a clear rule to be applied *prior* to any determination of whether a deed reservation is ambiguous. See *id.* at 318 (“In view of our holding it is unnecessary to determine whether the contract at issue is ambiguous so that consideration of extrinsic evidence would be appropriate”), 319 (noting that this “clear rule” announced would avoid the need for deed interpretation in cases with similar language).

{¶25} Although *Graham* is not directly on point as the language of that deed referred to certain deep mining features, its rationale and holdings are instructive here. First, the fact that the deed was drafted in 1944, after strip mining was utilized in the county, does not impose a presumption that strip mining was intended. *Id.* at 316. Second, the reservation of “all mineral rights” in the deed still does not grant appellants the right to remove those minerals by strip mining. *Id.* at 316. Moreover, we are still to be guided by the *Burgner* precedent that a holder of mineral rights cannot destroy the surface unless a waiver of the right to an intact surface is expressed in the deed. *Id.* at 315, citing *Burgner v. Humphrey*, 41 Ohio St. 340 (1884).

{¶26} The grant of mineral rights with “reasonable surface right privileges” does not “clearly authorize” strip mining. See *Burgner*, 41 Ohio St. at 354. It does not “clearly import” a release of the right to surface support. See *Ohio Colliers Co.*, 107 Ohio St. at syllabus.

{¶27} In fact, the language stating that “reasonable surface right privileges” are included in the reservation of mineral rights is a clear indication that strip mining was not contemplated, and itself is language commonly associated with deep mining. That is, an owner of mineral rights has the implied right to use as much of the surface as it reasonably necessary to reach and remove the minerals. *Quarto Mining Co. v. Litman*, 42 Ohio St.2d 73, 83, 326 N.E.2d 676 (1975), citing *Skivolocki*, 38 Ohio St.2d at 377, citing 54 Am. Jur.2d 389, Mines and Minerals, Section 210.

{¶28} Thus, “reasonable surface right privileges” are not just associated with a grant of deep mining; they are automatic rights. See *id.* See also *Belville Mining Co. v. United States*, 999 F.2d 989,994 (6th Cir.1993) (using a clause granting “only

so much of the surface as is reasonable necessary" for mining as an example of language "peculiarly applicable to deep mining"). The deed in question granted reasonable privileges to use the surface; (notably, in the same clause granting ingress and egress). Strip mining is the total destruction of the surface rather the exercise of the "right to use" the surface incidental to mining, even if strip mining is the only practicable method of removing the coal. And, case law provides the right to use as much of the surface as is reasonable to reach and remove the materials does not include the right to strip mine. *Quarto Mining*, 42 Ohio St.2d at 83; *Skivolocki*, 38 Ohio St.2d at 251 ("the right to 'use' the surface cannot be reasonably construed as the right to destroy it").

{129} "To construe the 'right to use' as including the right to strip mine would be to pervert the based purpose of a principles designed to mutually accommodate the owner of the mineral estate and the owner of the surface estate in the enjoyment of their separate properties." *Skivolocki*, 38 Ohio St.2d at 249, fn.1. With these special principles in mind, no reasonable person could find that a grantor's reservation of mineral rights including ingress, egress, and "reasonable surface right privileges" clearly imports the right to strip mine.

{130} In conclusion, strip mining "necessarily and unavoidably causes a total disruption of the surface estate." *Id.* at 248-249. It inevitably causes surface "violence, destruction, and disfiguration." *Graham*, 76 Ohio St.3d at 318 (comparing the surface during strip mining to a "battleground"). Strip mining is clearly more than the exercise of a "reasonable surface right privilege." The surface right privilege exercised must be reasonable at each point that it is exercised. Appellants' desire to exercise more than reasonable surface right privileges on only part of the property does not get around the fact that strip mining was not clearly reserved and that strip mining is a total disruption and elimination of that surface that is strip mined. That the law requires reclamation thereafter does not diminish the fact that the original surface is gone and the fact that the existence of any surface is eliminated for a considerable time. See *Graham*, 76 Ohio St.3d 311 (where the 1996 Court did not analyze the fact that reclamation would eventually take place). See also *Belville Mining*, 999 F.2d at

994 (regulations requiring ultimate restoration of surface do not diminish force of case law regarding the surface violence of strip mining).

{¶31} The law states that strip mining is not a reasonable use of the surface as an incident to mining as strip mining is more than a "use". Thus, although the word "reasonable" can be a question of fact in some situations, it is a question of law in this case. See *Castle Props. v. Lowe's Home Ctrs., Inc.*, 7th Dist. No. 98CA185 (Mar. 20, 2000) (summary judgment permissible on whether Lowe's used "all commercially reasonable efforts").

{¶32} There is no positive indication that the right to strip mine was intended. In fact, the language shows that strip mining was not anticipated. We therefore uphold the trial court's decision granting summary judgment to the State based upon the plain language of the deed in conjunction with the special rules set forth in the strip mining precedent. Consequently, appellant's arguments on construing ambiguities, extrinsic evidence, and hearsay are overruled as moot.

FAILURE TO EXPRESSLY DECLARE RIGHTS & FAILURE  
TO ALLOW AUGER MINING

{¶33} Appellants complain that the trial court granted summary judgment and dismissed the complaint with prejudice but did not actually declare the parties' respective rights as required in resolving a declaratory judgment action. They ask this court to remand for a clear declaration of rights.

{¶34} In doing so, they ask that (even if we find strip mining to be prohibited) we order the trial court to permit auger mining because the trial court's rationale all deals with strip mining, but auger mining does not destroy the surface above the mined area as it drills laterally into a hillside. However, strip mining is statutorily defined as including auger coal mining. R.C. 1513.01(S). See also *Skivolocki*, 38 Ohio St.2d at 247 (citing a case treating strip and auger mining the same). In any event, *appellants admitted that they would need to strip mine an area of a hillside in order to auger mine into the hill*, and they only sought the right to auger mine in the strip mined area. See Complaint at ¶ 13, 10, 17 ("surface mining and auger mining in

a surface mining area"). As such, the same test would apply to both types of mining, and this argument is without merit.

{¶35} As for the form of the court's entry, the declaratory judgment statute provides that a person interested under a deed may have determined any question of construction or validity arising under the instrument and obtain a declaration of rights, status, or other legal relations under it. R.C. 2721.03. A plaintiff is entitled to a declaration of rights, rather than a dismissal, unless there is no real controversy between the parties or a declaratory judgment will not terminate the controversy. *Weyandt v. Davis*, 112 Ohio App.3d 717, 721, 678 N.E.2d 1191 (9th Dist.1996) (where court granted a motion to dismiss the action). Still, the court's form of entry is harmless if the court did in fact end up declaring the respective rights in its order. *Id.* at 721-722.

{¶36} A trial court should expressly declare the parties' rights in disposing of a declaratory judgment action. *Nickschinski v. Sentry Ins. Co.*, 88 Ohio App.3d 185, 189, 623 N.E.2d 660 (8th Dist.1993), citing *Waldeck v. N. College Hill*, 24 Ohio App.3d 189, 190, 24 OBR 280, 493 N.E.2d 1375 (1st Dist.1985) (a trial court does not fulfill its function in a declaratory judgment action when it disposes of the issues by journalizing an entry merely sustaining or overruling a motion for summary judgment without setting forth any construction of the document under consideration). In fact, it has been stated that the order granting summary judgment in declaratory relief action is not final if it does not declare rights. *See, e.g., Caplinger v. Raines*, 4th Dist. No. 02CA2683, 2003-Ohio-2586, ¶ 3; *Haberley v. Nationwide Mut. Fire Ins. Co.*, 142 Ohio App.3d 312, 314, 755 N.E.2d 455 (8th Dist.2001). *See also* R.C. 2721.02(A) (declaration may be affirmative or negative; declaration has the effect of a final judgment).

{¶37} The final judgment entry here contains no real declaration of rights as it merely stated that the State's motion for summary judgment was sustained and thus the case was dismissed with prejudice. However, in this case, we also have the trial court's opinion released prior to the final entry. This opinion did not merely grant summary judgment for the State and thus dismiss the complaint with prejudice. It

also contained the issues presented, the parties' arguments, the court's interpretation of the law, and the court's analysis.

{¶38} Specifically, the trial court quoted the pertinent portion of the deed and framed the issue as whether the quoted reservation encompassed the right to strip mine. The court concluded that the mere reservation of mineral rights did not imply the right to remove the minerals by strip mining methods. Instead, in order for the grantor to reserve the right to strip mine, he must have expressly reserved that particular right. The court found that although what is a "reasonable" use of the surface could be ambiguous in some situations, when the question is whether strip mining is a reasonable surface privilege incident to mining, the phrase is not ambiguous, explaining how case law characterizes strip mining as the destruction of the surface not merely as the use of the surface. The trial court then concluded that appellants could not use extrinsic evidence as such evidence cannot be viewed when there is no ambiguity.

{¶39} Considering all of this combined with the grant of summary judgment in favor of the State and the dismissal of appellants' request for declaratory relief, the trial court effectively declared that appellants have no right to strip mine the land. Thus, although a clearer declaratory conclusion could have been drafted, any issue with the form of the declaration is harmless.

{¶40} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

Waite, P.J., concurs.  
DeGenaro, J., concurs.

APPROVED:

  
JOSEPH J. VUKOVICH, JUDGE

