

ORIGINAL

In the
Supreme Court of Ohio

RONALD M. SNYDER, *et al.*,

Appellant,

v.

OHIO DEPARTMENT OF
NATURAL RESOURCES, *et al.*

Appellees.

: Case No. 12-1723
:
: On Appeal from the Jefferson
: County Court of Appeals,
: Seventh Appellate District
:
: Court of Appeals Case No. 11 JE 27
:
:
:

**MEMORANDUM IN OPPOSITION TO JURISDICTION
OF RONALD M. SNYDER AND STEVEN W. NEELEY**

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INTRODUCTION

Removal of coal by surface mining disrupts the surface estate through “violence, destruction, and disfiguration.” *Graham v. Drydock Coal Co.*, 76 Ohio St.3d 311, 318(1996). The destruction inherent in surface mining requires caution in reading into deeds permission to violate the land in that manner. That caution is well settled in Ohio law and nothing about the narrow, specific facts of this case suggest revisiting that principle. Jurisdiction is not warranted here.

Appellants Ronald Snyder and Steven Neeley (collectively “Snyder”) believe that the language in their deed reserving the mineral rights and “reasonable surface right privileges” authorizes them to strip mine in the Brush Creek Wildlife Area, land purchased by the State and maintained for the purpose of creating a unique and diverse wildlife habitation for all citizens to enjoy. The deed language does not contemplate surface mining, and in fact shows that surface mining was *not* anticipated. The law and the deed language compelled the decisions below and there is no need for further review.

At bottom, Snyder wants to litigate one more time about a proposal to mine a specific amount of one tract of land by questioning the meaning of language used in a few deeds from land sales dating to 1944. That is not a matter of public or great general interest, and further review of that question is not needed.

STATEMENT OF THE CASE AND FACTS

In 1944, the State acquired 1,674 acres of land in Jefferson County. This property was acquired from private landowners through eight separate deeds and would eventually make up a portion of Brush Creek Wildlife Area. Each of the eight deeds contained the same reservation

of mineral rights. This reservation states: “The Grantors reserve all mineral rights, including right of ingress and egress and reasonable surface right privileges.”

One of these eight deeds conveyed 651.43 acres from Lucy F. Davis to the State of Ohio. (hereinafter “1944 deed”). This deed was acquired by Ronald Snyder and Ralph Six through a Sheriff’s sale on October 26, 1999. (Complaint, Exhibit B). On May 13, 2003, Snyder filed a Complaint for Declaratory Judgment in the Jefferson County Court of Common Pleas, seeking a declaration that they were entitled to surface and auger mine under the language of the 1944 deed. The State filed a Motion for Summary Judgment, but before the court could issue a decision, Snyder voluntarily dismissed the case.

Snyder then re-filed, the seeking the same relief. After a substitution of parties, the State moved for summary judgment, which the court granted--holding that Snyder did not have the right to surface mine on the State’s property. Snyder appealed to the Seventh District, which affirmed.

**THIS CASE DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION
NOR IS IT ONE OF PUBLIC OR GREAT GENERAL INTEREST**

This case does not warrant review because the lower court’s decision falls squarely within this Court’s previous rulings and has little consequence beyond this particular dispute.

Contrary to Snyder’s suggestions, the Seventh District’s decision does not depart from the well-settled law about the necessary deed language to allow surface mining of coal. Far from unprecedented, the Seventh District’s determination that the deed does not manifest the right to surface mine the coal with “clear and unequivocal language” follows the holdings of this Court and the United States Sixth Circuit Court of Appeals. *Snyder v. Ohio Dept. of Natural Resources*, 7th Dist. No. 11 JE 27, 2012-Ohio-4039, at ¶16. The Seventh District’s holding that

surface mining is only permitted when express language to that effect is included in a deed is not a departure from the previous holdings of this Court. It is well settled in Ohio that when the mineral and surface rights of a property are severed, the “right to strip mine is not implicit in the ownership of the severed, mineral estate.” *Skivolocki v. East Ohio Gas Co.*, 38 Ohio St.2d. 244, syllabus 2, 313 N.E.2d 374 (1974). Therefore, any intention to reserve the right to extract the minerals by strip mining must be expressly and unequivocally stated in the deed. *See, Id.* at 248; *Graham*, 76 Ohio St.3d at 315, 667 N.E.2d 949; *Bellville Mining Co. v. United States of America*, 999 F.2d 989, 994 (6th Cir. 1993). The Seventh District’s decision did not modify existing law.

Nor will the decision have wide-ranging implications. Snyder suggests that, if the decision below stands, it will dramatically affect the holders of coal interests and violate Ohio’s public policy encouraging the maximum use of Ohio’s coal resources. That is not accurate. First, the lower court’s decision only restricts coal mining under the deed by *surface* methods. Snyder retains the right to remove coal through underground mining methods. Second, the exact language found in the deed exists only in *eight other deeds* in the Brush Creek Wildlife Area, and none of the other seven deed holders has requested permission to mine.

Snyder wants to characterize the planned mining as “limited and temporary,” and asserts that there will be no irreparable damage to wildlife or wildlife habitats. But this Court has already recognized that “surface mining” inevitably causes “violence, destruction, and disfiguration” of the surface. *Graham*, 76 Ohio St.3d 311. And as the Seventh District correctly noted, once the damage has been done, the mere fact that the law requires reclamation 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 amount of time.” *Snyder* at ¶ 30, citing *Bellville Mining Co. v. United States of America*, 999 F.2d 994.

Snyder’s efforts to make this case significant falter on his own description of the issue he wants to litigate: whether the proposal to strip mine 10% of a given tract is “reasonable.” Br. at 2; see also *id.* at 5 (describing proposal to “temporarily” mine a “small portion” of the tract). Even if the language in these eight deeds were worthy of this Court’s review, surely the narrower question whether Snyder’s proposal about how he would mine his parcel (for now) is not a question of broad public or general interest.

Finally, Snyder’s own propositions of law betray his arguments that this case deserves further review. Whether extrinsic evidence is appropriate as to *this deed*, to determine the scope of “reasonable surface privileges,” Br. at 13, is hardly a pressing question meriting this Court’s review. Two courts have evaluated the need for extrinsic evidence about this deed and whether Snyder’s specific mining proposal is a “reasonable” surface privilege (including a decision rejecting the multi-layered hearsay affidavit of Mr. Six). A third opinion is not necessary on that question.

Nor is there a worthy dispute in asking whether the “reasonable” surface privilege can be decided by summary judgment. That is a repackaging of the complaint about extrinsic evidence, but it is no more deserving of this Court’s review. Snyder simply wants another chance to litigate the reasonableness of his specific mining proposal under language found in seven other deeds. That is not a controversy meriting Supreme Court review.

The Seventh District’s decision rests on solid legal and factual grounds. Although the decision does affect how two deed holders can extract coal, the ruling does not more than restrict

the deed holders' preferred method of mining the coal. These narrow consequences do not elevate the case to Supreme Court review.

ARGUMENT

Appellees' proposition of law 1:

A deed reserving mineral rights and containing the phrase "reasonable surface right privileges" does not clearly authorize surface mining.

It is well settled in Ohio that when the mineral and surface rights of a property are severed, the "right to strip mine is not implicit in the ownership of the severed, mineral estate." *Skivolocki*, 38 Ohio St.2d. 244 at syllabus 2. Therefore, any intention to reserve the right to extract the minerals by strip mining must be expressly and unequivocally stated in the deed. *See id.* at 248; *Graham*, 76 Ohio St.3d 311, t315.

Since its 1884 decision in *Burgner v. Humphrey*, this Court has consistently and repeatedly held that, if the owner of a mineral estate would like to remove those minerals in a way that would significantly injure the surface estate, the reservation of that right must be made through *express language* in the written instrument. 41 Ohio St. 340, 353 (1884); *see also Skivolocki*, 38 Ohio St.2d 244, 248; *Graham*, 76 Ohio St.3d 311, 315. In *Burgner*, the Court laid out clear rules for protecting the rights of owners of surface estates when the mineral estate has been severed. *Burgner*, 41 Ohio St. 340. In holding that the owner of a surface estate "has a natural right to the use of his land, in the situation in which it was placed by nature," the Court determined that "this obligation to protect the superincumbent soil" creates a presumption that "the owner of the minerals is not, by removing them wholly or in part, to injure the owner of the soil above." *Id.* at 352-53. The Court went on to hold that in order to waive this duty, the written instrument must contain "explicit language" expressing that intention. *Id.* at 353.

Burgner was decided prior to the advent of surface mining, and addressed the issue of subjacent support. However, when given the opportunity, the Court did not hesitate to apply the principles and “time honored rules” established in *Burgner* to cases involving strip mining. Specifically, the Court determined that “the right to strip mine for coal and the right to subjacent support for the surface estate cannot co-exist.” *Id.* The Court further determined that “a waiver of subjacent support is prerequisite to finding a right to strip mine.” *Id.* And a waiver of subjacent support must be made through “explicit language” in the written instrument. *Burgner*, 41 Ohio St at 353.

Twenty-two years later this Court again confirmed the rules established in *Burgner*. *Graham*, 76 Ohio St. 3d 311, at 315. The Court held that “though *Burgner* predated the advent of strip mining, it stated a principle which we have held applicable to the strip-mining issues of today* * * ‘[t]he actions of the mineral owner are limited by the obligation not to destroy or damage the surface estate unless a release from that obligation is *expressly included* in the deed or contract.’” *Id.* at 315 (emphasis added), quoting *Burgner*, 41 Ohio St. 340, 353.

There is no question that the Court in *Graham* was looking for explicit language reserving the right to surface mine. Because “the deeds contain[ed] neither an express provision authorizing strip mining, nor any provision even suggesting that strip-mining was intended” they did not reserve the right to strip mine. *Graham*, 76 Ohio St. 3d 311, at 317. The Court buttressed this holding by citing other jurisdictions, emphasizing that if the owner of a mineral estate “desires to reserve rights inconsistent with the full enjoyment of the surface, it is his duty to reserve those rights by clear and unequivocal language. *Id.* at 318, quoting *Stonegap Colliery Co. v. Hamilton*, 119 Va. 271, 292 (1916).

Although neither *Graham* nor *Skivolocki* require that the exact words “strip mining” in the deed language in order to reserve that right, and the Court did determine that the parties need to include an expression of their intent to reserve the right to strip mine. And the expression of that intent must be made with “express provisions” in “unequivocal” language. *Graham*, 76 Ohio St. 3d 311, at 317-18. The 1944 deed in this case, simply does not contain that necessary language.

Existing precedent provides full guidance on the narrow question of strip-mining rights in severed surface lands. The trial and appellate courts followed this direction in granting, and affirming, summary judgment in favor of the State. Snyder offers no reason to supplement or supplant this well-settled precedent.

Appellees’ proposition of law 2:

A court may only look to extrinsic evidence to determine the intent of the parties when the deed language is ambiguous.

A trier of fact consults extrinsic evidence only when the deed language is ambiguous. *Bellville Mining Co.*, 999 F.2d at 995. Language is ambiguous when it is susceptible to two reasonable but conflicting interpretations. *Id.*, citing *Wells v. American Electric Power Co.*, 48 Ohio App. 3d 95, 97 (4th Dist. 1988).

Here the 1944 deed is unambiguous and does not require extrinsic evidence to determine the intent of the parties. Ohio law requires that the court look to the “four corners” of the written instrument to determine that intent. *Hinman v. Barnes*, 146 Ohio St. 497, 66 N.E.2d 911, 916 (1946). It is “presumed” that the intent of the parties “resides” in the language of the deed. *Graham*, 76 Ohio St. 3d at 313, citing *Kelly v. Med. Life Ins. Co.*, , 31 Ohio St.3d 130, 31 (1987), paragraph one of the syllabus. The court must “analyze the language used in the deed” and

determine not what the parties meant to say, but what they did say in the written instrument. *American Energy Corp. v. Datkuliak*, 7th Dist. No. 07 MO 3, 2007-Ohio-7199, ¶75, review denied, 118 Ohio St. 3d 1411, 2008-Ohio-2340. In doing so, the court “cannot put words into an instrument which the parties themselves failed to do.” *Id.* at ¶ 50, *citing Larwill v. Farrelly*, 8 Ohio App. 356, 360 (9th Dist. 1918).

Because the 1944 Deed is unambiguous, there was no error in the trial judge’s decision not to consider extrinsic evidence, or in the Seventh District’s affirmance of summary judgment.

Appellees’ proposition of law 3:

Summary judgment was appropriate here.

Throughout the litigation, Snyder has attempted to create a “reasonableness” test where none exists. He contends that the 1944 Deed should be treated as a basic non-mining deed and not be evaluated in light of the precedent guiding review of deed language regarding strip mining. Snyder’s suggestion would not only create an unnecessary, and undesirable, “reasonableness” test, but would be contrary to prior decisions of this Court.

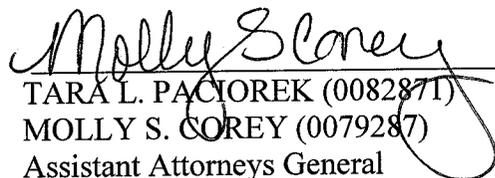
Snyder is wrong that summary judgment was not appropriate here. The Seventh District affirmed summary judgment based on its finding that the meaning of “reasonable” in the 1944 deed is question of law, not a question of fact. *Snyder*, 2012-Ohio-4039 at ¶ 31. That result comports with this Court’s decision in *Graham*, which reinstated a trial court decision that interpreted a mining deed as a matter of law.

CONCLUSION

The Court should decline jurisdiction over this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Defendants State of Ohio, Department of Natural Resources' Memorandum in Opposition to Jurisdiction was served by ordinary U.S. mail this 13th day of November, 2012 upon the following:

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