

ORIGINAL

In the Supreme Court of Ohio

RONALD M. SNYDER, <i>et al.</i> ,	:	Case No. 2012-1723
	:	
Plaintiffs-Appellants,	:	
	:	On Appeal from the Jefferson County
v.	:	Court of Appeals, Seventh Appellate
	:	District
OHIO DEPARTMENT OF	:	(Ct. App. Case No. 11 JE 27)
NATURAL RESOURCES, <i>et al.</i> ,	:	
	:	
Defendants-Appellees.	:	

**MERIT BRIEF OF PLAINTIFFS-APPELLANTS
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STATEMENT OF FACTS

A. Appellants Own the Mineral Rights and “Reasonable Surface Right Privileges” for the 651.43 Acres of Land at Issue in this Appeal.

In 1944, Appellee State of Ohio acquired a 651.43-acre tract of undeveloped land in Jefferson County, Ohio, from Lucy F. Davis. (Def’s MSJ, Ex. H, Supp. 64-65; Pls’ Amend. Compl. Ex. A, Supp. 8-9.) Like other deeds prepared by the State at that time, the Deed for the Davis property expressly reserved the mineral estate and related surface rights to the grantor, Ms. Davis: “[t]he Grantors reserve all the mineral rights, including rights of ingress and egress and reasonable surface right privileges.” (*Id.*) This language plainly expresses the intention of the parties to reserve ownership of the coal and other minerals, including surface right privileges, to Ms. Davis.

Appellants Ronald Snyder and Steven W. Neeley are the successors to Ms. Davis’s interests in the property. (Pls’ Amend. Compl. at ¶¶ 8 & Ex. B, Supp. 3 & 10-13; Affidavit of Ralph E. Six (“Six Aff.”) at ¶ 8, Ex. 1 to Pls’ Response to MSJ, Supp. 93.) Appellants plan to exercise their surface right privileges and remove the coal on approximately 10% of the property by surface mining methods, which is the only practical way to mine the coal. They filed this lawsuit when the State objected and refused to allow the mining.

B. There Is Substantial Evidence that the Parties to the Deed Intended “Reasonable Surface Right Privileges” to Include the Right to Surface Mine Coal.

The State drafted the Deed to the Davis property, including the reservation of mineral rights and surface right privileges. It included language not found in any other reported decision and no language that limits the mineral owners’ right to mine the coal or that limits the related surface rights to any particular mining method. The Deed neither expressly refers to deep mining methods nor expressly prohibits surface and auger mining methods. The only limitation

that the State placed in the Deed is that the exercise of the surface right privileges must be “reasonable.”

The precise scope of these “reasonable surface right privileges” must be ascertained from the intentions of the parties at the time the Deed was signed, in light of the language used in the Deed, the historical context in which the Deed was drafted, and the particularities of the property. The parties agree that the property is unimproved and “rugged,” with over 650 acres of varying topography (April 11, 2004 Dep. of Jeffrey Herrick (“Herrick Dep.”) Ex. 2, Supp. 212-13; Aff. of Dennis Hosack (“Hosack Aff.”) at ¶ 7 & “Description”, Supp. 185-86; Dep. of Timothy R. Miller (“Miller Dep.”) at Ex. 16, Supp. 223.) Appellants seek to surface mine about 65 acres of the tract and to auger mine some additional acreage, which contains approximately \$11 million worth of coal. (Affidavit of Gregory J. Honish (“Honish Aff.”) at ¶¶ 2-5 & 11-13, Ex. 4 to Pls’ Resp. to MSJ, Supp. 113-16.) It is undisputed that this coal cannot economically be recovered by any deep mining methods, and it will remain in the ground unless Appellants use surface or auger mining techniques. (Miller Dep. at 49-53, 55 & Ex. 16, Supp. 215-223; Honish Aff. at ¶¶ 11-13, Supp. 115-16.)

Coal production by surface mining methods had already become widespread in Jefferson County when the Deed was drafted in 1944; it increased from 7% of the coal produced in 1914 to approximately 38% of the coal produced in 1944. Douglas L. Crowell, *History of the Coal-Mining Industry in Ohio*, at 184-185 (ODNR, Division of Geological Survey 1995), Supp. 248-49. In fact, this same property had been surface mined for coal prior to 1944. (Six Aff., at ¶ 5, Supp. 92.) When the State presented deeds with the same reservation language to landowners for signature, it assured them that the “reasonable surface right privileges” included the right to surface mine the coal. (*Id.*, Supp. 92.) There are no provisions in the Deed that refer directly or

indirectly to deep mining, or that expressly or implicitly limit the mineral rights and related surface rights to deep mining methods. (Defs' MSJ, Ex. H, Supp. 64-65.) In addition, the Deed does not reference any intended use of the property by the State that would be inconsistent with the exercise of reserved surface mining rights. (*Id.*)

In short, Appellants presented substantial evidence that under the circumstances surrounding the execution of the Deed in 1944, including "the nature of the property, the prevalent practice of surface mining, and the actual language used in the deed," the parties "intended that surface mining was among the 'reasonable surface right privileges' reserved to [the grantor]." (Affidavit of Geoffrey B. Mosser ("Mosser Aff.") at ¶ 10, Ex. 3 to Pls' Resp to MSJ, Supp. 110-11.)

C. The State Refused to Allow Appellants to Use Surface or Auger Mining Methods and Thus Prevented Them from Obtaining Their Coal.

The property is located within the Brush Creek Wildlife Area, a 4,000 acre undeveloped wilderness largely used for hunting and fishing. Nearby land within the Brush Creek Wildlife Area has previously been strip mined. (Herrick Dep. at 40, 42, 44, 49, 65 & Ex. 2, Supp. 204-07 & 211-12; Deposition of Jeffrey Janosik ("Janosik Dep.") at 43-45 & Ex. 2 (pink and green highlighting), Supp. 227-29.) Nonetheless, the Ohio Department of Natural Resources ("ODNR") objected to Appellants' plan to surface mine and auger mine a small portion of the property.¹ ODNR argues that the reservation clause of the Deed precludes any surface mining, regardless of whether it involves 65 acres or .65 acres or 65 square feet, and regardless of whether the mining and reclamation plan is reasonable. Appellants contend that their mining

¹ Although ODNR argues that Ohio Revised Code 1513.01(S), enacted years after the deed was drafted, somehow converts auger mining into "strip mining," auger mining does not disturb the surface of the land. Auger mining is the practice of drilling laterally into an exposed highwall, and the surface land over an auger mine is left intact. (Miller Dep. at 82, Supp. 221.) The trial court erroneously held that the 1944 Deed does not permit auger mining.

plan is a reasonable exercise of the surface right privileges reserved by the Deed because it temporarily affects only a small portion the property and an even smaller portion of the Brush Creek total acreage. (Herrick Dep. Ex. 2; Hosack Aff. at ¶ 7 & “Description” for 4,131 acres, Supp. 185-86.)

After they complete this limited mining, Appellants must return the surface 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, Supp. 137-38.) Appellants have presented uncontroverted evidence that their proposed mining will not destroy hunting or other recreational uses of the property and that the wildlife habitat will be rehabilitated in “a reasonable amount of time.” (Hosack Aff. at ¶ 9, Supp. 186.) Indeed, nearby 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, Supp. 225 & 231-39.)

ODNR nevertheless refuses to allow any surface mining on the property. (Pls’ Amend. Compl. ¶ 11, Supp. 4; Six Aff. ¶ 7, Supp. 92.) This prevents the removal of the coal by the only feasible mining method available and thus effectively nullifies the language of the Deed that reserves the mineral estate and “reasonable surface right privileges.”

D. The Course of Proceedings.

Appellants filed this action and asked the trial court to declare that the Deed allows the use of surface mining methods to obtain their coal from the property. ODNR moved for summary judgment and argued that the language of the Deed, standing alone, conclusively proves that surface mining rights were not reserved. Appellants presented evidence to demonstrate that their mining plan is reasonable and entirely consistent with the “reasonable surface right privileges” reserved in the Deed.

The trial court granted ODNR's motion for summary judgment. It held that the right to surface mine property must be "expressly reserved" in the Deed, and it refused to consider the extensive evidence Appellants presented regarding the language and historical context of the Deed, the intentions of the parties at the time the Deed was executed, and the reasonableness of the mining plan. Opinion, at 3 (Appx. 5.)

On appeal, the Court of Appeals for the Seventh Appellate District affirmed the trial court's entry of summary judgment in favor of ODNR. Judgment Entry (Appx. 2). It saw "no positive indication [in the Deed] that the right to strip mine was intended" and concluded, based essentially on the absence of the terms "surface mine" or "strip mine" in the Deed, that "reasonable surface right privileges" do not include the use of surface mining methods "as a matter of law." Opinion, at ¶ 32 (Appx. 3).

Appellants timely filed a Notice of Appeal (Appx. 1), and this Court accepted jurisdiction.

ARGUMENT

This appeal challenges the summary judgment entered in favor of ODNR. This Court reviews summary judgment rulings de novo, with no deference to the findings of the courts below on issues of law. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, ¶ 8. ODNR's summary judgment therefore cannot be affirmed unless the Court independently concludes that "(1) no genuine issue of any material fact remains, (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[.]" *DIRECTV, Inc. v. Levin*, 128 Ohio St.3d 68, 2010-Ohio-6279, ¶ 15. The Court must construe the record and the evidence "most strongly in favor of the nonmoving party." *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, ¶ 10.

ODNR is not entitled to summary judgment in this case for several reasons. First, as discussed below in connection with Appellants' Proposition of Law No. 1, the right to surface mine is plainly encompassed within the Deed's reservation of the mineral estate and "reasonable surface right privileges." This unique language contains no limitation on mining methods, no terminology peculiarly applicable to deep mining, no description or identification of uses of the surface that would be incompatible with surface mining, and no language prohibiting surface mining. The words used in the reservation clause of the deed evidence the intention of the parties to allow reasonable surface mining, and summary judgment should not have been granted to ODNR.

In Proposition of Law No. 2, Appellants show that summary judgment was improper because, at a minimum, the reservation of reasonable surface right privileges in the Deed is ambiguous as to the use of surface mining. The Deed clearly reserves reasonable surface rights in connection with the rights to coal and other minerals. To the extent that the language of the reservation is ambiguous about the scope of those rights, it should be interpreted here as in any other contract case – by reference to extrinsic evidence of the parties' intention or, in the absence of such evidence, by construing the ambiguity against the drafter of the Deed. The evidence of record establishes that the State drafted the Deed and that the parties intended to allow reasonable surface mining when they signed it.

Finally, as set forth in the discussion of Proposition of Law No. 3, the express language of the Deed allows Appellants to exercise "reasonable" surface right privileges in their proposed mining plan. "Reasonableness" is an issue for the trier of fact, and Appellants presented substantial evidence that surface mining is reasonable in the circumstances of this case.

Accordingly, the summary judgment order that was entered against Appellants should be reversed.

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.

A. Ohio law allows parties to deeds to separate mineral and surface interests.

Ohio law allows property owners to separate mineral interests from surface interests because this optimizes the productive use of the land. “When the mineral and surface interests in a tract of land are severed so that use can be made of the same land by different parties ... the land is thereby rendered doubly productive[.]” *Graham v. Drydock Coal Co.*, 76 Ohio St.3d 311, 316 (1996). As discussed below, all mining methods necessarily require the use of some portion of the surface to remove the minerals from the premises, and the balance of the surface and mineral interests in any particular case is established in large measure by the language of the deed that conveys or reserves the mineral interests. *Graham*, 76 Ohio St.3d at 313 (noting that the parties’ rights are determined by the provisions of their deeds); *Belville Mining Co. v. United States*, 999 F.2d 989, 996 (6th Cir. 1993) (finding that the language in the deeds demonstrated that the parties intended to permit certain strip mining methods).

“Courts, in construing deeds and like written instruments, must be guided by the intention of the parties to them[.]” *Larwill v. Farrelly*, 8 Ohio App. 356, 360 (9th Dist. 1918). Many Ohio courts have applied this rule to determine the rights of a mineral owner to recover the minerals. See *Skivolocki v. East Ohio Gas Company*, 38 Ohio St.2d 244, 247, 251 (1974); *Graham, supra*, 76 Ohio St.3d at 313-14; *Belville Mining Co., supra*, 999 F.2d at 995.

“The intent of the parties is presumed to reside in the language they chose to use in their agreement.” *Graham, supra*, 76 Ohio St.3d at 313. If the parties’ intent is clear from the language of a deed, the inquiry ends there. *Skivolocki, supra*, 38 Ohio St.2d at 247, 251; *Graham*, 76 Ohio St.3d at 313-14. However, “extrinsic evidence is admissible to ascertain the intent of the parties when the [deed] is unclear or ambiguous, or when circumstances surrounding the [deed] give the plain language special meaning.” *Graham, supra*, 76 Ohio St.3d at 313-14. Finally, if the extrinsic evidence does not clarify the parties’ intentions, any ambiguity “is to be construed against the party that drew it.” (*Id.*) In the present case, the intent of the parties, as reflected in the language they used in the Deed, establishes Appellants’ right to remove some of their coal by surface mining.

B. Appellants have the “surface right privilege” to surface mine the property as long as the mining is reasonable.

When the State bought the land at issue from Lucy Davis in 1944, it drafted the Deed and reserved “all of the mineral rights, including ... reasonable surface right privileges.” The language it chose has not been addressed in any known judicial decision. (Defs; MSJ at 8, Supp. 26.) The Deed’s unprecedented reservation of “reasonable surface right privileges” to the grantor must be understood to include the right to engage in reasonable surface mining on the property.

The only question presented under the Deed is whether Appellants’ proposed surface mining is reasonable. The same question would arise if a deep mining plan were proposed.² It is

² After all, even a deep mine must disturb the surface, to open up a mine face or pit. Thus, the argument that *any* surface mining is impermissible because it results in destruction of the surface is a red herring. “By necessity, surface land is disturbed in the process of mining coal.” (History at 38, Supp. 241.) See also *Skivolocki*, 38 Ohio St.2d at 247-48 (analyzing case law “observing that even customary deep mining would be destructive of the surface land due to accumulation of slag and waste, and operation of tram roads, tipples and mine houses”).

answered, not by reference to a label, but rather by the extent, if any, to which the proposed mining will unreasonably infringe upon the surface estate. This requires a consideration of the nature of the proposed mining, including how it will take place, when it will take place, and where it will take place. In this case, the evidence of record establishes that the proposed mining would not unreasonably interfere with ODNR's interests. It involves only a small fraction of the property, which will be remediated when the mining is completed, and will not materially interfere with ODNR's use of the property. Accordingly, the express reservation of reasonable surface right privileges in the Deed includes the right to conduct the proposed surface mining.

C. When the language of a deed does not reflect an intention to limit the mining methods available to the owner of the mineral interests, express use of the words "surface mining" is not required to allow surface mining methods.

The Court of Appeals misinterpreted Ohio law when it concluded that surface mining, even of a small percentage of the land, is always inconsistent with a surface owner's rights, regardless of the nature, scope, duration, and effect of the planned mining, unless the deed contains an express reservation or other positive indication of the right to engage in surface mining. *See Snyder v. Ohio Dept. of Natural Resources*, 7th Dist. No. 11 JE 27, 2012-Ohio-4039, ¶¶ 8 & 32. This creates a categorical bar on surface mining methods, regardless of the circumstances, unless the words "surface mining" or "strip mining" are used in a deed. The Court of Appeals erred as a matter of law by adopting a blanket rule that this Court has twice declined to adopt and that is directly at odds with Ohio law governing the construction of written instruments.

In *Graham, supra*, this Court emphasized that its rulings in that case and in *Skivolocki, supra*, merely applied the longstanding Ohio legal principle that the intent of the parties determines the meaning of language used in a deed. 76 Ohio St.3d at 317. *See Skivolocki*, 38 Ohio St.2d 244, paragraph one of the syllabus. Indeed, the Court declined to adopt a proposed

rule in *Skivolocki*, based on dominant and subservient estates, because it could “lead to a result which negates the real intent of the parties to the deed.” 38 Ohio St.2d at 248.

Far from establishing a blanket test requiring the use of the express phrase “surface mining” in a deed, the Court looked at the deed language in its totality in both *Graham* and *Skivolocki*. The deeds in both of those cases described the rights of the mineral estate owners in language “peculiarly applicable to deep-mining techniques.” See *Graham*, 76 Ohio St.3d at 314-15; *Skivolocki*, 38 Ohio St.2d at 246. For example, the deeds in *Graham* expressly referred to “opening and maintaining ... entries, passages, airways, shafts or slopes” and “the rights to occupy that portion of said surface necessary for said shafts, slopes, tanks and/or pipe lines.” 76 Ohio St.3d at 314-15. The deed in *Skivolocki* referred to “necessary air shafts” and use of a “manway” – language that is also “peculiarly applicable to deep-mining techniques.” 38 Ohio St.2d at 246.

Both decisions also considered other indications of the parties’ intentions. The deeds in *Graham* expressed “the clear expectation by both parties that the surface of the land will be used for farming,” and the Court found this use “entirely incompatible” with any alleged intention to allow the removal of the surface by strip mining. 76 Ohio St.3d at 316-7. The *Skivolocki* Court noted that the deed at issue was drafted in 1901; the evidence showed “that the technique of strip mining was not known in Guernsey County until 1917,” so the parties could not have intended to allow an unknown mining technique. 38 Ohio St.2d at 251.

Finally, the surface mining plans in both *Graham* and *Skivolocki* contemplated mining the entire surface of the properties. See *Graham v. Drydock Coal Co.*, 4th Dist. No. 93CA1599, 1994 Ohio App. LEXIS 6083, * 1-2 (Dec. 29, 1994) (coal company sought to mine approximately 300 acres of the surface owners’ 302.11 acres); *Skivolocki, supra*, 38 Ohio St.2d

at 248 (surface mining could cause subsidence of an express easement for a gas line, which would wholly frustrate the easement).³ The issue was therefore whether the parties to the deed intended to authorize the owner of the mineral estate to totally exclude the owner of the surface estate from any use of the surface. In the present case, by contrast, Appellants' mining plan includes only a small portion of the property and would not materially interfere with ODNR's use of its surface rights.

It was for all of these reasons – and not because the deeds failed to expressly mention surface mining – that this Court concluded in *Graham* and *Skivolocki* that the parties to those deeds did not intend that the owners of the mineral estate would have the right to engage in the extensive surface mining they had proposed. See also *Belville Mining Co., supra*, 999 F.2d at 996, where the Court found that deed language prohibiting surface mining by hydraulic means implied that the parties intended to allow other surface mining techniques.

The analysis of this Court in the *Skivolocki* and *Graham* decisions indicates that the language of the Deed in the present case reserves the right to produce coal through surface mining methods as long as the mining plan and activity are reasonable. It expressly reserves “reasonable surface right privileges” and contains no reference to deep mining or activities peculiarly applicable to deep mining, and no mention of any use of the property by the surface owner that would be incompatible with surface mining. Unlike the historical evidence that this Court considered in *Skivolocki*, the historical evidence in this case establishes that surface mining was well known (and increasingly common) in Jefferson County in 1944 when the State wrote the Deed.

³ This is more completely explained in the brief of the appellant in *Skivolocki*, which explained that the strip mining operations were only three feet from the center of the gas line. (Pls' Opp'n to ODNR's MSJ Ex. 6, at 2; Supp at 145.)

The purpose of allowing property owners to sever a mineral estate from a surface estate is to facilitate the development of Ohio's natural resources. *Graham, supra*, 76 Ohio St.3d at 316. See also R.C. 1551.31 ("it is declared to be the public policy of the state ... to assist in the development of facilities and technologies that will lead to increased, environmentally sound use of Ohio coal"). The Court of Appeals' blanket rule would thwart that purpose to no benefit; the evidence before the trial court showed that Appellants' plan to surface mine a fraction of the property would have no long term effects on ODNR's surface rights.

In short, the Court of Appeals erred in holding that Ohio law requires a "positive indication" in a deed of the right to surface mine. The existence of that right depends upon the intentions of the parties, as expressed by the totality of the deed language considered in historical context. "Reasonable surface right privileges" include surface mining where, as here, the Deed for property that had previously been surface mined contains neither a reference to deep mining nor a reference to any use by the surface owner that is incompatible with surface mining.

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.

For the reasons explained above, the plain language of the Deed allows surface mining, and the Court of Appeals erred in concluding otherwise. In addition, the Deed does not *unambiguously prohibit* surface mining. It may be read to include the right to surface mine – in a reasonable time, place, and manner – just as easily as it may be read to exclude the right to surface mine. At a minimum, then, the Deed is ambiguous. As with any written instrument, extrinsic evidence should be considered to resolve that ambiguity.

The Sixth Circuit's decision in *Belville*, *supra*, which relied on *Skivolocki* and was cited with approval in *Graham*, is instructive on this issue. It applied Ohio law to three deeds, which were silent as to the intended method of mining and were drafted after the advent of strip mining, to determine whether the parties intended to allow strip mining. Like the Deed in issue here, the three deeds contained no language peculiarly applicable to underground mining or deep mining, so the Court considered extrinsic evidence to discern the intent of the parties. 999 F.2d at 992, 995-96. It found that the owner of the mineral estate had a right to surface mine for coal based on the circumstances surrounding the establishment of the mineral estate. *Id.* at 1002. The Seventh Circuit Court of Appeals has likewise considered extrinsic evidence in determining whether a mineral estate owner had the right to engage in surface mining. *See Am. Land Holdings of Indiana, LLC v. Jobe*, 604 F.3d 451, 455 (7th Cir. 2010) (noting "key extrinsic evidence presented at the bench trial ... that there was no strip mining of coal in Sullivan County, Indiana, in 1903" when the deed was drafted).

The record in the present case contains substantial evidence that is directly relevant to the intent of the parties to the Deed, including:

- Evidence that surface mining was prevalent in Jefferson County, Ohio in 1944, and that post-mining reclamation was a known practice. Douglas L. Crowell, *History of the Coal-Mining Industry in Ohio*, at 184-85 (ODNR's Division of Geological Survey 1995), Supp. at 248-49).
- Expert evidence that, given the special circumstances of the property and the coal industry in 1944, the grantors would have expected "reasonable surface right privileges" to include the right to surface mine coal. (Affidavit of Geoffrey B.

Mosser (“Mosser Aff.”) ¶ 10 [filed June 17, 2011 as Ex. 3 to Pls’ Resp to MSJ], Supp. 110-11.)

- Evidence of custom and practice, *i.e.*, “that, before 1944, [the Grantors] had surface mined coal on the Property ... and sold the coal locally and understood that they could continue to get the coal in any way they could after the Deed was signed.” (Six Aff., ¶ 5, Supp. 92.)
- Evidence that Appellants’ proposed surface mining is limited in scope (Six Aff., ¶ 7, Supp. 92) but will yield \$11 million worth of coal reserves. (Honish Aff., ¶ 13, Supp. 116.)
- Evidence that Appellants’ proposed surface mining will not result in catastrophic disruption or destruction of the surface estate, including testimony from ODNR regarding prior surface mining and reclamation activity within the Brush Creek Wildlife Area (Herrick Dep. at 40, 42, 44, 49, 65 & Ex. 2, Supp. 204-07 & 211-12; Janosik Dep. at 43-45 & Ex. 2 (pink and green highlighting), Supp. 227-29), and expert testimony regarding the temporary impact on the wildlife habitat and the long-term benefits arising from the reclamation activity. (Hosack Aff. at ¶ 9, Supp. 186.) This evidence demonstrates that, unlike *Skivolocki* and *Graham*, the limited surface mining proposed by Appellants would not unduly burden the State’s surface estate.

Appellants’ evidence thus demonstrated that the “reasonable surface right privileges” reserved in the Deed were intended to include reasonable surface and auger mining. The Court of Appeals erroneously refused to consider this evidence and thereby (1) failed to give meaning and effect to the intentions of the parties, and (2) rendered the reserved coal estate inaccessible

for all practical purposes. This error was plainly prejudicial; had the evidence been considered, there would be a dispute of material fact as to whether the “reasonable surface right privileges” in the Deed include the right to surface mine coal pursuant to a “reasonable” mining plan.

Even if Appellant’s proffered evidence did not clarify the parties’ intentions, summary judgment in favor of ODNR would be improper. As this Court explained in *Graham, supra*, ambiguities in a deed that are not resolved by extrinsic evidence should be construed against its drafter. 76 Ohio St.3d at 313-14. “Any ambiguities in the document setting forth the rights and responsibilities of each party must be construed against the drafter of the document. Otherwise the nondrafter of the document may ultimately forfeit far more than he or she reasonably contemplated at the time the agreement was signed.” *Fletcher v. Fletcher*, 68 Ohio St.3d 464, 471 (1994) (Resnick, J., dissenting). When it acquired land in this coal-rich, rural region, the State drafted the 1944 Deed – and at least eight others like it – using language that is unlike any other known deeds. (Defs’ MSJ at 2, 8 & Exs. A-H, Supp. 20, 26 & 36-65; Herrick Dep. at 58, Supp. 209.) If any ambiguity in the Deed cannot be resolved by extrinsic evidence, it should be construed against the State. Accordingly, it was error to enter summary judgment in favor of ODNR.

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 and cannot be determined by summary judgment where the evidence presents a genuine dispute of material fact on that issue.

The Deed defines Appellants’ surface rights using the term “reasonable” surface right privileges. Whether Appellants’ proposed surface mining is “reasonable” is a factual issue, and the only evidence presented on that issue establishes that it is reasonable. The Court of Appeals

erred when it concluded that the reasonableness of Appellants' mining plan "is a question of law in this case." (Opinion, at ¶¶ 30-31.)

The Deed expressly reserves all mineral rights and "reasonable surface right privileges." The determination of whether Appellant's proposed temporary use of a small portion of the property for surface mining is within the parties' intended scope of "reasonable" is a question of fact that must be determined in light of all the surrounding circumstances. See *Hunker v. Whitacre-Greer Fireproofing Co.*, 155 Ohio App.3d 325, 2003-Ohio-6281, ¶ 34 (7th Dist.) ("[w]hether a person's actions are reasonable or unreasonable is generally a question of fact to be determined by the trier of fact"), citing *Cater v. Cleveland*, 83 Ohio St.3d 24, 33 (1998). The trier of fact typically decides what constitutes a "reasonable use" of land. See, e.g., *Delta Fuels, Inc. v. Consol. Envtl. Servs.*, 6th Dist. No. L-11-1054, 2012-Ohio-2227, ¶ 30 ("A use reasonable under one set of facts may be unreasonable under another. ... Given this emphasis on facts, the reasonableness of land usage would ordinarily be a question of fact."); *Bayes v. Toledo Edison Co.*, 6th Dist. Nos. L-03-1177 & L-03-1194, 2004-Ohio-5752, ¶ 69 ("when the specific dimensions or terms of an easement are not expressed in the grant itself, determining the dimensions or reasonableness of use becomes a question of fact"); *Franklin v. Hunter*, 3d Dist. No. 1-82-69, 1984 Ohio App. LEXIS 9812, *5 (May 16, 1984) ("[w]hat constitutes 'reasonable use' is more a question of fact than one of law"). Accordingly, it is generally inappropriate to determine reasonableness at the summary judgment stage. See *Delta Fuels, Inc. v. Consol. Envtl. Servs.*, *supra*, 2012-Ohio-2227, ¶ 30; *Bayes v. Toledo Edison Co.*, *supra*, 2004-Ohio-5752, at ¶¶ 72, 74.

Here, the only evidence presented on this issue establishes that Appellants' proposed surface mining is reasonable. First, it is very limited; Appellants propose to surface mine only

about 10% of the property. Second, the proposed surface mining will not affect the State's long-term use of the property as part of a wildlife area. Approximately 90% of the property will not be mined, and unrebutted expert testimony shows that the "wildlife habitat could be rehabilitated in a reasonable amount of time" on the small portion that will be mined. (Hosack Aff. ¶ 9, Supp. 186.) ODNR admits that it acquired previously strip-mined land within the Brush Creek Wildlife Area for value, and included it as part of this property, further undercutting any misconception that surface mining results in catastrophic permanent destruction of the surface estate. (Herrick Dep. at 40, 42, 44, 49, 65 & Ex. 2, Supp. 204-07 & 211-12; Janosik Dep. at 43-45 & Ex. 2 (pink and green highlighting), Supp. 227-29.) Finally, Appellants' proposed mining will create jobs and yield \$11 million worth of coal, furthering Ohio's public policy of developing, producing, and utilizing Ohio's coal resources. R.C. 1551.31.

Appellees did not offer any contrary evidence suggesting that Appellants' proposed mining plan is an unreasonable exercise of surface right privileges. In resolving ODNR's motion for summary judgment, the evidence (including the language of the Deed) must be construed most strongly in favor of Appellants. Neither of the lower courts did so. Instead, both assumed a parade of horrors that have no factual basis in the record of this case - including, for example, the trial court's unsupported finding that Appellants' proposed surface mining would result in "catastrophic disruption" and "destruction" of the surface estate.⁴ The record evidence shows

⁴ At oral argument on ODNR's summary judgment motion, the trial court declared: "Reclamation in the forties, there wasn't any, you would back the bulldozer out, and you just leave. A lot of times, you don't back the bulldozer out, you just leave, and there is a complete and total destruction of the surface." (Tr. Oral Arg. p. 22 [filed November 29, 2011], Supp. 249.) But there is no evidence in the record to support that statement, and ODNR's own publication notes "attempts by early coal operators at reclaiming mined land" even before reclamation was required by statute. (History at 40, Supp. 243.) In any event, the parties bargained for protection from such doom and gloom scenarios by requiring that the surface right privileges be reasonably exercised.

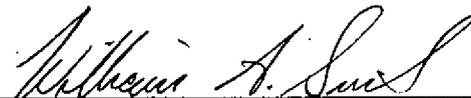
that Appellants' proposed mining is economically and environmentally reasonable, and there is no evidentiary basis for the trial court's summary judgment order finding that it is not a "reasonable" exercise of surface right privileges.

As noted above, Appellants produced evidence that surface mining was prevalent in Jefferson County in 1944, that it was previously done on this property, that it is necessary to extract this coal, and that it can be done with minimal impact on the use of the surface estate. In short, Appellants produced substantial evidence that the planned surface mining is reasonable and within the rights reserved by the Deed, and ODNR is not entitled to summary judgment in this case.

CONCLUSION

Appellants request that the Court reverse the decision of the Seventh District Court of Appeals for any or all of the reasons set forth in their Propositions of Law, and that it remand the matter for further proceedings in the Jefferson County Court of Common Pleas.

Respectfully submitted,



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The undersigned hereby certifies that, on April 29, 2013, a true and correct copy of the foregoing *Merit Brief of Appellants* was served by regular U.S. mail, postage prepaid, on the following:

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APPENDIX

1. Date-stamped Notice of Appeal to the Supreme Court of Ohio (October 11, 2012)
2. Judgment Entry of the Seventh District Court of Appeals (Aug. 27, 2012)
3. Opinion of the Seventh District Court of Appeals (Aug. 27, 2012)
4. Judgment Entry of the Jefferson County Court of Common Pleas (September 26, 2011)
5. Opinion and Order of the Jefferson County Court of Common Pleas (September 7, 2011)

Appx. 1

In the Supreme Court of Ohio

RONALD M. SNYDER, <i>et al.</i> ,	:	Case No. 12-1723
	:	
Plaintiffs-Appellants,	:	
	:	On Appeal from the Jefferson County Court
v.	:	of Appeals, Seventh Appellate District
	:	(Ct. App. Case No. 11 JE 27)
OHIO DEPARTMENT OF	:	
NATURAL RESOURCES, <i>et al.</i> ,	:	
	:	
Defendants-Appellees.	:	

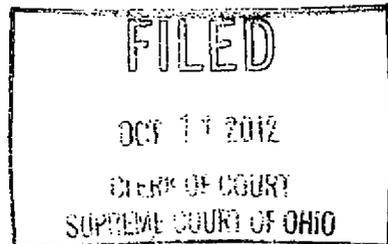
NOTICE OF APPEAL OF PLAINTIFFS-APPELLANTS
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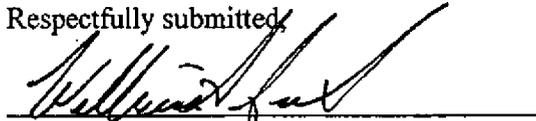


NOTICE OF APPEAL OF PLAINTIFFS-APPELLANTS
RONALD M. SNYDER AND STEVEN W. NEELEY

Plaintiffs-Appellants Ronald M. Snyder and Steven W. Neeley hereby give notice of appeal to the Supreme Court of Ohio, under Ohio Supreme Court Rule 2.1(A)(3), from the opinion and judgment of the Court of Appeals of Jefferson County, Seventh Appellate District, entered in *Snyder, et al., v. Ohio Dept. of Natural Resources, et al.*, 7th Dist. No. 11 JE 27, 2012-Ohio-4039, on August 27, 2012. Date-stamped copies of the Seventh District's Opinion and Judgment Entry are attached hereto as Exhibits A and B, respectively.

For the reasons set forth in the accompanying Memorandum in Support of Jurisdiction, this case is one of public or great general interest.

Respectfully submitted,



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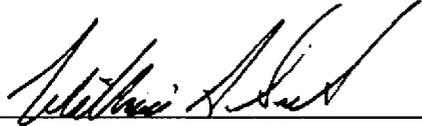
Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing *Notice Of Appeal Of Plaintiffs-Appellants Ronald M. Snyder and Steven W. Neeley*, was served this 11th day of October 2012, via regular U.S. Mail, postage prepaid upon the following counsel of record:

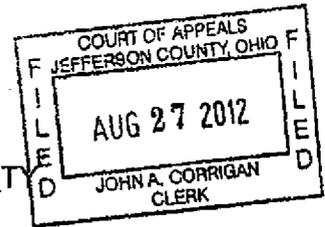
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STATE OF OHIO, JEFFERSON COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

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.

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JUDGES:

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

Dated: August 27, 2012



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.

{¶6} 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.

{¶7} 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.

{¶8} 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.

{¶9} 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. Cocke*, 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. *Skivolocki 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").

{¶29} "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.

{¶30} 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

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{¶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.

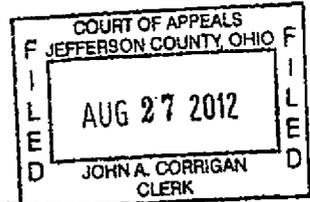
{¶39} Considering all of this combined with the grant of summary judgment in favor of the State and the dismissal of appellants' request for declaratory relief, the trial court effectively declared that appellants have no right to strip mine the land. Thus, although a clearer declaratory conclusion could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



STATE OF OHIO)
JEFFERSON COUNTY)

IN THE COURT OF APPEALS OF OHIO

SS: SEVENTH DISTRICT

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

CASE NO. 11 JE 27

JUDGMENT ENTRY

For the reasons stated in the Opinion rendered herein, the assignments of error are without merit and are overruled. It is the final judgment and order of this Court that the judgment of the Common Pleas Court, Jefferson County, Ohio, is affirmed. Costs taxed against appellants.

Joseph W. White

John A. White

Mark DeGuzman

JUDGES.



Appx. 2

Appx. 2

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

STATE OF OHIO)
)
JEFFERSON COUNTY)

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JUDGES.

Appx. 3



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 PLAINTIFFS-APPELLANTS,)
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 OHIO DEPARTMENT OF NATURAL)
 RESOURCES, et al.,)
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CASE NO. 11 JE 27

OPINION

CHARACTER OF PROCEEDINGS:

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

JUDGMENT:

Affirmed.

APPEARANCES:

For Plaintiffs-Appellants:

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For Defendants-Appellees:

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Attorney General
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Columbus, Ohio 43229

JUDGES:

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

Dated: August 27, 2012

VUKOVICH, J.

{¶11} 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.

{¶12} 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.

{¶13} 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

{¶14} 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."

{¶15} 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. Cocke*, 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. *Skivolocki 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").

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{¶30} 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

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

{138} 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.

{139} 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.

{140} 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

Appx. 4

FILED
COMMON PLEAS COURT

IN THE COURT OF COMMON PLEAS
JEFFERSON COUNTY, OHIO

2011 SEP 26 P 3:38

JOHN A. CORRIGAN
CLERK OF COURTS
JEFFERSON COUNTY OH

RON SNYDER, et al.,

Plaintiffs,

v.

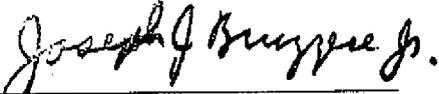
OHIO DEPARTMENT OF
NATURAL RESOURCES, et al.,

Defendants.

Case No. 09 CV 00245
Judge Joseph J. Bruzzese, Jr.

JUDGMENT ENTRY

For the reasons stated in the opinion rendered on September 7, 2011, Defendant's Motion for Summary Judgment is sustained. The case is dismissed with prejudice, and Court costs taxed against Plaintiffs. This Judgment is a final appealable order.



JOSEPH J. BRUZZESE, JR.
JUDGE

Approved by:


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Approved only as to form¹:

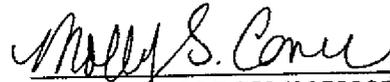
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Ronald Snyder, et al.

¹ Plaintiffs do not approve the Court's September 7, 2011 opinion or the substance of this Judgment Entry and reserve all rights, including rights of appeal.

Respectfully submitted,

MIKE DEWINE
ATTORNEY GENERAL OF OHIO



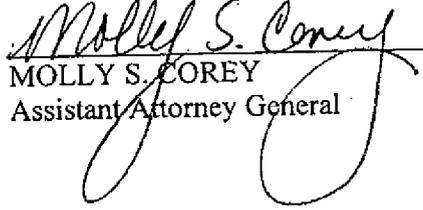
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CERTIFICATE OF SERVICE

A copy of the foregoing Judgment Entry was served by ordinary U.S. mail and electronic mail this 23rd day of September, 2011 upon the following:

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Appx. 5

IN THE COMMON PLEAS COURT OF JEFFERSON COUNTY, OHIO

COURT REPORTER

RONALD SNYDER, ET AL)
Plaintiffs)

ORDER GRANTING
SUMMARY JUDGMENT

301 SEP -7 P 4:15

JOHN A. COLEMAN
CLERK OF COURTS
JEFFERSON COUNTY OH

-vs-

) Case No: 09-CV-243

OHIO DEPARTMENT)
OF NATURAL RESOURCES)
Defendants)

JOSEPH J. BRUZZESE, JR.
JUDGE

FACTS

On or about April 6, 1944, Grantors Lucy F. Davis et al sold the subject real estate to the State of Ohio.

In that deed was a reservation that read as follows:

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

Plaintiffs are the successors in interest of the Grantors and want to cause the premises to be strip mined for coal. Defendant says “no.” The issue becomes whether or not the reservation quoted above encompasses the right to strip mine.

DISCUSSION

On June 3, 2011, Defendant filed its Motion for Summary Judgment citing numerous Ohio Authorities including the Ohio Supreme Court and the Seventh Appellate District both of which control this Court.

It is clear from these authorities that the mere reservation of mineral rights does imply the right to remove the minerals but does not imply the right not remove them by

strip mining methods. The rationale that runs consistently through those cases is that strip mining does not merely use the surface, it destroys the surface. In order for the Grantor to reserve the right to strip mine he must expressly reserve that particular right under the line of cases cited.

Plaintiff points out that times have changed. While there were no laws governing strip mining in 1944 there are many now that would lessen or fix the surface. The problem here is that the deed was signed in 1944 and means now what it meant then. Documents do not morph over time to mean something different later than what they meant when they were executed. The deed means now and forever what it meant in 1944.

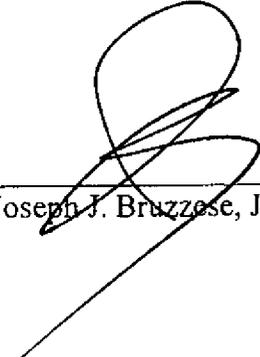
Plaintiff repeatedly points out that no language in the deed prohibits strip mining. While that may be true the Ohio Courts have focused on an express inclusion of that right rather than an express exclusion. The failure to expressly exclude does not amount to an express inclusion as required by Ohio Courts.

Plaintiffs argue that the reservation is ambiguous by reason of the words "reasonable surface right privileges" which is susceptible to more than one meaning. While the Court does agree that the word "reasonable" creates a certain amount of wiggle room the Court also holds that the word "reasonable" mandates at least some amount of limitation. If this case was about some less than catastrophic disruption to the surface then one could argue whether that disruption fell within the wiggle room created by the word "reasonable." This case however involves the destruction of the surface, which is on the far side of limitless and definitely not within the wiggle room created by the word "reasonable."

Plaintiff seeks to create an ambiguity by referring to extrinsic evidence. This puts the cart before the horse. Extrinsic evidence may be used to resolve an ambiguity but is never used to create one. In any event all of the extrinsic evidence presented and bearing upon the intent of the actual grantors is inadmissible hearsay.

ORDER

Defendant's Motion for Summary Judgment is sustained. Case dismissed with prejudice. Costs to Plaintiff.



Joseph J. Bruzzese, Judge

Copies to:

All Attorneys of Record