

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.	:	

**REPLY BRIEF OF PLAINTIFFS-APPELLANTS
RONALD M. SNYDER AND STEVEN W. NEELEY**

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INTRODUCTION

This Court accepted jurisdiction over three related propositions of law that collectively address whether the parties to a 1944 deed intended to reserve reasonable surface and auger mining rights to the owners of the mineral estate (Proposition of Law No. 1), including whether extrinsic evidence of such an intent should have been considered (Proposition of Law No. 2) and whether it was proper to resolve the disputed factual question of intent on summary judgment (Proposition of Law No. 3).

The State's merit brief barely mentions these issues. Instead, it simply assumes that no owner of a surface estate would ever intend to give the owner of the mineral estate the right to use surface or auger mining methods on any portion of the land -- despite the fact that countless Ohio surface owners have done exactly that. The State then pretends that this Court's prior decisions have ignored the intentions of the parties to a deed and have adopted a blanket rule that a mineral estate owner never has the right to obtain any of its coal by surface or auger mining unless the deed expressly refers to those mining methods by name -- despite the fact that those decisions eschewed the need for any such "magic words" and examined the intentions of the parties to the deed.

The State aims to obscure the issues on appeal and to avoid the axiomatic inquiry into the intent of the parties. This is evident in the first paragraph of its brief, where it claims that the outcome of this appeal is dictated by the principle that, when surface rights and mineral rights have been severed, "[e]ach owner must so use his own, as not to injure the property of the other." (Merit Brief of Appellees, at 1, *quoting Burgner v. Humphries*, 41 Ohio St. 340, 352 (1884).) Appellants completely agree with this principle, but it begs the question before the Court, *i.e.*, whether the original parties to the 1944 deed intended to grant reasonable surface and auger mining property rights to the surface estate owner or intended to reserve these property

rights to the mineral estate owner. The principle discussed in *Burgner* will apply only after this litigation determines ownership of these property rights. If the parties to the deed intended to reserve them to the mineral estate, these rights are now the property of appellants, and the quoted principle from *Burgner* mandates that the State cannot use its own property rights to injure appellants' property right to use reasonable surface and auger mining methods.

The State convinced the courts below that they should simply assume, as a matter of law, that absence of the words "surface mine" or "strip mine" in the 1944 deed is dispositive and made it unnecessary for the lower courts to consider the actual intent of the parties to the 1944 deed. But the language of the deed in this case shows that they intended to reserve reasonable surface mining rights to the owner of the mineral estate, as discussed below in connection with Proposition of Law No. 1. To the extent that any of the words used in the deed could be considered ambiguous, there is a host of extrinsic evidence confirming that this is what the parties to the deed actually intended, as described under Proposition of Law No. 2. Finally, there is at the very least a genuine dispute of fact regarding their intentions that should have precluded summary judgment in favor of the State, as explained under Proposition of Law No. 3.

Appellants respectfully ask the Court to reverse the ruling below on any or all of these grounds and to remand the determinative factual question in this dispute -- whether the parties to the 1944 deed intended to reserve reasonable surface and auger mining rights to the mineral estate -- for resolution by the trier of fact.

STATEMENT OF FACTS

Despite its title, the Statement of Facts in the State's merit brief omits virtually all of the evidence of record that is relevant to the issues in this appeal. That evidence uniformly shows that the parties to the 1944 deed intended to include reasonable surface and auger mining

rights when they reserved “all mineral rights, including...reasonable surface right privileges” to the mineral estate. The following facts are undisputed:

- all mining necessarily disrupts and destroys some of the surface of the land (History at 38, Supp. 241)¹, see also *Skivolocki v. East Ohio Gas Company*, 38 Ohio St.2d 244, 247-48, 313 N.E. 2d 374 (1974) (analyzing case law “observing that even customary deep mining would be destructive of the surface land”);
- surface-mining methods were commonly used in Jefferson County at the time this deed was executed, with 38% of the coal that was produced in the County in 1944 mined in this way (History at 184-85, Supp. at 248-49);
- when the 1944 deed was executed, some portions of the deeded property had previously been surface-mined (Six Aff. at ¶ 5, Ex. 1 to Pls’ Response to MSJ, Supp. 92);
- one of the parties to the 1944 deed had included surface mining rights in the mineral estate when she granted an option to purchase “all the strippable coal” in this property to a third party shortly before she granted the surface estate to the State and reserved the mineral estate to herself in the deed, see *State of Ohio v. Baity*, Jefferson Cty. C.P. No. 50354 (Dec. 10, 1963) (attached to Merit Brief of Appellees as Appx. A);
- the State drafted the 1944 deed and other deeds containing identical language for numerous other nearby properties, for which it also obtained the surface estates, and it told some of the landowners that the “reasonable surface right privileges” that were reserved to their mineral estates included surface mining rights (Defs’

¹ All citations to documents in the Record and Appellants’ Supplement follow the short-forms used in Appellants’ Merit Brief.

MSJ at 2, 8 & Ex. A-H; Supp. 20, 26 & 36-65; Herrick Dep., Supp. 209; Six Aff., at ¶ 5, Supp. 92);

- the deed at issue contains no language that limits the mineral estate owner to deep mining methods or that is uniquely applicable to deep mining, and it describes no uses of the surface that would be incompatible with reasonable surface or auger mining;
- the use of surface and auger mining methods was the only economically feasible way to remove the \$11 million worth of coal in this property that was reserved by the deed (Honish Aff. at ¶¶ 2-5 & 11-13, Ex. 4 to Pls' Resp. to MSJ, Supp. 113-16; Miller Dep. at 49-53, 55 & Ex. 16, Supp. 215-23);
- the small amount of land that appellants propose to mine constitutes only about 10% of the property conveyed by the 1944 deed (Defs' MSJ, Ex. H, Supp. 64-65; Pls' Amend. Compl. Ex. A, Supp. 8-9) and only about 1.5% of the total property within the Brush Creek Wildlife Area (Herrick Dep. Ex. 2, Supp. 212-13; Hosack Aff. at ¶ 7 & "Description" for 4,131 acres, Supp. 185-86);
- other nearby land that had been surface-mined before being bought by the State was reclaimed and is included in the 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
- like the other land in the Wildlife Area that was mined by surface and auger mining methods in the past, the small portion of the property that appellants seek to mine will be reclaimed and then used for exactly the same purposes that it is used for now (Merit Brief of Appellants' at 4).

Each of these undisputed facts supports appellants' contention that the original parties to the 1944 deed intended to include reasonable surface and auger mining rights in the "reasonable surface right privileges" that they expressly reserved to the owner of the mineral estate.

Instead of including these facts in the Statement of Facts of its Merit Brief, the State includes matters that are contradicted or unsupported by the record. For example, it repeatedly represents that appellants' proposed surface and auger mining will permanently obliterate the surface of this property and render it useless, when the record evidence shows that they will mine less than 10% of the surface, which will then be reclaimed and suitable for continued use as a wildlife habitat -- just like the other land in the wildlife area that was previously surface-mined and reclaimed.

Similarly, the State alleges that it "purchased most of the wildlife area with the assistance of federal funding," and that it "risks being diverted" from future federal funding if it loses this appeal. (Merit Brief of Appellees, at 2.) This argument is not only improper -- it is being made here for the first time without any record support -- but it is also irrelevant to the issue before the Court: whether the parties to the 1944 deed intended to reserve reasonable surface and auger mining rights to the mineral estate now owned by appellants, or whether they intended to grant these rights to the surface estate now owned by the State.

As discussed below, there is substantial evidence of record in this case that the original parties to the deed intended to include reasonable surface and auger mining rights in the "reasonable surface right privileges" that they expressly reserved to the mineral estate. The summary judgment order entered below should be reversed and the case should be remanded so that the trier of fact can resolve this dispositive factual issue.

ARGUMENT

Proposition of Law No. 1:

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

The State agrees with appellants that Ohio law authorizes property owners to sever mineral interests from surface interests because “the land is thereby rendered doubly productive.” *Graham v. Drydock Coal Co.*, 76 Ohio St.3d 311, 316, 667 N.E. 2d 949 (1996). The State also agrees that all coal mining methods necessarily require the use of some portion of the surface of the land, and that the balance of the surface and mineral rights in any particular case is determined by the intentions of the parties, as reflected by the language of the deed that severs the surface and mineral estates. “The intent of the parties is presumed to reside in the language they chose to use in their agreement,” and if the parties’ intent is clear from that language, the inquiry ends there. *Graham, supra*, 76 Ohio St.3d at 313. See *Belville Mining Co. v. United States*, 999 F.2d 989, 996 (6th Cir. 1993) (finding that the deed language showed that the parties intended to give surface mining rights to the owner of the mineral estate); *Skivolocki v. East Ohio Gas Company*, 38 Ohio St.2d 244, 247, 251, 313 N.E. 2d 374 (1974) (finding that the deed language did not show an intention to give surface mining rights to the mineral estate).

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. If extrinsic evidence does not clarify the parties’ intentions, the language used in the deed “is to be construed against the party that drew it.” *Id.*

The State hopes the Court will ignore these settled legal principles and adopt a blanket rule that ignores the intentions of the parties to the 1944 deed. It chooses this tactic because it cannot plausibly argue that all surface mining – whether of 100 acres or 1 acre or even one foot – is per se unreasonable or that there is so little evidence of the parties’ intent to allow reasonable surface and auger mining that summary judgment was proper on this issue.

The State recognizes that the 1944 deed was executed soon after one of the parties to the deed, who then owned both the surface and the mineral estates, had granted a temporary option to a third party “to purchase all the strippable coal” in the property. (Merit Brief of Appellees, Appendix, at 2.) She obviously believed that surface mining on the property would not destroy her surface interests when she included the surface mining rights in the option to purchase the mineral estate. It would be very surprising if she did not similarly intend to include some surface and auger mining rights in the mineral estate less than two years later, when she conveyed the surface estate to the State and reserved “all the mineral rights, including...reasonable surface right privileges” to herself in the 1944 deed.

The parties to the deed knew that this parcel of land, like other nearby properties that were also included in the Wildlife Area, had been surface-mined in the past, and that surface-mining was very common in the County at the time the deed was executed. The deed itself contains no language that prohibits the owner of the mineral estate from using surface or auger mining methods; in fact, the deed expressly reserves “surface right privileges.” The deed also does not describe the mining rights in words that are associated with deep mining methods. Further, the deed does not refer to farming or to any other future uses of the surface that are incompatible with an intent to allow surface and auger mining.

Nevertheless, the State's sole argument in this appeal is that it is so inconceivable that any surface owner would ever intend to allow surface-mining on even a small portion of the property that the trial court properly decided that question *as a matter of law* and entered summary judgment. This ignores the fact that one of the parties to the 1944 deed had previously agreed to allow surface-mining when she owned the surface estate in this very property. More importantly, the 1944 deed reserves only "reasonable" surface right privileges to the mineral estate owners. The issue here is not whether appellants have the right to surface mine the entire surface of the property, but whether the parties to the deed intended to include the right to surface mine a small, reasonable portion of the surface. Unlike the case law cited by the State, where parties claimed unlimited surface mining rights, the surface estate in this case is protected by the requirement that the mining must be "reasonable."

This very point is illustrated by the State's citation to the ruling in *State v. Baity*, Jefferson Cty. C.P. No. 50354 (Dec. 10, 1963) (attached to Merit Brief of Appellees). In that case, the question was whether the parties to this 1944 deed intended to include the right to surface mine the entire surface of the property when they reserved "reasonable surface right privileges" to the mineral estate. The trial court granted the State a temporary restraining order after finding that the reserved rights did not include the right to surface mine all of the surface. It noted that the defendants claimed the right to "demolish and ravish the entire area," and held that "such a construction cannot be placed upon the words 'reasonable surface right privileges.'" (*Id.*, at 7.) "[T]hey should have framed their reservation in such a way as to clearly show [that] intention as they did in their option to Blackstone [*i.e.*, "all the strippable coal"]...and not in such a way as to lead the grantee to believe they only reserved 'reasonable surface right privileges.'" (*Id.*, at 7-8.)

In the present case, the issue is very different: whether the parties to the 1944 deed intended to include the right to surface mine a small portion of the surface when they reserved “reasonable surface right privileges.” A trier of fact could properly find that they considered some limited surface mining to be “reasonable” under the circumstances, including the history of surface mining on this and other nearby property. The parties to the deed provided protection to the surface owner by allowing only reasonable surface mining -- protection that was not given to the surface estate owners in *Graham, supra*, and *Skivolocki, supra*, where the mineral estates sought to mine the entire surfaces of the properties and the Court looked for assurances in the deeds that the parties had actually intended to reserve such an unlimited right.

The State’s citation to *Baity, supra*, is also significant because that decision references “knowledge...by the State or the Attorney General,” at the time the deed was executed in 1944, that an option to lease had previously been given to a third party, Blackstone, for “all the strippable coal” in the property. (*Id.*, at 2, 8.) The Attorney General had examined the 1944 deed two days before it was signed, and it had acknowledged that “certain separable mineral rights...under an existing lease held by William E. Blackstone,” *i.e.*, the “strippable coal” in the property, were “to be reserved” by this deed. 1944 Ohio Atty.Gen.Ops. No. 6802 (April 4, 1944), Appx. 1 hereto. This is further direct evidence of the intention of the State and the grantor to include surface mining rights in the deed reservation.

The blanket rule proposed by the State ignores the intentions of the parties and automatically prohibits the owners of a mineral estate from using reasonable surface or auger mining to recover their coal unless those methods are specifically named in the deed. No such rule has ever been endorsed by any Ohio court or applied to any Ohio deed, grant, reservation, or exception. The State insists that the Court adopted this “rule” in two of its previous decisions,

Graham, supra, and *Skivolocki, supra*, but neither of those decisions adopted a blanket rule or suggested that any specific words must be used in a deed to reserve reasonable surface and auger mining rights. On the contrary, the decisions in both cases confirmed the settled legal principle that “[c]ontracts are to be interpreted so as to carry out the intent of the parties, as that intent is evidenced by the contractual language,” *Skivolocki*, syllabus paragraph 1, and in both cases the Court considered evidence of the parties’ intentions as to surface mining, rather than simply invoking some blanket rule.

In *Graham, supra*, this Court held that the parties to the deed did not intend to reserve strip mining rights for the entire surface of the property to the mineral estate after it found that the language of the deed, which described the mineral estate’s mining rights in language “peculiarly applicable” to deep mining methods, indicated no such intent, and further found that extrinsic evidence “clearly indicated absence of intent to allow strip mining.” 76 Ohio St.3d at 319. In *Skivolocki, supra*, the Court similarly emphasized that a deed must be interpreted “so as to carry out the intent of the parties,” and it held that the deed in that case did not allow surface mining of the property after noting that it “is coached in language peculiarly applicable to deep mining, and the evidence shows that the technique of strip mining was not known in Guernsey County” when the deed was executed. 38 Ohio St.2d at 247, 251. The Court would not have bothered to analyze the intentions of the parties to the deeds in either of these cases if it had actually adopted the State’s blanket rule.²

² The State improperly argues that “at least three other counties concluded that strip mining was incompatible with a surface owner’s rights where the deed did not expressly allow it.” (Merit Brief of Appellees at 10 (citing *Franklin v. Callicoat*, 119 N.E. 2d 688, 694 (Ohio Ct. Com. Pleas, 1954); *E. Ohio Gas Co. v. James Bros. Coal Co.*, 85 N.E. 2d 816, syllabus (Ohio Ct. Com. Pleas, 1948); *Tennessee Gas Transmission Co. v. Blackford*, 160 N.E. 2d 336, 341 (Ohio Ct. App., 1958).) Not one of those courts held that the absence of the terms “strip mine” or “surface mine” was dispositive. Instead, each court analyzed the deed and circumstances presented to ascertain the intent of the parties. See *Franklin*, 119 N.E. 2d at 690, 694 (finding it “undisputed that in 1905 strip mining methods were unknown to the coal industry in this county,” that the deed expressly contemplated and protected agricultural use of the land, that the deed language allowed surface use only “as is necessary for tramways,

In short, the respective rights of the surface estate and the mineral estate depend upon the intentions of the parties to the 1944 deed, and the language used in that deed and the surrounding circumstances indicate that they intended to include limited surface and auger mining rights in the “reasonable surface right privileges” that were reserved to the owner of the mineral estate.

Proposition of Law No. 2:

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

As discussed above, the language of the 1944 deed reserves reasonable surface and auger mining rights to the owner of the mineral estate, and the courts below erred in holding otherwise. But even if the Court believed that the deed language does not clearly reserve those rights to the mineral estate, it also does not clearly grant them to the surface estate. As with other written instruments, extrinsic evidence may properly be considered to resolve any ambiguity. *See Belville, supra*, cited with approval in *Graham, supra*, where the Sixth Circuit Court of Appeals considered extrinsic evidence in holding that the parties to three deeds had intended to give the right to surface mine to the mineral estate. *See also Skivolocki, supra*, holding that the parties to a deed did not intend for the mineral estate to have surface mining

necessary buildings and appurtenances to” deep mining, and that the mineral interest owner sought the right to “tear up the entire surface of the farm”); *E. Ohio Gas*, 85 N.E. 2d at 817 (finding that E. Ohio Gas acquired its surface interest under a 1909 instrument that expressly contemplated and protected East Ohio’s right to lay and maintain pipelines across the land, and that defendant was seeking to remove all “coal and clay beneath the plaintiff’s lines”); *Tennessee Gas Transmission Co.*, 160 N.E. 2d at 341 (finding that a 1901 deed “specifically provided that the minerals were to be mined and deposits made so as to do the least possible injury to the surface of the land,” allowed only removal of “the minerals in the accustomed method of mining known” in 1901, and “did not grant a right to destroy all of the surface by the strip-mining process”). None of these cases adopted the State’s suggested blanket rule.

rights, after it found, *inter alia*, that surface mining methods were not known in that county until decades after the deed was executed.

The record in the present case contains substantial evidence that the parties to the 1944 deed intended to allow surface and auger mining on a small portion of the surface when they reserved “reasonable surface right privileges” to the mineral estate. There is uncontested evidence that surface mining was very common in the area and was used to mine 38% of the coal produced in the county that year. (History at 184-85, Supp. at 248-49.) There is also expert evidence that, under the circumstances surrounding the execution of this deed, the parties would have expected that “reasonable surface right privileges” included the right to surface and auger mine coal. (Mosser Aff., at ¶ 10, Supp. 110-11.) And there is further evidence that this was the custom and practice; “before 1944, [the owners of this property] had surface mined coal...and sold the coal locally and understood that they could continue to get the coal [in this way] after the Deed was signed.” (Six Aff., at ¶ 5, Supp. 92.)

Instead of submitting evidence on this issue in the trial court, the State simply insisted that the parties to the 1944 deed could not possibly have intended that the “reasonable surface right privileges” they reserved to the mineral estate would include the right to surface and auger mine a small portion of the property. Now, the State hypothesizes a parade-of-horribles if different mining is done under different circumstances and mocks appellants for suggesting that the very limited extent of the surface mining in this case bears on its reasonableness. But the State’s resort to hypotheticals only proves that the reasonableness of a surface right depends on the circumstances of proposed mining – *any* proposed mining. For example, it seems self-evident that a surface owner might believe that it would be unreasonable

to surface-mine the entire surface of the property but reasonable to surface-mine much less – perhaps just ten percent – of the surface.

The evidence of record also refutes the State’s assertion that this surface and auger mining would completely destroy the surface estate and render it useless. Apart from the fact that only a small portion of the surface will be mined, there is expert testimony – the only expert testimony on the subject – that establishes the temporary effects of surface mining and the permanent long-term benefits to the wildlife habitat that result from mining and reclamation activities. (Hosack Aff., at ¶ 9, Supp. 186.) Even the State concedes that other land within the Wildlife Area that was surface-mined and reclaimed in the past is now suitable for use as a wildlife habitat. It disingenuously argues that reclamation cannot “perfectly restore the land” while it simultaneously concedes that the “reclaimed land...in this wildlife area...is usable.” (Merit Brief of Appellees, at 13-14.) The State’s assertion that it is also “using the property” at issue “by preserving its natural topography” (*id.*, at 15) renders the phrase “using the property” utterly meaningless.

Finally, even if the extrinsic evidence did not clarify any perceived ambiguity in the language of the 1944 deed, that language would then have to be construed against its drafter, which is the State in this case. *Graham, supra*, 76 Ohio St.3d at 313-14. The State vaguely implies that it might not have drafted the deed, but it is undisputed that this language appears in only nine deeds, and that the State, which was the only party common to each of those deeds, handled their preparation. (Defs’ MSJ at 2, 8 & Ex. A-H; Supp. 20, 26 & 36-65; and Herrick Dep. at 57-58; Supp. 209.) The State accordingly argues that, even if it drafted the deed, a “special rule” governs ambiguous reservations of property interests, which purportedly requires that they must be construed “most strongly against the grantor.” (Merit Brief of Appellees, at

21.) The State relies upon a single 1926 case as support for that argument and ignores the Court's most recent ruling on the issue, which held that the validity of surface mining rights does not depend upon whether they were reserved by the deed or were granted by it:

Neither do we agree that the determination of the intent of the parties [regarding surface mining] should be made according to whether the surface interest or the mineral interest is severed from the fee.... We have not discovered any authority in support of that contention.

Graham, supra, 76 Ohio St.3d at 317. The normal rule that language is construed against the drafter applies to the 1944 deed.

In any event, the extrinsic evidence confirms that the parties to the 1944 deed intended to reserve reasonable surface and auger mining rights to the mineral estate. It was error to hold that they had no such intent as a matter of law and to grant summary judgment in favor of the State on that basis.

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 State concedes that land is “doubly productive” when surface and mineral estates are severed (Merit Brief of Appellees at 16), and it cannot deny that the public policy of Ohio strongly favors production of coal and other energy resources. *See* R.C. 1551.31 (finding and declaring that “[i]t is imperative for this State to have a strong, viable coal industry in order to create and preserve jobs and improve the economy of this state”); *Redman v. Ohio Dept. of Ind. Relations*, 75 Ohio St.3d 399, 360, 662 N.E. 2d 352 (1996) (noting that Ohio public policy favors “the maximum...production of coal...in an environmentally and economically proficient

manner”). The State has never attempted to refute appellants’ evidence that the \$11 million worth of coal in this property cannot be recovered realistically by deep-mining methods. It nevertheless announces that Ohio public policy “favors the State’s view” (Merit Brief of Appellees, at 16), without ever explaining how that can possibly be true.

The State denies that the coal in this property is “inaccessible” without surface and auger mining, despite undisputed evidence that it would cost more to recover it by deep mining methods than it is worth, and it asserts that “ownership of mineral rights does not require that such rights be economically viable.” (Merit Brief of Appellees, at 17.) The State misrepresents the issue before this Court. A trier of fact could properly consider the fact that this coal could be obtained only by surface and auger mining methods to determine whether the parties to the 1944 deed intended that “reasonable surface right privileges” included those methods.

The State questions why a surface owner would ever agree to deed language that permits surface mining, even if it is limited to a small fraction of the surface and its effects on the planned use of the property are temporary, but countless surface estate owners have done exactly that. Significantly, the State never questions its own implausible theory that the mineral owner in this case intentionally agreed to deed language that would prevent it from obtaining its coal.

In any event, even if the language of the 1944 deed were unclear, and even if the extrinsic evidence did not clarify the intent of the parties to the deed, a trier of fact could properly find that surface and auger mining on approximately ten percent of the surface of this undeveloped property is a “reasonable surface right privilege” that is reserved to the owner of the mineral estate. The trial court erred by granting summary judgment to the State in the face of this genuine dispute of material fact.

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 above in support of their three Propositions of Law.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on July 8, 2013, a true and correct copy of the foregoing *Reply Brief of Plaintiffs-Appellants* was served by regular U.S. mail, postage prepaid, on the following:

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APPENDIX 1

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APR 4 1944

OPINION NO. 6802

Hon. Don Waters, Commissioner,
Conservation and Natural Resources,
Columbus, Ohio.

Dear Sir:

This is to acknowledge receipt of your recent communication with which you submit for my examination and approval certain documents of title, Warranty Deed, Contract Encumbrance Record No. 21, Controlling Board's Release of date January 6, 1944, a blueprint or plat with description and other files relating to the proposed purchase by the Commissioner of Conservation of Natural Resources, for and in the name of the State of Ohio, of a tract of land of 639.5 acres located in Sections 13 and 7 in Township 12, Range 3 in the Township of Brush Creek, County of Jefferson and State of Ohio, and more particularly described in said deed.

Upon examination of the documents of title and indices and instruments of record affecting the same, I find that the owners of record, Lucy F. Davis, Elmer Russell and Bertha Russell, his wife, Raymond E. Russell and Viola Russell, his wife, Cora Russell, a widow,

Hon. Don Waters.

John R. Williams and Nellie Williams, his wife, Frank Williams, unmarried, Myrtle Hazel, unmarried, Mart Williams, a widower, ^{Ida} and Marker and Charles Marker, her husband, also William E. Blackstone and Blance N. Blackstone who hold an undivided interest in the fee and also certain separable mineral rights to be reserved under an existing lease held by William E. Blackstone, have a good and merchantable fee simple in and to the above described premises, free of encumbrances, excepting the lien of taxes in the amount due and payable to date and including the amount payable in June, 1944.

Subject to the exception herein noted as to taxes, the title in and to said land is approved as is likewise the form of warranty deed, which together with the contract encumbrance record and other files that you have submitted for my consideration is herewith returned.

Respectfully,

Thomas J. Herbert

Attorney General.