ORIGINAL

IN THE SUPREME COURT OF OHIO

John D. Walker, Jr.,	:	14-0803
Appellee,	:	On Appeal from the Noble County Court of Appeals, Seventh Appellate District
v.	:	
	:	Court of Appeals Case No. 13 NO 402
Patricia J. Shondrick-Nau, Executrix of the Estate of John R. Noon, and Successor Trustee of the John R. Noon Trust	:	
Appellant.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT PATRICIA J. SHONDRICK-NAU, AS EXECUTRIX OF THE ESTATE OF JOHN R. NOON, AND SUCCESSOR TRUSTEE OF THE JOHN R. NOON TRUST

Matthew W. Warnock (0082368)*
**Counsel of Record*
Daniel C. Gibson (0080129)
Daniel E. Gerken (0088259)
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215-4291
Telephone: (614) 227-2300
Facsimile: (614) 227-2390
E-mail: mwarnock@bricker.com
dgibson@bricker.com
dgerken@bricker.com

COUNSEL FOR APPELLANT

Kenneth Cardinal (0010659)
758 North 15th Street
P.O. Box 207
Sebring, Ohio 44672
(330) 938-2161 direct
(330) 938-1556 fax
cardinallaw@sbcglobal.net

James F. Mathews (0040206)
Baker, Dublikar, Beck, Wiley & Mathews
400 South Main Street
North Canton, Ohio 44720
(330) 499-6000 direct
(330) 499-6423 fax
mathews@bakerfirm.com

COUNSEL FOR APPELLEE

FILED
MAY 16 2014
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST 1

STATEMENT OF THE CASE AND FACTS 3

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW 5

Proposition of Law No. I: The 2006 version of the DMA is the only version of the DMA to be applied after June 30, 2006, the effective date of said statute. 5

Proposition of Law No. II: To establish a mineral interest as "deemed abandoned" under the 1989 version of the DMA, the surface owner must have taken some action to establish abandonment prior to June 30, 2006. In all cases where a surface owner failed to take such action, only the 2006 version of the DMA can be used to obtain relief. 5

Proposition of Law No. III: To the extent the 1989 version of the DMA remains applicable, the 20-year look-back period shall be calculated starting on the date a complaint is filed which first raises a claim under the 1989 version of the DMA. 10

Proposition of Law No. IV: For purposes of R.C. 5301.56(B)(3), a severed oil and gas mineral interest is the "subject of" any title transaction which specifically identifies the recorded document creating that interest by volume and page number, regardless of whether the severed mineral interest is actually transferred or reserved. 12

Proposition of Law No. V: Irrespective of the savings events in R.C. 5301.56(B)(3), the limitations in R.C. 5301.49 can separately bar a claim under the DMA. 13

Proposition of Law No. VI: The 2006 version of the DMA applies retroactively to severed mineral interests created prior to its effective date. 14

CONCLUSION 15

CERTIFICATE OF SERVICE 16

THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

The State of Ohio is experiencing a resurgence in oil and gas leasing activity as a result of technological advancements that have made it possible to produce oil, natural gas, and natural gas liquids from the Marcellus Shale and Utica (or Point Pleasant) Shale. Owners of mineral rights in eastern Ohio, including Noble County, stand ready to earn thousands of dollars per acre in up-front signing bonus payments simply for owning the oil and gas mineral rights and having the privilege of entering into an oil and gas lease.

Like innumerable lawsuits percolating through the courts in eastern Ohio, this matter involves a dispute between a surface owner and a prior owner of the property who reserved the oil and gas mineral rights. At the core of the litigation is a seemingly innocuous question: Who owns the oil and gas mineral rights? Although the answer is literally worth thousands of dollars per acre, the question does not have a simple or straightforward answer.

In 1989, the General Assembly sought to help answer this question through the enactment of R.C. 5301.56, Ohio's Dormant Mineral Act ("DMA"). Although designed to provide a surface owner with the opportunity to acquire title to previously-severed mineral rights that remained "dormant" for an unidentified 20-year time period, the 1989 version of the DMA proved to be inherently flawed, as it: (i) failed to specify the specific 20-year look-back period; and (ii) proved impractical and unworkable in light of the ambiguity regarding whether it provided for "automatic" abandonment without any due process protections being offered to the severed mineral interest owner(s). *See generally*, R.C. 5301.56(B).

As a result, the DMA was substantially rewritten in 2006 to require a surface owner to follow a multi-step procedure, replete with fundamental due process protections, to regain ownership of previously severed mineral interests. Unfortunately, as the Seventh District Court of Appeals noted below: "No Ohio appellate court or the Ohio Supreme Court has yet to address

the issue of when to apply the 1989 version of R.C. 5301.56 and when to apply the 2006 version." The result is that surface and mineral owners are left no choice but to litigate, while oil and gas companies scramble to enter into oil and gas leases with both the surface owner and severed mineral interest owner or risk losing their significant financial investment. *Walker v. Noon*, 7th Dist. Noble No. 13 NO 402, 2014-Ohio-1499. App. No. 13 NO 402, 2014-Ohio-1499. In this case, the Court is presented with the opportunity to resolve this legal quagmire.

Admittedly, there are two other cases pending before this Court involving the DMA, albeit involving three narrow issues—none of which will impact the outcome in this case. See *Dodd v. Croskey*, 138 Ohio St. 3d. 1432, 2014-Ohio-889, 4 N.E.3d 1050; *Chesapeake Exploration, LLC v. Buell*, 138 Ohio St. 3d. 1446, 2014-Ohio-1182, 5 N.E.3d 665.[1] Perhaps more importantly, neither of these cases address the core issues presented in this appeal; in particular, the issue of when to apply the 1989 version of the DMA (if ever).

Although the Seventh District attempted to rule upon this issue in this case, it: (i) misapplied the law; (ii) rendered a decision that runs directly counter to the stated purpose of the DMA ("simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title"); and (iii) overlooked a number of critical questions that must be answered if the 1989 version of the DMA applies (see Propositions of Law I – III below).

This Court now has the opportunity, in a single case, to provide clarity in an area of the law that is paralyzing oil and gas development throughout eastern Ohio by making it more risky

---

[1] In *Dodd*, jurisdiction was granted on the following issue: "Ohio Revised Code Section 5301.56(B)(3) requires a showing by a party claiming the preservation of a prior mineral interest of a 'savings event' that occurred in the 20 years prior to notice being served and not a 'savings event' after the date of the notice being served"); and in *Buell*, jurisdiction was accepted over two certified questions from the Southern District of Ohio, namely whether an oil and gas lease and release of oil and gas lease constitute "title transactions" for purposes of R.C. 5301.56(B)(3)(a).

for companies to do business in Ohio; causing chaos among abstractors, title attorneys, oil and gas companies and the judiciary; and leading to a glut of unnecessary lawsuits in the trial and appellate courts. In essence, the Court could resolve a series of issues of the utmost importance to the general public and State of Ohio (property owners and businesses alike), while encouraging and facilitating shale development throughout eastern Ohio—development that stands ready to continue transforming the region's economic and employment future. *See e.g.*, Knox, *Oil-and gas-related investment in Ohio nears $19B*, Columbus Business First, (April 2, 2014) available at http://www.bizjournals.com/columbusinews/2014/04/02/oil-and-gas-related-investment-in-ohio-nears-19b.html (accessed April 15, 2014).

STATEMENT OF THE CASE AND FACTS

None of the facts in this case are, or ever have been, in dispute. At the heart of this case is the ownership of the oil and gas mineral rights underlying two parcels totaling approximately 42.226 acres located in Noble County, Ohio (the "Property"). John Noon first acquired the Property in 1964. Approximately one year later, on July 26, 1965, Mr. Noon sold the surface of the Property by quit claim deed, but expressly reserved the oil and gas mineral rights underlying the Property (the "1965 Severance Deed"). Specifically, the 1965 Severance Deed states:

> Excepting and reserving to the Grantor [John Noon], his heirs, successors and assigns, all coal, oil and gas and all other minerals underlying the premises together with all the easements, rights and privileges therein which Grantor, his heirs, successors or assigns in his or their sole discretion may deem necessary, desirable or convenient in order to remove said coal, oil, gas and other minerals by any method now employed or hereafter developed, including strip mining methods, from said premises and also to reclaim as required, or permitted by law, said premises and any other premises now or hereafter owned, leased or operated upon by Grantor, his heirs, successors and assigns.

Over the subsequent 12 years, the surface rights to the Property were transferred three times—twice in 1970, and once in 1977. Each of these three conveyances specifically

referenced, by volume and page number, the reservation of the oil and gas mineral rights in the 1965 Severance Deed. The John D. Walker, Jr. (the "Appellee") purchased the surface rights to the Property in 2009.

On November 28, 2011, the Appellee sent a notice of abandonment of the mineral rights to Mr. Noon under the 2006 version of the DMA, with service perfected on December 2, 2011. Contrary to R.C. 5301.56(H)(2), the Appellee recorded an affidavit of abandonment in the Noble County Recorder's Office on January 3, 2012. In response, and pursuant to R.C. 5301.56(H)(1), Mr. Noon timely recorded an affidavit and claim to preserve the severed mineral interest on January 10, 2012 in the Noble County Recorder's Office—approximately 39 days after receiving the notice of abandonment and well before the 60 day limitation in R.C. 5301.56.

On April 27, 2012, and after unsuccessfully attempting to utilize the 2006 version of the DMA, the Appellee filed a complaint to quiet title and for declaratory judgment seeking to divest John Noon of his mineral rights based exclusively on the DMA. This is the first time the Appellee even attempted to use the superseded 1989 version of the DMA.

The parties filed cross-motions for summary judgment. On March 20, 2013, the Noble County Court of Common Pleas issued a decision granting summary judgment in favor of the Appellee, and denying Mr. Noon's motion. In finding in favor of Plaintiff, the trial court applied the 1989 version of the DMA and concluded that the three surface transfers in 1970 and 1977 did not qualify as savings events under R.C. 5301.56(B)(3)(a).

Mr. Noon timely appealed to the Seventh District Court of Appeals (the "Seventh District").[2] On April 3, 2014, the Seventh District affirmed the trial court's decision, holding

[2] During the pendency of the appeal, Mr. Noon passed away. A motion for substitution of parties was granted by the Seventh District on January 8, 2014, thereby substituting the Appellant as the real party in interest for purposes of this appeal.

that: (i) "in order for the mineral interest to be the 'subject of' the title transactions" for purposes of R.C. 5301.56(B)(3)(a), the grantor must actually convey or retain that interest; (ii) the 1989 version of the DMA controls over the 2006 version of the DMA; and (iii) the state constitutional concerns (due process and retroactivity) regarding the application of the 1989 version of the DMA need not be addressed. It is from this decision that this appeal arises.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: The 2006 version of the DMA is the only version of the DMA to be applied after June 30, 2006, the effective date of said statute.

and

Proposition of Law No. II: To establish a mineral interest as "deemed abandoned" under the 1989 version of the DMA, the surface owner must have taken some action to establish abandonment prior to June 30, 2006. In all cases where a surface owner failed to take such action, only the 2006 version of the DMA can be used to obtain relief.

Propositions of Law I and II are inherently intertwined and must be considered together. At the end of the day, the Seventh District erred in applying the superseded, 1989 version of the DMA.

A. The 2006 version of the DMA is the only version of the DMA to be applied after June 30, 2006, the effective date of said statute.

First and foremost, the Seventh District's decision violates the very purpose of the DMA as expressly stated in R.C. 5301.55. Specifically, R.C. 5301.55 states, in relevant part: "Sections 5301.47 to 5301.56, **inclusive**, of the Revised Code, shall be liberally construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title as described in section 5301.48 of the Revised Code." (Emphasis added.) This statute expressly confirms the three goals of the DMA: (i) simplifying real property transactions; (ii) facilitating real property transactions; and (iii) allowing persons to rely on record chain of title.

Applying the 1989 version of the DMA in a present-day lawsuit directly contravenes the express legislative purpose of the statute. The Seventh District's interpretation of the1989 version of the DMA as "automatic" or "self-executing" actually serves to complicate transactions involving the oil and gas mineral rights, and undercuts the public's ability to rely on the record chain of title in the county recorder's office.

Under the Seventh District's construction of the 1989 version of the DMA, hundreds, if not thousands, of severed mineral interests "automatically" vested in the surface owner as of March 22, 1992. There is not (and will not be) anything in the public record establishing such an "automatic" abandonment of the mineral rights. Under the 2006 version of the DMA, the result of the abandonment process is a recorded document—either a notice preserving the severed mineral interest or an affidavit of abandonment. Under the 1989 version of the DMA (as interpreted by the Seventh District), there would be nothing.

Second, one of the consequences of the Seventh District's decision will be even more DMA litigation. In addition to there being nothing in the record evidencing abandonment, a number of the "savings events" set forth in R.C. 5301.56 cannot be analyzed in the county recorder's office. For example, a determination of whether there has been gas storage or oil and gas development involving the mineral rights requires discussions with the relevant natural gas distribution companies or Ohio Department of Natural Resources. As a result, the only way to truly resolve a claim under the 1989 version of the DMA is through the filing of a quiet title action, and only then, upon the receipt of a final, non-appealable order. Burdening the trial and appellate courts with even more DMA litigation, rather than simplifying and facilitating oil and gas transactions, certainly is not the outcome desired by the appellate court.

Third, neither the Appellee nor its predecessor-in-interest asserted or attempted to enforce

any abandonment claim while the 1989 version of the statute was in effect—a period of more than 17 years. The Appellee (and its predecessors-in-interest) should not be rewarded for sitting on his hands for the past 25 years (since the effective date of the 1989 version of the DMA).

Fourth, the Seventh District's broad interpretation of the 1989 version of the DMA turns on its head the longstanding principle that courts should "favor individual property rights when interpreting forfeiture statutes." *Ohio Dept. of Liquor Control v. Sons of Italy Lodge 0917*, 61 Ohio St. 3d 532, 534, 605 N.E.2d 368 (1992). The Ohio Supreme Court long ago recognized that: (i) "[f]orfeitures . . . are not favored in law or equity and statutory provisions therefor must be strictly construed;" and (ii) "[w]henever possible, such statutes must be construed to avoid a forfeiture of property. No forfeiture may be ordered unless the expression of the law is clear and the intent of the legislature manifest." *State ex rel. Lukens v. Indus. Comm. of Ohio*, 143 Ohio St. 609, 611, 56 N.E.2d 216 (1944) (quoting *State ex rel. Cline v. Indus. Comm. of Ohio*, 136 Ohio St. 33, 23 N.E.2d 636 (1939)); *State v. Lilliock*, 70 Ohio St. 2d 23, 26, 434 N.E.2d 723 (1982) (superseded by statute on other grounds) (emphasis added).

Finally, the application of the 1989 version of the DMA today violates the Ohio Constitution. Although the United States Constitution and the Ohio Constitution guarantee all citizens fundamental due process rights, the Ohio Constitution goes one step further. *Cleveland v. Ruple*, 130 Ohio St. 465, 469, 200 N.E. 507 (1936). As this Court has clearly explained, the "Ohio Constitution further provides that private property shall ever be held inviolate . . . and classes among the inalienable rights of man those of acquiring, possessing and protecting property[.]" *Id.* at 469. Therefore, in addition to the federal due process guarantees, Ohioans enjoy even greater protection of their property rights under the state constitution. *See City of Norwood v. Horney*, 110 Ohio St. 3d 353, 362, 2006-Ohio-3799, 853 N.E.2d 1115 (ruling that, in

light of Ohio's reverence for property rights, the government's taking powers are more limited under the Ohio Constitution than the federal Constitution). In light of the fundamental importance of these rights, this Court recognized: "it is not surprising that the founders of our state expressly incorporated individual property rights into the Ohio Constitution in terms that reinforced the sacrosanct nature of the individual's 'inalienable' property rights, Section 1, Article I, 6 which are to be held forever 'inviolate.' Section 19, Article I." *Horney*, at ¶ 37.

The constitutionality of the 1989 version of the DMA under the Ohio Constitution has not been ruled upon by an Ohio appellate court. Of the two trial courts to rule upon the issue, both concluded that the 1989 version of the statute was constitutional based on the United States Supreme Court's decision in *Texaco v. Short*. *Tribett v. Shepherd*, Belmont C.P. No. 12-CV-180 (July 22, 2013); *Taylor v. Crosby*, Belmont C.P. No. 11 CV 472 (Sept. 16, 2013). In *Texaco*, the Court upheld the constitutionality of Indiana's dormant mineral act in the context of federal takings and federal due process claims. *Texaco v. Short*, 454 U.S. 516, 102 S. Ct. 781, L. Ed. 2d 738 (1981). The *Texaco* Court, however, did not analyze any state constitutional claims and bears no outcome on the state constitutional analysis.

Although the Seventh District chose not to address the state constitutional question,[3] the application of the 1989 version of the DMA after June 30, 2006 violates the Ohio Constitution; in particular, the due process protections in Article I, Sections 1 and 19. The reason is simple and straightforward: no process (as the Appellee and Seventh District contend under the "automatic" abandonment theory) cannot be due process under the Ohio Constitution.

---

[3] The Seventh District improperly concluded that the constitutional issue was waived because it was not raised before the trial court. In reality, the Appellant's Motion for Summary Judgment raised the constitutional concerns on pages 5-7, the Appellee countered them in its Memorandum in Opposition on page 6, and both parties addressed the state constitutional questions in their appellate briefs.

For the foregoing reasons, the 2006 version of the DMA is the only applicable version of the DMA in this case.

B. To establish a mineral interest as "deemed abandoned" under the 1989 version of the DMA, the surface owner must have taken some action to establish abandonment prior to June 30, 2006. In all cases where a surface owner failed to take such action, only the 2006 version of the DMA can be used to obtain relief.

Building on the arguments above, the Court must address a related issue involving the mischaracterization of the 1989 version of the DMA as "self-executing" or "automatic." Appellee argues that, because the long-defunct 1989 version of the DMA was "self-executing," any abandonment of the severed mineral interest occurred automaticelly as of March 22, 1992 (the expiration of the three-year grace period under the 1989 version of the DMA). Under this theory, the surface owner was not required to make any affirmative claim to these valuable interests, or to give the Appellant (as record owner of the severed mineral interest) any notice of their total divestiture. The "abandonment" just happened "automatically" on March 22, 1992.

Admittedly, this is the approach taken by Seventh District in its decision below. But, as explained in support of Proposition of Law Number 1 above, this is not what the statute required, and certainly not how Ohio treats constitutionally protected private property rights. Although criticized by the Seventh District, Judge Richard Markus' decision in *Dahlgren v. Brown Farm Properties, LLC*, provides the most cogent and practical analysis of this issue—and remains instructive. See *Dahlgren v. Brown Farm Properties, LLC,* Carroll C.P., No. 13CVH27445 (Nov. 5, 2013).

In *Dahlgren,* Judge Markus faced the same argument raised here—that the 1989 version of the DMA automatically divested the mineral owners of their property rights in 1992 and, therefore, the surface owner was not required to comply with the 2006 version of the DMA.

Judge Markus disagreed. He reasoned that "[a]bsent any implementation of enforcement [i.e., a quiet title action] of claimed abandonment rights before the 2006 amendment," the surface owner "must comply with the procedures which the 2006 amendment requires." *Id.* at 14. In other words, in accordance with the DMA's directive, there must be *something* in the record of title evidencing a transfer. Here, the Appellee (as surface owner) concedes that there is nothing. The Appellee did not assert or attempt to enforce any abandonment claim while the 1989 version of the DMA was in effect prior to the filing of this lawsuit. Such total inaction on the part of the surface owner (and its predecessors in interest) cannot (and should not) divest the Appellant of its properly recorded, and long-vested, property rights in the oil and gas mineral estate.

Proposition of Law No. III: To the extent the 1989 version of the DMA remains applicable, the 20-year look-back period shall be calculated starting on the date a complaint is filed which first raises a claim under the 1989 version of the DMA.

In applying the 1989 version of the DMA, the Court must first determine the applicable 20-year look-back period.[4] Unlike the 2006 version of the DMA, which specifies that the 20-year time period begins on the "date on which notice is served or published," the 1989 version did not specify the starting point for the 20-year look-back period. Although the 1989 version of the DMA defines the look-back period as the "preceding twenty years," it failed to indicate what event triggered the 20-year look-back period. The lack of clarity surrounding this issue represented one of the primary reasons the statute was amended and updated in 2006. See Ohio State Bar Association, *Report of the Natural Resources Committee*,

[4] The 1989 version of the DMA states that mineral interests shall be deemed abandoned unless "[w]ithin the preceding twenty years, one or more of the following has occurred: . . . .").

https://www.ohiobar.org/NewsAndPublications/SpecialReports/Pages/StaticPage-313.aspx (accessed Oct. 2, 2013).[5]

Although practitioners have proffered more than a half dozen triggers for the start of the 20-year look-back period under the 1989 version of the DMA, the only reasonable period involves the 20 years immediately preceding the date on which a complaint is filed first raising a claim under the 1989 version of the DMA. Only this look-back period: (i) furthers the legislative purpose of the DMA, and (ii) harmonizes the two versions of the DMA.

First, this proposed trigger of the look-back period furthers the intent of "simplifying and facilitating land title transactions" under R.C. 5301.55. Absent some affirmative act under the 1989 version of the DMA, an abstractor or title reviewer would never know whether the minerals transferred with the surface estate. By tying the 20-year look-back period to the filing of a quiet title action, a recorded document would finally and conclusively establish the true owner of the mineral rights. This would provide notice to the mineral rights owner and provide a clear, measurable starting point for the "preceding twenty years."

In addition, the adoption of such a look-back period is the only way to harmonize the 1989 and 2006 versions of the DMA. Because Ohio courts are nearly always asked to apply both statutes in a single case, interpreting them together would bring consistency and simplicity back to Ohio's ever-changing oil and gas jurisprudence.

Specifically, the 2006 version of the DMA retains its predecessor's 20-year look-back period, but it explicitly specifies a triggering event: "date on which notice [of the surface owner's

[5] This report explains that one of the "major changes addressed in the amendment" was that "the original statute provided for the lapse to occur if no specified activities took place within 'the preceding twenty years.' Questions arose as to whether that language meant 20 years preceding enactment of the statute, 20 years preceding commencement on an action to obtain the minerals or any 20-year period in the chain of title."

claim to the mineral estate] is served or published." In other words, the look-back period begins when the surface owner first makes an affirmative claim to own the severed mineral interest, and provides notice to the severed mineral owner. The adoption of Appellant's proposition of law does the exact same thing in the context of the 1989 version of the DMA.

> **<u>Proposition of Law No. IV</u>: For purposes of R.C. 5301.56(B)(3), a severed oil and gas mineral interest is the "subject of" any title transaction which specifically identifies the recorded document creating that interest by volume and page number, regardless of whether the severed mineral interest is actually transferred or reserved.**

One of the first steps required under either version of the DMA is that the surface owner confirm that the severed oil and gas mineral interest is not subject to any of the defined "savings events" during the relevant 20-year look-back period. See R.C. 5301.56(B) (2006 version); R.C. 5301.56(B)(1)(c) (1989 version). Any one of these "savings events" would prevent a surface owner from claiming the severed mineral interests under the DMA.

The most oft-litigated savings event, which remains the same in both versions of the DMA, involves whether the oil and gas mineral interest "has been the subject of a title transaction that has been filed or recorded in the office of the county recorder of the county in which the lands are located." R.C. 5301.56(B)(3)(a). *See e.g., Dodd v. Croskey*, 138 Ohio St. 3d. 1432, 2014-Ohio-889, 4 N.E.3d 1050 (holding, that a deed conveying the surface that specifically references severed mineral interest is not the "subject of" a title transaction because the phrase "subject of" "establishes that something *less than the conveyance* of the mineral interest must be [a Savings Event]") (Emphasis added.); *Chesapeake Exploration, LLC v. Buell*, 138 Ohio St. 3d. 1446, 2014-Ohio-1182, 5 N.E.3d 665 (jurisdiction accepted over two certified questions from the Southern District of Ohio, namely whether an oil and gas lease and release of oil and gas lease constitute "title transactions" for purposes of R.C. 5301.56(B)(3)(a)).

The phrase "title transaction" is defined in R.C. 5301.47(F) to mean "any transaction affecting title to any interest in land, including title by will or descent," as well as warranty deed, quit claim deed, or mortgage. R.C. 5301.47(F). When that definition is inserted into the language of R.C. 5301.56(B)(3)(a), it becomes clear that the savings event occurs when the "mineral interest has been the subject of ["any transaction affecting title to any interest in land, including title by will or descent," as well as warranty deed, quit claim deed, or mortgage] that has been filed or recorded in the office of the county recorder of the county in which the lands are located." R.C. 5301.56(B)(3)(a).

The key to this "savings event" is that the mineral rights were the subject of a transaction "affecting title to **any interest** in property." Yet, the Seventh District twice has improperly ruled that only an actual transfer of the oil and gas mineral rights (e.g., by mineral deed) constitutes a savings event.[6] Nowhere in the statute, however, is there a requirement that the mineral estate actually be transferred. This conclusion is supported by the legislative history and purpose of the DMA, principles of statutory interpretation, rules of grammar, and important public policy considerations (including those expressed in R.C. 5301.55).

Proposition of Law No. V: Irrespective of the savings events in R.C. 5301.56(B)(3), the limitations in R.C. 5301.49 can separately bar a claim under the DMA.

Irrespective of the analysis in support of Proposition of Law Number 4 above, the interplay of R.C. 5301.55 and R.C. 5301.49 can separately and independently bar a DMA claim.

R.C. 5301.55, which is part of the Ohio Marketable Title Act, states: "Sections 5301.47 to 5301.56, **inclusive**, of the Revised Code, shall be liberally construed to effect the legislative

[6] The Seventh District initially ruled upon this issue in *Dodd v. Croskey*, but that issue was not appealed. Relying solely upon its prior decision in *Dodd v. Croskey*, the court reached the same conclusion in this case.

purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title as described in section 5301.48 of the Revised Code, **subject only to such limitations as appear in section 5301.49 of the Revised Code**." R. C. 5301.48 (Emphasis added.). It is clear that this statute expressly applies to the DMA (R.C. 5301.56). As a result, the DMA is "subject. . . to such limitations as appear in section 5301.49 of the Revised Code."

One of the most important limitations in R.C. 5301.49(A) states that record title is subject to "[a]ll interests and defects which are inherent in the muniments of which such chain of record title is formed and which have existed for forty years or more." This means that a title transaction which is recorded during the applicable look-back period and specifically references the severed oil and gas mineral interest by volume and page number bars a claim under either version of the DMA. Otherwise, the result would be a statutory anomaly—the severed mineral interest owner holds valid title under the Ohio Marketable Title Act, but not the DMA. The only way to harmonize the statutes is to adopt the Appellant's proposition of law, thereby reaching the unavoidable conclusion that the limitation set forth in R.C. 5301.49(A) applies to the DMA.

Proposition of Law No. VI: The 2006 version of the DMA applies retroactively to severed mineral interests created prior to its effective date.

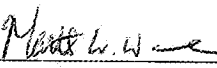
The Seventh District inaccurately stated that the "2006 version of R.C. 5301.56 does not specifically provide for retroactive application," thereby rendering it inapplicable to severed mineral interests created prior to June 30, 2006 (its effective date). The Seventh District, however, failed to extend this same logic to the 1989 version of the DMA. Under the court's view of retroactivity, the Appellee (and all other severed mineral interest owners) should be unable to utilize *either* version of the DMA for severed mineral interests created prior to March 22, 1989 (the effective date of the 1989 version of the DMA).

If this Court chooses to accept the logic of the Seventh District, then the Appellant is the rightful owner of the oil and gas mineral rights underlying the Property because the severed mineral interest was created in 1965. If the Court determines that the DMA applies retroactively, then *both* versions of the DMA apply to severed mineral interests created prior to their respective effective dates, and the Appellee was required to comply with the 2006 version of the DMA. Under either option, the Seventh District's analysis was flawed.

CONCLUSION

For the reasons discussed above, this case implicates numerous issue of public and great general interest. Accordingly, the Appellant respectfully requests that this Court accept jurisdiction in this case and decide the important issues presented by this appeal.

Respectfully submitted,



Matthew W. Warnock (0082368)*
**Counsel of Record*
Daniel C. Gibson (0080129)
Daniel E. Gerken (0088259)
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215-4291
Telephone: (614) 227-2300
Facsimile: (614) 227-2390
E-mail: mwarnock@bricker.com;
dgibson@bricker.com; dgerken@bricker.com

COUNSEL FOR APPELLANT

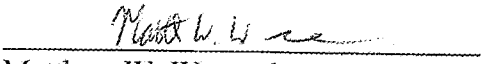
7481820v8

CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to counsel for appellee, at the following addresses on May 16, 2014:

Kenneth Cardinal
758 North 15th Street
P.O. Box 207
Sebring, Ohio 44672

James F. Mathews
Baker, Dublikar, Beck, Wiley & Mathews
400 South Main Street
North Canton, Ohio 44720



Matthew W. Warnock

COUNSEL FOR APPELLANT

7481820v8

STATE OF OHIO, NOBLE COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

COURT OF APPEALS
NOBLE COUNTY, OHIO
FILED
APR - 3 2014
CLERK OF COURTS

JON WALKER, JR.,	)	
PLAINTIFF-APPELLEE,	)	
VS.	)	CASE NO. 13 NO 402
PATRICIA J. SHONDRICK-NAU, EXECUTRIX OF THE ESTATE OF JOHN R. NOON AND SUCCESSOR TRUSTEE OF THE JOHN R. NOON TRUST,	)	OPINION
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Court of Common Pleas of Noble County, Ohio Case No. 212-0098

JUDGMENT: Affirmed

APPEARANCES:

For Plaintiff-Appellee

Attorney Kenneth Cardinal
758 N. 15th St.
Sebring, Ohio 44672

Attorney James F. Mathews
400 South Main St.
North Canton, Ohio 44720

For Defendant-Appellant

Attorney James Hughes, III
Attorney Matthew Warnock
Attorney Daniel Gerken
100 South Third St.
Columbus, Ohio 43215

JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite

Dated: April 3, 2014

EXHIBIT
tabbies
1

DONOFRIO, J.

{¶1} Defendant-appellant, Patricia J. Shondrick-Nau, Executrix of the Estate of John R. Noon and Successor Trustee of the John R. Noon Trust, appeals from a Noble County Common Pleas Court judgment granting summary judgment in favor of plaintiff-appellee, Jon Walker, Jr., on appellee's claim to quiet title as to the mineral estate (specifically oil and gas interests) underlying a tract of land in Noble County.

{¶2} John Noon purchased the disputed property, located in Enoch Township, in 1964. On July 26, 1965, Noon severed the mineral rights and created a separate mineral estate by reserving the mineral rights to himself when he sold the surface rights on that date.

{¶3} In 1970, the surface rights to the property were sold twice. In both of the 1970 conveyances, the deeds included the mineral rights reservation and referenced the volume and page number where the mineral rights reservation was recorded. In 1977, the surface rights were sold again. And again the deed included the mineral rights reservation and referenced the volume and page number where the mineral rights reservation was recorded.

{¶4} Appellee purchased the subject property in 2009. The property is described in two deeds. The first tract of land is 37.042 acres and the second tract is 5.186 acres.

{¶5} On December 2, 2011, appellee sent a notice of abandonment of mineral interest to Noon.

{¶6} On January 10, 2012, Noon filed an affidavit and claim to preserve mineral interest.

{¶7} On April 27, 2012, appellee filed a complaint for declaratory judgment and to quiet title. He requested that the trial court rule that he is the lawful owner of the mineral rights. Appellee asserted that the mineral rights merged with the surface estate no later than March 22, 1992, by way of the prior version of R.C. 5301.56 (the Ohio Dormant Mineral Act), which was in effect from March 22, 1989, until June 30,

2006. He also claimed Noon abandoned any interest in the mineral rights when he failed to preserve them from expiring.

{¶8} Noon filed a motion for summary judgment. He alleged that the filing of a mineral preservation notice pursuant to R.C. 5301.56(H) preserved the severed mineral interest and R.C. 5301.56(D) indefinitely preserves a severed mineral interest. On these bases, Noon claimed he was entitled to summary judgment on appellee's claims.

{¶9} Appellee then filed a cross-motion for summary judgment. He asserted that because the transactions relied upon by Noon did not represent title transactions in the mineral estate, those transactions did not operate as a savings event under R.C. 5301.56.

{¶10} The trial court found that no facts were in dispute. The court framed the question before it as, "do the surface transfers in 1970 and 1977 count as 'title transactions'?" The court answered in the negative. The court found that although the transactions were within the 20-year period prior to March 22, 1989, they did not affect an interest in land as contemplated by R.C. 5301.56(F). The court further found that any discussion of the current version of R.C. 5301.56, effective June 30, 2006, was moot because as of June 30, 2006, any interest Noon had in the mineral rights had already been abandoned. Therefore, the trial court granted appellee's motion for summary judgment and denied Noon's motion for summary judgment. It went on to declare that appellee is the true and rightful owner of the oil and gas underlying the subject property and that Noon has no interest in the subject oil and gas.

{¶11} Noon filed a timely notice of appeal on April 17, 2013. Noon passed away after the filing of this appeal. His daughter, Shondrick-Nau, in her capacity as the executrix of Noon's estate and successor trustee of Noon's trust, was substituted as the appellant in this case.

{¶12} Appellant raises two assignments of error. The assignments of error share a common basis in law and fact. Appellant then raises three distinct issues for

review. For ease of discussion, we will treat each issue for review separately.

{¶13} Appellant's assignments of error state:

> THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR PLAINTIFF-APPELLEE.
>
> THE TRIAL COURT ERRED IN NOT GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT-NOON.

{¶14} In reviewing a trial court's decision on a summary judgment motion, appellate courts apply a de novo standard of review. *Cole v. Am. Industries & Resources Corp.*, 128 Ohio App.3d 546, 552, 715 N.E.2d 1179 (7th Dist.1998). Thus, we shall apply the same test as the trial court in determining whether summary judgment was proper. Civ.R. 56(C) provides that the trial court shall render summary judgment if no genuine issue of material fact exists and when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *State ex rel. Parsons v. Flemming*, 68 Ohio St.3d 509, 511, 628 N.E.2d 1377 (1994). A "material fact" depends on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc.*, 104 Ohio App.3d 598, 603, 662 N.E.2d 1088 (8th Dist.1995), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

{¶15} This case involves the application of the current and prior versions of R.C. 5301.56, known as Ohio's Dormant Mineral Act.

{¶16} The prior version of R.C. 5301.56 was enacted on March 22, 1989. The 1989 version of R.C. 5301.56 provided, in pertinent part:

> (B)(1) Any mineral interest held by any person, other than the owner of the surface of the lands subject to the interest, shall be deemed abandoned and vested in the owner of the surface, if none of the following applies:

* * *

(c) Within the preceding twenty years, one or more of the following has occurred:

(i) The mineral interest has been the subject of a title transaction that had been filed or recorded in the office of the county recorder of the county in which the lands are located[.]

* * *

(2) A mineral interest shall not be deemed abandoned under division (B)(1) of this section because none of the circumstances described in that division apply, until three years from the effective date of this section.

{¶17} The current version of R.C. 5301.56 became effective on June 30, 2006. The most substantial change to the statute was the addition of the notice requirements giving the owner of the abandoned mineral interest the opportunity to reclaim his or her interest. R.C. 5301.56 now provides, in pertinent part:

(B) Any mineral interest held by any person, other than the owner of the surface of the lands subject to the interest, shall be deemed abandoned and vested in the owner of the surface of the lands subject to the interest if the requirements established in division (E) of this section are satisfied and none of the following applies:

(1) The mineral interest is in coal, or in mining or other rights pertinent to or exercisable in connection with an interest in coal * * *.

(2) The mineral interest is held by the United States, this state, or any political subdivision, body politic, or agency of the United States or this state * * *.

(3) Within the twenty years immediately preceding the date on which notice is served or published under division (E) of this section, one or more of the following has occurred:

(a) The mineral interest has been the subject of a title transaction that has been filed or recorded in the office of the county recorder of the county in which the lands are located.

(b) There has been actual production or withdrawal of minerals by the holder * * *.

(c) The mineral interest has been used in underground gas storage operations by the holder.

(d) A drilling or mining permit has been issued to the holder, * * *.

(e) A claim to preserve the mineral interest has been filed in accordance with division (C) of this section.

(f) In the case of a separated mineral interest, a separately listed tax parcel number has been created for the mineral interest in the county auditor's tax list and the county treasurer's duplicate tax list in the county in which the lands are located.

* * *

(E) Before a mineral interest becomes vested under division (B) of this section in the owner of the surface of the lands subject to the interest, the owner of the surface of the lands subject to the interest shall do both of the following:

(1) Serve notice by certified mail, return receipt requested, to each holder or each holder's successors or assignees, at the last known address of each, of the owner's intent to declare the mineral interest abandoned. If service of notice cannot be completed to any holder, the owner shall publish notice of the owner's intent to declare the mineral interest abandoned at least once in a newspaper of general circulation in each county in which the land that is subject to the interest is located. The notice shall contain all of the information specified in division (F) of this section.

(2) At least thirty, but not later than sixty days after the date on

> which the notice required under division (E)(1) of this section is served or published, as applicable, file in the office of the county recorder of each county in which the surface of the land that is subject to the interest is located an affidavit of abandonment that contains all of the information specified in division (G) of this section.

{¶18} The definition of a "title transaction," which is defined in R.C. 5301.47, did not change between the two versions of R.C. 5301.56. A "title transaction" is "any transaction affecting title to any interest in land, including title by will or descent, title by tax deed, or by trustee's, assignee's, guardian's, executor's, administrator's, or sheriff's deed, or decree of any court, as well as warranty deed, quit claim deed, or mortgage." R.C. 5301.47(F).

{¶19} With these statutes in mind, we turn now to appellant's issues for review.

{¶20} Appellant's first issue for review asserts:

> A title transaction that transfers the ownership of the surface rights and clearly references and reserves the mineral interest preserves a mineral interest under R.C. 5301.56(C).

{¶21} Appellant contends here that the mineral rights at issue were the subject of a title transaction during the applicable 20-year look-back period. Because the mineral rights were the subject of a title transfer during the 20-year period that was recorded in the county recorder's office, appellant claims the rights were not subject to forfeiture. Appellant points out that this argument is valid under both the prior and the current versions of R.C. 5301.56.

{¶22} Appellant argues that in reaching its decision, the trial court effectively added the word "only" to the beginning of R.C. 5301.56(B)(3)(a) in finding the interest to be conveyed must be the mineral interest itself and nothing else. Appellant states there is no dispute that there was a clear exception of the mineral interest in both the

1970 deed and the 1977 deed. She points out that all of the deeds recite Noon's mineral interest reservation, state the volume and page numbers on which the mineral estate reservation appears in the public record, and refer to Noon by name.

{¶23} Appellant goes on to argue that the "title transaction" savings event must be analyzed in the broader context of Ohio's Marketable Title Act (R.C. 5301.47 to R.C. 5301.56). She notes that a "mineral interest" is "a fee interest in at least one mineral regardless of how the interest is created and of the form of the interest." R.C. 5301.56(A)(3). She further notes that a "mineral" includes oil and gas. R.C. 5301.56(A)(4). She then points to the definition of "title transaction," which includes "any transaction affecting title to any interest in land." R.C. 5301.47(F). Appellant argues that when these definitions are read together, it becomes clear that the savings event occurs when the mineral interest has been the subject of *any* title transaction. She contends there is no requirement that the mineral interest is actually transferred.

{¶24} Appellant also contends that the statute's legislative history supports her interpretation. Appellant argues the Legislature's amendment to the language of the savings event from situations where the "interest has been conveyed" to situations where the "mineral interest had been the subject of a title transaction" evidences the Legislature's deliberate decision to eliminate the requirement that the mineral interest itself be conveyed or transferred in order to qualify as a savings event.

{¶25} In *Dodd v. Croskey*, 7th Dist. No. 12 HA 6, 2013-Ohio-4257 (discretionary appeal accepted by Ohio Supreme Court on a different issue, cross-appeal on this issue not accepted, 2013-1730), we examined whether an oil and gas interest was "the subject of" a title transaction. In 2009, when the appellants acquired the surface rights to the disputed property, the deed that conveyed the surface rights included a reservation of the oil and gas interest to the Porters, which included the date it had been filed (May 27, 1947) and the volume and page numbers where it could be found in the Recorder's Office. The trial court found that R.C.

5301.56(B)(3)(a) applied. It concluded that the mineral interest was the "subject of" the title transaction and that it had been filed within 20 years immediately preceding the publishing of notice under R.C. 5301.56(E).

{¶26} On appeal, we noted that the issue to be decided was whether the oil and gas interest was the "subject of" the title transaction. *Id.* at ¶41. We noted that the 2009 deed conveying the surface rights was a "title transaction" as defined by R.C. 5301.47(F). *Id.* at ¶43. We also noted that other than a Fifth District case, which we found unhelpful, there was no case law in Ohio discussing what "subject of a title transaction" means. *Id.* at ¶48. And we pointed out that "subject of" is not defined in the statute. *Id.* Thus, we looked to the phrase's ordinary meaning and construed it according to common usage. *Id.* We explained:

> The common definition of the word "subject" is topic of interest, primary theme or basis for action. Webster's II New Riverside Dictionary 11553 (1984). Under this definition the mineral interests are not the "subject of" the title transaction. Here, the primary purpose of the title transaction is the sale of surface rights. While the deed does mention the oil and gas reservations, the deed does not transfer those rights. In order for the mineral interest to be the "subject of" the title transaction the grantor must be conveying that interest or retaining that interest. Here, the mineral interest was not being conveyed or retained by Coffelt, the party that sold the property to appellants.
>
> Therefore, we disagree with the trial court's conclusion that oil and gas interests were the "subject of" the 2009 title transaction. Instead we specifically find that they were not the "subject of" the 2009 title transaction.

Id. at ¶¶48-49.

{¶27} Applying this court's reasoning, that in order for the mineral interest to be the "subject of" the title transaction the grantor must be conveying or retaining that

interest, to the case at bar leads to the conclusion that the mere mention of the mineral interest reservation in the 1970 and 1977 deeds did not make the mineral interest "the subject of" the title transactions. Instead, "the subject of" those title transactions was the conveyance of the surface estate. Thus, the 1970 and 1977 deeds were not savings events under either the 1989 version or the current version of R.C. 5301.56.

{¶28} Accordingly, appellant's first issue for review is without merit.

{¶29} Appellant's second issue for review asserts:

> The trial court erred in applying the 1989 version of R.C. 5301.56 and not the current version of the statute.

{¶30} In this issue for review, appellant contends the trial court incorrectly applied the 1989 version of R.C. 5301.56 instead of the 2006 version.

{¶31} Firstly, appellant points to the general rule by the United States Supreme Court that a court should apply the law in effect at the time it renders its decision, even when that law was enacted after the events that gave rise to the lawsuit. Citing, *Landgraf v. USI Film Products*, 511 U.S. 244, 273, 114 S.Ct. 1483 (1994). Appellant points out that neither appellee nor his predecessors in interest sought to quiet title to the mineral rights between 1989 and 2006, when the 1989 version of the statute was in effect. When the complaint was filed in this case, appellant points out, the 2006 version of the statute had been in effect for approximately six years.

{¶32} Secondly, appellant asserts the trial court should have applied the 2006 version of the statute because it was the law in effect during the events that gave rise to this suit. She points out that appellee did not purchase the disputed property until 2009, three years after the 2006 version of the statute took effect. Therefore, appellant notes, appellee did not own the surface rights during the time the 1989 version of the statute was in effect.

{¶33} Thirdly, appellant argues that she must prevail under the 2006 version

of the statute because Noon filed a timely preservation of mineral interest. She points out that R.C. 5301.56(E) now requires a surface owner to serve by certified mail to each holder of the mineral rights the surface owner's intent to declare the mineral interest abandoned. She further notes the statute then provides that the owner of the mineral interest can file a claim to preserve the mineral interests within 60 days after the notice.

{¶34} Appellant asserts that appellee sent his notice of abandonment of mineral interest on November 27, 2011. Appellant states that Noon then filed a preservation of mineral interest on January 10, 2012, meeting the statutory requirements and preventing the interest from being divested.

{¶35} No Ohio appellate court or the Ohio Supreme Court has yet to address the issue of when to apply the 1989 version of R.C. 5301.56 and when to apply the 2006 version.

{¶36} The Ohio Revised Code offers some general guidance in examining this issue. "A statute is presumed to be prospective in its operation unless expressly made retrospective." R.C. 1.48. The amendment or repeal of a statute does not affect the prior operation of the statute or affect "any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder." R.C. 1.58(A)(1)(2).

{¶37} There is no language in the 2006 version of R.C. 5301.56 to suggest that it is to be applied retroactively. Thus, it is only to apply prospectively. Additionally, although R.C. 5301.56 was amended in 2006, this amendment would not have affected any "validation, cure, right, privilege, obligation, or liability previously acquired."

{¶38} Under the terms of the 1989 version of R.C. 5301.56, any mineral interest held by anyone other than the surface owner "shall be deemed abandoned and vested" in the surface owner if none of the stated circumstances applied. Former R.C. 5301.56(B)(1). The stated circumstances were: (1) the mineral interest was in coal; (2) the mineral interest was held by the government; and (3) within the

preceding 20 years, one or more of the stated events occurred, which included that the mineral interest has been the subject of a title transaction. Former R.C. 5301.56(B)(1). The 1989 version became effective on March 22, 1989. It further provided that a mineral interest would not be deemed abandoned under division (B)(1) because none of the circumstances described in that division applied, until three years from the effective date of this section. Former R.C. 5301.56(B)(2). Thus, it provided a three-year grace period until March 22, 1992.

{¶39} Given the effective dates of the 1989 version of R.C. 5301.56, on March 22, 1992, Noon's mineral interest was "deemed abandoned and vested" in the surface owner at the time. As discussed in appellant's first issue for review, Noon's mineral interest was not the subject of any title transactions that would trigger the title transaction event. And appellant has not alleged any other savings events.

{¶40} The Ohio Supreme Court explained what it means for someone to have a "vested" interest in something in *State ex rel. Jordan v. Indus. Comm.*, 120 Ohio St.3d 412, 2008-Ohio-6137, 900 N.E.2d 150, ¶9:

> A "vested right" can "be created by common law or statute and is generally understood to be the power to lawfully do certain actions or possess certain things; in essence, it is a property right." *Washington Cty. Taxpayers Assn. v. Peppel* (1992), 78 Ohio App.3d 146, 155, 604 N.E.2d 181. It has been described as a right "which it is proper for the state to recognize and protect, and which an individual cannot be deprived of arbitrarily without injustice." *State v. Muqdady* (2000), 110 Ohio Misc.2d 51, 55, 744 N.E.2d 278. A vested right is one that " 'so completely and definitely belongs to a person that it cannot be impaired or taken away without the person's consent.' " *Harden v. Ohio Atty. Gen.*, 101 Ohio St.3d 137, 2004-Ohio-382, 802 N.E.2d 1112, ¶9, quoting Black's Law Dictionary (7th Ed.1999) 1324. A right also cannot be characterized as vested "unless it constitutes more than a 'mere expectation or interest based upon an anticipated continuance of

existing laws.' " *Roberts v. Treasurer* (2001), 147 Ohio App.3d 403, 411, 770 N.E.2d 1085, quoting *In re Emery* (1978), 59 Ohio App.2d 7, 11, 13 O.O.3d 44, 391 N.E.2d 746.

{¶41} When the 2006 version of R.C. 5301.56 was enacted, Noon's mineral interest had already been abandoned and the mineral interest had been vested with the surface owner for 14 years. Once the mineral interest vested in the surface owner, it was reunited with the surface estate. Noon did not have any mineral interest in the subject property after March 22, 1992, because on that date the interest automatically vested in the surface owner by operation of the statute. And once the mineral interest vested in the surface owner, it "completely and definitely" belonged to the surface owner.

{¶42} Numerous trial courts in our District have likewise found that the 1989 version of R.C. 5301.56 applies to similar actions. See, *Walker v. Noon*, Noble County Common Pleas No. 2012-0098 ; *Marty v. Dennis*, Monroe County Common Pleas No. 2012-230; *Tribbett v. Shepherd*, Belmont County Common Pleas No. 12 CV 180.

{¶43} One trial court in our District has found to the contrary. *Dahlgren v. Brown Farm*, Carroll County 2013 CVH 274455. The trial court in *Dahlgren* found no merit to the "automatic vesting" theory. Instead, it classified the mineral rights under the 1989 version as "inchoate" rights. By definition, "inchoate" means "not completely formed or developed yet." Merriam-Webster Online Dictionary. This definition is in direct contrast to the definition of "vested" which means that something "so completely and definitely belongs to a person that it cannot be impaired or taken away without the person's consent." *Jordan v. Indus. Comm.*, 120 Ohio St.3d at ¶9, quoting *Harden*, 101 Ohio St.3d at ¶9. Thus, the *Dahlgren* court's characterization of the mineral rights under the 1989 version is contrary to the statute itself, which states that the mineral rights are "vested."

{¶44} Additionally, trial courts in the Fifth District have likewise found that the 1989 version of the statute applies. See, *Wiseman v. Potts*, Morgan County

Common Pleas No. 2008CV145 (where the parties agreed the 1989 version applied notwithstanding the fact it was filed after the 2006 version became effective); *Wendt v. Dickerson*, Tuscarawas County Common Pleas No. 2012 CV 02 0135 (prior version of the statute applied because the landowner's rights had vested and could not be taken away).

{¶45} Further support for this finding is found in *Cadles of Grassy Meadows, II, LLC v. Kistner*, 6th Dist. No. L-09-1267, 2010-Ohio-2251. In *Kistner*, a judgment was entered in 1987 against the Kistners. The judgment was not fully satisfied and, pursuant to statute, the judgment became dormant on March 12, 1992. At the time the judgment became dormant, the prior version of R.C. 2325.18 (effective October 1, 1953, to June 1, 2004) was in effect and provided for a 21-year statute of limitations for revivor proceedings. In August 2009, Cadles moved the trial court to revive the judgment. The Kistners opposed the revivor arguing Cadles had abandoned its rights and because the statute of limitations barred revival. The trial court found that revival of the judgment was barred because the current version of R.C. 2325.18(A) provided for a 10-year statute of limitations for revival and more than 17 years had passed since the judgment became dormant. Cadles appealed.

{¶46} On appeal, Cadles argued the trial court erred in applying the current version of R.C. 2325.18 retroactively. It claimed the right to sue became a vested, substantial right at the time the judgment became dormant.

{¶47} The Sixth District examined an 1893 Ohio Supreme Court case dealing with the same issue. It noted that in *Bartol v. Eckert*, 50 Ohio St. 31, 33 N.E. 294 (1893), the Court held that without an expression of retroactivity, and based on the rule that amendments do not affect causes already existing, the amended statute was not applicable and the earlier statute applied. *Id.* at ¶14. It also stated that the *Bartol* Court considered the constitutionality of retroactively applying the statute and held that no vested right had been taken away or impaired by the statute. *Id.*

{¶48} The Sixth District noted that when determining whether a statute is to be applied retroactively the court must conduct a two-part inquiry. *Id.* at ¶15. First,

there must be a clear, express legislative intent to apply the statute retroactively. *Id.* Then, if there is such an intent, the statute must affect only remedial, not substantive, rights or it will be found to violate Section 28, Article II of the Ohio Constitution. *Id.*, citing *State ex rel. Romans v. Elder Beerman Stores Corp.*, 100 Ohio St.3d 165, 2003-Ohio-5363, 797 N.E.2d 82, ¶11.

{¶49} The court went on to point out that the current version of R.C. 2325.18 did not clearly provide for retroactive application. *Id.* at ¶17. It found, therefore, the statute was not intended to apply to dormant judgments that existed prior to the amendment of the statute. *Id.* Consequently, the court found that the prior version of the statute, which provided for a 21-year statute of limitations, controlled. *Id.*

{¶50} Although dealing with the application of a different statute, *Kistner* is helpful in that it found that the prior version of the statute applied, which was in effect at the time the judgment became dormant, as opposed to the current version of the statute, which was in effect when the revival claim was filed. And *Kistner* held that because the current version of the statute did not specifically provide for retroactive application, it did not apply to past judgments.

{¶51} Similarly, in the present case, the 2006 version of R.C. 5301.56 does not specifically provide for retroactive application. Thus, the 1989 version, which was in effect at the relevant time to render the mineral interest vested in the surface owner, controls here.

{¶52} Accordingly, appellant's second issue for review is without merit.

{¶53} Appellant's third issue for review asserts:

> As applied by the trial court, the 1989 version of the Dormant Minerals Act violates the Ohio Constitution's proscription on retroactive legislation.

{¶54} Appellant argues that the retroactive application of the 1989 version of the statute in this case is unconstitutional. She asserts that any reliance on *Texaco v. Short*, 454 U.S. 516, 102 S.Ct. 781 (1982), is misplaced. In *Texaco*, the United

States Supreme Court upheld the constitutionality of Indiana's Dormant Mineral Interests Act. And Noon contends the application of the 1989 version of the statute violates Article II, Section 28 of the Ohio Constitution, which prohibits the General Assembly from passing retroactive laws.

{¶55} Noon failed to raise these constitutional arguments in his complaint or in his motion for summary judgment in the trial court. In fact, Noon even argued in his summary judgment motion that under the 1989 version of R.C. 5301.56, his mineral rights were preserved by three title transactions.

{¶56} The Ohio Supreme Court has held that "[f]ailure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue." *State v. Awan*, 22 Ohio St.3d 120, 489 N.E.2d 277 (1986), syllabus. However, the Ohio Supreme Court has also held that the waiver doctrine announced in *Awan* is discretionary. *In re M.D.*, 38 Ohio St.3d 149, 527 N.E.2d 286 (1988), syllabus. "Even where waiver is clear, [a reviewing court may] consider constitutional challenges to the application of statutes in specific cases of plain error or where the rights and interests involved may warrant it." *Id.*

{¶57} But recognizing plain error in a civil case occurs only in extremely rare situations "involving exceptional circumstances" where the error "seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 679 N.E.2d 1099 (1997), syllabus. In this case, we cannot conclude that the trial court committed plain error by failing to consider the constitutionality of the 1989 version of R.C. 5301.56 when neither party raised this argument. Not only did neither party raise this argument, but both parties argued how they would prevail under the 1989 version. Thus, we need not address appellant's constitutional argument.

{¶58} Accordingly, appellant's third issue for review is without merit.

{¶59} Based on the analysis of appellant's issues for review, both of her

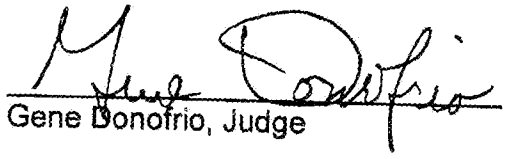
assignments of error are without merit. The trial court properly granted summary judgment in appellee's favor and denied appellant's motion for summary judgment.

{¶60} For the reasons stated above, the trial court's judgment is hereby affirmed.

Vukovich, J., concurs.

Waite, J., concurs.

APPROVED:



Gene Donofrio, Judge

COURT OF APPEALS
NOBLE COUNTY, OHIO
FILED
APR - 3 2014

STATE OF OHIO	)	IN THE COURT OF APPEALS OF OHIO
	)	
NOBLE COUNTY	) SS:	SEVENTH DISTRICT
JON WALKER, JR.,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	
VS.	)	CASE NO. 13 NO 402
	)	
PATRICIA J. SHONDRICK-NAU, EXECUTRIX OF THE ESTATE OF JOHN R. NOON AND SUCCESSOR TRUSTEE OF THE JOHN R. NOON TRUST,	)	JUDGMENT ENTRY
	)	
DEFENDANT-APPELLANT.	)	

For the reasons stated in the opinion rendered herein, appellant's two 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, Noble County, Ohio, is affirmed.

Costs taxed against appellant.

JUDGES.

EXHIBIT
2

IN THE COURT OF COMMON PLEAS
NOBLE, OHIO

COMMON PLEAS COURT
NOBLE COUNTY, OHIO
2013 MAR 20 PM 1:45

JON D. WALKER, JR.
Plaintiff
VS
JOHN R. NOON
Defendant

CASE NO. 212-0098

JOURNAL ENTRY

This matter is before the Court upon cross motions for summary judgment. The issue is ownership of oil and gas interests.

The facts are not in dispute. Defendant, the owner of the fee, conveyed the surface and reserved the oil and gas (plus other minerals) by deed recorded July 27, 1965. Subsequent deeds in 1970 and 1977 conveyed the surface, specifically noting that the oil and gas had previously been reserved. All other surface transfers post date March 22, 1992. There have been no subsequent conveyances of the oil and gas by the Defendant. No claim to preserve a mineral interest was filed before March 22, 1992. Plaintiff claims his title by virtue of Fiduciary Deed recorded May 14, 2009.

Summary judgment is governed by Rule 56.

Ohio Revised Code Section 5301. 56 effective March 22, 1989, provides in pertinent part:

•••

(B) (1) Any mineral interest held by an person, other than the owner of the surface of the lands subject to the interest, shall be deemed abandoned and vested in the owner of the surface, if none of the following applies.

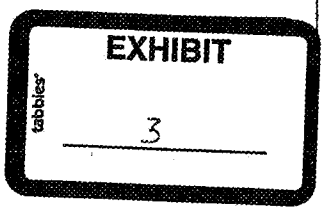
•••

(c) Within the preceding twenty years, one or more of the following has occurred:

(I) The mineral interest has been the subject of a title transaction that has been filed or recorded in the office of the county recorder of the county in which the lands are located:

•••

(2) A mineral interest shall not be deemed abandoned under



division (B) (1) of this section because none of the circumstances described in that division apply, until three years from the effective date of this section.

(C)(1) A claim to preserve a mineral interest from being deemed abandoned under division (B)(1) of this section may be filed for record by its holder. Subject to division (C)(3) of this section, the claim shall be filed and recorded in accordance with sections 317.18 to 317.201 and 5301.52 of the Revised Code, and shall consist of a notice that does all of the following:

(a) States the nature of the mineral interest claimed and any recording information upon which the claim is based;

(b) Otherwise complies with section 5301.52 of the Revised Code;

(c) States that the holder does not intend to abandon, but instead to preserve, his rights in the mineral interest.

Revised Code Section 5301.47(F) provides:

(F) "Title transaction" means any transaction affecting title to any interest in land, including title by will or descent, title by tax deed, or by trustee's, assignee's, guardian's, executor's, administrator's, or sheriff's deed, or decree of any court, as well as warranty deed, quit claim deed, or mortgage.

The present case rises or falls based on the interpretation of R.C. Section 5301.56(B)(1)(C)(i) No other subparagraphs of R.C. Section 5301.56(B)(i) are applicable.

The Question becomes, do the surface transfers in 1970 and 1977 count as "title transactions"? The Court believes the answer to be no. They would be within the 20 year period prior to March 22, 1989. However, to be "title transactions", they would need to affect an interest in the land (Sec. 5301.47(F)), and for purposes of this case that interest is the mineral interest (Sec. 5301.56 (B)(1)(c)(i)). While the surface transfers reference the mineral reservation, those transfers do not affect the mineral interest. See, *Wiseman v. Potts*, Morgan County C. P. Case No. 08 CV 0145 (June 29, 2010). The Court is cited to Riddell v. Layman, 5th Dist. No. 94 CA 114, 1995 WL

498812 for a different interpretation. But a close reading of that case reveals that the "title transaction" in question was the original deed wherein the fee was split, transferring part to the grantee but reserving 49% of the oil and gas to the Grantors. Clearly in that case title to the mineral interest was affected by that "title transaction".

Applying the Statutes and Case Law to the undisputed facts, the Court finds that Plaintiff is entitled to Summary Judgment and the Defendant is not.

Any discussion of R.C. 5301.56, effective June 30, 2006 is moot, because as of June 30, 2006, any interest of Defendant in the oil and gas had been abandoned. See Wendt v. Dickerson, Tuscarawas County C.P. Case No. 2012 CV 020135, 02/21/2013.

The motion of Plaintiff for summary judgment is granted. Defendant's request for summary judgment is overruled.

It is ordered, and the Court declares that:

(1) Plaintiff is the true and rightful owner of the oil and gas underlying the subject real estate;

(2) The Defendant has no interest in the subject oil and gas, no oil and gas reservation, and no oil and gas rights under the subject real estate;

(3) Title to the oil and gas underlying the subject real estate is quieted in favor of the Plaintiff; and,

(4) Counsel for Plaintiff shall provide the Court with a journal entry with the legal description of the subject property quieted, which is sufficient for recording in the office of the Noble County Recorder.

(5) Costs assessed to the Defendant.

The Court finds there is no just reason for delay.

FINAL APPEALABLE ORDER
Copy to be sent, per Civil Rule 5 (B),
to all parties not in default

JOHN W. NAU, JUDGE