

IN THE SUPREME COURT OF OHIO

PHILLIP B. DODD, et al., : Case No. 2013-1730  
 Plaintiffs-Appellants :  
 v. :  
 JOHN CROSKEY, et al., :  
 Defendants-Appellees :  
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MERIT BRIEF OF APPELLEE HARRIET C. EVANS

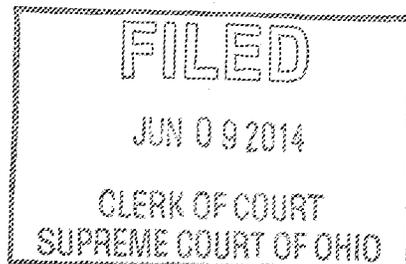
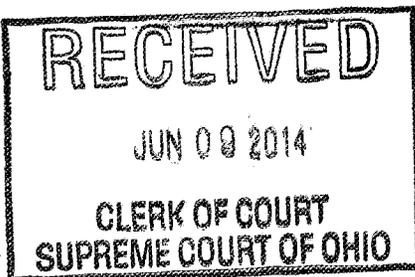
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## STATEMENT OF THE FACTS

This appeal arises under the Ohio Dormant Minerals Act, §5301.56, Ohio Rev. Code. The facts which gave rise to this appeal are as follows.

The Appellants purchased real estate in Harrison County, Ohio, receiving a deed which was recorded on August 5, 2009. (Exhibit B, Complaint) The deed effected a conveyance "Subject to the following:" (Exhibit B, page 2) The reservations or muniments of title which appear on page 3 of the deed include the following:

Excepting and reserving unto Samuel A. Porter and Blanche Long Porter all of the oil and gas in Warranty Deed to Consolidated Fuel Company filed for record May 27, 1947 in Volume 121, page 381, Deed Records for the 148.105 acre. (Note: No further transfers)

\* \* \*

Excepting a one-third interest in the oil and gas to Samuel A. Porter and Blanche Long Porter in Warranty Deed filed for record may [sic] 27, 1947 in Volume 121, page 383, Deed Records.

Although Appellants made no effort to effect service on anyone by certified mail, on November 27, 2010, they caused a notice to appear in the *Harrison News Herald*, which was addressed to Samuel A. Porter and Blanche Long Porter (both deceased) and "their unknown successors and assigns", purporting to advise the owners of the oil and gas underlying the property of Appellants' intent to file a Notice of Abandonment of the owners' interests.

On December 23, 2010, Appellee John William Croskey filed an Affidavit Preserving Minerals with the Hamilton County Recorder, which is recorded at Book 186, Pages 1949-1956 of the Land Records of Harrison County, Ohio. This Affidavit is

appended to the Complaint as Exhibit H. This Affidavit traced the history of title of the subject property. It also clearly identified the current holders of interests, and the basis upon which the interests were claimed. The Affidavit indicated that none of the holders, including the Appellees, intended to abandon their interest in the minerals underlying the subject property.

Thereafter, it appears that the Appellants recorded an Affidavit of Abandonment with the Harrison County Recorder on two separate occasions. (Exhibit F to Complaint) Thereafter, Appellants commenced the underlying action, requesting that the Court of Common Pleas determine that the Appellees' interests in the oil and gas underlying the Appellants' surface interest be declared to have been abandoned to the Appellants.

The parties filed cross Motions for Summary Judgment in the Court of Common Pleas. The Trial Court granted Summary Judgment in favor of Appellees on three independent bases. First, it was held that the mineral interests which are the subject of this action were the subject of a title transaction recorded in the twenty year period prior to publication of the Appellants' notice of abandonment. Second, the Common Pleas Court held that the Appellants could not avail themselves of the abandonment procedure in any event, because they had admittedly failed to comply with §5301.56(E)(1), Ohio Rev. Code, in that they never attempted certified mail service on any holders of mineral interests. Finally, the Court held that, in any event, the claim which was filed by Appellee Croskey preserved the interests of the mineral rights holders.

The Appellants appealed to the Seventh District Court of Appeals. That Court sustained the Summary Judgment entered by the Common Pleas Court, but on a more

limited basis. The Appellate Court disagreed with the Trial Court, and held that the mineral interests had not been the subject of a title transaction within the twenty years prior to the publication of the notice of abandonment. The Court further agreed with the Trial Court that the claim which was filed in response to the publication of the notice of abandonment preserved the interests of the holders of the mineral interests. The Court indicated that since the mineral interests had been preserved by the filing of the Croskey claim, the "failure [of Appellants] to strictly comply with the [certified mail] notice requirement, in this instance, amounts to harmless error." (Opinion of the Seventh District Court of Appeals, p.15)

## ARGUMENT

### Proposition of Law No. 1

Section 5301.56(H)(1)(a), Ohio Revised Code, affords holders of mineral interests sixty days from the service or publication of a notice of abandonment under Section 5301.56(E), within which to file a claim to preserve those interests.

Rule 56(C) of the Ohio Rules of Civil Procedure provides that summary judgment is appropriate where the pleadings, affidavit and other proper evidence “show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law”.

This Court explained Rule 56(C) in *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317 (1977) as follows:

Civ. R. 56(C) specifically provides that before summary judgment may be granted, it must be determined that: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

(50 Ohio St.2d 317, 327)

The simple truth is that there is no dispute regarding the facts of this appeal. This action is governed by the terms of Ohio Revised Code §5301.56. Since its operation can result in an owner being deprived of his or her interest by operation of law, it sets forth a series of mandatory requirements which a surface owner must accomplish in order to force an abandonment of mineral interests. These mineral

interests constitute an estate in lands. *Franklin v. Callicoa*, 53 Ohio Op. 240, 68 Ohio L. Abs. 67 (Lawrence Cty. Ct. Com. Pleas, 1954).

The law of Ohio has never favored forfeitures. *Lessee of Bond v. Swearigen*, (1824) 1 Ohio 395, *State v. Lilloock*, (1982) 70 Ohio St. 2d 23, 25-26. It is a well-established principle of statutory construction that statutes be strictly construed against the forfeiture or deprivation of any legal right. *State, ex rel. Jones v. Board*, (1915) 93 Ohio St. 14, 16.

Both Lower Courts have held that the plain language of the Ohio Dormant Minerals Act grants certain rights to holders of mineral interest upon compliance by the surface owner with the notice requirements of the Act. In applying this statutory language to the facts of this case, both Courts simply followed the injunction of this Court that the first rule of statutory construction is to apply the plain language of the statute. *Provident Bank v. Wood*, (1973) 36 Ohio St.2d 101, *Roxane Laboratories, Inc. v. Tracy*, (1996) 75 Ohio St.3d 125.

The specific portion of the Act which is before this Court is §5301.56(H), Ohio Rev. Code. After a surface holder has properly served and published a notice of intent to declare the mineral interests abandoned under §5301.56(E), the statutory rights under subsection (H) come into play. That subsection provides:

- (1) If a holder or a holder's successors or assignees claim that the mineral interest that is the subject of a notice under division (E) of this section has not been abandoned, the holder or the holder's successors or assignees, not later than sixty days after the date on which the notice was served or published, as applicable, shall file in the office of the county recorder of each county where the land that is subject to the mineral interest is located **one of the following**:
  - (a) A claim to preserve the mineral interest in accordance with division (C) of this section;

(b) An affidavit that identifies an event described in division (B)(3) of this section that has occurred within the twenty years immediately preceding the date on which the notice was served or published under division (E) of this section.

(§5301.56(H), emphasis added.)

Both Lower Courts held that the claim filed by Appellee Croskey 26 days after the notice of intent to abandon was published in the *Harrison News Herald* was filed in accordance with the requirements of §5301.56(C), and preserved the mineral interests of the holders. The Appellants have argued throughout these proceedings that this notice mechanism does not afford the holders of mineral interests the opportunity to file a claim after the service or publication of the notice. It is rather their position that holders may only record evidence of an event (including the filing of a claim) which occurred in the twenty years prior to the service/publication of the notice of intent to abandon. The Lower Courts properly rejected this interpretation of the language for a variety of reasons.

First, the statute is clearly worded in the disjunctive. As the emphasized portion of the statute states clearly, holders of mineral interests may protect their property interests by doing “one of the following”. They may either file a claim (§5301.56(H)(1)(a)), or they may file an affidavit identifying a prior preserving event (§5301.56(H)(1)(b)).

Subsection (b), which governs the issue of prior preserving events references division (B)(3) of the statute. §5301.56(B)(3)(e) provides that one of these preserving event is a claim which was filed in the preceding 20 years. Subsection (a) provides that if a holder wishes to file a claim, it must be filed in accord with §5301.56(C). There is no

issue but that the document recorded by Appellee Croskey complied with the terms of subsection (C).

Accordingly the Court of Appeals correctly held that if one were to read the statute as proposed by the Appellants, there would be no reason for subsection (a), as the issue of a previously filed claim is already treated in subsection (b), and its reference to subsection (B)(3)(e).

The clear terms of the statute support the decisions of the Lower Court. Even if this did not end the inquiry, application of the statute in the manner suggested by the Appellants makes no practical sense. The statute provides a fairly detailed process by which a surface owner may attempt to have mineral rights abandoned to him or her. If the claim were required to be filed before the notice of abandonment, as suggested by the Appellants, there would be no reason for this elaborate statutory scheme. Claims are filed for record just as preserving title transactions are filed. (§5301.56(C)) Under the Appellants interpretation, there would be no reason for the sixty day period after the notice to file the claim because it would already be of record.

In very simple terms, §5301.56(H)(1) provides that a claim may be filed within sixty days of the surface holder's compliance with the notice provisions of §5301.56(E). That clearly occurred in this case, and both Lower Courts correctly determined this issue.

## Proposition of Law No. 2

Section 5301.56(E), Ohio Revised Code, requires that a surface owner attempt certified mail service of a notice of intent to abandon mineral interest before resorting to publication.

As noted above, forfeitures are not favored in the law. §5301.56, Ohio Revised Code, sets forth a very specific procedure by which a surface owner may effect a forfeiture of underground mineral interests. The Appellants did not comply with that procedure. The Court of Appeals essentially held that this issue was mooted by the fact that a claim to preserve mineral interest was timely filed, holding that any failure on the part of the Appellants to comply was "harmless error". Jurisdiction over this question was not accepted by this Court. However, should the Court accept the Appellants' interpretation of §5301.56(H)(1)(a), this issue would no longer be moot. Accordingly this discussion of this issue is submitted pursuant to S.CT.Prac.R. 1603(B)(1).

The requirements for abandonment which are placed upon the surface owner are set forth in §5301.56(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 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.

(Emphasis added.)

The Appellants have not provided evidence of any attempt whatsoever to comply with the mandatory statutory requirement that they attempt certified mail service of their intent upon "each holder or holder's successors or assignees."

The statute in question is a forfeiture statute, and should be strictly construed against forfeiture in accordance with settled Ohio law. Beyond this, the terms of the statute are clear and worded in the mandatory "shall". The individuals who were to have been served by certified mail were all identified within days by Appellee John William Croskey, when he filed his claim with the Harrison County Recorder on December 23, 2010 (Exhibit C). From all that appears in the record, the Appellants rejected making any attempt at service by certified mail as required by the statute, and moved immediately to publishing the newspaper notice..

The notice which was published in lieu of compliance with the statutory requirement of certified mail service did not name any living human being. The notice named only Samuel A. Porter and Blanche Long Porter, who have been deceased since 1948 and 1950, respectively. (Croskey Affidavit, Exhibit C to the Judgment Entry) The statute and Due Process require more than a mere gesture at notice. There was no meaningful compliance with the notice requirements of §5301.56, Ohio Revised Code. In the event that this Court would accept the Appellants' construction of the statute before the Court, this would provide an additional reason why the Decision of the Court of Appeals should be affirmed.

## CONCLUSION

The language of §5301.56(H) is clear, and permits a mineral rights holder to record *either* a claim or a reference to a prior claim or other preserving event. Such a claim was filed within the 60 day period permitted by the statute. The Decisions of both Lower Courts in granting and sustaining Summary Judgment in favor of the Appellees were well reasoned and rooted in firmly established concepts of statutory construction. This Honorable Court is respectfully urged to affirm the decision of the Seventh District Court of Appeals.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by First Class U.S. Mail upon the following:

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