ORIGINAL

IN THE SUPREME COURT OF, OHIO

PHILLIP B. DODD, et al.

CASE NO. HA-2013-1730

Plaintiffs-Appellants

-vs-

JOHN WILLIAM CROSKEY, et al.
Defendants-Appellees

On appeal from the Harrison County Court of Appeals, Seventh Appellate District Court of Appeals Case No. 12 HA 6

MERITS BRIEF OF APPELLEES JOHN WILLIAM CROSKEY, MARY E. SURREY, ROY SURREY, EMMA JANE CROSKEY, MARGARET ANN TURNER, MARY LOUISE MORGAN, MARTHA BEARD, LEE JOHNSON, EDWIN JOHNSON, JOANN ZITKO, DAVID B. PORTER, JOANN C. WESLEY, CINDY R. WEIMER, BRIAN PORTER, MARY ELAINE PORTER, KIM BERRY, SAMUEL G. BOAK, LORNA BOWER, SANDRA DODSON, EVART DEAN PORTER, STEWART BERRY PORTER, IAN RESOURCES, LLC

Paul Hervey (#0063611)
Jillian A. Daisher (#0087051)
Fitzpatrick, Zimmerman & Rose Co., LPA
P.O. Box 1014
New Philadelphia, OH 44663
Telephone: (330) 364-1614
E-mail: PBH@FZRLAW.COM

Counsel for Plaintiffs-Appellants

R. Jefferey Pollock (#0018707)
Erin K. Walsh (#0078142)
McDonald Hopkins LLC
600 Superior Ave., E, Suite 2100
Cleveland, OH 44114
Telephone: (216) 348-5400
Facsimile: (216) 348-5474
Email: jpollock@mcdonaldhopkins.com
ewalsh@mcdonaldhopkins.com

Counsel for Appellees
Karen A. Chaney, Patty Hausman
Linda C. Boyd and Terri Hocker

Rupert Beetham (#0019088)
110 S. Main St. P.O. Box 262
Cadiz, OH 43907
Telephone: (740) 942-8282
Facsimile: (740) 942-8383
Email: rupelaw@myfrontiermail.com

Counsel for Defendants-Appellees
John William Croskey, Mary E. Surrey, Emma Jane Croskey, Margaret Ann Turner, Mary Louise Morgan, Martha Beard, Lee Johnson, Edwin Johnson, Joann Zitko, David B. Porter, Joann C. Wesley, Cindy R. Weimer, Brian Porter, Mary Elaine Porter, Kim Berry, Samuel G. Boak, Lorna Bower, Sandra Dodson, Evart Dean Porter, Stewart Berry Porter, Ian Resources, LL C

FILED
JUN 10 2014
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
JUN 10 2014
CLERK OF COURT
SUPREME COURT OF OHIO

Ronald K. Lembright
One Cascade Plaza, 15th Floor
Akron, Ohio 44308

Counsel for Defendants-Appellees
William K. Kalbaugh, William H. Boak, Samuel G. Boak, Jennifer Bernay, Charlotte S. Bishop, Richard G. Davis, Harry Roy Davis, Thomas Davis, Harry K. Kalbaugh and Michael Kalbaugh

R. Jeffrey Pollock
Erin K. Walsh
McDonald Hopkins, LLC
600 East Superior Ave., Suite 2100
Cleveland, OH 44114

Counsel for Defendants-Appellees
Karen A. Chaney, Linda C. Boyd, Terri Hocker and Patty Hausman

Brian Crist
3384 North River Road
Zanesville, OH 43701
Defendant-Appellee

Consolidated Coal Company
1800 Washington Road
Pittsburgh, PA 15241
Defendant-Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iv

STATEMENT OF THE FACTS.....1

STATEMENTS OF THE CASE.....3

PROPOSITION OF LAW.....5

Ohio Revised Code Section 5301.56 (H)(1)(a) Provides for the preservation of prior reserved mineral interests by the timely filing of an Affidavit of Preservation

CONCLUSION.....8

CERTIFICATE OF SERVICE.....9

STATEMENT OF FACTS

The Appellants purchased 127.8387 acres of real property in Section 22 of Green Township, Harrison County, Ohio by deed recorded August 5, 2009 in Official Record Book 156, Page 2343, Office of the Harrison County Recorder. Said deed contained the following two reservations as to oil and gas ownership:

> Excepting and reserving unto Samuel A. Porter and Blanche Long Porter all the oil and gas in Warranty Deed to Consolidated Fuel Supply Company filed for record May 27, 1947 in Volume 121, Page 381 Deed Records for the 148.105 acres (Note: No further transfers)
>
> Except a one-third interest in the oil and gas to Samuel A. Porter and Blanche Long Porter in Warranty Deed filed for record May 27, 1947 in Volume 121, Page 383, Deed Records.

Said Deed also reserves coal, rights of way and a highway easement.

Samuel A. Porter had received the 148.105 acres by Certificate for Transfer of Real Estate Inherited from Elizabeth Porter of record in Volume 114, Page 102, Deed Records of Harrison County, Ohio By deed of record in Volume 121, Page 381 Samuel A. Porter and Blanche Long Porter, husband and wife, conveyed the 148.105 acres to The Consolidated Fuel Company. This deed, in which Blanche Long Porter released her right of dower, reserved to grantors "all the oil and gas within and underlying said lands together with all rights and privileges necessary to drill for, remove and market said oil and gas....." Exhibit C to appellants complaint.

This reservation has been included in all subsequent deeds conveying the 148.105 acres.

On Saturday, November 27, 2010, Appellants caused a notice of intent to declare abandonment of the oil and gas reserved by the Porters to be published in a local newspaper, without attempting to serve certified mail notice on anyone.

On Monday, November 29, 2010, John William Croskey caused a quit-claim deed dated November 23, 2010 to be recorded conveying the oil and gas reserved by Samuel Porter and Blanche Long Porter to himself and Anita M. Croskey as Trustee of the John William Croskey Revocable Trust. Said deed was accepted for recording by the Harrison County Recorder.

On December 23, 2010, less than 30 days after the publication by Appellants of their notice of intent to declare abandonment, John William Croskey caused an Affidavit Preserving Minerals to be recorded pursuant to 5301.56 (H) (i), ORC. This affidavit named the current owners, their addresses and how they derived ownership.

Nevertheless, on December 27, 2010, Appellants recorded an affidavit claiming abandonment of 127.8387 acres reserved by Samuel A. Porter and Blanche Long Porter, even though only a portion of their property contains oil and gas reserved by the Porters.

Nowhere in the record does a deed to Samuel A. Porter of record in Volume 96, Page 23 appear. Nor does a deed from Samuel A. Porter of record in Volume 96, Page 24 appear anywhere in the record. Furthermore, the estate of Blanche Long Porter does not appear in the record; nor, is there any evidence that she did not know about the reserved oil and gas when Samuel A. Porter's estate was administered. Any statement that Blanche Long Porter would have taken against the Will of Samuel A. Porter is mere speculation not supported by the record.

STATEMENT OF THE CASE

On February 9, 2011, Appellants filed suit against thirty-five (35) heirs and devisees of Samuel A. Porter and Consolidation Coal Company to quiet-title to the oil and gas under their premises and for damages against John William Croskey for slander of title, even though eleven (11) of the named Defendants had already deeded their interests to Ian Resources, LLC, which was not made a party Defendant.

All Defendants save Consolidation Coal Company which was never served with summons answered the complaint.

Appellants filed an amended complaint after being informed that Ian Resources, LLC was the record owner of about one-half of the oil and gas reserved by the Porters, joining Ian Resources, LLC.

Appellants and Appellees filed motions for summary judgment. The Harrison County Common Pleas Court rendered judgment in favor of appellees and against appellants holding that:

a. The mineral interests were the subject of a title transaction recorded within twenty years of Appellant's Notice of Intent to Declare Minerals Abandoned, namely the deeds for the surface setting forth the specific oil and gas reservation by name, date and recording data;

b. The persons who claim title to said oil and gas by or through the record holders, Samuel A. Porter, Blanche Long Porter and Emma A. Croskey were not notified as required by statute;

c. The affidavit filed by John William Croskey meets the requirements of the statute to preserve the interests of all persons who claim an interest in the oil and gas underlying the subject premises as successors in interest or assigns of Samuel A. Porter, Blanche Long Porter and Emma Croskey.

Appellants filed an appeal of this Judgment to the Seventh District Court of Appeals. The Appellate Court upheld the judgment of the trial court on the basis of 5301.56 (H) (i), the timely filing of the affidavit of preservation of minerals by John William Croskey. The Court did, however, overrule the trial court's finding of a title transaction. The Court held that the specific oil and gas reservation in Appellant's deed was not the subject of a title transaction as required by 5301.56 (B)(3)(a), ORC. Rather the conveyance to appellants was a conveyance of the surface which was the subject of the transaction.

Finally, the Court held that the failure of Appellants to notify the holders of the mineral interest before publishing a Notice to Declare Abandonment was harmless error because John William Croskey responded to the published notice.

PROPOSITION OF LAW
OHIO REVISED CODE SECTION 5301.56 (H)(1)(a)
PROVIDES FOR THE PRESERVATION OF PRIOR
RESERVED MINERAL INTERESTS BY THE TIMELY FILING
OF AN AFFIDAVIT OF PRESERVATION

This is a case where appellants have sought a forfeiture of oil and gas rights reserved by appellees relict pursuant to the 2006 Ohio Dormant Minerals Act (ODMA) Section 5301.56, ORC; which oil and gas appellants knew they were not receiving in their deed to the premises. Both the Harrison County Common Pleas Court and the Seventh District Court of Appeals have rejected appellant's claim that the oil and gas was abandoned.

The ODMA is part of the Marketable Title Act, (MTA) which was enacted in 1961. 5301.47, ORC, et seq. The MTA provides that the legislative purpose of the act is to simplify and facilitate land title transactions by allowing people to rely on a RECORD CHAIN OF TITLE. (emphasis added) 5301.55, RC. In its original form, the MTA did not apply to minerals. See Morgenstern v. National City Bank of Cleveland, 4th District Washington No. 85 CA 33 (1987). In 1973 it was amended to include mineral interests. However, the MTA still did not adequately address the problem which can arise from a severed mineral estate.[1]

In an effort to address the problem of severed mineral estates, the Ohio legislature enacted the ODMA in 1989. In 2006 the legislature amended the ODMA to clarify the procedures pursuant to the act R.C. 5301.56 establishes both methods of preserving reserved mineral rights and the method for obtaining a declaration of abandonment of said rights. Its purpose is not to cause abandonment of reserved minerals but rather to facilitate the legislative purpose of the act which is to clear the record title to minerals so as to permit their development. Such development of minerals being consistent with the public policy of the state.

RC 5301.56 (B) sets forth the circumstances under which reserved minerals can be deemed abandoned. The section lists events that have occurred within twenty (20) years that prohibit abandonment, and sets forth those mineral interests, basically coal and minerals reserved by public entities that cannot be abandoned. If none of the listed events have occurred within twenty (20) years and the mineral interest is subsequent to abandonment, the surface owner must then proceed to comply with RC 5301.56 (E) which requires the surface owner to do both of the following:

> 1. Serve notice by certified mail, return receipt requested, to each holder or each holder's successors or assigns (holder being record holder of a fee interest in fee reserved mineral interest, RC 5301.56 (A)(1) and (3)) 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.

[1] See Proponent Testimony of William J. Taylor, Esq. on behalf of Senate Bill 223 and House Bill 521, and Ohio Dormant Mineral Act Testimony, 117th General Assembly (1987-1988)

2. At least thirty, but not later than sixty days after the date on which the notice required under (E)(1) is served or published, file in the office of the county recorder.....an affidavit of abandonment.

In this case, appellants did not comply with section (E)(i). They made no attempt to serve certified mail notice on each mineral holder or each holder's successors or assigns. The estate of Samuel A. Porter with his will admitted to probate was administered in Harrison County. The will names the devisees of his estate. Appellants failed to exercise due diligence to determine who these individuals are and there current addresses so that they could be served by certified mail. Their first step in attempting to obtain abandonment of the reserved minerals was to publish a notice of intent to declare abandonment. The statute clearly provides that notice by publication is to be used only if service of notice cannot be completed to any holder. As appellants attempted no certified mail service, they did not comply with the statutory requirement. Even though this statutory requirement was not followed, the Seventh District Court of Appeals found this to be harmless error because John William Croskey responded to the publication notice with the affidavit of preservation he filed.

One Notice of Intent to Declare Abandonment has been served or published, section (H)(i) authorizes holder's successors or assigns to claim that the mineral interest has not been abandoned. The holder or the holder's successors or assigns, not later that sixty days after the date on which the notice was served or published, shall file in the office of the county recorder ONE (emphasis added) of the following:

1. A claim to preserve the mineral interest in accordance with division (c) of this section;

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

In the instant case, the trial court and the appellant court both held that the affidavit of John William Crokey preserved the oil and gas reserved by Samuel A. Porter and Blanche Long Porter pursuant to section (H)(1) as it was timely filed and complied with division (c) of 5301.56. These holdings are correct as they interpret RC 5301.56 in accordance with its purpose.

The paramount goal of statutory construction is to ascertain and give effect to the legislature's intent in enacting the statute; in doing so, the court must first look to the plain language of the statute and the purpose to be accomplished. Ohio Pediatric Med. Ass. V. Taylor, 2012-Ohio 2732 (10th District) words used in a statute must be accorded their usual, normal and customary meaning.Id. If the words in a statute are "free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the law-making body, there is no occasion to resort to

the other means of interpretation." State v. Hairston, 101 Ohio St. 3d 308, 2004-Ohio-969, quoting Slingheff v. Weaver, 66, Ohio St. 621 (1902), paragraph two of the syllabus" An unambiguous statute is to be applied, not interpreted." Meek v. Papadopulus, 62 Ohio St. 2d 187 (1980), quoting Sears v. Weimer, 143 Ohio St. 312 (1944), paragraph five of the syllabus.

5301.56 (H)(1) is clearly unambiguous. It provides that a holder or a holder's heirs or assigns can preserve reserved minerals by recording an affidavit after service of notice of intent to declare abandonment. The subsection contains no restrictions on the preservation save that it must be recorded within sixty days of the service of the notice to declare abandonment and must comply with section C. If it does, the reserved minerals are preserved to the holder or the holder's heirs or assigns. The subsection requires no savings event. The inclusion of a twenty year requirement in Section (B), while no such requirement included in Section (H)(1)(a) clearly establishes there is no twenty year requirement in Section (H)(1)(a).

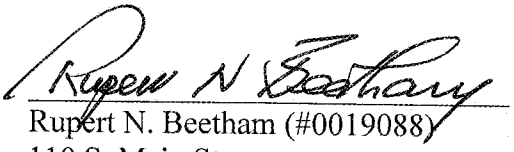
It is a longstanding principle in Ohio that the law abhors forfeiture. Lessee of Band v. Swearigen (1824), 1 Ohio 395; Ohio Department of Liquor Control v. Sons of Italy Lodge 0917, 65 Ohio St. 3d 532 (1992), quoted at Sogg v. Zurz 121 Ohio St. 3d 449, 2009-Ohio-1526 (10th District). Courts are obligated to construe forfeiture provisions against the party seeking forfeiture. See Joseph J. Freed and Associates, Inc. v. Cassinelli Apparel Corp., 23 Ohio St 3rd 94 (1986), citing Pepper v. Knoepp, 15 Ohio cc 294 (1897), affirmed 60 Ohio St. 620; Hawthorne v. Cassidy, 137 NW 2d 818 (1965). Application of 5301.56 (H)(i) as appellant argues creates a forfeiture of valuable minerals reserved by Samuel A. Porter and Blanche Long Porter. A clear unambiguous application of the statute prevents for forfeiture of a valuable property right. Section (H)(i)(a) is the legislative recognition of the constitutional provision that real property, the reserved mineral interest, shall be forever held inviolate, Article 1, Section 19, Ohio Constitution.

To interpret Section (H)(1)(a) as appellant argues renders it meaningless. To interpret it as appellees urge, gives meaning to all words in the statute and prevents forfeiture while complying with the public policy of Ohio by to provide for the development of valuable natural resources.

CONCLUSION

5301.56 (H)(1) clearly and unambiguously provides that after Service of Notice of Intent to Declare Abandonment of severed minerals, the holder or the holder's heirs or assigns may record an affidavit with sixty (60) days and preserve their ownership in the severed minerals, such a finding made by both lower Courts gives meaning to the legislative intent of the statute, preserves valuable property rights, maintains clear record title and furthers the public policy of the State of Ohio in development of valuable minerals.

Respectfully submitted,



Rupert N. Beetham (#0019088)
110 S. Main St.
P.O. Box 262
Cadiz, OH 43907
Telephone: 740-942-8282
Facsimile: 740-942-8383
rupelaw@myfrontiermail.com
Attorney for Appellees
John William Croskey, Mary E. Surrey, Emma Jane Croskey, Margaret Ann Turner, Mary Louise Morgan, Martha Beard, Lee Johnson, Edwin Johnson, Joann Zitko, David B. Porter, Joann C. Wesley, Cindy R. Weimer, Brian Porter, Mary Elaine Porter, Kim Berry, Samuel G. Boak, Lorna Bower, Sandra Dodson, Evart Dean Porter, Stewart Berry Porter, Ian Resources, LL C

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing on Paul Hervey, Attorney for Appellants, PO Box 1014, New Philadelphia, Ohio 44663, Attorney Ronald K. Lembright, One Cascade Plaza, 15th floor, Akron, OH 44308, Attorney Marquette D. Evans, 920 Race St., 2nd floor, Cincinnati, OH 45202, R. Jeffrey Polloock, Erin K. Walsh, Attorney for Appellees, McDonald Hopkins, LLC, 600 E. Superior Ave., Suite 2100, Cleveland, OH 44114, Brian Crist, 3384 North River Rd. Zanesville, OH 43701, Appellee, Consolidated Coal Comp. 1800 Washington Rd., Pittsburgh, PA 15241, Appellee, by mailing the same to them, postage pre-paid, this 9 day of June, 2014.

Rupert N. Beetham
Attorney for Defendants
John William Croskey, Mary E. Surrey, Emma Jane Croskey, Margaret Ann Turner, Mary Louise Morgan, Martha Beard, Lee Johnson, Edwin Johnson, Joann Zitko, David B. Porter, Joann C. Wesley, Cindy R. Weimer, Brian Porter, Mary Elaine Porter, Kim Berry, Samuel G. Boak, Lorna Bower, Sandra Dodson, Evart Dean Porter, Stewart Berry Porter, Ian Resources, LL C