

ORIGINAL

IN THE SUPREME COURT OF OHIO

JON D. WALKER, JR.,)	CASE NO. 2014-0803
)	
Appellee,)	
)	
vs.)	
)	
PATRICIA J. SHONDRICK-NAU,)	On Appeal from the Noble
EXECUTRIX OF THE ESTATE OF JOHN)	County Court of Appeals,
R. NOON AND SUCCESSOR TRUSTEE)	Seventh Appellate District
OF THE JOHN R. NOON TRUST,)	Court of Appeals
)	Case No. 13 NO 402
Appellant.)	

**MEMORANDUM IN RESPONSE OF
APPELLEE, JON D. WALKER, JR.**

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**STATEMENT OF POSITION AS TO WHY THIS CASE IS NOT A CASE
OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT PRESENT
A SUBSTANTIAL CONSTITUTIONAL QUESTION**

The Court of Appeals' opinion in this case simply reflects a thoughtful analysis and proper application of a statute to the particular facts involved. Both the Common Pleas Court and the Court of Appeals followed well-established rules of statutory construction. The 1989 version of the Dormant Mineral Act specifically stated that severed mineral rights which were left "dormant," that is not used or property preserved, were "deemed abandoned and vested in the owner of the surface." The General Assembly used the word "vested" in the law, and that is what it intended; for dormant mineral interests to be reunited with the surface estate by operation of law. Accordingly, this case is not one of public or great general interest calling for this Court's review.

STATEMENT OF THE CASE AND FACTS

Appellee, Jon D. Walker, Jr. ("Walker"), filed suit in this case to obtain a judgment confirming his ownership of oil and gas interests under the Ohio Dormant Mineral Act ("DMA"). An old severance of the oil and gas underlying appellee's property existed stemming from an instrument recorded on July 26, 1965. (Opinion, ¶2). The lower courts have confirmed, by judgment, that the previously-severed mineral interests had merged, by operation of law, in accordance with the DMA. Consequently, the oil and gas interests in and to the appellee's property were "vested" with the appellee.

The parties submitted cross-motions for summary judgment for the determination of the trial court. By Journal Entry filed on March 20, 2013, the trial court granted the appellee's motion and overruled the appellant's motion. The trial court held that the interests in the oil and gas underlying the appellee's property were quieted in favor of the appellee Walker. The appellant Noon filed an

appeal, which was later prosecuted by his personal representative.

The Court of Appeals affirmed, correctly recognizing that the severance of oil and gas interests upon which the appellant relied had become dormant, as a matter of law, because it had neither been timely utilized nor timely preserved. Otherwise, the transfers of the surface estate upon which the appellant relied could not, and thus did not, in any manner affect a transfer of the previously-severed mineral interests. Consequently, those transfers were not “title transactions” for which the mineral interests were “*the* subject.”

The appellee Walker is the owner of real property located in Enoch Township, Noble County, Ohio which is described in two separate deeds. There existed a reservation of oil and gas interests in the property, previously severed from the surface estate, by a Quitclaim Deed dated July 26, 1965, recorded in the Noble County Records. Appellant claimed that the reservation was preserved over the passage of time by way of mere references to same in later deeds. However, those later deeds actually conveyed *only the surface estate* in the subject property. Because the transactions relied upon by the appellant do not represent title transactions *in the mineral interest*, those transactions did not operate as a “savings event” for purposes of the DMA which was effective March 22, 1989 to June 30, 2006. The 1970 and 1977 deeds transpired *before* the severed mineral interests merged with the surface estate, by operation of law, no later than March 22, 1992. Thus, the 1970 and 1977 deeds conveyed nothing but the surface. In the absence of any other evidence of a lawful savings event, and the appellant offered no such evidence for the record, the severed mineral interests merged with the surface estate no later than March 22, 1992. The 1989 version of the DMA was subject to a three-year “saving provision” or tolling provision. R.C. 5301.56(B)(2).

The record developed and argued in this case fully supports the determination that the previously-severed mineral interest merged with the surface estate, automatically, under the 1989 version of R.C. 5301.56. Both the trial court and the appellate court properly construed R.C. 5301.56, and then applied that construction to the facts of this case. Thus, the appellee respectfully submits that this case was fairly and correctly decided by the Court of Appeals, and that no substantial constitutional question is presented for resolution by this Court. Further, this case is not otherwise one of public or great general interest.

ARGUMENT IN OPPOSITION TO THE PROPOSITIONS OF LAW

As to Proposition of Law No. I:

The Common Pleas Court and Court of Appeals correctly applied the 1989 version of the DMA in determining that the oil and gas interests “vested” with the surface ownership under the express provisions of that enactment.

As the Court of Appeals perhaps best summarized:

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.

(Opinion, ¶41). There was no basis for application of the 2006 amendment of the DMA to the facts of this case.

The General Assembly drafted the 1989 DMA with clear and specific wording. The DMA did not merely provide that severed mineral rights were “abandoned” but, moreover, provided that such interests were “**shall be** deemed abandoned” and then “vested” in the surface owner:

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

R.C. 5301.56(B)(2). This statute operated, quite simply, to automatically deem unused, dormant mineral rights “abandoned” *and* “vested” in the owner of the surface as a matter of law.

The used of the word “vested” by the General Assembly is significant. A vested right is a right that so completely and definitely belongs to a person that it cannot be impaired or taken away without the person’s consent. In re. Hensley, 154 Ohio App. 3d 210, 2003-Ohio-4619, ¶23. Accord, Wendt v. Dickerson, Tuscarawas C.P. Case No. 2012 CV 02 0135. A “vested” right will not be affected or disturbed by the later amendment of the subject statute under which the right has vested.

As the Court of Appeals observed, a series of other courts have, similarly, held that rights which vested under the 1989 version of the DMA merged previously-severed oil and gas interests with the surface owner, by operation of law. See, Walker v. Noon, Noble County C.P. Case No. 2012-0098 (March 20, 2013); Marty v. Dennis, Monroe C.P. 2012-203 (Apr. 11, 2013); Tribett v. Shepherd, Belmont C.P. Case No. 12-CV-180 (Jul. 22, 2013). (Opinion, ¶42). See also, Hendershot v. Korner, C.P. Case No. 12-CV-453, Belmont County (Oct. 28, 2013). In Hendershot, the plaintiffs sought to quiet title to an undivided one-half interest in oil and gas. The interests at issue had previously been reserved by a transferor in a deed dating back to 1932. While, over the years, various property transfers had made reference to the reservation, there were no actual transfers of the one-half mineral interests. Utilizing the 1989 DMA, the plaintiffs maintained that the interests was abandoned and vested in the surface estate owner no later than March 23, 1992. The Court granted the plaintiffs’ motion for summary judgment, concluding in pertinent part:

The 1989 version of the Ohio Dormant Mineral Act vests the surface owner with ownership in severed mineral interest without the need for any notice, recordation of any document, assertion of any claim or filing of any action. Ohio Revised Code Section 1.58 sets forth that the amendment of a statute does not disturb a vested or required (sic) right.

- (A) The reenactment, amendment, or repeal of a statute does not, except as provided in division (B) of this section:
- (2) Affect any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder; . . .

Without the protection of a “Saving Event,” the undivided one-half mineral interest in the parcel in question vested in the Plaintiffs on March 23, 1992. This Court finds that the Plaintiff did not waive the right to claim abandonment by operation of law under the 1989 version of the statute. Rather, the Plaintiffs asserted their abandonment claim and placed the same upon the record. This Court finds that Plaintiff’s actions were not an election of remedies which would deny them the mineral rights which vested on March 23, 1992. “A ‘vested right’ is a right that so completely and definitely belongs to a person that it cannot be impaired or taken away without the person’s consent.” In re: Hensley, 154 Ohio App. 3d 210, 2003-Ohio-4619, para. 27. Having so found, any further discussion of Revised Code 5301 effective June 30, 2006 is hereby rendered moot. (Emphasis added).

The oil and gas rights which were abandoned and vested within the surface estate, at issue in this case, were complete and cannot be impaired under the amended, 2006 version of the statute. Accord, Blackstone v. Moore, Monroe C.P. Case No. 2012-166 (Jan. 22, 2014); Shannon v. Householder, Jefferson C.P. Case No. 12 CV 226 (July 17, 2013) (1989 DMA self-executing and vested rights prior to 2006 amendment); *affirmed*, 2014-Ohio-2359 (7th Dist).

Nothing about the recognition of rights under the 1989 version of the DMA runs contrary to any purpose of the Marketable Title Act. The self-executing effect of the 1989 DMA was not contrary to “simplifying and facilitating” land transactions, as appellant suggests. A title examiner, versed in the DMA, may determine ownership of oil and gas rights as easily from the absence of

any recorded transaction in a severed mineral right (and lapse of the requisite time period) as from some form of recording “claiming” an abandoned interest. Moreover, the 1989 DMA actually placed the burden or obligation on a severed mineral rights holder to take affirmative action (including recording of a claim or title transaction) in order to preserve a severed mineral right from becoming dormant and vesting with the surface owner. The code did not place any obligations whatsoever upon the surface owner who acquired vested oil and gas interests by operation of the law. Within a chain of title, one can determine whether the mineral holder has done anything to preserve an interest.

As to Proposition of Law No. II:

The words “deemed abandoned” cannot be isolated from the immediately following words “and vested” under the 1989 version of the DMA, and no words can be read into the statute requiring a surface owner to have “taken some action” to capture his vested rights.

Appellant, for obvious reasons, would have the Courts gloss over the presence of the words “and vested” in the 1989 enactment of the DMA. There was absolutely nothing “inchoate” or conditional about the operation of the 1989 DMA. A “vested” right – the word used in the statute – is full and complete; it is the polar opposite of some inchoate interest. (Opinion, ¶43). Vesting under the 1989 version of the DMA was by operation of law, automatic if you will, and there was no action required on the part of the surface estate owner to trigger or activate the “vested” right to the merged oil and gas interests.

Not a single provision of the 1989 DMA required the surface owner to affirmatively assert some claim to the vested rights, record any such claim, or file any form of suit or other declaration of the vested interests. Because the statute did not require any action on the part of the surface

owner to be vested with the abandoned interest, no such provision can be read into the 1989 DMA. “In interpreting a statute, [the courts] are bound by the language enacted by the General Assembly, and it is [the court’s] duty to give effect to the words used in a statute.” Hall v. Banc One Mgmt. Corp., 114 Ohio St. 3d 484, 2007-Ohio-4640, ¶24. As the Court stressed in Hall, “[w]e are free neither to disregard or delete portions of the statute through interpretation, nor to insert language not present.” Id. Citing, Whitaker v. M.T. Auto., Inc., 111 Ohio St. 3d 177, 2006-Ohio-5481, ¶15. Rights vested by law in the title of the surface owner then passed, by deed or other instrument, to successive owners.

In Blackstone, *supra*, the court examined competing claims to mineral rights relating to a 1915 reservation of a one-half interest in oil and gas royalties. The court expressed the following, regarding the 1989 version of the DMA:

[T]here is a difference between a statute that is self-executing and one that is not. Under the Former DMA, rights to a Severed Mineral Interest became “vested in the owner of the surface” of the property by operation of law upon the lapse of 20 years without the occurrence of a savings event identified in division (B)(1)(c). This Court has previously held that the Former DMA is self-executing. See, Marty v. Dennis, Monroe C.P. 2012-203 (Apr. 11, 2013). **It does not contain any requirement that the surface owner of property take any action before the mineral interest is deemed abandoned.** Id. (Emphasis added).

Accordingly, **under the Former DMA, a mineral interest is deemed abandoned and vested in the surface owner of the property if none of the savings events set forth in (B)(1)(c)(i) through (vi) occurred within any period of 20 years while the former DMA was in effect**, so long as the Severed Mineral Interest is not in coal or held by the United States, this State or any political subdivision. (Emphasis added).

See also, Shannon v. Householder, *supra*.

The court in Dahlgren only partially quoted from the DMA, stating the act “provides that they [dormant minerals] are ‘deemed abandoned.’” Somehow the court missed the very next words

used by the legislature – “and vested.” For this reason, the Court of Appeals in this case properly discounted the approach taken in Dahlgren. (Opinion, ¶43).

Rights to merged or united oil and gas interests vested under the 1989 version of the DMA by operation of law. The surface owner was not required to complete any action to ratify or make such vested right whole.

As to Proposition of Law No. III:

The 20-year look-back period in this case was simply from March 22, 1992 (the expiration of the tolling period under the 1989 version of the DMA).

As addressed above, not a single provision of the 1989 enactment of the DMA required a surface owner to file an action to “claim” or assert his “vested” right to an abandoned, severed mineral interest. Thus, it would be illogical to utilize the date of filing suit to determine the operative 20-year look-back for purposes of the statute.

Once again, the statute was self-executing and the previously-severed oil and gas interests were (they “**shall be**”) “deemed abandoned and vested” in the surface owner unless there was a “savings event” established within the 20 year period prior to vesting. The statute was not amended until June 30, 2006. The vesting of rights, under the 1989 DMA, could occur at any time prior to the amendment, upon the lapse of a 20 year period of non-use or non-preservation. Here, one only need “look back” 20 years prior to the passage of the code and expiration of the savings period of the 1989 DMA (March 22, 1992), because the reservation under consideration dated back to July 26, 1965. The significance of the 1989 version of the DMA is bolstered by the General Assembly’s use of the word “shall,” to reenforce the effect of the statute. Shall conveys mandatory; the reuniting of the severed interest with the surface was mandatory, “shall be . . . vested.”

As to Proposition of Law No. IV:

A severed oil and gas mineral interest is not the “subject of” any title transaction involving only the surface estate of the property.

The only purported “savings events” relied upon by the appellant were three transactions of the surface estate in the property at issue. “[N]oon’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.” (Opinion, ¶39). “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.” See, Dodd v. Croskey, 2013-Ohio-4257 (7th Dist.), at ¶48 (Emphasis added); (discretionary appeal accepted by the Ohio Supreme Court on a different issue, cross-appeal on this issue not accepted, 2013-1730). (Opinion, ¶25). See also, Shannon v. Householder, supra.

In Eisenbarth v. Reusser, Monroe C.P. Case No. 2012-292 (June 6, 2013), the court held that:

This Court finds that a recitation of the original oil and gas reservation in subsequent transfers of the surface do not affect the Severed Mineral Interest and therefore do not constitute “title transactions” under ORC § 5301.56(B)(1)(c)(i). The Court finds that the Severed Mineral Interest was not deeded, transferred or otherwise conveyed in any of the following title transactions and as a result, title thereto was not affected.

...

Again, none of these transactions affected title to the property at issue in this case, more specifically the Severed Mineral Interest. Instead, these transactions only affect title to the surface of the property. Accordingly, they do not constitute a savings condition under ORC § 5301.56.

Eisenbarth v. Reusser, supra, at pp. 8-10. In this case, the appellant did not offer proof of any savings event under the 1989 DMA, and title to the oil and gas was properly quieted in appellee.

As to Proposition of Law No. V:

Appellant only asserted alleged “title transactions” as savings events in an effort to avoid the result called for under the vested rights analysis of the 1989 DMA.

The appellant has argued in this case that transactions in the surface estate of the property, by others and not Noon himself, operated to protect appellant from operation of the self-executing provisions of the 1989 DMA. “And appellant has not alleged any other savings events.” (Opinion, ¶39). Now, the appellant suggests that R.C. 5301.49 provides some safe harbor; it does not.

R.C. 5301.56(B)(1) required, succinctly, that in order to prevent the abandonment and vesting of rights under the DMA, through reliance upon a title transaction, the mineral interest must have 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.” (Emphasis added). In the interplay of statutes, the “more specific statutory provision” must be deemed to control. Summerville v. City of Forest Park, 128 Ohio St. 3d 221, 2010-Ohio-6280, ¶¶ 25, 26. The appellant did not demonstrate any transaction where the severed mineral interest was “the subject of” that transaction. Consequently, no savings event under the specific provisions of the DMA was proven.

As to Proposition of Law No. VI:

The 2006 version of the DMA was not made specifically retroactive and, regardless, cannot be applied to disturb or strip “vested” interests already accrued under the 1989 version of the DMA.

Appellee maintains that the Court of Appeals correctly observed that the appellant did not preserve litigation of any constitutional issue in this case. (Opinion, ¶57). Regardless, the 2006 amendment to the DMA is presumed to operate prospectively. R.C. 1.48. In re. Hensley, 154 Ohio App. 3d 210, 2003-Ohio-4619, ¶23. Shannon v. Householder, supra at p. 7. Moreover, “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.” (Opinion, ¶37).

It is fundamental that the 2006 amendment cannot be applied retroactively to impair or take away vested rights. “A statute is ‘substantive’ if it impairs or takes away vested rights, affects an accrued substantive right, imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction, or creates a new right.” Hensley, ¶26; citing Van Fossen v. Babcock & Wilcox, 36 Ohio St. 3d 100, 107 (1988). A statute is substantive, and therefore unconstitutionally applied retroactively, if it “impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction.” Smith v. Smith (2006), 109 Ohio St. 3d 285, 354. vested or acquired under it.” The oil and gas rights here vested – automatically – under the former version of the statute, no later than March 22, 1992 (after the exhaustion of the tolling period). The amended version of the code cannot be applied to have a substantive effect (impair or take away) those accrued rights to the mineral interest. Similarly, the amended version of the code cannot be applied to impose any new or additional burden (any notice or other requirement) as to the previously-vested rights.

“A ‘vested right’ is ‘a right that so completely and definitely belongs to a person that it cannot be impaired or taken away without the person’s consent.’” In re. Hensley, supra, ¶27. “Vested” means “having become a completed, consummated right for present or future enjoyment; not contingent; unconditional; absolute.” Id. Appellee’s rights satisfy these definitions. Again, the 1989 version of the statute operated “automatically.” The merger became complete and was consummated by the passage of time alone. There was no “saving event” after the severance; as a result, and by operation of law, the interests were “deemed abandoned and vested in the owner

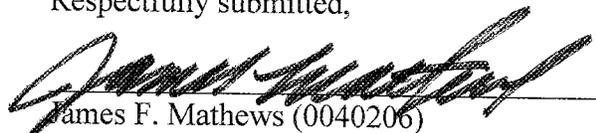
of the surface.” R.C. 5301.56(B)(1). See, Nationwide Ins. v. Ohio Dept. of Transp., 61 Ohio Misc. 2d 761, 765 (1990), (“[T]he . . . amendment of a statute will not destroy, affect, or impair rights .

Under the 1989 version of the DMA, abandoned mineral interests were, by law, “vested in the owner of the surface.” Specific use of the word “vested” by the General Assembly simply cannot be ignored. The meaning of a “vested” right has already been briefed. 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 (Emphasis added). Here, the “vested” right for the surface owner was expressly created by operation of the 1989 version of the DMA; that vested right being the property right, the ownership, of the previously–severed oil and gas interests in their properties. Such vested rights cannot be affected, limited, stripped, or burdened by application of the 2006 version of the code. See, Art. II, Sec. 28, Ohio Constitution; R.C. 1.58.

CONCLUSION

WHEREFORE, appellee, Jon D. Walker, Jr., respectfully submits that this case does not present any substantial constitutional question for determination by this Court, and this case is not a case of public or great general interest.

Respectfully submitted,



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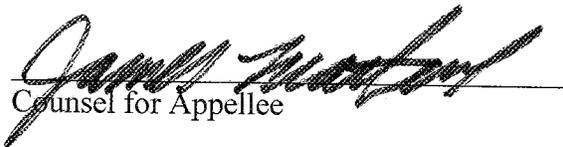
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