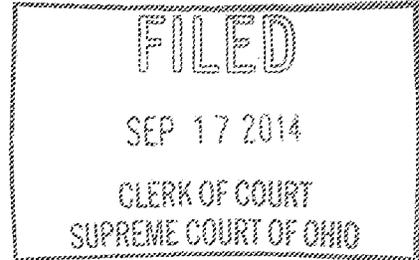


ORIGINAL

IN THE SUPREME COURT OF OHIO

PHILLIP B. DODD, et al., :
Plaintiffs – Appellants, :
v. :
JOHN CROSKEY, et al., :
Defendants – Appellees. :

CASE NO. 2013-1740-1730



**BRIEF OF CHESAPEAKE EXPLORATION, L.L.C.
AS AMICUS CURIAE IN SUPPORT OF PETITIONER**

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I. STATEMENT OF INTEREST OF AMICUS CURIAE

Chesapeake Exploration, L.L.C. (“Chesapeake”) is an exploration and production company engaged in lease acquisition and development of oil and gas minerals throughout the Utica Shale formation. Chesapeake has acquired substantially more leasehold acreage and has drilled and produced more horizontal wells than any other exploration and production company currently operating in Ohio. In order to obtain its leasehold position, Chesapeake has expended considerable resources to understand and address the respective interests of record holders and surface owners claiming ownership of severed oil and gas rights underlying their property pursuant to R.C. 5301.56, commonly known as the Ohio Dormant Mineral Act. Issues involving the application and interpretation of R.C. 5301.56 have resulted in significant amounts of litigation, the uncertainty of which has materially hindered Chesapeake’s ability to ensure that valid leases are obtained and payments are made to the proper parties in interest prior to its commencement of drilling operations.

As a result, Chesapeake has a clear economic interest regarding whether the recitation of a prior reservation in a deed constitutes a “title transaction” preventing abandonment of a severed mineral interest under R.C. 5301.56. The Court’s resolution of this important issue will provide much needed clarity as to the operation of R.C. 5301.56, and will resolve a significant number of claims with regard to ownership of valuable severed mineral rights throughout Ohio. Chesapeake, as *amicus curiae*, respectfully urges this Court to find that a deed with a recitation of a prior mineral reservation constitutes a title transaction preventing abandonment under the statute. Such a ruling fulfills the purpose and intent of the Marketable Title Act, of which the Dormant Mineral Act is a part.

II. STATEMENT OF FACTS

This matter involves a dispute over ownership of a severed oil and gas mineral interest underlying approximately 82 acres of Plaintiffs-Appellants Phillip B. Dodd and Julie Bologna's (the "Plaintiffs-Appellants") property located in Harrison County, Ohio (the "Property"). In 1947, by Warranty Deeds recorded in Deed Book Volume 121, Page 381, Deed Book Volume 121, Page 382, and Deed Book Volume 232, Page 383, Samuel A. Porter and Blanche Porter, husband and wife, and Emma A. Croskey, conveyed their interest in the Property to Consolidated Fuel Company, reserving the oil and gas underlying the premises (the "Mineral Reservations"). In 2009, Plaintiffs-Appellants acquired title to the surface of the Property by Survivorship Deed from James Coffelt (the "Survivorship Deed"). The Survivorship Deed included language reciting and referencing the Mineral Reservations, and states:

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.

Excepting a one-third interest in the oil and gas to Samuel A. Porter and Blanche Long Porter¹ in Warranty Deed filed for record May 27, 1947 in Volume 121, Page 383, Deed Records.

On or about November 27, 2010, Plaintiffs-Appellants published notice of their intent to claim abandonment of the interests reserved by the Mineral Reservations in a local newspaper. On November 29, 2010, Defendant-Appellee John W. Croskey ("Croskey") recorded a Quit Claim Deed, conveying his interest in the Mineral Reservations to John W. Croskey and Anita M. Croskey, as Trustees of the John William Croskey Revocable Trust dated June 1, 2007. On

¹ The trial court found this exception contains an error with regard the reservation of a 1/3 interest, which was retained by Emma A. Croskey, not Samuel A. Porter and Blanche Long Porter. The Seventh District noted that neither party challenged the finding; therefore, it was not addressed. (Opinion Pg. 2, Footnote 1).

December 23, 2010, Croskey recorded an Affidavit Preserving Minerals, claiming an interest in the Mineral Reservation as an heir of Samuel A. Porter and stating that he intended to preserve his interest in the oil and gas minerals. On December 27, 2010, Plaintiffs-Appellants recorded an Affidavit of Abandonment with regard to the Mineral Reservations stating that the interests had been abandoned pursuant to R.C. 5301.56.

III. STATEMENT OF THE CASE

On February 9, 2011, Plaintiffs-Appellants filed a quiet title action against Defendants-Appellees John W. Croskey, et al. (the “Defendants-Appellees”) seeking a declaratory judgment as to the ownership of a severed oil and gas mineral interest underlying their property.² Plaintiffs-Appellants alleged Defendants-Appellees’ interests in the severed oil and gas minerals were abandoned pursuant to R.C. 5301.56, as amended in 2006 (the “2006 DMA”). After the close of pleadings, the parties filed cross-motions for summary judgment.

On October 29, 2012, the Harrison County Court of Common Pleas issued a decision granting summary judgment in favor of Defendants-Appellees. Specifically, the trial court found that: (1) a deed recorded on August 5, 2009, which conveyed surface rights, but also included a restatement and reference to a prior mineral reservation, constitutes a “title transaction” preventing abandonment of the mineral interest within the definition of R.C. 5301.56 (B)(3)(a); (2) Plaintiffs-Appellants failed to comply with the notice requirements set forth in R.C. 5301.56(E); and (3) the affidavit filed by Croskey preserved the rights of all of the current record holders of the mineral interest pursuant to R.C. 5301.56(H).

On November 5, 2012, Plaintiffs-Appellants timely appealed the trial court’s decision. On September 23, 2013, the Seventh District Court of Appeals affirmed the trial court’s decision,

² Plaintiffs-Appellants filed an Amended Complaint on January 19, 2012.

except in two respects. The Seventh District found: (1) the Survivorship Deed, which restated the Mineral Reservations, did not constitute a “title transaction,” and (2) Plaintiffs complied with the notice requirements of R.C. 5301.56 (E).

On November 14, 2013, Plaintiffs-Appellants timely filed a notice of appeal and a memorandum in support of jurisdiction on a proposition of law concerning whether a claim to preserve filed within 60 days of a notice of intent to abandon preserves a mineral interest where no savings event occurred during the twenty-year look back period. Several Defendants-Appellees, including Harriet C. Evans, filed notices of cross-appeal and memoranda in support of jurisdiction on additional propositions of law, including whether the restatement of a prior mineral reservation in a deed constitutes a “title transaction” within the definition of R.C. 5301.56. On March 12, 2014, this Court accepted jurisdiction on Plaintiffs-Appellants’ proposition of law and oral argument was held on August 20, 2014. Subsequently, on August 28, 2014, the Supreme Court of Ohio accepted, *sua sponte*, Defendant-Appellee Harriet C. Evans’ Proposition of Law No. II as set forth in her Memorandum in Opposition of Jurisdiction filed on November 27, 2013.

IV. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

A DEED CONTAINING RESTATEMENT OF A PRIOR MINERAL RESERVATION IS A “TITLE TRANSACTION” WITHIN THE MEANING OF §5301.56, OHIO REVISED CODE.

A. The Seventh District Erred in Narrowly Construing the Definition of the Word “Subject” in its Interpretation of R.C. 5301.56 (B)(3)(a).

Pursuant to R.C. 5301.56, before a surface owner is in a position to acquire a severed mineral interest, it must be shown that none of the enumerated circumstances set forth in division

(B) of the statute applied during the twenty-year look back period.³ These circumstances are:

- (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...
- (b) There has been actual production or withdrawal of the minerals by the holder from the lands...
- (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...or
- (f) In the case of a separated mineral interest, a separately listed tax parcel number has been created for the mineral interest...

Id. (B)(3).

The proposition of law at issue here focuses on whether the mineral interest at issue was the “subject of a title transaction.” The instrument being reviewed as to whether it constitutes a title transaction under division (B)(3)(a) is a deed which recites and references (by book and page number) the prior mineral reservations. The appellate court concluded that the deed does not constitute a title transaction precluding the surface owner from claiming abandonment under the statute. Chesapeake submits that the appellate court’s conclusion with regard to this instrument is incorrect.

The appellate court’s analysis relies on the word “subject,” being defined as “topic of interest, primary theme, or basis of action,” as set forth in Webster’s II New Riverside University Dictionary (1984). Opinion at ¶ 48. Using this definition, the court reasoned that, because the

³ This analysis applies regardless of which version of R.C. 5301.56 is at issue. The issue whether the 1989 or 2006 version of the statute controls quiet title actions filed after 2006 is the subject of other cases pending before this Court. See *Corban v. Chesapeake Exploration, L.L.C.*, Case No. 2014-0804 and *Walker v. Shondrick-Nau*, Case No. 2014-0803.

primary purpose of the title transaction was the sale of the surface rights, the mineral interests (although referenced) were not the “subject of” the title transaction. *Id.* The court concluded: “[i]n order for the mineral interest to be the ‘subject of’ the title transaction the grantor must be conveying that interest or retaining that interest.”⁴ *Id.*

The Seventh District’s interpretation of “subject” focuses exclusively on the concept of a “primary theme,” and the court limits its analysis to a determination of a title transaction’s one, “primary purpose.” This narrow interpretation, however, ignores the fact that the same definition relied upon by the court also includes “topic of interest,” which is a more fitting definition within the context of the statute, as explained below. Merriam-Webster’s Dictionary supports a more expansive “topic of interest” interpretation, defining “subject” as “the person or thing that is being discussed or described.” Merriam-Webster’s Dictionary (2014). Both of these definitions provide a more common usage of the word “subject,” which cannot be read so narrowly as to be limited to only one “primary” or singular subject. Under this interpretation, a title transaction, such as a deed, can have *more than one* subject. Thus, the restatement of a prior mineral reservation would be considered a “topic of interest” (the interest being expressly excluded from the conveyance), or alternatively, an interest that is being “discussed or described” by the instrument. Based on these definitions, and the ordinary usage of the word “subject,” it becomes clear the Seventh District erred in narrowly interpreting the phrase “subject of” as being limited to a “primary purpose.”

⁴ In *Eisenbarth v. Reusser*, 2014-Ohio-3792, 2014 WL 4291635 (Ohio App. 7 Dist., Aug. 28, 2014), the Seventh District clarified that its holding in this regard was *in the context of a surface deed. Id.* at ¶ 27.

B. Division (B)(3)(a) Was Not Intended to Require a Conveyance or Reservation of the Mineral Interest.

The court's narrow interpretation of "subject," and its conclusion that a mineral interest must be conveyed or retained, undercuts the legislative purpose of R.C. 5301.56 when viewed within the context of Marketable Title Act. As this Court has noted, "[w]hen interpreting a statute, a court's paramount concern is legislative intent." *State ex rel. United States Steel Corp. v. Zaleski*, 98 Ohio St.3d 395, 2003-Ohio-1630, ¶ 12. When interpreting a statute "courts must examine the statute in its entirety rather than focus on an isolated phrase to determine legislative intent." *Horvath v. Ish*, 134 Ohio St.3d 48, 2012-Ohio-5333, ¶ 10, citing *Massillon City School Dist. Bd. of Edn. v. Massillon*, 104 Ohio St.3d 518, 2004-Ohio-6775, ¶ 37. Further, "[i]t is a well-settled rule of statutory interpretation that statutory provisions be construed together and the Revised Code be read as an interrelated body of law." *Riffle v. Physicians & Surgeons Ambulance Serv.*, 135 Ohio St.3d 357, 2013-Ohio-989, ¶ 12. An analysis or interpretation of the phrase "subject of" must be considered within the context of the statute and its legislative purpose, and not in isolation.

R.C. 5301.56 (B)(3)(a) states, in relevant 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:

(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 recorded in which the lands are located.

(Emphasis added.)

The phrase “subject of” within the body of division (B)(3)(a) must be interpreted in conjunction with the phrase “a title transaction,” which immediately follows. The Marketable Title Act sets forth the following definition of a “title transaction” in R.C. 5301.47(F), which states:

“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.

(Emphasis added.)

Accordingly, when this definition of a “title transaction” in R.C. 5301.47(F) is inserted into the language of R.C. 5301.56(B)(3)(a) of the statute, it is evident that the particular event was intended to be satisfied where the “mineral interest has been the subject of [‘any transaction *affecting title to any interest in land...*’] that has been filed or recorded in the office of the county recorder...” The key is the phrase “any interest in land.” Under the appellate court’s interpretation, however, these words no longer have significance because division (B)(3)(a) would require more than just a title transaction affecting title to “any interest in land,” and would instead require an actual grant or reservation of the mineral interest by the grantor. A plain reading of R.C. 5301.56 (B)(3)(a) does *not* require a grant or retention of a mineral interest to have occurred within the title transaction. Thus, the Seventh District’s adoption of the narrow meaning of the phrase “subject of” as requiring the “primary purpose” of the title transaction to include a conveyance or retention of the mineral interest does not fit within the context of the statute.

C. The Legislative History of R.C. 5301.56 Reflects that a Deed which Recites a Prior Mineral Reservation was Intended to Constitute a Title Transaction.

A review of the legislative history of R.C. 5301.56 further supports a conclusion that a deed which recites a prior mineral reservation in a deed constitutes a title transaction which prevents abandonment under the statute. In 1987, when the statute was first introduced as Senate Bill 223, it did not include the phrase “subject of a title transaction.” Instead, the language required that the “[mineral] interest had been conveyed, leased, transferred, or mortgaged by an instrument filed or recorded in the recorder’s office...” Ohio S.B. 223 (1987) (as introduced) at 2. This phrase, however, was revised in an amendment to the Senate Bill, which replaced this language with a broader standard requiring only that the mineral interest was the subject of a “title transaction,” defined by the Marketable Title Act as being “any transaction affecting title to any interest in land.” This broader description remains in the current version of the statute.

The legislative history thus reflects an intent for division (B)(3)(a) of the statute to require something *less* than a conveyance, transfer, or reserve a mineral interest. By amending the proposed language, the legislature enacted a considerably broader standard to encompass any situation where the mineral interest was the “subject of” a title transaction involving *any interest in land*. Had the legislature intended division (B)(3)(a) to require that the instrument convey or retain a mineral interest, it would not have amended the language as introduced in the Senate Bill. When interpreting division (B)(3)(a) within the context of the legislative history of the statute, it must be concluded that a deed which specifically references a reservation of a prior mineral interest qualifies as a title transaction. It both affects title to an interest in land (the surface), and references the mineral reservation as an interest excepted from the conveyance. As the trial court correctly held:

The plain language of the statute establishes that something less than the conveyance of the mineral interest must be sufficient to trigger the exclusion. The identification of ‘exceptions’ to the property conveyed is an essential part of any deed because *the exceptions are as critical as the metes and bounds description in defining the specific bundle of rights, i.e. property, conveyed by the instrument.* Furthermore, the warranty covenants provided by the deed are specifically limited by the exceptions set forth with the instrument.

Entry at 7. (Emphasis added.)

The trial court’s analysis correctly recognizes that the restatement of a prior mineral reservation serves a necessary purpose as it describes what interests are being excluded from the conveyance. Specifically, the excluded mineral interest is also a “subject of” the deed because it is an essential part of the description of the interests being conveyed. In this case, the exclusions of the Mineral Reservations recited in the Survivorship Deed are essential to understanding the complete subject of the deed. Both the rights granted, and the rights excluded, from the conveyance of the Property are plainly described. The Mineral Reservations are expressly part of the subject matter of the Survivorship Deed.

D. The Seventh District’s Ruling is not in Accord with the Legislative Purpose of R.C. 5301.56.

Interpreting division (B)(3)(a) to include deeds which directly recite and reference prior reservations of mineral interests is consistent with the legislative purpose set out in R.C. 5301.55, which provides, 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...*

(Emphasis added.)

Under the appellate court’s more narrow interpretation of division (B)(3)(a), a deed containing a recitation or reference to a prior mineral reservation would not be sufficient to preserve the interest simply because the “primary purpose” of the deed was not a conveyance of

the interest. This interpretation, therefore, fails to recognize the inherent effect of the recital and reference to a prior mineral reservation on the title record itself. Where a prior mineral reservation is specifically recited in a deed, regardless of whether title to the mineral interest is conveyed or retained by the grantor, the continued existence of a separate chain of title for the mineral interest is once again affirmed. Thus, where a deed recites and provides a book and page reference to a prior mineral reservation, the underlying purpose of the Marketable Title Act is accomplished because it provides further reliability with regard to the mineral interest in the title record, and notice of the continued existence of a separate chain of title corresponding to the severed mineral interest.

The case at bar illustrates this conclusion. In this case, restatements and references to the prior Mineral Reservations (which include specific book and page numbers for the deeds which originally created the severance) plainly appear in the Survivorship Deed. The recitations of the prior Mineral Reservations provided notice to the Plaintiffs-Appellants that the Mineral Reservations were expressly excluded from the interest in the Property they received. There can be no question as to exactly what rights were excluded from the conveyance because the prior reservations were recited, and book and page references to the deeds creating the severances were provided.

As a result, Plaintiffs-Appellants (and any other persons examining the record chain of title to the Property) would be able to reliably ascertain that, as of the date of the Deed, the interests reserved in the Mineral Reservations were conveyed separately from the surface rights conveyed by the Survivorship Deed. Further, because the Survivorship Deed plainly directs a title examiner to the book and page where the severance deeds creating the Mineral Reservations were recorded, the chains of title for Mineral Reservations can be followed, and ownership of the

same can be established. Therefore, a proper interpretation of division (B)(3)(a) must necessarily include deeds which both recite and reference prior reservations of severed mineral interests, regardless of whether the mineral interest is being conveyed or retained by the grantor. By doing so, the intended purpose of the statute is accomplished.

V. CONCLUSION

For the reasons set forth above, Chesapeake Exploration, L.L.C., as *amicus curiae*, respectfully requests that this Court find that a deed which restates a prior mineral reservation constitutes a title transaction that prevents abandonment of a severed oil and gas interest pursuant to R.C. 5301.56(B)(3)(a).

Respectfully submitted,



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