

ORIGINAL

IN THE SUPREME COURT OF OHIO

PHILLIP B. DODD,

Plaintiffs-Appellants,

v.

JOHN CROSKEY, *et al.*,

Defendants-Appellees,

CASE NO. 2013-1730

MERIT BRIEF OF *AMICI CURIAE* JEFFCO RESOURCES, INC., MARK AND KATHY RASTETTER, DOUGLAS HENDERSON, DJURO AND VESNA KOVACIC, BRETT AND KIM TRISSEL, AND STEVEN E. AND DIANE CHESHIER IN OPPOSITION OF PETITIONER, HARRIET EVANS ON PROPOSITION OF LAW NO. II

Clay K. Keller (#0072927)
J. Alex Quay (#0085130)
Jackson Kelly PLLC
17 South Main Street
Akron, OH 44308
Phone: (330) 252-9060
Fax: (330) 252-9078
Email: ckkeller@jacksonkelly.com
jaquay@jacksonkelly.com
Counsel for Amicus Curiae,
Chesapeake Exploration, L.L.C.

Paul Hervey (#0063611)
Jilliann Daisher (#0087051)
Fitzpatrick, Zimmerman & Rose, L.P.A.
P.O. Box 1014
New Philadelphia, OH 44663
Counsel for Appellants,
Phillip B. Dodd and Julie R. Bologna

Gregory W. Watts (0082127)*
**Counsel of Record*
Matthew W. Onest (0087907),
David E. Butz (0039363), and
William G. Williams (0013107) of
KRUGLIAK, WILKINS, GRIFFITHS
& DOUGHERTY CO., L.P.A.
4775 Munson Street NW/P.O. Box 36963
Canton, Ohio 44735-6963
Phone: (330) 497-0700/Fax: (330) 497-4020
gwatts@kwgd.com; monest@kwgd.com;
dbutz@kwgd.com; bwilliams@kwgd.com

Counsel for Amici Curiae Jeffco Resources,
Inc., Mark and Kathy Rastetter, Douglas
Henderson, Djuro and Vesna Kovacic, Brett
and Kim Trissel, and Steven E. and Diane
Cheshier

RECEIVED
SEP 29 2014
00935321-3 / 25851.01-000
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
SEP 29 2014
CLERK OF COURT
SUPREME COURT OF OHIO

R. Jeffrey Pollock (#0018707)
Erin K. Walsh (#0078142)
McDonald Hopkins LLC
600 Superior Ave., East, Suite 2100
Cleveland, OH 44114
*Counsel for Appellees,
Karen A. Chaney, Patty Hausman,
Linda C. Boyd, and Terri Hocker*

Marquette D. Evans (#0008082)
Evans Law Office
902 Race Street, 2nd Floor
Cincinnati, OH 45202
Counsel for Appellee, Harriet C. Evans

Consolidated Coal Company
n/k/a Consol Energy, Inc.
1000 Consol Energy Drive
Canonsburg, PA 15317

Brian Crist
3384 N. River Road
Zanesville, OH 43701

Ronald K. Lembright (#0023732)
Ronald K. Lembright Co., L.P.A.
One Cascade Plaza, 15th Floor
Akron, OH 44308
*Counsel for Appellees,
William L. Kalbaugh, William H. Boak,
Jennifer Bernay, Charlotte S. Bishop,
Richard G. Davis, Harry Roy Davis,
Thomas Davis, Harry K. Kalbaugh,
Michael L. Kalbaugh, and Charlotte S. Bishop*

Rupert N. Beetham (#0019088)
110 South Main Street
P.O. Box 262
Cadiz, OH 43907
*Attorney for 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, Evert Dean Porter,
Stuart Barry Porter, Kim Berry,
Samuel G. Boak, Lorna Bower,
Sandra J. Dodson, and Ian Resources, LLC*

TABLE OF CONTENTS

STATEMENT OF AMICUS INTEREST1

STATEMENT OF THE CASE AND FACTS2

ARGUMENT IN OPPOSITION TO PROPOSITION OF LAW NO. II.....4

 I. PETITIONER’S PROPOSITION OF LAW NO. II: “A restatement of a prior mineral reservation in later deeds is a “title transaction” within the meaning of § 5301.46, Ohio Revised Code.”4

 A. PETITIONER’S PROPOSITION OF LAW MISSTATES THE ISSUE BEFORE THE COURT.....4

 B. A MERE REPETITION OF A PRIOR MINERAL RESERVATION IN A SUBSEQUENT DEED CANNOT BE “THE SUBJECT OF” THAT TRANSACTION BECAUSE NEITHER PARTY TO THE DEED HAS ANY INTEREST IN THE PREVIOUSLY SEVERED INTEREST.....4

 1. The Plain Language of the 2006 DMA requires this Court to reject Proposition of Law No. II.5

 2. As a matter of law, the 2009 Deed could not reserve or preserve any interest in Appellees, who were strangers to the deed.8

 3. *Riddell v. Layman* does not support Petitioner’s Proposition of Law No. II.....9

 C. PETITIONER’S POSITION WOULD EVISCERATE THE PURPOSE OF THE 2006 DMA AND ALLOW UNRELATED THIRD PARTIES TO INADVERTENTLY PRESERVE DORMANT SEVERED INTERESTS11

 1. The 2006 DMA requires action or use by the mineral holder, not the mere recitation of the mineral reservation in the muniments of title under the general Marketable Title Act.12

 D. THE COURT NEED NOT EVEN CONSIDER THE PETITIONER’S PROPOSITION OF LAW NO. II, IF THE COURT UPHOLDS THE COURT OF APPEALS DETERMINATION REGARDING THE CLAIM TO PRESERVE.15

CONCLUSION18

PROOF OF SERVICE.....19

TABLE OF AUTHORITIES

Cases

<i>Akron Cold Spring Co. v. Unknown Heirs of Ely</i> , 18 Ohio App. 74, 80 (9th Dist. 1923).....	9
<i>Dodd v. Croskey</i> , 7th Dist. Harrison No. 12 HA 6, 2014-Ohio-4257, ¶4 (Sep. 23, 2013).....	passim
<i>In re Allen</i> , 415 B.R. 310 (N.D. Ohio 2009)	9
<i>In re T.R.</i> , 120 Ohio St.3d 136, 896 N.E.2d 1003 (2008).....	6
<i>Kirk v. Conrad</i> , 3rd Dist. Crawford No. 1266, 1931 WL 2566, 9 Ohio Law Abs. 717 (Feb. 17, 1931).....	9
<i>Larson v. Norheim</i> , 830 N.W.2d 85, 2013 ND 60 (N.D. 2013)	16
<i>Lighthorse v. Clinefelter</i> , 36 Ohio App.3d 204, 521 N.E.2d 1146 (9th Dist. 1987)	9
<i>Manley v. Carl</i> , 11 Ohio C.D. 1 (1900).....	9
<i>McLaughlin v. CNX Gas Co.</i> , N.D. Ohio No. 5:13CV1502 (Dec. 13, 2013).....	10
<i>Riddel v. Layman</i> , 5th Dist. Licking No. 94CA114, 1995 WL 498812 (July 10, 1995).....	10
<i>Scully v. Overall</i> , 17 Kan. App. 2d 582, 840 P.2d 1211 (1992).....	16
<i>Smith v. Landfair</i> , 135 Ohio St.3d 89, 984 N.E.2d 1016 (2012).....	6
<i>Sugarcreek Twp. V. Centerville</i> , 133 Ohio St.3d 467, 979 N.E.2d 261 (2012).....	6

Statutes

5301.56(H)(1)(a).....	3
R.C. 5301.48.....	14
R.C. 5301.49.....	14
R.C. 5301.49(A)	13, 14
R.C. 5301.49(D)	14
R.C. 5301.55.....	13
R.C. 5301.56.....	1, 10, 13
R.C. 5301.56(A)(1).....	16
R.C. 5301.56(B).....	11
R.C. 5301.56(B)(3).....	12
R.C. 5301.56(B)(3)(a)	5, 6, 7, 12
R.C. 5301.56(B)(3)(b)	5
R.C. 5301.56(B)(3)(c)	5
R.C. 5301.56(B)(3)(d)	5
R.C. 5301.56(B)(3)(e)	6
R.C. 5301.56(B)(3)(f).....	6
R.C. 5301.56(C).....	3, 18
R.C. 5301.56(C)(2).....	3, 17
R.C. 5301.56(E).....	16
R.C. 5301.56(H)	16
R.C. 5301.56(H)(1).....	17
R.C. 5301.56(H)(1)(a)	3, 4, 17
R.C. 5301.56(H)(1)(b).....	17

Other Authorities

Article II, § 36 of the Ohio Constitution	11
Black’s Law Dictionary 1465 (2004).....	7
Webster’s II New Riverside University Dictionary 1153 (1984).....	7

STATEMENT OF AMICUS INTEREST

Amici Curiae, Jeffco Resources, Inc., Mark and Kathy Rastetter, Douglas Henderson, Djuro and Vesna Kovacic, Brett and Kim Trissel, and Steven E. and Diane Cheshier, submit this Brief in opposition to Petitioner's, Harriett Evans, Proposition of Law No. II: "A restatement of a prior mineral reservation in later deeds is a "title transaction" within the meaning of § 5301.46, Ohio Revised Code."

Amici Curiae are Ohio residents and real property owners who may be directly affected by the Court's interpretation of R.C. 5301.56 (in effect June 30, 2006) ("2006 DMA"). *Amici Curiae* own over 9,000 acres of real property located in the State of Ohio, including Belmont, Guernsey, Harrison, Jefferson, and Noble Counties, portions of which were previously subject to severances of oil, gas, and/or other mineral rights. *Amici Curiae* have a vested interest in the legal effect, if any, that is given to a mere repetition or recitation of a previously severed mineral interest by unrelated third parties under the 2006 DMA.

As discussed more fully below, the 2006 DMA was enacted in order to promote the efficient production and exploration of Ohio's natural resources, including oil, gas, and related hydrocarbons, promote title simplicity by re-unifying old unused interests, which over time can become splintered and fractionalize, in a readily identifiable surface owner if the statutory procedure is satisfied, and provide title certainty that if no specified events occur within the 20 years before notice and no claim to preserve is recorded by the mineral interest holder within 60 days after notice, the interest vests with the surface owner. It promotes this policy by requiring the owners of severed mineral interests to take affirmative action to preserve their interests. As the chains of title of *Amici Curiae* contain repetitions of old reservations, they have a vested interest in the outcome of this Court's analysis of Proposition of Law No. II. Based

upon Ohio law, including the plain language of the 2006 DMA, *Amici Curiae* respectfully request that the Court reject the Petitioner's Proposition of Law No. II.

STATEMENT OF THE CASE AND FACTS

This case involves oil and gas reservations created in 1947 by Warranty Deeds recorded in Deed Book Volume 121, 381, Deed Book Volume 121, Page 382, and Deed Book Volume 232, Page 383, of the Harrison County Recorder's Office (collective referred to hereinafter as the "1947 Reservation"). In 2009, Appellants acquired a tract of real property, a portion or all of which was subject to the 1947 Reservation, by virtue of a Survivorship Deed from James Coffelt, recorded in Volume 180, Page 2239, of the Harrison County Recorder's Office (hereinafter referred to as the "2009 Deed"). *Dodd v. Croskey*, 7th Dist. Harrison No. 12 HA 6, 2014-Ohio-4257, ¶4 (Sep. 23, 2013). The 2009 Deed, which conveyed the surface estate of the real property at issue, contained a repetition of the prior 1947 Reservation.

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 Porter¹ in Warranty Deed filed for record may [sic] 27, 1947 in Volume 121, page 383, Deed Records.

It is undisputed the Appellees, the successors-in-interest to the 1947 Reservation, were not parties to the 2009 Deed. *Id.* It is further undisputed that the 2009 Deed did not reserve to the grantor therein, James Coffelt, or convey to the grantee therein, Appellants, any interest in the 1947 Reservation, as the grantor could neither retain or convey an interest he did not own.

On November 27, 2010, Appellants published notice of their intent to have the

¹ The trial court found that this exception contained an error, which was that the correct reserving party was Emma A. Croskey, not Samuel A. Porter and Blanche Long Porter. None of the litigants challenged this finding and thus, it was not addressed.

1947 Reservation declared abandoned under the 2006 DMA. *Id.* at ¶6. Within 60 days after that notice, on December 23, 2010, one of the Appellees, John William Croskey, filed a document which provided that he, along with other individuals, were the heirs of the parties who had created the 1947 Reservation and that they did not intend to abandon that interest (hereinafter the “Claim to Preserve”). *Id.* at ¶7.

For purposes of this Court’s review, it is critical to highlight two particular holdings of the Seventh District Court of Appeals. First, the Seventh District Court of Appeals held that the Claim to Preserve recorded by Mr. Croskey met the requirements of R.C. 5301.56(H)(1)(a) and R.C. 5301.56(C) and therefore, prevented abandonment under the 2006 DMA. *Id.* at ¶¶17-36. Revised Code Section 5301.56(H)(1)(a) provides that:

If a holder or a holder's successors or assignees claim that the mineral interest that is the subject of a notice . . . 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;

Pursuant to R.C. 5301.56(C)(2), a claim to preserve filed by the holder “preserves the rights of all holders of a mineral interest in the same lands.”

Second, on Proposition of Law No. II, the Seventh District Court of Appeals held that the 2009 Deed, which transferred the property to the Appellants, was a title transaction. However, the Court of Appeals held the 1947 Reservation was not the subject of the 2009 Deed. *Id.* at ¶49. In order for the 1947 Reservation to be the subject of the 2009 Deed, the grantor, James Coffelt, would have had to be conveying or retaining that interest, which was not the case. *Id.* at ¶48. Regardless, the Court of Appeals went on to state that because Appellees had taken affirmative steps by filing the Claim to Preserve after the notice of intent to abandon was

published, summary judgment for the Appellees was appropriate under R.C. 5301.56(H)(1)(a).
Id. at ¶50.

ARGUMENT IN OPPOSITION TO PROPOSITION OF LAW NO. II

I. PETITIONER'S PROPOSITION OF LAW NO. II: "A restatement of a prior mineral reservation in later deeds is a "title transaction" within the meaning of § 5301.46, Ohio Revised Code."

A. PETITIONER'S PROPOSITION OF LAW MISSTATES THE ISSUE BEFORE THE COURT.

Petitioner's brief and the briefs of the *Amici Curiae* in support of Petitioner each repeatedly misstate that the Seventh District Court of Appeals held that the 2009 Deed was not a "title transaction" for purposes of the 2006 DMA. (*See e.g.*, Brief of Chesapeake Exploration, L.L.C., p. 5). This is not the case. The Seventh District Court of Appeals held, without equivocation, the 2009 Deed was a "title transaction." *Dodd*, 2014-Ohio-4257, ¶43 (stating "the 2009 deed clearly constitutes a title transaction"). However, Petitioner's argument (even Proposition of Law No. II itself) and the briefs of the *Amici Curiae* in support of Petitioner miss the mark. The issue is not whether the 2009 Deed was a title transaction – it was. The issue decided by the Court of Appeals and before this Court is whether the 1947 Reservation was "the subject of" the 2009 Deed. *Id.* ("The issue to be decided here is whether the oil and gas interest was the "subject of" that title transaction.") For the reasons more fully set forth below, the answer to that issue is clearly no and this Court should affirm the Seventh District Court of Appeals decision.

B. A MERE REPETITION OF A PRIOR MINERAL RESERVATION IN A SUBSEQUENT DEED CANNOT BE "THE SUBJECT OF" THAT TRANSACTION BECAUSE NEITHER PARTY TO THE DEED HAS ANY INTEREST IN THE PREVIOUSLY SEVERED INTEREST.

Petitioner, and the briefs of the *Amici Curiae* in support of Petitioner, want this Court to hold that a mere repetition of a previously severed interest in a deed by unrelated third

parties with no ownership interest in that severed interest should preserve that severed interest regardless of the continued and protracted inaction, negligence and abandonment by the actual mineral holders who can continue to remain dormant and unaccounted for, in many cases, for many decades and generations. This must be rejected for multiple reasons, not the least of which is common sense.

First, such a result ignores the plain language of the 2006 DMA, which requires affirmative action by the mineral holder, and that the severed mineral interest itself be “the subject of” a title transaction, not merely a muniment of title. Second, Petitioner’s Proposition of Law No. II would fundamentally undercut the very purpose of the 2006 DMA by allowing dormant mineral interests to be preserved indefinitely by the acts of unrelated third parties, while the interests themselves continue to remain dormant and undeveloped and the holders thereof no more identifiable than before the incidental repetition. Third, Petitioner’s Proposition of Law No. II ignores the differences in the purpose and requirements of the Ohio Marketable Title Act and 2006 DMA.

1. **The Plain Language of the 2006 DMA requires this Court to reject Proposition of Law No. II.**

The plain language of the 2006 DMA requires a severed mineral holder to take some affirmative action to preserve his or her interest:

- Make the mineral interest the subject of a title transaction (R.C. 5301.56(B)(3)(a));
- Produce the mineral interest (R.C. 5301.56(B)(3)(b));
- Use the mineral interest in underground gas storage (R.C. 5301.56(B)(3)(c));
- Obtain a drilling or mining permit for the mineral interest (R.C. 5301.56(B)(3)(d));

- File a claim to preserve the mineral interest (R.C. 5301.56(B)(3)(e)); or
- Create a tax parcel number for the mineral interest (R.C. 5301.56(B)(3)(f));

Each of the above-discussed “savings events” furthers the 2006 DMA’s goals of facilitating identification and locating of owners of severed mineral interests, producing or using those severed mineral interests, and collecting taxes on those interests. Specifically at issue before the Court on Petitioner’s proposition of law is R.C. 5301.56(B)(3)(a), under which a severed mineral interest cannot be abandoned if it 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 within 20 years immediately preceding the date on which notice of the intent to declare the mineral interest abandoned is served or published. Petitioner’s Proposition of Law No. II would not only deviate substantially from the enumerated savings events, but undermines them completely by allowing serendipitous repetitions of prior reservations to haphazardly preserve interests which continue to be remain dormant and abandoned. The plain language requires the severed mineral interest, the 1947 Reservation, to be the actual subject of the transaction, and the answer to Proposition of Law No. II is in the negative.

When construing a statute’s text, a court is duty bound to apply the text, as written. *Sugarcreek Twp. V. Centerville*, 133 Ohio St.3d 467, 979 N.E.2d 261 (2012) (finding that a court must apply statutory language consistent with the plain language unless the statutory language is ambiguous); *In re T.R.*, 120 Ohio St.3d 136, 896 N.E.2d 1003 (2008) (“When we engage in statutory interpretation, we must first examine the plain language of the statute.”). Any phrase or word within a statute must be “given its plain, common, ordinary meaning and is to be construed ‘according to the rules of grammar and common usage.’ ” *Dodd*, 2014-Ohio-4257, p. 13 quoting *Smith v. Landfair*, 135 Ohio St.3d 89, 984 N.E.2d 1016 (2012).

Contrary to Chesapeake Exploration, L.L.C.'s argument in its amicus brief, the phrase to be analyzed is "the subject of" and not "title transaction." Therefore, Chesapeake's focus on the legislative history, and the change from "the mineral interest has been **conveyed, leased, transferred, or mortgaged by an instrument** filed or recorded" to "the mineral interest has been **the subject of a title transaction** that has been filed or recorded" misses the point. The General Assembly merely substituted a previously defined term ("title transaction"), rather than separately list out different transactions the minerals could be the subject of. Clearly, if the mineral interest was conveyed, leased, transferred, or mortgaged, the mineral interest would have been the actual subject of those transactions.² Petitioner's brief, and the amicus briefs in support of Petitioner, ignore this critical limitation in the 2006 DMA that the mineral interest does not need to be mentioned or repeated in a title transaction, it has to be the actual subject of the title transaction. As stated above, there is no dispute the 2009 Deed was a title transaction; the issue is whether the 1947 Reservation was the subject of the that transfer, which it clearly was not.

In order to be preserved under R.C. 5301.56(B)(3)(a), a severed 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). The severed mineral interest must be "the subject" of the particular title transaction, not merely referenced in the muniments of title. As the Seventh District Court of Appeals noted, the "common definition of the word 'subject' is topic of interest, primary theme or basis for action." *Dodd*, 2014-Ohio-4257, p. 13 *quoting* Webster's II New Riverside University Dictionary 1153 (1984). The term "subject" has also been defined as the "matter of concern over which something is created." Black's Law Dictionary 1465 (2004). Applying these definitions to the

² *Amici Curiae* take no position in this brief as to what constitutes a "title transaction", as that issue is not tangential to the issue before the Court.

deed at issue, it is clear that the 1947 Reservation was not the “topic of interest, primary theme or basis for action” in the 2009 Deed, nor was the 1947 Reservation the matter of concern over which the 2009 Deed was created.

The grantor of the 2009 Deed, James Coffelt, did not own the severed mineral interest, he did not and could not convey the severed mineral interest, and he did not and could not retain the severed mineral interest. None of the Appellees (including Petitioner) were parties to the 2009 Deed, and the 2009 Deed could not and did not affect their interest. The parties to the 2009 Deed could not transfer, convey, or affect what they did not own and they could not have the purpose of doing that. Instead, the purpose of the 2009 Deed was simply to transfer the rights the grantor owned to the surface estate, nothing more. As the Court of Appeals in *Dodd* correctly held, “[w]hile 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.” *Dodd*, 2014-Ohio-4257, ¶48.

Contrary to the suggestion in the Merit Brief of Amici Curie, The Noon and Shepherd Mineral Interest Owners, in Support of Appellee Harriet Evans’ Proposition of Law No. II, at page 8, any argument that a deed can have many subjects, like that of a novel or movie, ignores a critical fact: in the novel or movie, the author and screenwriter have the power to create and delete the various subjects, whereas, a surface owner does not have the power to convey or retain what he or she does not own.

2. As a matter of law, the 2009 Deed could not reserve or preserve any interest in Appellees, who were strangers to the deed.

The Court of Appeals’ interpretation of the phrase “the subject of” complies with another important rule under Ohio law: the stranger-to-the-deed rule. Under Ohio law, any real

property exception or reservation in favor of a third-party, i.e. a person who is not a party to the deed in which the exception or reservation is located, is void, as a matter of law. *Manley v. Carl*, 11 Ohio C.D. 1 (1900) (“The law will never imply a covenant in favor of a stranger to the deed. It is well settled that an exception or reservation to a third person not a party to a deed is void.”) (Citations omitted); *Akron Cold Spring Co. v. Unknown Heirs of Ely*, 18 Ohio App. 74, 80 (9th Dist. 1923) (“...a reservation in a deed is ineffectual to create title in a stranger to the conveyance...”); *Kirk v. Conrad*, 3rd Dist. Crawford No. 1266, 1931 WL 2566, 9 Ohio Law Abs. 717 (Feb. 17, 1931) (“[W]e conclude that the exception or reservation in favor of a third person not a party to the deed is void.”); *Lighthorse v. Clinefelter*, 36 Ohio App.3d 204, 521 N.E.2d 1146 (9th Dist. 1987); *In re Allen*, 415 B.R. 310 (N.D. Ohio 2009) (finding that Ohio law supports the common law rule that exceptions or reservations in favor of strangers to deeds are void). The repetition of the reservation in the 2009 Deed contains the following language:

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 Porter¹ in Warranty Deed filed for record may [sic] 27, 1947 in Volume 121, page 383, Deed Records.

Dodd, 2014-Ohio-4257, ¶4. Based on the language of the 2009 Deed, it is clear the grantor was not reserving the oil and gas rights (which had been previously severed) to himself, and any attempt to reserve the rights to third parties - the Appellees - would have been void as a matter of law.

3. ***Riddel v. Layman* does not support Petitioner’s Proposition of Law No. II.**

Petitioner, at pages 3-4 of her Supplemental Merit Brief, erroneously relies on

Riddel v. Layman, 5th Dist. Licking No. 94CA114, 1995 WL 498812 (July 10, 1995), for the proposition that even though a surface deed does not convey the minerals, the reserved interest can be the subject of the title transaction and therefore, preserved. Petitioner ignores the fact that the deed at issue in *Riddel* was the original reserving deed, and not merely a repetition in a subsequent deed.

In *Riddel*, the severed mineral interest was created in a deed which was recorded on June 12, 1973. *Id.* at *1 (applying former version of R.C. 5301.56). That deed was the operative deed which severed the mineral interest from the surface estate and thus, the severed mineral interest was certainly the subject of that deed. This holding fits squarely within the Court of Appeals holding below, that “[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.” *Dodd*, 2014-Ohio-4257, ¶48. As a result, *Riddel* does not hold nor support that mere repetitions of prior reservations preserve otherwise dormant mineral interests.

Likewise, Appellees’ selective quoting of *McLaughlin v. CNX Gas Co.*, N.D. Ohio No. 5:13CV1502 (Dec. 13, 2013), in the Reply Brief of John William Croskey, et al., erroneously focuses on the definition of “title transaction.” In setting forth the portion of the opinion quoted by Appellees, the district court was analyzing whether a recorded memorandum of oil and lease which covers a severed mineral interest is a “title transaction.” *Id.* Of note, the district court held that the severed mineral interest was actually “the subject of” the oil and gas lease at issue in that case.³ The district court was in no way opining on whether a mere repetition of a prior mineral reservation by unrelated third parties in a subsequent surface deed made the prior mineral reservation the actual subject of the subsequent surface deed.

³ *Amici Curiae* take no position in this brief on whether the district court’s findings related the instruments that it found to be “title transactions” were correct.

C. **PETITIONER'S POSITION WOULD EVISCERATE THE PURPOSE OF THE 2006 DMA AND ALLOW UNRELATED THIRD PARTIES TO INADVERTENTLY PRESERVE DORMANT SEVERED INTERESTS**

The 2006 DMA declares that severed mineral interests in property are of less than absolute duration. Retention is simply conditioned on the performance of at least one of the actions required by the 2006 DMA. Just as a state may create a property interest that is entitled to constitutional protection, the state has the power to condition the permanent retention of that property right on the performance of reasonable conditions that indicate a present intention to retain the interest. The 2006 DMA is designed as a statute of abandonment, requiring severed mineral interest holders to take simple affirmative steps to preserve their interests, such as by filing a claim to preserve. R.C. 5301.56(B). The statute is designed to promote Ohio's legitimate and paramount interest in seeing that its natural resources are efficiently produced. *See* Article II, § 36 of the Ohio Constitution. The impetus to act is placed on the severed mineral holder. R.C. 5301.56(B). The impetus to act is not on unrelated third parties who would be required to repeat severed mineral interests in order to preserve rights that they themselves do not own.

A holding that allows a mere repetition of a prior reservation to preserve a severed mineral interest without any affirmative action by any actual mineral holders does nothing to remedy the continued and protracted inaction, negligence, and abandonment of those interests which continue to remain dormant and unaccounted for, and does nothing to identify the potential current holders of those severed interests, which in many cases are not of record. For instance, in this case, nothing was filed of record since the severance in the 1947 Reservation until 2010, over 60 years later. The 2009 Deed which repeated the 1947 Reservation did nothing to put the severed mineral interest to use or to identify the current mineral holders, Appellees. In short, it did not serve the purpose of the 2006 DMA. It was the Claim to Preserve, filed in

December of 2010, that fulfilled the requirements and purpose of R.C. 5301.56(B)(3).

Interpreting the 2006 DMA to allow unrelated third parties with no interest or ownership in the prior reserved interest to inadvertently preserve ancient dormant, severed mineral interests by merely repeating the prior reservation in the chain of title runs contrary to the 2006 DMA's abandonment mechanism and its purpose. Such an interpretation would find that third-parties who have no interest in a severed mineral interest can preserve those rights. In such a transfer, as is presented in this case, the severed mineral interest holder had no control over the deed which transfers the surface. Those mineral holders, Appellees, were not parties to that deed and thus, the preservation of the interest was serendipitous. This is not a reasonable interpretation of a statute of abandonment, as is the 2006 DMA, that requires some affirmative action by the actual mineral interest holders. It is unreasonable to conclude that the General Assembly's intent was, by use of the phrase "subject of a title transaction", to allow a mineral interest holder to completely neglect his or her interest for decades, yet still retain ownership of that interest through the actions of unrelated third parties (the surface owners).

1. **The 2006 DMA requires action or use by the mineral holder, not the mere recitation of the mineral reservation in the muniments of title under the general Marketable Title Act.**

The 2006 DMA is generally concerned with an affirmative use or act of the severed mineral interest holders to preserve their interests, and therefore required the mineral interest to be the subject of a title transaction to be preserved under R.C. 5301.56(B)(3)(a). On the other hand, the more general Marketable Title Act is concerned with owners of real property simply being on notice of interests or defects in their property inherent in the muniments of title. Petitioner and the Noon and Shepherd *Amici Curiae* erroneously confuse the heightened requirements under the 2006 DMA with those under the Marketable Title Act.

Petitioner advocates that the mere recitation of a mineral reservation is a sufficient

preserving event, as it qualifies as a “muniment of title.” (See Petitioner’s Supplemental Merit Brief, p. 4). The Noon and Shepherd *Amici Curiae* also fall into this trap by referring the Court to R.C. 5301.55. Accepting the Petitioner’s argument requires ignoring the plain language of the more specific 2006 DMA. A careful reading of R.C. 5301.55 and R.C. 5301.56 reveals that their position is misguided.

A “muniment of title” is a concept created by the Marketable Title Act. The use of a “muniment of title”, as further described in R.C. 5301.49(A), highlights the main purpose behind the Marketable Title: to provide notice to all prospective purchasers of real property of the interests and defects which are inherent in the muniments of which such chain of record title is formed. If there is no notice of interest or defect in the requisite time period, certain interests and defects can be extinguished. The focus is on what interests or defects that the owner of the real estate is aware, looking at his or her chain of title.

Conversely, the term “muniment of title” or any derivation thereof does not appear in the 2006 DMA. The 2006 DMA focuses on the affirmative use of the severed mineral interest or act of the severed mineral interest holder. Therefore, the 2006 DMA requires the mineral interest not to just be inherent in the muniments of title, but for the mineral interest to be the actual subject of the title transaction, which is a higher burden. If the General Assembly had intended to allow a mere passive specific recitation of a severed mineral interest to preserve that interest under the 2006 DMA, they could have included that as a specific savings event as they had under the Marketable Title Act generally. Instead, the General Assembly chose a higher standard under the more specific 2006 DMA statute, which required an affirmative act, that the mineral interest must have been “the subject of” the title transaction, not just a mere muniment therein.

The Noon and Shepherd *Amici Curiae*'s argument regarding the exceptions to marketability contained within R.C. 5301.49 ignores the plain language of the 2006 DMA. Under the Marketable Title Act, a person has marketable title to a particular real property interest free from other interests unless those other interests meet one of the limitations enumerated in R.C. 5301.49. R.C. 5301.48. Contained within R.C. 5301.49 are several limitations, which include specific recitations of a property interest, i.e. a muniment of title and title transactions. Importantly, the muniment of title limitation is separate and distinct from the title transaction limitation. *Compare* R.C. 5301.49(A) with R.C. 5301.49(D). Thus, if the General Assembly intended a muniment of title to constitute a preserving event under the 2006 DMA, they would have chosen to use the language contained in R.C. 5301.49(A). Instead, they chose to use the phrase the subject of a "title transaction," which is used in R.C. 5301.49(D). To accept Noon and Shepherd *Amici Curiae*'s argument would be to not only to ignore the express language in the 2006 DMA, but to rewrite the 2006 DMA to make it mere surplus to the Marketable Title Act. Such a reading cannot be sustained.

Further, contrary to Chesapeake Exploration, L.L.C. and Noon and Shepherd *Amici Curiae*'s arguments, the legislative history, as stated above, of the previous version of the 2006 DMA does not support a holding that a mere recitation in a surface deed preserves a severed mineral interest. Chesapeake Exploration, L.L.C. and Noon and Shepherd *Amici Curiae* spend a great deal of time arguing about what constitutes a "title transaction" while giving little treatment to what it means to be the "subject of" a "title transaction." What is clear is that the General Assembly decided to utilize a term that they had already defined, title transaction, and they chose to further limit the use of the term "title transaction" in the dormant mineral context by requiring that the severed interest be the actual "subject" of the title transaction. Once again,

had the General Assembly intended to include the mere recitation of a severed mineral interest as a preserving event, they could have included that in the 2006 DMA, but instead choose a higher standard.

D. THE COURT NEED NOT EVEN CONSIDER THE PETITIONER'S PROPOSITION OF LAW NO. II, IF THE COURT UPHOLDS THE COURT OF APPEALS DETERMINATION REGARDING THE CLAIM TO PRESERVE.

The requirement that a mineral owner file a public statement of claim furthers the goals of the 2006 DMA by facilitating the identification and location of mineral owners, from whom developers may acquire operating rights and from whom the county may collect taxes. A repetition of a dormant ancient interest in a subsequent surface deed, between unrelated third parties neither of whom have an interest in the severed minerals, have no such benefit, and actually impedes rather than promotes the purpose and intent of the statute.

It is clear from the facts of this case and the holding of the Seventh District Court of Appeals, that Proposition of Law No. II is moot, and need not be considered by the Court, if the Court finds the 1947 Reservation was preserved by the filing of the Claim to Preserve within the sixty-day period after notice as provided in the 2006 DMA.

If the Court affirms the Seventh District Court of Appeals' decision that Appellees preserved the 1947 Reservation by timely filing the Claim to Preserve, the issue of whether the 1947 Reservation was subjected to an independent savings event in the 20 years prior to Appellants' service of notice is moot. This fact was expressly discussed by the Seventh District Court of Appeals when, after analyzing whether the 2009 Deed constituted a "title transaction", it stated:

"Regardless, as discussed above, summary judgment was appropriately granted on the basis that appellees took affirmative steps to preserve their mineral interests after notice of appellant's intent to have the mineral interest deemed abandoned was

published.”

Dodd, 2014-Ohio-4257, ¶50; Other jurisdictions addressing claims to preserve within the statutory timeframe after notice have reached the same result. *Scully v. Overall*, 17 Kan. App. 2d 582, 840 P.2d 1211 (1992) (holding that a “mineral interest is not extinguished or vested in a surface owner even after twenty years of nonuse when a mineral interest owner files a statement of claim within sixty days from the date of publication of notice of lapse by the surface owner under the notice provision of the statute); *Larson v. Norheim*, 830 N.W.2d 85, 2013 ND 60 (N.D. 2013) (holding a mineral interest is not extinguished if the owner of the mineral interest within sixty days after first publication of the notice of lapse of mineral interest records a statement of claim).

The plain language of the 2006 DMA supports affirming the Seventh District Court of Appeals’ finding that a claim to preserve which is filed within 60 days after notice of abandonment is served sufficiently preserves a severed mineral interest and therefore, renders consideration of Proposition of Law No. II moot. In order to have a severed mineral interest declared abandoned under the 2006 DMA, a surface owner must first send notice to the “holder” of the severed mineral interest or the successors or assigns of the “holder.” R.C. 5301.56(E). A “holder” is defined as the “record holder of a mineral interest, and any person who derives the person's rights from, or has a common source with, the record holder and whose claim does not indicate, expressly or by clear implication, that it is adverse to the interest of the record holder.” R.C. 5301.56(A)(1). After being served with said notice, a holder has one of two options, either of which must be accomplished within 60 days from date of notice. R.C. 5301.56(H). That portion of the 2006 DMA provides as follows:

(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.

The holder or the holder's successors or assignees shall notify the person who served or published the notice under division (E) of this section of the filing under this division.

R.C. 5301.56(H)(1) (emphasis added).

Thus, the 2006 DMA allows a severed mineral holder to either identify a past preserving event (through a filed affidavit) or take an affirmative step to avoid abandonment (through a claim to preserve). *Id.*; *Dodd*, 2014-Ohio-4257, ¶¶27-28 (“Thus, R.C. 5301.56(H)(1)(b) addresses past events that render the interest not abandoned. R.C. 5301.56(H)(1)(a), on the other hand, allows for a present act by the mineral interest holder that prevents the interest from being determined to be abandoned.”)

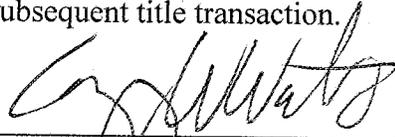
Further, and perhaps more importantly, under the express terms of the 2006 DMA, a claim to preserve filed by a holder within the sixty-day period preserves the rights of all the mineral interest holders of the same mineral interest. R.C. 5301.56(C)(2) (“A claim that complies with division (C)(1) of this section or, if applicable, divisions (C)(1) and (3) of this section **preserves the rights of all holders of a mineral interest in the same lands.**”); *Dodd*, 2014-Ohio-4257, p. 7.

The parties do not dispute that the Claim to Preserve was filed within 60 days

after Appellants served their notice of abandonment. *Id.* at ¶22. The filing of that Claim to Preserve stops the Court's analysis, as the Appellants have not challenged the legal effectiveness of the Claim to Preserve, i.e. whether the Claim to Preserve meets the requirements of R.C. 5301.56(C). Therefore, if this Court upholds the Court of Appeals' decision as to the preserving effect of the Claim to Preserve, there is no need to determine whether there is another preserving event in the 20 years preceding the date on which Appellants served notice upon Appellees and thus, no reason for this Court to examine and answer Proposition of Law No. II.

CONCLUSION

Based on the foregoing, the Court should refrain from answering the Proposition of Law No. II if it upholds the Court of Appeals on the basis that the severed mineral interest was preserved through the recorded Claim to Preserve. If the Court should decide to answer Proposition of Law No. II, it should answer by holding that a recitation or repetition of a prior severed mineral interest in a subsequent surface deed by unrelated third parties does not make the severed mineral interest the subject of that subsequent title transaction.



Gregory W. Watts (0082127)*

**Counsel of Record*

Matthew W. Onest (0087907),

David E. Butz (0039363), and

William G. Williams (0013107) of

KRUGLIAK, WILKINS, GRIFFITHS

& DOUGHERTY CO., L.P.A.

4775 Munson Street NW/P.O. Box 36963

Canton, Ohio 44735-6963

Phone: (330) 497-0700/Fax: (330) 497-4020

gwatts@kwgd.com; monest@kwgd.com;

dbutz@kwgd.com; bwilliams@kwgd.com

Counsel for Amici Curiae Jeffco Resources, Inc.,

Mark and Kathy Rastetter, Douglas Henderson,

Djuro and Vesna Kovacic, Brett and Kim Trissel,

and Steven E. and Diane Cheshier

PROOF OF SERVICE

I hereby certify that a copy of the foregoing was sent via regular U.S. Mail this

26th day of September, 2014, to:

Clay K. Keller (#0072927)
J. Alex Quay (#0085130)
Jackson Kelly PLLC
17 South Main Street
Akron, OH 44308
Phone: (330) 252-9060
Fax: (330) 252-9078
Email: ckkeller@jacksonkelly.com
jaquay@jacksonkelly.com
*Counsel for Amicus Curiae,
Chesapeake Exploration, L.L.C.*

Paul Hervey (#0063611)
Jilliann Daisher (#0087051)
Fitzpatrick, Zimmerman & Rose, L.P.A.
P.O. Box 1014
New Philadelphia, OH 44663
*Counsel for Appellants,
Phillip B. Dodd and Julie R. Bologna*

Marquette D. Evans (#0008082)
Evans Law Office
902 Race Street, 2nd Floor
Cincinnati, OH 45202
Counsel for Appellee, Harriet C. Evans

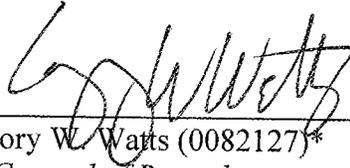
Consolidated Coal Company
n/k/a Consol Energy, Inc.
1000 Consol Energy Drive
Canonsburg, PA 15317

Brian Crist
3384 N. River Road
Zanesville, OH 43701

Ronald K. Lembright (#0023732)
Ronald K. Lembright Co., L.P.A.
One Cascade Plaza, 15th Floor
Akron, OH 44308
*Counsel for Appellees,
William L. Kalbaugh, William H. Boak,
Jennifer Bernay, Charlotte S. Bishop,
Richard G. Davis, Harry Roy Davis,
Thomas Davis, Harry K. Kalbaugh,
Michael L. Kalbaugh, and Charlotte S. Bishop*

R. Jeffrey Pollock (#0018707)
Erin K. Walsh (#0078142)
McDonald Hopkins LLC
600 Superior Ave., East, Suite 2100
Cleveland, OH 44114
*Counsel for Appellees,
Karen A. Chaney, Patty Hausman,
Linda C. Boyd, and Terri Hocker*

Rupert N. Beetham (#0019088)
110 South Main Street
P.O. Box 262
Cadiz, OH 43907
*Attorney for 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, Evart Dean Porter,
Stuart Barry Porter, Kim Berry,
Samuel G. Boak, Lorna Bower,
Sandra J. Dodson, and Ian Resources, LLC*



Gregory W. Watts (0082127)*

**Counsel of Record*

Matthew W. Onest (0087907),

David E. Butz (0039363), and

William G. Williams (0013107) of

KRUGLIAK, WILKINS, GRIFFITHS

& DOUGHERTY CO., L.P.A.

4775 Munson Street NW/P.O. Box 36963

Canton, Ohio 44735-6963

Phone: (330) 497-0700/Fax: (330) 497-4020

gwatts@kwgd.com; monest@kwgd.com;

dbutz@kwgd.com; bwilliams@kwgd.com

*Counsel for Amici Curiae Jeffco Resources, Inc.,
Mark and Kathy Rastetter, Douglas Henderson,
Djuro and Vesna Kovacic, Brett and Kim Trissel,
and Steven E. and Diane Cheshier*