

ORIGINAL

IN THE SUPREME COURT OF OHIO

LELAND EISENBARTH, *et al.*,

Plaintiffs-Appellants,

v.

DEAN REUSSER, *et al.*,

Defendants-Appellees,

Ohio Supreme Court Case No. 2014-1767

On Appeal from the Monroe County Court of Appeals, Seventh District Court of Appeals

Court of Appeals Case No. 13 MO 10

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MEMORANDUM IN SUPPORT OF JURISDICTION AS *AMICI CURIAE* JEFFCO RESOURCES, INC., MARK AND KATHY RASTETTER, DOUGLAS HENDERSON, DJURO AND VESNA KOVACIC, BRETT AND KIM TRISSEL, JOHN YASKANICH, BARBARA L. MILLER, JEFFREY V. MILLER, JERILYN E. CHRISTENSEN AND KJELD F. CHRISTENSEN, CO-TRUSTEES OF THE KJELD F. CHRISTENSEN REVOCABLE TRUST DATED SEPTEMBER 25, 2012, AND THE JERILYN E. CHRISTENSEN REVOCABLE TRUST DATED SEPTEMBER 25, 2012, RALPH AND SHARLEY GREER, AND STEVEN E. AND DIANE CHESHER

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THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

Ohio's goal is to ensure that domestic natural resources are fully utilized and do not remain dormant for extensive periods of time. This State is currently a hotbed for the production of oil and gas reserves, and has a long, rich history of oil and gas production dating back to the mid-1800's. This boom was followed by a number of other oil booms throughout the last 130 years. During these periods, landowners reserved their oil and gas rights in real estate transactions. However, some reservations were forgotten and abandoned over the years. Over time, the reserving parties passed away without ever transferring the reserved interest, their estates often failed to probate these mineral reservations, and the reserving parties and their heirs failed to take any action to preserve or develop the mineral interests. Due to this fractionalization and the inability in many cases to locate all the owners of the reserved interests, over time these valuable resources are lost, and remain undeveloped and neglected.

In the 1980's, due to the great number of forgotten and abandoned mineral interests, the legislative body acted. To promote the production of natural resources, title simplicity, and title certainty, the Ohio Legislature passed R.C. 5301.56 ("1989 DMA"). The 1989 DMA is a statewide, uniform system to ensure that oil, gas, and other mineral rights do not remain dormant through years of inaction. This statute requires mineral owners to follow simple, minimal steps to preserve their mineral interests. The goal is to provide clarity and simplicity to chains of title containing long-ignored and unused mineral interests and reservations by reunifying these interests back into the readily identifiable surface chain of title.

The Seventh District Court of Appeals held an oil and gas lease recorded January 23, 1974, preserved the severed mineral interest in this case despite the lack of any savings event for over thirty-two (32) years, from January 24, 1974 through June 29, 2006, under the 1989

DMA. This Court's review of the Seventh District Court of Appeals' decision will clarify a central concept of the 1989 DMA, specifically, whether it operated prospectively and in perpetuity, or was a dead letter law upon enactment, operating for only one (1) day. A decision on the issues presented herein will provide clarity to landowners and businesses throughout Ohio regarding the ownership and development of mineral rights. As such, it is of great public and general interest that the Court accept this case and reverse the Seventh District Court of Appeals' decision.

To retain an otherwise dormant mineral interest, one of the following must occur "within the preceding twenty years":

1. The mineral interest must have been subject to a title transaction that has been filed or recorded with the county recorder's office in the county in which the property is located;
2. The holder of the mineral interest obtained actual withdrawal or production of minerals from the mineral interest, i.e. from lands specifically associated with the mineral interest;
3. The mineral interest has been used in underground storage;
4. A drilling permit has been issued to the holder;
5. An appropriate claim to preserve has been filed with the county recorder's office; or
6. A separate tax identification number has been issued to the severed mineral interest.

R.C. 5301.56(B)(1)(c)(i)-(vi).

There are currently several cases before this Court which involve the interpretation and application of the 1989 DMA. *John D. Walker v. Shondrick-Nau*, Ohio Supreme Court Case No. 2014-0803; *Chesapeake Exploration, L.L.C., et al. v. Kenneth Buell et al.*, Ohio Supreme Court Case No. 2014-0067; and *Hans Michael Corban v. Chesapeake*

Exploration, L.L.C., et al., Ohio Supreme Court Case No. 2014-0804. This case presents a critical issue associated with the 1989 DMA, whether the General Assembly intended the 1989 DMA to be a dead letter law only effective for a single day, March 22, 1992. In construing the phrase “within the preceding twenty years” the Seventh District Court of Appeals applied an oppressively narrow interpretation yielding an absurd result and ignoring the plain language of the statute.

The Seventh District Court of Appeals decided the General Assembly, by use of the phrase “within the preceding twenty years,” intended to arbitrarily subject only those severed mineral interests created prior to March 22, 1969, to abandonment if they were not preserved by an enumerated savings event between March 22, 1969 and March 22, 1989. *Eisenbarth v. Reusser*, 7th Dist. Monroe No. 13 MO 10, 2014-Ohio-3792 (Aug. 28, 2014). The court held that if a severed interest was subjected to a savings event during that initial twenty-year period, it was forever preserved. *Id.* This has the dubious result that a severed mineral interest created March 21, 1969 was subject to abandonment if not otherwise preserved by a savings event under the 1989 DMA, but that a severed mineral interest created the very next day, March 22, 1969, could never be subject to abandonment. Further, the decision undercuts the very purpose of the 1989 DMA, to abandon and vest dormant mineral interests with the surface owner of the real estate if, as in this case, no savings events under the statute had occurred for 32 years.

The Court’s interpretation of the 1989 DMA, specifically whether it operated on a continuous basis, i.e. a severed mineral holder was required to use their interest every 20 years, will have an expansive impact on numerous landowners throughout the State of Ohio, including *Amici Curiae*. The 1989 DMA was intended to facilitate and ease mineral-land transactions. From March 22, 1989 until June 30, 2006 (the date on which the 1989 DMA was amended),

surface owners throughout Ohio relied upon the statute's plain language which required a severed mineral holder to take one of several simple, minimal steps to preserve their interests every 20 years. R.C. 5301.56(B)(1)(c). If there was not a preserving event every twenty-year period during which the 1989 DMA was in effect, then the surface owner could rely upon the lack of any of those events as determinative of his or her unencumbered title to the once affected mineral rights, just like a surface owner could rely upon the absence of a preserving event under the Ohio Marketable Title Act.

Prior to the Seventh District Court of Appeals' holding in this case, numerous courts throughout Ohio had applied the 1989 DMA utilizing a continuous basis. *Shannon v. Householder*, Jefferson C.P. Case No. 12CV226 (July 17, 2013); *Taylor v. Crosby*, Belmont C.P. Case No. 11 CV 422 (Sep. 16, 2013); *Albanese v. Batman*, Belmont County C.P. Case No. 12 CV 0044 (Apr. 28, 2014); *Whittaker v. Northwood Energy Corporation*, Monroe C.P. No. 2012-374 (June 5, 2014); *Greer v. Frye*, Belmont C.P. Case No. 13 CV 0244 (June 30, 2014). These decisions were in accord with the plain language of the 1989 DMA and the clear intent of the General Assembly: to ensure that severed mineral interests do not remain dormant for decades. That intent can only be accomplished through the use of continuous twenty-year periods during which severed mineral owners were required to use or take an affirmative act with respect to their interest or lose it. Because the competing claims of surface owners and mineral owners will continue to delay and/or prevent efficient production of Ohio's precious natural resources, *Amici Curiae* respectfully requests the Court to accept review of the propositions of law discussed herein and discussed in Appellants' jurisdictional memorandum.

STATEMENT OF THE CASE AND FACTS

This case involves a reservation of a one-half (1/2) interest oil, gas, and other

minerals (“Reservation”). The Reservation was created through a deed recorded on February 3, 1954. From that date until 2009, the holders of the Reservation did not convey, transfer, use, or otherwise take any action related to the Reservation. Thus, the holders of the Reservation allowed it remain dormant for approximately 55 years. Appellees claim to be the heirs and/or successors of the original holders of the Reservation. At no time between 1954 and 2009, were Appellees conveyed any right in the Reservation of record.

During that fifty-five-year period (1954-2009), the Appellees and/or their predecessors failed to take a single action to use the Reservation. The Appellees can identify only one event that they claim preserves the Reservation: an oil and gas lease executed by the surface owners of the real property at issue, and recorded January 23, 1974 (“1974 Lease”). Even assuming the 1974 Lease was a preserving event, there was an additional 32 years of inactivity from 1974 through 2006 under the 1989 DMA during which time the Reservation was abandoned and vested with the Appellants.

Subsequently, Appellees, for the first time in more than five decades, claimed ownership of the Reservation, filing a claim to preserve on February 19, 2009. However, Appellees, and Appellees predecessors-in-title, had previously failed to take any action for in excess of 20 years under the 1989 DMA.

At the close of discovery, the parties submitted competing motions for summary judgment. The trial court granted the Appellees’ motion for summary judgment and denied the Appellants’ motion for summary judgment. On July 3, 2014, Appellants timely filed their notice of appeal with the Seventh District Court of Appeals. On August 28, 2014, the appellate court affirmed the trial court’s decision and held that: (1) an oil and gas lease is a title transaction for purposes of the 1989 DMA and that the 1974 lease, which was not executed by the then-owners

of the Reservation and to which those owners were not parties, preserved the Reservation; (2) that the 1989 DMA utilized a “fixed” review period, i.e. March 22, 1969 to March 22, 1989.; and (3) that an owner of a severed, partial mineral interest, without the right to lease the same, is entitled to upfront signing bonus payments associated with a lease executed by the mineral co-tenant who possesses the executive rights.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

I. **PROPOSITION OF LAW NO. I: The 1989 DMA was prospective in nature and operated using continuous twenty-year review periods.**

A. **THE PLAIN LANGUAGE OF THE 1989 DMA PROVIDES FOR THE USE OF CONTINUOUS REVIEW PERIODS.**

The Seventh District Court of Appeals found the phrase “within the preceding twenty years” to be ambiguous. However, the phrase “preceding twenty years,” when considered within the 1989 DMA’s full text and context, is not reasonably susceptible to multiple interpretations and therefore, is not ambiguous. Instead, the plain language of the 1989 DMA provides for the use of continuous twenty-year periods, during which the dormant mineral holder was required to extend his or her rights. As such, the Court should overrule *Eisenbarth* on this issue and hold that the 1989 DMA utilized continuous twenty-year review periods, similar to Marketable Title Act (as to 40 years).

1. **Seventh District Court of Appeals erroneously construed the 1989 DMA as a forfeiture statute.**

The Seventh District Court of Appeals erroneously categorized the 1989 DMA as a forfeiture statute. *Eisenbarth*, 2014-Ohio-3792, ¶49 (“As forfeitures are abhorred in the law, we refuse to extend the look-back period from fixed to rolling.”). The 1989 DMA is not a forfeiture statute. It is an abandonment statute.

Important to this Court's review of the 1989 DMA's text is the rule of construction which mandates that a statute's text "shall be read in context and construed according to the rules of grammar and common usage." R.C. 1.42. The express text of the 1989 DMA mentions the word "abandon" or "abandoned" in subsections (B)(1), (B)(2), (C)(1), (C)(1)(c), and (D)(1). The only mention of the word "forfeiture" is in Subsection (D)(2) referring to a lease forfeiture under a separate code section. *See* R.C. 5301.56(D)(2) ("The filing of a claim to preserve a mineral interest under division (C) of this section does not affect the right of a lessor of an oil or gas lease to obtain its forfeiture under section 5301.332 of the revised code."). Thus, it is clear that the General Assembly knew the difference between an abandonment statute and a forfeiture statute, but chose to expressly enact the 1989 DMA as an abandonment statute.

When interpreting the phrase "within the preceding twenty years," keeping in mind that one must interpret that phrase while considering the full text, context, and purpose of the 1989 DMA, it is clear that the 1989 DMA provides for continuous twenty-year periods during which the mineral holder must take simple minimal steps to preserve his or her interest, similar to the Marketable Title Act. Additionally, contrary to a forfeiture statute, a court is required to "liberally construe" the 1989 DMA to serve the purposes of easing and facilitating mineral transactions. R.C. 5301.55. A court should not strictly construe the 1989 DMA, as the Seventh District Court of Appeals erroneously did. That erroneous decision needlessly tainted the lower court's entire analysis on this issue.

Further, as the 1989 DMA was part of the Marketable Title Act and was expressly intended to ease and facilitate future mineral transactions, it is reasonable to conclude that the General Assembly intended the law to operate prospectively, and in perpetuity. Additionally,

because the 1989 DMA was not a forfeiture statute, but instead, was expressly a statute of abandonment, it should not be strictly construed against abandonment. The 1989 DMA places the burden to act upon the mineral right holders and provides a statutory framework for determining whether those holders have abandoned their interests. The 1989 DMA does not impose any forfeiture or taking upon mineral holders. The United States Supreme Court characterized this mechanism as an automatic abandonment in *Texaco v. Short*, 454 U.S. 516, 102 S.Ct. 781 (1982), in reviewing the self-executing feature of an Indiana statute, substantially similar to the 1989 DMA. Any assertion that the 1989 DMA is a forfeiture statute is wrong. See *State ex rel. A.A.A. Investments v. City of Columbus*, 17 Ohio St.3d 151, 152, 478 N.E. 2d 773 (1985) (finding that Ohio's adverse possession statute does not operate a taking).

The mineral holders had ample opportunities to act to avoid abandonment, as the 1989 DMA contained a three-year grace period from March 22, 1989, to March 22, 1992, for a mineral holder to preserve their interest, including the mere filing of a claim to preserve. Thereafter, the mineral holder could simply file a claim to preserve once every 20 years to preserve his or her interest, a very minimal burden. It is the inaction of the severed mineral interest holders, not state action, which results in abandonment.

Additionally, there is no public policy against abandonment of real property rights, which go neglected and unused for decades. In fact, the public policy of Ohio, as enacted in the 1989 DMA, is the opposite. The law favors abandoning dormant, severed mineral interests. The 1989 DMA is no more repugnant than the Marketable Title Act (or statutes of limitation generally), both of which operate to automatically abandon and extinguish old dormant real estate interests. Further, this purpose and public policy of Ohio is to be liberally construed in favor of the surface owner. See R.C. 5301.55. The lower court ignored this

mandate and its analysis of the 1989 DMA's review periods was needlessly tainted by its erroneous classification of the statute as a forfeiture statute. This case gives this Court the opportunity to set the record straight on this statute.

2. **The 1989 DMA's text, as a whole, provides for continuous dormancy-review periods.**

When reviewing the 1989 DMA in whole, and keeping in mind that liberal construction is required, the only reasonable interpretation is that the statute's plain language provides for continuous dormancy-review periods. The term "within the preceding twenty years" must be read in conjunction with R.C. 5301.56(D)(1), which provides:

A mineral interest may be preserved indefinitely from being deemed abandoned under division (B)(1) by the occurrence of any of the circumstances described in division (B)(1)(c) of this section, including but not limited to, successive filings of claims to preserve mineral interests under division (C) of this section.

Based on the plain language of R.C. 5301.56(D)(1), which specifically mandates that a mineral holder must file "successive" claims to preserve under subsection (C) of the 1989 DMA, the legislature clearly intended severed mineral holders to be under a continuing obligation. This is the only reasonable interpretation given the fact that it would make little sense for the legislature to pass a law focused on encouraging mineral development and not have it apply to twenty-year periods that move forward in time. The General Assembly, by the express language of the 1989 DMA, stated that their intent was to require continuous actions by severed mineral holders. A contrary finding would mean the General Assembly intended to subject only those mineral interests created before March 22, 1969, for example March 21, 1969, to abandonment, but intended to indefinitely protect a severed mineral interest created only one day later, on March 22, 1969. It would also mean that the General Assembly intended the 1989 DMA to operate on

only one day, March 22, 1992.¹ Such an interpretation would lead to absurd results and as such, it is inappropriate to arrive at such a conclusion. *State ex rel. Cincinnati Post v. Cincinnati*, 76 Ohio St.3d 540, 543, 668 N.E.2d 903 (1996) (“This court avoids adopting a construction of a statute that would ‘result in circumventing the evident purpose of the enactment.’ We must also construe statutes to avoid unreasonable or absurd results.”) (Internal citations omitted).

When reviewing the 1989 DMA, the Honorable Mary DeGenaro found that the use of a fixed period violates the express terms of the 1989 DMA:

The provision in R.C. 5301.56(D)(1) delineating the process for preserving severed mineral rights for successive terms signals the General Assembly's intention that in order to preserve that interest, every 20 years a savings event must occur or the holder must file a claim to preserve, in order to retain their interest for another 20 years.

2014-Ohio-3792, ¶124 (DeGenaro, J., concurring in judgment only). In *Albanese v. Batman*, the Belmont Court of Common Pleas came to the same conclusion:

A static twenty (20) year look back period would have no need for a provision calling for indefinite preservation of mineral interest through successive filings of preservation claims. Based upon the same, this Court finds the 1989 Dormant Mineral Act to provide for a “rolling look back period.”

This Court finds this determination to be consistent with the comments set forth in the Ohio Legislative Service Commission Report relating to the 1989 Enactment of R.C. 5301.56. The Commission therein stated:

Under the act, an interest could be preserved indefinitely from deemed abandonment by the occurrence of any of the four listed categories of exceptional circumstances within each preceding 20 year period.

¹ The 1989 DMA, while enacted on March 22, 1989, contained a three-year grace period before a dormant mineral interest was abandoned and vested with the surface owner. This meant that the first day that a severed mineral interest, which was not subject to a preserving event in a twenty-year period, could be abandoned was March 22, 1992. This grace period allowed mineral holders to take simple steps to preserve their interests for an additional 20 years.

Belmont County Court of Common Pleas Case No. 12 CV 0044 (Apr. 28, 2014). These decisions reflect a direct and reasonable reading of the 1989 DMA's text as a whole. When considering that the 1989 DMA is not a forfeiture statute and is to be liberally construed, such an interpretation is the only reasonable interpretation.

B. EVEN IF THE 1989 DMA'S TEXT IS AMBIGUOUS, THE GENERAL ASSEMBLY STATED ITS EXPRESS INTENT THAT THE LAW WAS INTENDED TO OPERATE ON A CONTINUOUS BASIS.

Even if the phrase "preceding twenty years" is ambiguous, which *Amici Curiae* expressly deny, the legislative intent and history of the 1989 DMA require an interpretation embracing continuous review periods. The explicit legislative history behind the 1989 DMA confirms it was to operate on a continuous basis. *See* S.B. 223 (As Introduced); *see also* Fiscal Note Sub. S.B. 223. The 1989 DMA was introduced to work parallel to the Marketable Title Act by "terminating unused mineral interests not preserved by operations, transfers or a filing of notice of an intent to preserve interest." Fiscal Note Sub. S.B. 223. The mineral rights "revert to the surface landowner if the mineral right holder does nothing to the rights for 20 years. To **extend** their rights, a mineral right holder would simply have to file an **extension** with the local county recorder." Fiscal Note Sub. S.B. 223 (emphasis added). The General Assembly explicitly stated that they intended mineral holders to be able to "extend" their mineral interests by one of several preserving acts, including the filing of a claim to preserve. They did not use the phrase "preserve indefinitely" when describing the abandonment and preservation mechanism. Instead, they chose to use the word "extend", which denotes a continuing obligation to act to preserve one's interest. The word "extend" is defined as "to cause to be longer." *Merriam-Webster's Collegiate Dictionary* 411 (1995). In addition, the term "extension" has been defined as "an increase in length of time." *Merriam-Webster's Collegiate Dictionary* 411 (1995).

The legislature did not rest upon the use the word "extend" to express its intent,

but went further by stating that a mineral interest could avoid abandonment by the “continuing occurrence of any of the items listed in the bill” (referring to the exceptions and preserving events S.B. 223 (As Introduced)). The General Assembly did not intend for the indefinite preservation of an interest upon the “occurrence” of any of the preserving events, but intended for the “continuing occurrence” of preserving events. S.B. 223 (As Introduced). Thus, even if the phrase “within the preceding twenty years” is ambiguous, it must be interpreted in accordance with the purpose of the statute and the General Assembly’s stated intent within the law’s legislative history: a mineral interest must have been subjected to continuous preserving events and as such, the law utilizes continuous review periods. *See* R.C. 1.49.

C. THE SEVENTH DISTRICT COURT OF APPEALS ERRONEOUSLY RELIED UPON *RIDDEL V. LAYMAN* AS SUPPORT FOR A “FIXED” REVIEW PERIOD.

The Seventh District Court of Appeals based its decision to apply the 1989 DMA on a fixed basis, in part, on *Riddell v. Layman*, 5th Dist. No. 94CA114, 1995 WL 498812 (July 10, 1995). However, the lower court’s analysis of that case is clearly erroneous and sufficiently clouded their determination, such that this Court should accept review of this issue. The Seventh District Court of Appeals erroneously concluded that the Fifth District Court of Appeals decided the 1989 DMA reviewed only one twenty-year period, the 20 years before the statute’s enactment. *Eisenbarth*, 2014-Ohio-3792, ¶41. The court relied upon the bare language in the opinion, without any reference to actual facts of *Riddell*.

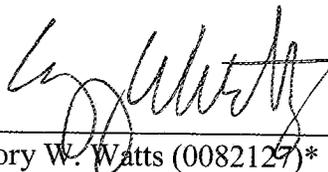
The actual facts before the *Riddell* court established that the severed mineral interest was the subject of a claim to preserve filed on May 28, 1992, approximately two months after the 1989 DMA became operative. (Appellate Brief of Appellee Eula Faye Layman, filed in *Riddell v. Layman*). That claim to preserve would have preserved the severed mineral interest from May 28, 1992 through May 28, 2012. The only issue before the Fifth District Court of

Appeals was whether the interest was abandoned before May 28, 1992 on March 22, 1992. Specifically, the issue was whether the execution date of the reserving deed (January 4, 1965) or the recording date of the reserving deed (June 12, 1973) served as the operative start date for 1989 DMA preservation analysis. *Riddell*, 1995 WL 498812, at *1. The court found the operative date was the date the deed severing the mineral interest was recorded, June 12, 1973, thus, there was no 20-year period without a savings event under the 1989 DMA. As such, the court did not hold that the 1989 DMA operated under a “fixed” basis.

Despite these facts, the Seventh District Court of Appeals erroneously concluded that the Fifth District Court of Appeals had already decided that the 1989 DMA utilized a “fixed” review period. Since the decision in this case, the Seventh District Court of Appeals has issued at least three other decisions finding that the 1989 DMA used a “fixed” review period, all of which rely in part on the erroneous interpretation of *Riddell*.

CONCLUSION

In attempting to achieve their goals of efficient production of Ohio’s natural resources, the General Assembly enacted the 1989 DMA as a statute of abandonment. It was not, as its opponents systematically claim, a forfeiture statute. It was intended to work parallel to the Marketable Title Act and was intended to clear old, stale, dormant mineral interests from surface owners’ chains of title based upon extensive non-use (defined by statute to be 20 years). The interpretation of this statute will affect thousands of Ohioans. The only reasonable interpretation of the 1989 DMA is that it was intended to operate prospectively (on a continuous basis) and that severed mineral holders were under a minimal obligation to use their interests every 20 years. The Seventh District Court of Appeals, ignoring the mandates of R.C. 5301.55, clearly lost its way and therefore, this Court should exercise jurisdiction over this appeal.



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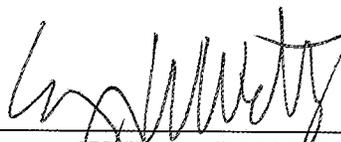
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