

ORIGINAL

IN THE SUPREME COURT OF OHIO

LELAND EISENBARTH, et al.,)	Case No. 2014-1767
)	
Appellants,)	
)	
vs.)	Jurisdictional Appeal from the
)	Monroe County Court of Appeals,
DEAN REUSSER, et al.,)	Seventh Appellate District
)	
Appellees.)	Court of Appeals
)	Case No. 13 MO 10

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF AMICI CURIAE CHARLES J. SCHUCHT,
WILMA L. SCHUCHT, THERESA E. SCHUCHT, AND THE
SCHUCHT FAMILY TRUST U/A DATED APRIL 2, 2013**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
STATEMENT OF INTEREST OF <i>AMICI CURIAE</i>	1
STATEMENT OF FACTS	1
STATEMENT OF THE CASE	2
ARGUMENT	2
<u>Proposition of Law No. 1:</u>	
The 1989 DMA was prospective in nature and operated to have a severed oil and gas interest “deemed abandoned and vested in the owner of the surface” if none of the savings events enumerated in ORC §5301.56(B) occurred in the twenty (20) year period immediately preceding <u>any date</u> in which the 1989 DMA was in effect.	
	2
<u>Proposition of Law No. 2:</u>	
Assuming, <i>arguendo</i> , that the 1989 DMA operates on a “fixed” twenty (20 year look-back period from the date of enactment, an oil and gas lease is not a “title transaction” within the meaning of ORC §5301.47(F) and Appellee’s interest has nonetheless been abandoned.	
	8
CONCLUSION	12
PROOF OF SERVICE	13

STATEMENT OF INTEREST OF AMICUS CURIAE
(THIS CASE IS ONE OF GREAT GENERAL PUBLIC INTEREST)

Charles J. Schucht, Wilma L. Schucht, Theresa E. Schucht and the Schucht Family Trust U/A

Dated April 2, 2013, have an appeal pending before the Seventh District Court of Appeals styled *Charles J. Schucht, et al. v. Bedway Land & Minerals Company, et al.*, Harrison County Court of Appeals, Case No. 14-HA-10. The Schucht case involves application of the Ohio Dormant Mineral Act, R.C. 5301.56, as enacted in 1989. The propositions of law proposed by the appellants in this case are issues squarely implicated in the Schucht case. The trial court in Schucht ruled that the DMA (1989) was subject to a “rolling period” of prospective operation, however, the court also held that a memorandum of oil and gas lease (more particularly a quit-claim release of same) operated as a savings event.

Schucht, as *amici curiae*, join to urge that the Court accept this case for review of the propositions of law presented by the appellants. Upon review, the Court should determine that the 1989 DMA operated prospectively and, further, hold that an oil and gas lease is not a title transaction or savings event.

STATEMENT OF FACTS

The appellants, Leland Eisenbarth, Michael Eisenbarth, and Keith Eisenbarth, own real property located in Monroe County, Ohio. In a 1954 deed, a one-half interest in the oil and gas underlying that property was severed and reserved.

In 1973, the owners of the surface and one-half of the oil and gas interests entered into an oil and gas lease. The lease was recorded in 1974. The appellees in this case assert that they are the successors to the one-half reservation. Appellants pursued the abandonment of the previously-

severed mineral interests in accordance with the 1989 DMA and with the amended statute. The appellees asserted that the 1973 oil and gas lease operated as a savings event to avoid abandonment. Further, appellees asserted that the 1989 version of the DMA did not apply prospectively.

STATEMENT OF THE CASE

Appellants pursued an action asserting ownership to the oil and gas interests underlying their property (including the one-half interest in dispute). The trial court entered judgment in favor of appellees, and the Seventh District Court of Appeals affirmed.

The Court of Appeals held, in part, that the 1989 DMA operated only during a “fixed” period of analysis preceding its enactment and effective date. Eisenbarth v. Reusser, 2014-Ohio-3792, ¶51 (7th Dist.). The Court further held that the oil and gas lease (executed in 1973 and recorded in 1974) operated as a savings event which precluded abandonment.

ARGUMENT IN SUPPORT OF THE PROPOSITIONS OF LAW

Proposition of Law No. 1:

The 1989 DMA was prospective in nature and operated to have a severed oil and gas interest “deemed abandoned and vested in the owner of the surface” if none of the savings events enumerated in ORC §5301.56(B) occurred in the twenty (20) year period immediately preceding any date in which the 1989 DMA was in effect.

Every statute is *presumed* to apply prospectively, and the analysis and application of former R.C. 5301.56 begins simply with utilization of R.C. 1.48. R.C. 1.48 succinctly provides that:

A statute is presumed to be prospective in its operation unless expressly made retroactive. (Emphasis added).

This principle has been routinely reinforced by the Court. E.g., State v. LaSalle, 96 Ohio St. 3d 178, 2002-Ohio-4009, ¶14 (“A statute is presumed to be prospective in its operation”); Thorton v.

Montville Plastics & Rubber, 121 Ohio St. 3d 124, 2009-Ohio-360, ¶26; Hyle v. Porter, 117 Ohio St. 3d 165, 2008-Ohio-542, ¶7.

Importantly, “[t]he General Assembly is not required to specify the prospective nature of a statute.” Id., ¶23. Obviously, this is because of the presumption of prospective operation which attaches as a function of law.

These rules produce the following conclusions: (1) R.C. 5301.56 enacted March 22, 1989 was (and is) presumed to operate prospectively; and (2) the General Assembly was not required to specify the prospective nature of the Act as part of its enactment. Consequently, the DMA operated prospectively from March 22, 1989 [subject to the tolling or saving provision of section (B)(2)], until it was amended effective June 30, 2006. The oil and gas rights at issue in this case vested prior to the amendment of the Act.

The 1989 version of the DMA was not somehow expressly limited to retroactive, or “fixed,” effect. Frankly, it would be an unusual circumstance for the General Assembly to enact any statute that would operate strictly in a one-time, retroactive manner. In any event, the words used in former R.C. 5301.56 did not expressly limit the code to some exclusively retroactive effect.

The 1989 statute provided as follows, in pertinent part:

5301.56 Abandonment and preservation of mineral interests

(B)(1) Any mineral interest held by any person, other than the owner of the surface of the lands subject to the interest, shall be deemed abandoned and vested in the owner of the surface, if none of the following applies:

...

(c) Within the preceding twenty years, one or more of the following has occurred:

- (i) The **mineral interest 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;
 - (ii) There has been **actual production or withdrawal of minerals** by the holder from the lands, **from lands covered by a lease** to which the mineral interest is subject,
- . . . (Emphasis added).

Effective Date: 03-22-1989.

There is nothing within this language which confines the operation of the DMA to a single, 20-year period prior to its enactment. Rather, if no saving event occurs (there is no title transaction in the mineral estate, there has been no actual production under a lease, the interest is not used for underground gas storage, and so forth), within “the preceding twenty years” from any point in time in the record under consideration, then the mineral interest is “deemed abandoned and vested in the owner of the surface.”

The decision in this case effectively has the provision of R.C. 5301.56(B)(1)(c) restricted to read “within the preceding twenty years *before the enactment of this section*,” Of course, the italicized words do not appear in the actual text of the law. “In interpreting a statute, [the courts] are bound by the language enacted by the General Assembly, and it is [the court’s] duty to give effect to the words used in a statute.” Hall v. Banc One Mgmt. Corp., 114 Ohio St. 3d 484, 2007-Ohio-4640, ¶24. As the Court stressed in Hall, “[w]e are free neither to disregard or delete portions of the statute through interpretation, nor to insert language not present.” Id. Citing, Whitaker v. M.T. Auto., Inc., 111 Ohio St. 3d 177, 2006-Ohio-5481, ¶15.

If the 1989 Act operated retroactively only, then Section (D)(1) would make no sense. That portion of the statute read:

(D)(1) **A mineral interest may be preserved indefinitely** from being deemed abandoned under division (B)(1) of this section 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.** (Emphasis added).

If the statute only addressed a single, 20-year period pre-dating the enactment of the statute, there would never be a need to file “successive” claims to preserve under division (C). A single “claim to preserve” filed anytime with 20 years before the effective date of the statute would suffice, again, if the statute involved only a single, retroactive 20-year period.

It is obvious from the reference to the use of “successive” claims to preserve, that a single 20-year period was not envisioned by the General Assembly. Instead, a mineral rights holder may need to file “successive . . . claims to preserve” to avoid an interest being deemed abandoned throughout the following years. “In enacting a statute, it is presumed that: . . . (B) The entire statute is intended to be effective.” R.C. 1.47. Simply, a statute which only recognized a saving event between the years 1969 and 1989 would have no use for a provision allowing for the indefinite preservation of a mineral interest through successive filings of claims to preserve.

This analysis is consistent with the comments set forth in the Ohio Legislative Service Commission report relating to the 1989 enactment of R.C. 5301.56. Therein, the Commission observed:

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.** (Emphasis added).

(Ohio Legislative Service Commission, December, 1988, p. 38). The description “each preceding 20-year period” clearly understood and expressed that more than one period of time was to be examined, for determining the abandonment of a mineral interest for non-use or non-preservation.

It is fundamental that no part of a statute is to be “treated as superfluous” and, thus, the courts are to “avoid that construction which renders a provision meaningless or inoperative.” State ex rel. Carna v. Teays Valley Schools, 131 Ohio St. 3d 478, 483, 2012-Ohio-1484; State ex rel. Overholser v. Clark County Commissioners, 2008-Ohio-6338; In Re. S.N.V., 2009-Ohio-4219, ¶9. An interpretation of the DMA as applying only retroactively would violate these rules of statutory construction, by rendering Section D(1) of the 1989 statute meaningless. Consequently, such “fixed” construction must be revisited and rejected by the Court.

The operation of the DMA was not, and is not, complicated. First, one determines whether or not a saving event occurred within the 20 years prior to the effective date of the statute (March 22, 1989; March 22, 1992 – factoring the three-year tolling period). If there was no saving event, then the interest lapsed and was automatically abandoned and merged. Second, if there was some saving event within that time frame, then one determines, looking forward from the date of such saving event, whether a subsequent saving event has occurred within 20 years. If no subsequent saving event occurred in the 20 years since the last saving event, the mineral interest is, again, automatically abandoned, and ownership of the interest is merged and vested with the surface owner.

If the 1989 version of the Act is applied retroactively only (affecting only the period prior to 20 years before the effective date of the code), then the statute produces arbitrary and absurd results. The statute should not be interpreted in such a manner. “In enacting a statute, it is presumed that: . . . (C) A just and reasonable result is intended.” R.C. 1.47. Under Ohio law, it is a “well-established principle that statutes should be interpreted in a manner avoiding unreasonable or absurd results.” PFC Lamont Hill Garrison v. Ohio State Liquor Comm., 2008-Ohio-943, ¶13, citing State

ex rel. Dispatch Printing v. Wells (1985), 18 Ohio St. 3d 382, 384. *Accord*, Jung v. Davies, 2011-Ohio-1134, ¶20.

For instance, if a mineral holder's interests were created on March 21, 1969, and no "saving event" occurred in the 20 years immediately following such transaction, such interests would be deemed abandoned and merged with the surface owner, automatically on March 22, 1992. Again, the effective date of the statute was March 22, 1989, but that date was subject to the three-year tolling clause set forth in R.C. 5301.56(B)(2). The mineral holder's rights would be abandoned for non-use, or non-preservation, after 20 years and 1 day. Let's examine another set of facts, where the only difference is that the mineral interests were created on March 23, 1969, by a title transaction. If the 1989 statute is applied *only* retroactively, then even in the absence of any saving event, there would be no abandonment and merger with the surface owner at any time under the 1989 statute. Thus, the time could continue to run through June 30, 2006, when the statute was amended – a period of over 37 years of non-use or non-preservation, without loss or merger of the interest. This could not have been intended by the legislature. Again, the general assembly is presumed to have "intended a just and reasonable result" through the 1989 enactment of R.C. 5301.56. Clark v. Scarpelli, 91 Ohio St. 3d 271, 2001-Ohio-39; R.C. 1.47(C).

This conundrum is resolved by recognizing the presumption of prospective operation to which the DMA was and is entitled. The tacking of time prior to the enactment of the statute with time extending after the effective date is the only rational application of the 1989 DMA. The obvious intent behind the Dormant Mineral Act was to eliminate severed, non-coal mineral interests after 20 years of non-use or non-preservation. "Use it or lose it" was the clear import behind the law.

Any continuous, 20-year period in the record triggered the automatic merger of such abandoned interest in the name of the surface owner, by operation of law.

Proposition of Law No. 2:

Assuming, *arguendo*, that the 1989 DMA operates on a “fixed” twenty (20 year look-back period from the date of enactment, an oil and gas lease is not a “title transaction” within the meaning of ORC §5301.47(F) and Appellee’s interest has nonetheless been abandoned.

An oil and gas lease does not amount to a “title transaction,” because an oil and gas lease does not represent “a transaction *affecting title* to any interest in land” See, R.C. 5301.47(F).

Such a lease does not have an effect on title to the oil and gas underlying property and does not divest the lessor of its fee ownership in the property. See, 68 Ohio Jurisprudence 3d, Mines and Minerals, Section 28 (2013). “[T]he ordinary oil and gas lease creates no estate of the lessee in the land” A lease “is not a right in the land as such but a right to enter upon the land . . . and to take from underneath . . . such oil and gas as the lessee may find.” *Id.*

In those instances, relied upon by the lower court, where Ohio courts have concluded that an oil and gas lease *may* be a form of real estate transaction, the outcomes have been driven by the specific language of the actual lease instrument itself. The primary objective in the analysis of a recorded transaction (whether a deed, easement, or other such document) is to determine the intent of the parties to the instrument. When determining intent, of course, a court must analyze the language used in the instrument, “the question being not what the parties meant to say, but the meaning of what they did say, as courts cannot put words into an instrument which the parties themselves failed to do.” *Cartwright v. Allen*, 2012-Ohio-3631, ¶12 (12th Dist.).

In general, because an oil and gas lease is for the purpose of extending production rights (with the right of entry) an oil and gas lease should be viewed as a license. See, Back v. Ohio Fuel Gas Co., 160 Ohio St. 81, . . . (Ohio 1953) and Wellington Resource Group v. Beck Energy (Sept. 20, 2013), S.D. Ohio No. 2:12 CV 104, 2013 U.S. Dist. LEXIS 134838. When properly viewed as an instrument granting a license only, an oil and gas lease cannot qualify as a title transaction” and, thus, cannot serve as a savings event.

R.C. 5301.47(F) defines a “title transaction” as follows:

(F) “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). **As a matter of law, a “license” does not affect title to any interest in land.**

A license does not even involve an interest in land. Rather, “A license interest in property is . . . a mere permission or personal privilege to use **A license passes no property or interest in real estate.**” Waldock v. Unknown Heirs of Wagner (June 7, 1991), Erie App. No. E 89 53, 1991 Ohio App. LEXIS 2599, *9 (Emphasis added). Inasmuch as a license passes no interest in real estate, a license cannot qualify as a “title transaction.” *A license* cannot be a savings event, thus an oil and gas lease as such cannot be a savings event.

Ohio law defining a title transaction requires a transaction “affecting title,” and the statute then makes specific reference to a number of forms of deeds. In Ohio real property law, title is synonymous with ownership. E.g., Jefferson Golf and Country Club v. Leonard, 2011-Ohio-6829, ¶¶ 19, 25, 31 (10th Dist.). A property owner is the holder of legal title, not the holder of some equitable interest and not a lessee. Id. Accord, Performing Arts School of Toldeo v. Wilkins, 104

Ohio St. 3d 284, 2004-Ohio-6389, ¶14 (In real property, “owner” is the holder of “legal title.”). A lessee does not hold title; is not an owner. Id. See also, Shannon v. Householder, Jefferson C.P. Case No. 12 CV 226 (July 17, 2013), *aff’d.*, 2014-Ohio-2359 (7th Dist.) rejecting the contention that an oil and gas lease (without production) amounts to a “title transaction,” for purposes of operating as a savings event.

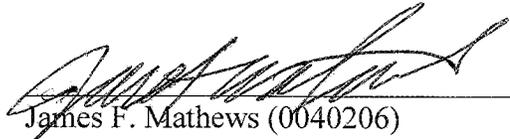
An oil and gas lease which extends permission in the form of a license to drill for and produce oil and gas, simply does not convey title; it does not affect who is the “owner” of the oil and gas. The “owner” who holds legal title remains at liberty to sell, transfer or convey ownership of the minerals, subject to the lease and the permission granted thereunder. At best, the holder of the lease can transfer the permission to explore and produce (typically by assignment and not by a title transaction) but cannot transfer ownership or title. See, Back, *supra*.

It is worth further observing that the list of instruments set forth in R.C. 5301.47(F) itself, that qualify as title transactions, does not include a lease for oil and gas, a memorandum of lease, or a release of same. The Court should reject the suggestion to include such instruments within the statutory list. If an oil and gas lease was sufficient to operate as a savings event, then the General Assembly would not have needed to include among the list of savings events “actual production or withdrawal of minerals . . . from the lands covered by a lease.” R.C. 5301.56(B)(1)(c)(ii). R.C. 5301.56(B)(1)(c)(ii) would be rendered superfluous by the position accepted by the lower court, and as a matter of statutory construction, no portion of a statute is to be rendered superfluous or inoperative. Only actual production or withdrawal of oil and gas under the terms of a lease operates as a savings event.

CONCLUSION

WHEREFORE, *amici curiae*, Charles J. Schucht, Wilma L. Schucht, Theresa E. Schucht and the Schucht Family Trust U/A Dated April 2, 2013, respectfully request that the Court accept the appellants' propositions of law for review in this appeal.

Respectfully submitted,



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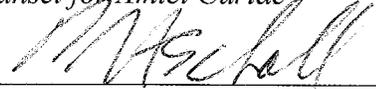
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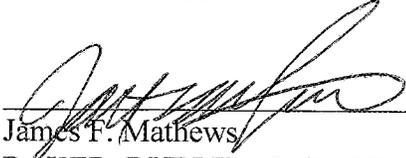
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