ORIGINAL

IN THE SUPREME COURT OF OHIO

HANS MICHAEL CORBAN,

Petitioner,

v.

CHESAPEAKE EXPLORATION, L.L.C., et al.

Respondents.

Case No. 2014-0804

On Certified Questions of State Law from the United States District Court for the Southern District of Ohio Eastern Division

S.D. Ohio Court Case No, 2:13-cv-00246

PETITIONER'S BRIEF IN REPLY TO BRIEF OF RESPONDENT NORTH AMERICAN COAL ROYALTY COMPANY

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Argument	1
Conclusion	20
Certificate of Service	22

TABLE OF AUTHORITIES

Page

CASES:

Bielat v. Bielat (2000), 87 Ohio St. 3d 350 16

Chesapeake Exploration, L.L.C. v. Buell, Case No. 2014-0067 18

Combs v. Comm'r of Soc. Sec., 459 F.3d 640, 647,
2006 U.S. App. LEXIS 20919, (6th Cir. Ky. 2006) 14

Cowen v. State, 101 Ohio St. 387 (1920) 8

Dahlgren v. Brown Farm Properties LLC,
2014-Ohio-4001 ..... 4, 5, 7, 8, 11, 16

Eisenbarth v. Reusser, 2014-Ohio-3792 ¶¶ 108-13
(7th Dist. 2014) 11, 12, 16

Gill v. Fletcher, 74 Ohio St. 295, 305 (1906) 3

Hardy v. VerMeulen, 32 Ohio St.3d 45, 49, 512 N.E.2d 626 (1987) 7

Hawley v. Kansas Dept. of Agriculture (2006), 281 Kansas 603, 621,
132 P. 3d 870 4

Heifner v. Bradford, 4 Ohio St.3d 49, 52, 446 N.E.2d 440 (1983) 7

Heifner v. Bradford, 1982 Ohio App. LEXIS 14859, 1982 WL 2902
(Ohio Ct. App., Muskingum County, Jan. 29, 1982) 17

Kraynak v. Youngstown City Sch. Dist. Bd. of Educ., 118 Ohio St.3d 400,
2008-Ohio-2618, 889 N.E.2d 528 ..... 12, 13

Kraynak v. Youngstown City Sch. Dist. Bd. of Educ., 172 Ohio App.3d 545,
2007-Ohio-1236, 876 N.E.2d 587, ¶ 34 (7th Dist.) 12

Longbottom v. Mercy Hosp. Clermont (2013), 187 Ohio St. 3d 103, 109 . 14

Nichols v. Villarreal, 113 Ohio App.3d 343, 349, 680 N.E.2d 1259
(4th Dist.1996) 9

Slingluff v. Weaver, 66 Ohio St. 621, 626 (1902) 12

Page

CASES:

Smith v. The New York Central R.R. Co. (1930), 122 Ohio St. 45 15

Sogg v. Zurz, 121 Ohio St. 3d 449, 2009-Ohio-1526 3

State, ex rel. Bouse v. Cickelli, 165 Ohio St. 191, 192 ..... 16, 17

State, ex rel. Merrill v. Ohio Dept. of Nat'l Resources, 2011-Ohio-4612, 130 Ohio St.3d 30, 42 18

Swartz v. Householder, 2014-Ohio-2359 ..... 4, 16

Texaco, Inc. v. Short, 454 U.S. 516, 533-34, 102 S.Ct. 781 (1982) 5

Tomasik v. Tomasik, 111 Ohio St. 3d 481, 2005-Ohio-6109, ¶ 13 ..... 10, 12

Univ. Hosps. v. Emerson Elec. Co., 202 F.3d 839, 848 n. 7 (6th Cir. 2000) 9

Wendt v. Dickerson (5th Dist.), 2014-Ohio-4615 ..... 4, 7

OTHERS:

Black's Law Dictionary, 5th Ed. 3

R.C. 1.58 14

R.C. 160.01 3

R.C. 2107.76 9

R.C. 2151.421 ..... 12, 13

R.C. 5301.47 18

R.C. 5301.56 ..... 1, 18, 20

R.C. 5301.57 1

ARGUMENT

I. The 2006 Amendment Of R.C. 5301.57 May Not Retroactively Destroy Rights That Vested Pursuant To The Unamended Version

A. Introduction

The Petitioner has argued (1) that title to the Mineral Interest automatically "vested" in him pursuant to the express language of the original 1989 version of R.C. 5301.56 ["ODMA"], (2) that ownership of the Mineral Interest "vested" in him prior to the 2006 amendment, and (3) that the 2006 amendment may not retroactively divest him of his vested title to the Mineral Interest.

B. The 1989 ODMA Expressly States That Title To The Mineral Interest "Vests" In The Surface Owner

The Respondents, therefore, deny that title to the Mineral Interest "vested" in the Petitioner prior to the effective date of the 2006 amendment, and base this denial on their belief that the 1989 ODMA should be read by this Court to have implicitly required that the surface owner take some affirmative action for "vesting" to occur:

> The 1989 Act did not provide for "automatic" vesting....
>
> * * *
>
> Nothing in the [1989] Act provided that a mineral interest would be vested without such action [, *i.e.*, without seeking some sort of judicial determination that vesting occurred]....

Brief of Respondent North American Coal Royalty Company [hereinafter "North American Coal"], pp. 1-2. The Respondents make this argument despite their acknowledgement that the 1989 ODMA did not specify that any such affirmative action be taken:

> [T]he ODMA as enacted in 1989 required some *unspecified* action before mineral rights could be taken from the record holder and vested in the surface owner.

Brief of Chesapeake Exploration, L.L.C., et al. [hereinafter Chesapeake Exploration"] (emphasis added) (p. 12). Simply stated, it is the Petitioner's position that the 1989 ODMA cannot be read to require the surface owner to take some affirmative action given (1) that it expressly provides that, unless certain statutorily defined events occurred in the preceding twenty (20) years, title to the Mineral Interest is "deemed abandoned and vested in the owner of the surface," and (2) that it does not contain any language requiring the surface owner to take any action whatsoever.

C. The Use Of The Word "Deemed" In The ODMA Does Not Mean That Title To A Mineral Interest Does Not Vest In The Surface Owner Unless The Surface Owner Takes Some Unspecified Affirmative Action

The Respondents, therefore, seek to make much of the fact that the ODMA uses the word "deemed," and argue that it makes clear that the General Assembly intended that title to the Mineral Interest would not vest in the surface owner unless the surface owner took some "unspecified" affirmative action:

> [T]he conclusion that the ODMA as enacted in 1989 required some *unspecified* action before mineral rights could be taken from the record holder and vested in the surface owner [is mandated by the fact that] the General Assembly stated that mineral rights shall be "deemed abandoned and vested"....

Brief of Chesapeake Exploration, p. 12 (emphasis added). *See also* Brief of North American Coal, p. 13 n. 4. This argument fails to consider the very reason that the ODMA was enacted, the plain meaning of the word "deem," and the context in which it is used.

As noted in the Prefatory Note to the Uniform DMA, the common law provided that a Mineral Interest could not be deemed abandoned as a result of nonuse, and that, instead, it must be shown that the owner actually intended to abandon the property:

> ***Abandonment requires a difficult showing of *intent* to abandon; nonuse of the mineral interest alone is not sufficient evidence of intent to abandon.

Prefatory Note, pp. 1 and 3 (Petitioner's Ex. 9, Appendix p. 81). Ohio common law was also to that effect. *See Gill v. Fletcher*, 74 Ohio St. 295, 305 (1906). The 1989 ODMA was intended, therefore, to provide that nonuse **does** constitute "abandonment" even if there was no intent to abandon, *i.e.*, that the holder of a Mineral Interest is "deemed" to have abandoned the Mineral Interest if it is not used in one of the ways described in the statute, *even if there was no intent to abandon.*

This is consistent with the plain meaning of the word "deem": "to hold; consider; adjudge; believe; condemn; determine; treat as if; construe." *See* Black's Law Dictionary, 5th Ed. The ODMA, therefore, provides that the owner of a Mineral Interest will be "considered" to have abandoned, or "treated as if" he or she intended to abandon, the Mineral Interest, even though there was no intent to actually abandon the property interest. This is also consistent with this Court's construction of the words "deemed abandoned" in other contexts. For example, R.C. § 160.01 deals with "unclaimed funds," and this Court noted that such unclaimed funds remained the property of the owner because, unlike the ODMA, there was no statutory language that provided that they would be "deemed abandoned" as a result of their owner's failure to claim them:

> We conclude that the General Assembly has not plainly legislated that unclaimed funds are or can be *deemed abandoned* property.

Sogg v. Zurz, 121 Ohio St. 3d 449, 2009-Ohio-1526, ¶ 9 (emphasis added).

The Petitioner's position is also supported by the decisions of the courts of other states vis-à-vis their own DMA's, which have noted that the words "deemed abandoned" simply means that the owner of the property interest will be "treated as if" he or she intended to abandon the property as a result of nonuse, even though there was no intent to abandon the Mineral Interest:

> By using "shall be deemed abandoned" the legislature has made the intent inquiry moot.

Hawley v. Kansas Dept. of Agriculture (2006), 281 Kansas 603, 621, 132 P. 3d 870. Accordingly, the Respondents' argument that the General Assembly, by using the word "deemed," was somehow manifesting the legislative intent that the surface owner must take some unspecified affirmative action for vesting to occur, should be rejected.

D. The Lower Courts Have Recognized That The 1989 ODMA Was Self-Executing

The Respondent North American Coal refers this Court to the trial court's decision in the *Dahlgren* case in support its argument that the courts should hold that the 1989 ODMA implicitly required a surface owner to take some unspecified affirmative action for vesting to occur. The trial court's decision, however (which was discussed at pages 21-27 of the Petitioner's initial Brief), was reversed by the Seventh District Court of Appeals, which held that, consistent with its prior decisions, the express language of the 1989 ODMA provided for automatic vesting, *i.e.*, that it was self-executing:

> We opined that the 1989 DMA is the type of statute characterized by automatic lapsing and reversion to the surface owner known as a self-executing statute....

Dahlgren v. Brown Farm Properties LLC, 2014-Ohio-4001, ¶¶ 23 and 28. *See also Swartz v. Householder*, 2014-Ohio-2359, ¶ 27 ("The 1987 DMA... a self-executing statute"). Most recently, the Fifth District has held that the 1989 ODMA was self-executing: "[W]e...follow the...Seventh District...to find...that the 1989 DMA applied and...the mineral rights automatically vested with the surface owners...." *Wendt v. Dickerson* (5th Dist.), 2014-Ohio-4615, ¶ 37.

E. The U.S. Supreme Court Has Not Held That There Must Be "Some Judicial Confirmation" For Vesting To Occur

The Respondents nonetheless argue that the trial court in *Dahlgren* correctly held that, pursuant to the U.S. Supreme Court's decision in *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), for vesting to occur, there must be some sort of "judicial confirmation" thereof:

> [The trial court in] *Dahlgren* properly concluded from this [*i.e.*, the decision in *Texaco*,] that the mere absence of a savings event alone "could not and did not transfer ownership" – for that, there must be, in addition, "some judicial confirmation...."

Brief of North American Coal, p. 13. In fact, however, the U.S. Supreme Court gave no indication that there "must be, in addition, some judicial confirmation," and, instead, expressly described the statute as "self-executing." *Texaco, Inc. v. Short*, 454 U.S. 516, 533-34, 102 S.Ct. 781 (1982). The U.S. Supreme Court, in *Texaco*, did hold that, *if judicial confirmation is sought*, the record holder is entitled to notice. In the instant case, therefore, the Respondents were entitled to, and received, notice of the lawsuit filed by the Petitioner seeking judicial confirmation that he has vested title to the Mineral Interest under his property.

F. The Legislative History Shows That The 1989 ODMA Is Self-Executing

The Respondents also assert that the legislative history of the 1989 ODMA shows that the General Assembly intended that a surface owner must take some unspecified, affirmative action for title to the Mineral Interest to vest in him or her. The Respondents premise this argument on the fact that the proponents of the 1989 ODMA requested the Ohio General Assembly to enact legislation that was based upon the provisions of the Uniform DMA, which legislation, like the Uniform DMA, would have required the surface owner to take affirmative action for vesting to occur, *i.e.*, would have provided for the result advocated by the Respondents herein:

> [T]he proponent [of the 1989 DMA] stated that the "proposed bill also contains the essential elements" of the Uniform Dormant

> Mineral Interests Act...one of which, as petitioners note, was that "the surface owner take affirmative action for vesting to occur."

Brief of Respondent North American Coal, p. 2.

This argument may have carried some weight if the General Assembly had enacted either the version of the Act "As Introduced," or the provisions of the Uniform DMA – but it didn't. The General Assembly, instead, enacted legislation that is markedly different from both the version "As Introduced" and the Uniform DMA, which legislation did not contain any language requiring the surface owner to take any affirmative action whatsoever. The legislative history of the 1989 ODMA, therefore, shows that the session of the General Assembly which enacted it *rejected* the proposed statutory language that required the surface owner to take affirmative action, *i.e.*, it shows that the 1989 ODMA is, as the appellate courts have unanimously held, self-executing.

G. Enforcement Of The 1989 ODMA Does Not Conflict With Or Frustrate The Marketable Title Act

The Respondents also argue that if the 1989 DMA is "self-executing," it would somehow conflict with, and frustrate, the provisions and purpose of the Marketable Title Act.[1] The Respondents' argument in this regard, however, is premised on the incorrect assertion that the "sole purpose of the ODMA is to...address the problem...in those few cases where the inability to identify or locate owners of a long-unused mineral interest frustrated efforts to develop the mineral resource." Brief of Respondent Chesapeake Exploration, p. 3. The ODMA, however, contains no language limiting its application to situations where the identity or whereabouts of the holders of a Mineral Interest cannot be determined, and, by its plain language, has much

[1] It should be noted that the Petitioner in the instant case has argued in the federal district court that ownership of the Mineral Interest also vested in him under the Marketable Title Act, but that issue has not been certified to this Court.

broader application. The Respondents also argue that the sole purpose of the Marketable Title Act was merely to simplify title searches. Brief of Respondent Chesapeake Exploration, p. 21. In fact, the purpose of the MTA is not that narrow – it also is intended to improve marketability by extinguishing older property interests unless the holder thereof filed a claim to preserve that interest:

> It is appellees' position that the purpose of the [MTA] is to limit title searches to forty years.
>
> * * *
>
> We are not inclined to view the purpose of the Marketable Title Act so narrowly.

Heifner v. Bradford, 4 Ohio St.3d 49, 52, 446 N.E.2d 440 (1983), fn. 4. *See also Hardy v. VerMeulen*, 32 Ohio St.3d 45, 49, 512 N.E.2d 626 (1987), fn. 8:

> The Ohio Marketable Title Act, R.C. 5301.47 through 5301.56, destroys certain ancient property interests....

Moreover, as set forth in the Proponent Testimony in support of the 1989 ODMA, the ODMA was deemed necessary, and was enacted, for the very reason that, as a result of this Court's decision in *Heifner*, *supra*, the "Marketable Title Act is not generally effective as a means of eliminating severed mineral interests." *See* Petitioner's Appendix Ex. 14. The Fifth District has recently recognized that this was the purpose of the ODMA: "The DMA was the General Assembly's response to *Heifner*." *Wendt v. Dickerson* (5th Dist.), 2014-Ohio-4615, ¶ 22. Thus, the intent and purpose of the ODMA was to divest the holder of a Mineral Interest of title thereto in those situations where, pursuant to the holding in *Heifner*, the Marketable Title Act does not, such that there is no conflict between the relevant statutory purposes and provisions.

The Respondents nonetheless refer this Court to the trial court's decision in *Dahlgren* to the effect that, if the ODMA is self-executing, it would somehow conflict with the Marketable

Title Act. That decision, however, was reversed on appeal, on the basis of the longstanding legal principle that, assuming, *arguendo*, there is some conflict between the general provisions and purposes of the Marketable Title and the 1989 ODMA, the *specific* provisions of the ODMA, which were *later enacted*, should control:

> In *Swartz*, we addressed a suggestion that the 1989 DMA was invalid because it wholly conflicted with the purpose of the MTA. We pointed out that R.C. 1.51 states that if a general provision conflicts with a special provision, they shall be construed if possible by giving effect to both, and if the conflict is irreconcilable, the special prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.... We then stated that the DMA is more specific, it was enacted later, and the legislative intent is clearly to reattach mineral interests back to the surface under a twenty-year look back. *Id.*

Dahlgren, ¶ 20 n.1.

H. The 1989 ODMA Is Not Ambiguous Because It Does Not Require The Surface Owner To Take Affirmative Action

The Respondent also argues that the 1989 ODMA is ambiguous because it did not "clearly define...exactly how the process to reunite the mineral ownership with the surface ownership was to be accomplished," and, in support, refers this Court to the testimony of the sponsor of the 2006 amendment, Representative Mark Wagoner, where he stated:

> Unfortunately, Ohio's Dormant Mineral Statute has seldom been used in large measure because the statute did not clearly define when a mineral interest became abandoned and exactly how the process to reunite the mineral ownership with the surface ownership was to be accomplished.

See Respondent North American Coal's Appendix, p. 68.

In the first place, it is this Court's function, not Representative Wagoner's, to determine if statutes are ambiguous. *Cowen v. State*, 101 Ohio St. 387 (1920). Moreover, statements of legislators to the effect that a statute should be construed in a certain way, to give effect to what

was "intended" by the legislative body that enacted it, are irrelevant, and the fact that a litigant resorts to reliance upon such statements tends to show that the statute, as written, actually provided for the opposite result:

> We note that appellee, rather than relying exclusively on the language of amended R.C. 109.36(A)...relied on extrinsic evidence in support of his retroactive application argument. The fact that appellee felt it necessary to rely on an affidavit by a former member of the Ohio General Assembly tends to support the argument that the amended R.C. 109.36(A) contains no express language making it retroactive. Additionally, we note that a single legislator does not speak for the entire Ohio General Assembly....

Nichols v. Villarreal, 113 Ohio App.3d 343, 349, 680 N.E.2d 1259 (4th Dist.1996). *See also Univ. Hosps. v. Emerson Elec. Co.*, 202 F.3d 839, 848 n. 7 (6th Cir. 2000) ("[W]e do not look to post-enactment statements of legislators when determining the meaning of statutes"). As will be discussed below, while the failure to require the surface owner to do anything may be perceived by some to be a "problem," that failure does not make the ODMA ambiguous.

I. Assuming That It Was "Perceived" That The 1989 ODMA Had Problems Or Was Otherwise Unsatisfactory, That Does Not Allow The Courts To Amend It To Remedy Any Such Perceived Problems

The Respondents assert that the 2006 ODMA can and should be applied retroactively because it "fix[ed] perceived problems" with the 1989 statute. Brief of Respondent North American Coal, p. 21. The fact that some persons may have "perceived" a "problem" with legislation does not, however, make it ambiguous, and it is well-settled that a court may not amend statutory language to remedy any such "perceived problems."

For example, this Court recently held that the fact that a prior version of R.C. 2107.76, which sets forth a statute of limitations to commence a will contest action, only applied to certain persons, such that it was amended four (4) years later to apply to all persons, did not mean that the original enactment was ambiguous, even if the original statutory provisions "proved unwise,"

and held that the courts should enforce the original statute as it was written, even if it was flawed – not as it was subsequently rewritten to remedy any such perceived flaw:

> We find that former R.C. 2107.76 is unambiguous. It sets forth a statute of limitations for the bringing of a will contest for [certain] persons.... It does not purport to do anything else. *A statute does not have to answer all questions or* address every possible class of persons. *It is not for this court to question what the statute accomplishes*; its language works to inform those that it affects exactly how it affects them. Former R.C. 2107.76 does not apply to persons who were not required to be given notice in accordance with R.C. 2107.19. Therefore, it applies to none of the appellees except Cecilia.
>
> The postscript to this case is that the current version of R.C. 2107.76 (effective June 15, 2006) adds this sentence: "No other person may commence an action permitted by section 2107.71 of the Revised Code to contest the validity of the will more than three months after the initial filing of a certificate described in division (A)(3) of section 2107.19 of the Revised Code."....
>
> The lack of a statute of limitations for "other person[s]" in former R.C. 2107.76 may have been the result of the General Assembly's *unintentional omission of language*, or it could have been a legislative experiment that experience has *proved unwise*. The statute's four-year survival could indicate that the "missing" language was *not merely an oversight*, or it could indicate that the statute was so seldom employed that no one noticed a *drafting mistake*. **Regardless, all that matters for our purposes here is that for its four-year run, former R.C. 2107.76 was unambiguous.**

Tomasik v. Tomasik, 111 Ohio St.3d 481, 2006-Ohio-6109, 857 N.E.2d 127, ¶ 16-18 (emphasis added).

The same is true herein – for its 17-year run (1989-2006), the original ODMA did not require any affirmative action for a Mineral Interest to vest in the surface owner. Thus, even assuming, *arguendo*, that it later "proved unwise" to not require the surface owner to take some affirmative action, and that this "problem" did not become apparent until later because the "statute was so seldom employed," that does not change the simple fact that the express language

of the 1989 ODMA is unambiguous and did not require the surface owner to take any action whatsoever for title to Mineral Interest to vest in the surface owner.

J. Ohio Law Provides That The Amendment Of A Statute Is Presumed To Change Its Provisions

The Respondents do, however, refer this Court to the concurring opinion in *Eisenbarth v. Reusser*, 2014-Ohio-3792 ¶¶ 108-13 (7th Dist. 2014), which supports their argument that, based upon the comments of Representative Wagoner vis-à-vis the 2006 amendment of the ODMA, the 1989 ODMA should be read by the courts to require the surface owner to take some unspecified affirmative action for vesting to occur. The concurrence in *Eisenbarth*, however, erroneously indicated that it was unnecessary to construe the 1989 ODMA in accordance with the canons of statutory construction because a subsequent legislature, in enacting the 2006 amendment thereof, effectively reached back in time and made clear what the 1989 ODMA had been intended to do by the legislative body that had enacted it, but had not accomplished ("failed to achieve"):

> [G]iven the unique procedural circumstances this case presents, namely, construing an ambiguous statute after it has been amended to remove that ambiguity, we do not need to resort to those canons [of statutory construction] in order to glean that intent. By virtue of the 2006 ODMA, we have the rare benefit of the General Assembly's statement of its intent with respect to the ambiguous language of the 1989 ODMA.
>
> * * *
>
> The 2006 version of R.C. 5301.56 does what the General Assembly intended the 1989 ODMA to do but failed to achieve....

Eisenbarth, ¶¶ 67 and (DeGenaro, P.J., concurring in judgment only). The concurrence in *Eisenbarth*, therefore, recognized that the 1989 ODMA did not require ("failed to achieve") the surface owner to take any affirmative action, and, therefore, would have, like the trial court in *Dahlgren*, judicially amended it to so provide.

Ohio law, however, is to the effect that a legislative enactment must be construed based upon its own language, and that a subsequent session of a legislative body may not reach back in time and dictate what the intent of a prior legislative session was in enacting a statute:

> "The object of judicial investigation in the construction of a statute is to ascertain and give effect to the intent of the law-making body *which enacted it*...."

Tomasik v. Tomasik, 111 Ohio St. 3d 481, 2005-Ohio-6109, ¶ 13 (emphasis added) (*quoting Slingluff v. Weaver*, 66 Ohio St. 621, 626 (1902)).

Further, this Court has held that the amendment of a statute is presumed to effect a change in its operation. For example, in *Kraynak v. Youngstown City Sch. Dist.*, 118 Ohio St.3d 400, 2008-Ohio-2618, this Court addressed the question whether R.C. 2151.421, which requires certain persons to report suspected child physical and sexual abuse, employed an objective or subjective standard. The court of appeals, like the concurrence in *Eisenbarth*, focused on the fact that the statute was amended to expressly impose an objective standard, and held that this amendment made clear that the original statute was also intended, by the prior legislative body that enacted it, to apply an objective standard (just like the concurrence in *Eisenbarth* held that the fact that the 2006 amendment of the ODMA to require affirmative action made clear that the original statute was also intended to require such affirmative action):

> [T] he fact that language was added to R.C. § 2151.421 making it apparent that the reporting duty is based on an objectively reasonable person standard only bolsters Appellant's argument that the standard was always intended to be objective.

Kraynak v. Youngstown City Sch. Dist. Bd. of Educ., 172 Ohio App.3d 545, 2007-Ohio-1236, 876 N.E.2d 587, ¶ 34 (7th Dist.).

This Court disagreed with the court of appeals, and noted that the exact opposite was true—the fact that R.C. 2151.421 was amended to expressly apply an objective test showed that the original statute employed a subjective test:

> Beyond the plain language of the statute, the current version of R.C. 2151.421 is instructive in determining what standard the former version required, as well as what the General Assembly intended in amending the statute. The new version of the statute changes the standard from "knows or suspects" (a subjective standard) to "knows, or has reasonable cause to suspect based on facts that would cause a reasonable person in a similar position to suspect," a clearly objective standard.
>
> Accordingly, we hold that pursuant to former R.C. 2151.421...the standard is subjective.

Kraynak v. Youngstown City Sch. Dist. Bd. of Educ., 118 Ohio St.3d 400, 2008-Ohio-2618, 889 N.E.2d 528, ¶ 16-17. The same is true herein – the fact that the ODMA was amended in 2006 to require the surface owner to take affirmative action for vesting to occur shows that such affirmative action was not required under the original ODMA.

K. If Title To The Mineral Interest Was Vested In The Petitioner, It May Not Be Retroactively Destroyed

The Respondents, therefore, argue that, even if the 1989 ODMA was self-executing and vested title to the Mineral Interest in the Petitioner prior to the 2006 amendment, that vested right could be later made subject to the "procedural" provisions of the 2006 ODMA:

> Assuming...that an automatic vesting of mineral rights occurred under the 1989 Act, those rights could be made contingent on the surface owner's compliance with the requirements of the 2006 Act...because the 2006 amendments are procedural or remedial.

Respondent's Brief, p. 20. This Court, however, recently held that when the prospective application of the amendment of a statute would destroy a right that was vested under the prior version of the statute, the amended statute may not be applied:

> [T]he constitutional limitation against retroactive laws **"'include[s] a prohibition against laws which *commenced on the date of enactment and which operated in futuro, but which, in doing so, divested rights*, particularly property rights, which had been vested anterior to the time of enactment of the laws.'"**

Longbottom v. Mercy Hosp. (2013), 137 Ohio St. 3d 103, 109 (bold faced emphasis added). *See also* R.C. 1.58:

> The...amendment...of a statute does not...[a]ffect the prior operation of the statute...or...[a]ffect any...right... previously acquired thereunder....

The Respondents, however, assert that *Longbottom* supports their position because the Court in that case allowed changes in the procedure for obtaining prejudgment interest to be applied to causes of action that accrued prior to its effective date. But, the unamended prejudgment interest statute, unlike the 1989 ODMA, did not contain any language creating a "vested" right, and, as shown above, this Court held in *Longbottom* that statutory amendments may not destroy "vested" rights.

The Respondents also refer this Court to the holding of the Sixth Circuit in *Combs v. Comm'r of Social Security*, 459 F.3d 640, but the court in that case held that, although statutes may retroactively change the procedure which must be followed for a right to vest, statutes may not retroactively take away rights that were already vested:

> In contrast, [procedural] rules that deprive persons of vested substantive rights may have retroactive effects if applied to conduct occurring prior to their enactment.

Combs v. Comm'r of Soc. Sec., 459 F.3d 640, 647, 2006 U.S. App. LEXIS 20919, (6th Cir. Ky. 2006). *See also* the concurrence in that case:

> [A]n impermissibly retroactive statute as one that "takes away or impairs vested rights acquired under existing laws...."

Combs, 459 F.3d at p. 654.

The Respondents also rely on *Smith v. The New York Central R.R. Co.* (1930), 122 Ohio St. 45, where this Court held that the application of an amended, shortened, statute of limitations to an existing, *i.e.*, vested, cause of action did not amount to an unconstitutional retroactive application because the plaintiff had no "vested" right in the prior, longer, statute of limitations. *Smith* also noted that the application of the amended statute of limitations did not destroy the vested right (the cause of action) because the plaintiff still had a reasonable amount of time after it was shortened to file suit. In the instant case, on the other hand, the claimed right, *i.e.*, ownership of the mineral interest, was a "vested" right pursuant to the express language of the 1989 ODMA, and the application of the amended version thereof would destroy that vested right.

L. The Existence Of A Look-Back Period Does Not Make A Statute Retroactive

The Respondents also assert that the General Assembly indicated that both the 1989 ODMA and the 2006 amendment to the ODMA were to apply retroactively because they both provide for a "look back" period, *i.e.*, they both provide that, if certain events had not occurred in the preceding 20 years, a Mineral Interest is deemed abandoned:

> Both the 1989 and the 2006 DMA clearly indicate that the legislature intended them to have retroactive, as well as prospective, effect. Both provide for a 20-year "look-back" period....

Brief of Respondent North American Coal, p. 21. As explained by this Court, however, the fact that a statute "looks-back" in time, and provides that, if certain things have not happened during that "look-back" period, then a certain consequence will ensue, does not make a statute retroactive:

> The statute in question [, which precluded a person from being a candidate for public office in a party primary if that person voted in another party's primary in the preceding four years,] does not violate any constitutional provision with reference to retroactive legislation. **It is not retroactive simply because the [statutory]**

> **test involves a time factor extending prior to the effective date of the amendment.**

State, ex rel. Bouse v. Cickelli, 165 Ohio St. 191, 192 (emphasis added). Accordingly, the same is true vis-à-vis the ODMA:

> We explained that a look-back period…did not expressly or even implicitly make a statute retroactive.

Dahlgren, ¶ 31 (*citing Swartz v. Householder*, 2014-Ohio-2359, ¶ 34 n.2.

This Court, in *Cickelli*, also observed that, although the amendment of the statute in question invalidated the relator from being a candidate in a primary even though he would have been a proper candidate under the unamended version of the statute, the amended statute could nonetheless be applied to the relator because the relator had no "vested" right to be a candidate in a primary under the prior statute: "The amendment of the statute has not deprived relator of a **vested** right." *Id.*, at p. 193 (emphasis added). In the instant case, on the other hand, as shown above, the Petitioner did have a "vested" right under the 1989 ODMA.

M. The General Assembly Did Not Indicate That It Intended For The 2006 Amendment Of The ODMA to Apply Retroactively

The Respondents also argue that the General Assembly, had it not intended for the 2006 amendment to apply retroactively and destroy previously vested rights, could have so indicated, and, in support, cite to the concurrence in *Eisenbarth*, ¶ 113, to that effect:

> In other words, the General Assembly could have stated that the 2006 ODMA applies only to severed mineral rights which had not reverted to the surface owner by operation of the 1989 ODMA….

Ohio law, however, is to the exact opposite effect – unless the General Assembly affirmatively indicates that legislation is to be applied retroactively, it does not, and, importantly, even if such an intent is indicated by the General Assembly, it may not do so if it would destroy vested rights. *See Bielat v. Bielat* (2000), 87 Ohio St. 3d 350. Thus, to the extent that the General Assembly, in

other legislation, may have indicated that it does not retroactively destroy vested rights, it merely acknowledged that it may not retroactively destroy vested rights.

N. The Marketable Title Act Does Not Retroactively Destroy Vested Rights

The Respondents also assert that this Court has held that, although the Marketable Title Act retroactively destroyed vested rights, it was nonetheless constitutional, such that the 2006 amendment of the ODMA may also retroactively destroy vested rights:

> This Court also "implicitly rejected" a retroactivity challenge to the MTA in *Heifner v. Bradford*... [even though t]he MTA clearly does "extinguish" and render "null and void" vested rights....

Brief of Respondent North American Coal, p. 30. In fact, however, this Court's decision in *Heifner* contains no discussion whatsoever vis-à-vis retroactivity, and the Respondents fail to refer this Court to the discussion of the court of appeals in that regard, which, consistent with this Court's decision in *Cickelli, supra*, makes clear that, as discussed above, the fact that the MTA, like the ODMA, has a "look-back" period does not make it retroactive:

> Thus, it is only the prospective action or inaction of the owners of real property interests after the effective date of the act which influences their rights. The singular retrospective aspect of looking back to a "root of title" filed before the act became effective does not violate Article II, Section 28 of the Ohio Constitution (prohibiting retroactive laws).

Heifner v. Bradford, 1982 Ohio App. LEXIS 14859, 1982 WL 2902 (Ohio Ct. App., Muskingum County, Jan. 29, 1982) (reversed on other grounds, 4 Ohio St. 3d 49).

O. Summary

In sum, if, as the Petitioner argues, title to the Mineral Interest vested in him under the 1989 ODMA, then the 2006 amendment thereof may not retroactively divest him of that right.

II. Oil And Gas Leases, The Expiration of Oil And Gas Leases, And Delay Rental Payments Under An Oil And Gas Lease, Are Not "Title Transactions" As Defined By R.C. 5301.47, And, Even If They Are, They Are Not "Savings Events" Under Either Version Of R.C. 5301.56 Unless They Were "Recorded"

The Petitioner has argued that the omission from the ODMA of any reference to an oil and gas lease as a savings event, in and of itself, shows that it is not. The Respondents counter that the General Assembly would have assumed that an oil and gas lease was a savings event, in and of itself, because it would have assumed that an oil and gas lease is a "title transaction." But, as shown by the arguments in support and in opposition to this conclusion, and the certification of that issue to this Court for resolution in *Chesapeake Exploration v. Buell* (Case No. 2014-0067), Ohio law in this regard was, and still is, far from settled, and the General Assembly is presumed to be aware of the common law. *See e.g. State, ex rel. Merrill v. Ohio Dept. of Nat'l Resources*, 2011-Ohio-4612, 130 Ohio St.3d 30, 42 ("[w]e presume that the General Assembly acted with full knowledge of the common law...."). Given that the common law did not clearly provide that an oil and gas lease is a "title transaction," it is not reasonable to assert that the General Assembly would have silently assumed it was.

In any event, assuming, *arguendo*, that an oil and gas lease is a "title transaction," the Respondents argue that "delay payments," *i.e.*, the private act of writing a check, also constitute a "title transaction" that was "recorded," because the 1984 lease, which was recorded, contains language requiring the delay payments:

> Mr. Corban and the *Amici* argue that a delay rental payment cannot make the mineral interest the subject of a title transaction because it is not recorded.... This argument omits entirely, however, the fact that the oil and gas *lease* at issue in this case is recorded, and explicitly calls for the making of delay rental payments, thereby providing record evidence to any interested party that the mineral interest is the subject of a title transaction (the oil and gas lease), which may be extended via a delay rental payment. This is

> sufficient to prohibit the passage of any ownership interest via the ODMA.

Brief of Respondent Chesapeake Exploration, pp. 30-31. This argument ignores the fact that there was no public record or filing of any kind, made anywhere, memorializing that any "delay payments" were made – in the instant case, the only evidence that any such delay payments were made are copies of the checks making those payments, checks that were not publicly recorded or filed and to which the public has no right of access.

The Respondents do, eventually, address the fact that the delay payments were not recorded, and, therefore, boldly claim that neither the MTA nor the ODMA require that each "title transaction," *i.e.*, each delay payment, must be recorded:

> The [delay] payments were not *separately* recorded, but did not have to be.... There is no requirement anywhere in the DMA or the MTA that every title transaction be separately recorded in its own individual document.

Brief of North American Coal, p. 33. In fact, of course, the ODMA expressly provides that a Mineral Interest is deemed abandoned and vested in the surface owner if, "within the preceding twenty years," there has been no "title transaction" that has been "filed or recorded," such that the twenty year period begins on the last date that a "title transaction" was "filed or recorded." Accordingly, the ODMA does require that any "title transaction," to be a savings event, must have been filed or recorded, and expressly provides that, twenty years after the last filing or recordation of a "title transaction," the Mineral Interest vests in the surface owner (unless some other savings event occurred during those twenty years).

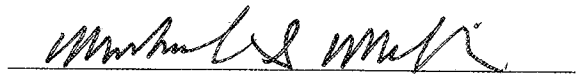
In sum, assuming, *arguendo*, that, as the Respondents assert, the 1984 oil and gas lease is a "title transaction," then the 1984 lease was a "title transaction" that was "filed or recorded." If it is further assumed, *arguendo*, that the private act of making a delay payment is also a "title

transaction," it is undisputed that the delay payments were not "filed or recorded." Thus, in the instant case, even assuming, *arguendo*, that the 1984 oil and gas lease, and the delay payments, were "title transactions," it is undeniable that the last "title transaction" that was filed or recorded in the instant case was the 1984 lease, such that the twenty year period set forth in the ODMA expired, at the latest, in 2004, prior to its 2006 amendment, which means that the Mineral Interest was deemed abandoned at that time and title thereto vested in the Petitioner.

III. CONCLUSION

In conclusion, the Petitioner Hans Corban respectfully requests that this Court hold (1) that the 2006 amendment of R.C. 5301.56 may not retroactively divest surface owners, such as the Petitioner herein, of the title to the Mineral Interest under their property if that title vested in the surface owners prior to the effective date of the 2006 amendment, and (2) that delay payments under an oil and gas lease are not "title transactions," and that, even if delay payments are "title transactions," they must have been filed or recorded to preclude the automatic vesting of title to the Mineral Interest in the surface owner.

Respectfully submitted:



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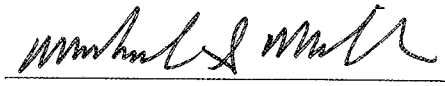

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