

ORIGINAL

IN THE SUPREME COURT OF OHIO

CHRISTOPHER WENDT, *et al.*,

Plaintiffs-Appellees,

v.

CONSTANCE CLARK, *et al.*,

Defendants-Appellants.

CASE NO.

14-2051

MEMORANDUM IN SUPPORT OF JURISDICTION BY APPELLANTS

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TABLE OF CONTENTS

REASONS WHY THIS MATTER IS OF PUBLIC OR GREAT GENERAL INTEREST1

STATEMENT OF THE CASE AND RELEVANT FACTS3

MEMORANDUM IN SUPPORT OF PROPOSITION OF LAW7

I. THE 2006 VERSION OF THE OHIO DORMANT MINERALS ACT CONTROLS THE VESTING OF TITLE IN A SURFACE OWNER WHO DID NOT MAKE A CLAIM FOR THE MINERAL INTERESTS BEFORE THE 2006 ENACTMENT.7

II. THE 1989 VERSION OF THE ODMA DID NOT PROVIDE MINERAL OWNERS WITH THE DUE PROCESS OF LAW REQUIRED UNDER THE STATE AND FEDERAL CONSTITUTION.....15

III. THE ODMA IS NOT NOW AND NEVER WAS SELF-EXECUTING.....18

CONCLUSION.....21

CERTIFICATE OF SERVICE21

APPENDIX.....22

REASONS WHY THIS MATTER IS OF PUBLIC OR GREAT GENERAL INTEREST

This matter is of great public importance to the citizens of the State of Ohio. It concerns interpretation of the Ohio Dormant Mineral Rights Act (hereinafter “ODMA”), codified at Ohio Revised Code §5301.56. It also involves the constitutional interpretation of the due process needed under the state and federal constitutions to take property rights from individuals. The interplay of the 2006 ODMA amendment and due process rights is also relevant to this appeal, as the parties differ on whether the 1989 ODMA operated as a matter of law without action by the surface owners before its repeal in 2006.

This Court has already accepted for review several cases in this area of law. See *Walker v. Shondrick-Nau*, Case No. 2014-0803; *Chesapeake Exploration, LLC v. Beull*, Case No. 2014-0067; and *Corban v. Chesapeake*, Case No. 2014-0804. Two of those cases are certified questions from the federal courts. *Walker* is from the Seventh District Court of Appeals. The Appellees have filed an *amicus* brief in *Corban*. Chesapeake has sided with the Appellants’ viewpoint in the *Corban* case. Only *Beull* has been fully briefed and argued with this Court so far.

Meanwhile, the Seventh District Court of Appeals now has a split of opinion on the very issues brought forward in this case – whether the 1989 ODMA can be used after the 2006 repeal and reenactment to claim abandonment of mineral rights. A majority of the panel in *Eisenbarth v. Reusser*, 2014-Ohio-3792 (Seventh District), *review pending*, 2014-1767, decided only a few weeks ago that there is no “rolling” 20-year look-back period under the 1989 ODMA. (In other words, a court should only look from 1969 to 1992 for “savings events.”) *Eisenbarth*, at ¶¶46-51. However, the dissenting opinion is **against the use of the repealed 1989 version of the ODMA at this late date.** *Id.*, at ¶¶69-70. As Judge DeGenaro stated in her dissenting opinion, the surface owners had the “potential” under the 1989 ODMA to claim an abandoned mineral interest and vest

it with the surface estate. By failing to act until after 2006, that “potential” under the 1989 ODMA was lost. *Id.*, ¶84.

All of these cases will determine who holds billions of dollars of mineral rights – ancestors of long-dead mineral owners or new surface owners? Did the Ohio Legislature intend to forfeit mineral rights to surface owners without any affirmative notice? Ohio landowners and corporate entities need definitive answers to these questions in order to avoid trespassing and to properly explore deep-mineral deposits in Ohio.

The Court of Appeals in this case specifically referred to the pending cases of this Court in its decision. Unfortunately, there was little explanation of the reasoning of its decision by the Court of Appeals. Likewise, the trial court’s decision in favor of the Appellees is but one sentence in an eight-page decision. The Appellants are still seeking a reasoned explanation from a court as to *why* their argument is unpersuasive.

This Court should exercise its discretionary jurisdiction under Article IV, §2(B)(2)(e) of the Ohio Constitution and pursuant to S.Ct.Prac.R. 5.02. The Appellants suggest that briefing be stayed in this case as duplicative of the cases cited above and that this case be held pending the determination of those cases.

STATEMENT OF THE CASE AND RELEVANT FACTS

This case involves a dispute over the mineral rights on an 81-acre piece of property in Harrison County, Ohio. The lower court decision's came down to a single legal issue --- whether the 1989 ODMA could be used by surface owners after 2006 to claim mineral rights.

The Appellants are the descendants of John R. and Marjorie Dickerson. John R. and Marjorie Dickerson sold this property in 1952 to Consolidated Coal Company ("Consolidated") shortly after they divorced. John R. and Marjorie each retained one-half of the non-coal mineral rights. Consolidated strip-mined the property for several decades. (Approximately half of Harrison County was strip-mined and later reclaimed.) After reclamation, Consolidated sold the property to the Dickersons' cousin, Neil Porter. He subdivided the property and sold 81 acres of vacant land to the Appellees, Christopher and Victoria Wendt, in 2006. The deed specifically referenced the mineral reservation from 1952. The Appellees built a house on the property and currently graze sheep there. They built a driveway across the street from and talked regularly to Appellant Celia Dickerson, daughter-in-law of John R. and Marjorie Dickerson.

John R. and Marjorie Dickerson had five children. Three are still alive. One child died after John R. Dickerson and before Marjorie Dickerson. His surviving spouse and his three children are his heirs at law. One of the other original five children died a few years ago, but after both her parents. Her will left all of her assets to a trust, of which her daughters are now the trustees and beneficiaries. As a result, the Appellants have all agreed on what their shares of the mineral estate would be. In fact, they have all agreed that Appellants Constance Clark, Deborah Snelson, Misty Engstrom, and Wanda Dickerson have no interest in the mineral estate.

The Appellants started the process of preserving their mineral interests in early 2011. They gave a power of attorney to Appellant John L. Dickerson for the purposes of dealing with

the mineral rights. John L. Dickerson then signed and caused to be **recorded two affidavits and notices preserving mineral interests on or about February 28, 2011** with the Harrison County Recorder. These affidavits, prepared by the Appellants' previous counsel, erroneously included some family members as owners by virtue of marriage.

Both sides were negotiating leases with Chesapeake's landmen without the knowledge of the other in 2011. **The Appellants signed a lease with Chesapeake on May 23, 2011. It was recorded on November 2, 2011.** (Generally, these leases give a lessee 90 days to do a title search to satisfy itself that the lessor owns the mineral interests. After the title "passes inspection" the lessee sends the bonus payment to the lessor.) The Appellants received up-front bonus money from Chesapeake in September 2011, but returned the money because the amounts were erroneous based on the ownership interest of each Appellant. This matter was in the process of being sorted out between Chesapeake and the Appellants when this litigation commenced.

In the spring of 2011, the Appellees signed a lease with Chesapeake. **The Appellees were told that the property "failed" its title search by Chesapeake because of the Appellants' interest.** The lease was never recorded and money was never exchanged. The Appellees then sought to have the Appellants' mineral interest deemed abandoned pursuant to the 2006 ODMA by publishing a notice in the newspaper. At the same time, the Appellees signed a new lease with Chesapeake for substantially more money than offered in the spring 2011 lease.

The Appellants discovered the published notice. Pursuant to the 2006 ODMA, they sent a notice to the Appellants that the mineral interest was not abandoned. The Appellants also filed the notice with the county recorder, as required by the 2006 ODMA, on December 9, 2011. The

Appellants also referenced in their notice to the Appellants the prior affidavits they had recorded back in February of 2011. Nevertheless, the Appellees recorded an affidavit of abandonment in the Harrison County Recorder's Office on December 21, 2011.

It was only at this point, once they realized they had no argument under the 2006 ODMA, that the Appellants began to claim ownership of the mineral interest pursuant to the 1989 version of the ODMA. The Appellees filed suit in Tuscarawas County Common Pleas Court Case No. 2012 CV 02 0135 on February 9, 2012. The Appellees named the 16 Appellants along with Chesapeake. The Appellants never claimed to the courts that they owned the mineral interests pursuant to the 2006 ODMA. Instead, they solely argued ownership under the 1989 ODMA.

On February 21, 2013, the trial court granted in part the Appellees' motion for summary judgment on the dispositive legal issue in the case – whether the Appellees could use the 1989 ODMA to quiet title to the mineral interests on the subject property. The decision designated the Appellants as the true owners of the mineral interest. Before a bench trial could be held on the remaining issues, the Appellants filed a notice of appeal on March 19, 2013. The Court of Appeals ruled in Tuscarawas County Case No. 2013 AP 03 0015 that the appeal was premature as that there was no final, appealable order.

The Appellees dismissed certain claims without prejudice soon thereafter, leaving only the issue of slander of title for the trial court. The Appellants moved for reconsideration of summary judgment on the grounds that the 1989 ODMA was unconstitutional. That motion was overruled. The trial court then conducted a bench trial on all remaining claims by both parties. On January 15, 2014, the trial court issued its final judgment entry, reaffirming its partial summary judgment decision, dismissing the Appellees' slander of title claim, and dismissing the Appellants' claims.

A timely notice of appeal was filed with the Fifth District Court of Appeals. On October 16, 2014, the Court of Appeals affirmed the trial court's decision on both assignments of error.

After the instant litigation commenced, all parties agreed to a new lease with Chesapeake dependent upon the resolution of these legal matters. Chesapeake still holds the bonus money awaiting this Court's decision.

PROPOSITION OF LAW I

THE 2006 VERSION OF THE OHIO DORMANT MINERALS ACT CONTROLS THE VESTING OF TITLE IN A SURFACE OWNER WHO DID NOT MAKE A CLAIM FOR THE MINERAL INTERESTS BEFORE THE 2006 ENACTMENT.

STATEMENT IN SUPPORT OF PROPOSITION OF LAW I

The Two Versions of the ODMA

In 1989, the Ohio Legislature adopted the first Ohio Dormant Mineral Act (ODMA). Prior to this Act, the only method to extinguish separated mineral interests was by the use of the Ohio Marketable Title Act. (OMTA) The purpose of the Marketable Title Act is to simplify and facilitate title transactions by allowing people to rely on a record chain of title. ORC §5301.55. Unfortunately, the 1989 ODMA did not simplify matters, but complicated them. The 1989 ODMA provided for a shortened time period of 20 years to claim that mineral rights were abandoned. However, the 1989 version of the ODMA was silent as to how a property owner must act to claim the abandoned rights. **The legislature repealed the 1989 ODMA in 2006 (see HR 151 v. 288 §2) and enacted a new version of the statute (the 2006 ODMA), which clarified the method by which a property owner can claim that the rights were abandoned.** The new statute provided for notice to the current holders, a waiting period of 30 days, and an affidavit to be filed in the county recorder's office. Under both the 1989 and the 2006 ODMA, there are several actions or circumstances which would prevent a surface owner from claiming abandonment. Under the 1989 ODMA, those events must have occurred within "the preceding 20 years". Under the 2006 ODMA, those events must have occurred "within the 20 years immediately preceding the date on which notice is served". ORC §5301.56.

Repeal and Reenactment

In Ohio, parties cannot pick and choose which laws they want to use when they file a lawsuit. Rather, they **must use the laws in effect at the time of the action**. The 2006 change in the procedure to be used in an ODMA claim should have been applied in this case.

The rule of law, which applies, in giving *effect* to a repealing statute, was well stated by Chief Justice Tindal, in *Key v. Goodwin*, 4 Moore & P. 341. ‘The effect of a repealing statute is to obliterate the statute repealed as completely from the records of parliament as if it had never been passed, and that it must be considered as a law that never existed, **except for the purpose of those action or suits which were commenced, prosecuted and concluded while it was an existing law**.

Pruseux v. Welch 20 F.Cas. 24 (1860) (emphasis added). Federal courts follow the same rule.

Landgraf v. USI Film Products, 511 U.S. 244, 273, 114 S.Ct. 1483 (1994). “We anchor our holding in this case on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.” *Bradley v. School Bd. of Richmond*, 416 US 696 (1974).

As stated above, the ODMA was not merely amended in 2006. Section 2 of the bill indicated that the prior version of the bill was “repealed.” Unchanged provisions of an earlier statute would nevertheless be deemed to have continued in effect.

[T]he weight of authority is that where a statute is repealed and all or some of its provisions are at the same time reenacted, the reenactment neutralizes the repeal, and the provisions of the repealed act, which are thus reenacted, continue in force without interruption. If the legislature repeals a single section of the Revised Code by express terms of a legislative enactment, but as a part of such repealing enactment it reenacts the original section in substance with certain additions, the original portions of the section are not to be regarded as having been repealed and reenacted, but as having been continuous and undisturbed by the amending act. The part which remains unchanged is to be considered as having continued the law from the time of its original enactment, and the new or changed portion, as having become the law only at, and subsequent to, the passage of the amendment.

85 Ohio Jur. 3d Statutes § 108. **However, as concerns the portions of the prior statute which are changed by the new statute, “It is presumed that the Legislature intended to change the effect and operation of the law to the extent of the change in the language thereof.”** *Bd. of Educ. of Hancock County v. Boehm*, 102 Ohio St. 292, 131 N.E. 812 (1921) (emphasis added).

One of the Appellees’ argument in favor of using the 1989 ODMA is that, because the amendment in 2006 contained no language concerning retroactive application, the statute must be assumed to only operate prospectively. They believe that the mineral rights transferred automatically under the 1989 ODMA prior to the passage of the 2006 ODMA. They argue that retroactive application of the 2006 ODMA would be unconstitutional.

To determine whether a law is unconstitutionally retroactive in violation of Section 28, Article II of the Ohio Constitution, a court must engage in a two-step analysis. The first step requires an initial determination of legislative intent. *State v. LaSalle*, 96 Ohio St.3d 178, 2002-Ohio-4009, at ¶14 citing *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100 (1988). Legislative intent is determined by applying ORC §1.48. *Id.* ORC §1.48 provides, “A statute is presumed to be prospective in its operation unless expressly made retrospective.” (Emphasis added.) The second step requires a determination of whether the law is substantive or remedial in nature. See *Van Fossen*, *supra*, at syllabus ¶3.

A review of the 2006 ODMA makes clear that it *was* intended by the legislature to cover events that occurred prior to its passage. A reading of section (B) of the statute, states that “[a]ny mineral interests held by any person, other than the owner of the surface of the lands shall be deemed abandoned,” if proper notice is given by the landowner to the mineral owner, and if the minerals have remained dormant *during the 20 years preceding the notice*. The statute became effective on June 30, 2006. The statute therefore clearly conveys that it is intended to

cover facts occurring prior to its enactment and that it is to operate retroactively. Any argument to the contrary would require the 2006 statute to be read as only being available for use by a landowner 20 years after its passage (i.e., 2026) – a completely unreasonable interpretation. Several courts have utilized the 2006 amendment prior to 2026. See *Dodd v. Croskey*, Harrison Ct. App. No. 12 HA 6, 2013-Ohio-4257 (7th Dist.), *appeal pending*, 2013-1730.

The changes in the 2006 ODMA were only procedural in nature. “Changes in procedural rules may often be applied [even] in suits arising before their enactment without raising concerns about retroactivity.” *State v. Ayala*, 10th Dist. Nos. 98AP-349, 98AP-350, 1989 Ohio App. LEXIS 5416, at *6-7 (Nov. 10, 1998) quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 275 (1994). Further, “remedial laws are those affecting only the remedy provided, and include laws that merely substitute a new or more appropriate remedy for the enforcement of an existing right.” *State v. Cook*, 83 Ohio St.3d 404, 411, 700 N.E.2d 570 (1998). **Procedural changes to a statute apply to all proceedings commenced after the effective date, even if the right or cause of action arose prior to the effective date.** *Opalko v. Marymount Hosp., Inc.*, 9 Ohio St.3d 63, 65, 458 N.E.2d 847, 849 (1984); *O'Mara v. Alberto-Culver Co.*, 6 Ohio Misc. 132, 215 N.E.2d 735 (1966).

The 2006 ODMA modified the 1989 ODMA by including the procedural requirement that the owner of the surface must provide notice of his intent to declare the mineral interest abandoned. ORC §5301.56(E). After providing notice, the surface owner must file an affidavit of abandonment including, among other things, a statement that there has been no mineral production in the previous twenty years. ORC §5301.56 (E) & (F). The 2006 ODMA removes the uncertainties in the prior law by setting forth clear procedures when a surface owner seeks abandonment and vesting of a mineral interest.

The rights of the Appellees under the 1989 ODMA were the **potential** for abandonment and vesting of a mineral interest. These rights were not taken away when the statute was amended. The 2006 ODMA only changed the procedure that surface owners must follow to recapture the mineral rights. “A fundamental distinction exists between a law changing accrued substantive rights and a law which changes the remedy for the enforcement of those rights”. *Weil v. Taxicabs of Cincinnati*, 139 Ohio St. 198, 39 N.E.2d 148 (1942). This Court stated that “remedies have to do with the methods and procedure by which rights are recognized, protected and enforced, not with the rights themselves.” *Id.*

“Despite the occasional substantive effect, ‘it is generally true that laws that relate to procedures are ordinarily remedial in nature.’” *Pinkney v. Southwick Investments, L.L.C., supra*, at ¶37, citing, *Van Fossen, supra*. “The fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive.” *Langraf*, 511 U.S. at 275. A change in the way rights are adjudicated is not a “retroactive” change in the law even though it may be outcome-determinative in some instances. *Combs v. Comm’r of Social Security*, 459 F.3d 640, 647 (6th Cir. 2006).

To follow the Appellees’ position, they should be able to pick and choose between the 1989 ODMA and the current law, depending upon which version best suits their needs. As discussed in the Statement of Facts, the Appellants took the required actions under the 2006 ODMA to preserve their rights; first by filing affidavits of transfer, and then the filing of a claim to preserve. The Appellees, perhaps not realizing the steps the Appellants had taken to prevent abandonment under the 2006 ODMA, served the required 2006 ODMA notice by publication. This evidenced an attempt to initially use the 2006 ODMA to recapture minerals. Once the

Appellees realized they had no argument under the 2006 ODMA, this tactic was later abandoned in favor of relying upon the 1989 ODMA.

Twenty Years Preceding What?

There is clearly ambiguity in what constitutes the 20 year period referred to in the 1989 ODMA. Under the 2006 ODMA, an inquiry is made into whether a savings event occurred within the 20 years preceding the landowner's required notice to the mineral owner of their intent to recapture the minerals. However, under the 1989 ODMA, the look back period is less clear – it indicates “*within the preceding 20 years.*” The question that arises is: Preceding what? Courts do not always agree. *Eisenbarth*, supra.

As explained in a report of the Ohio Bar Association's Natural Resources Committee concerning the Dormant Mineral Act, a primary motivation for the statute being repealed and amended in 2006 was to clarify the ambiguity as to what constituted the 20-year period of time under the statute.

[I]n the years since enactment of ORC § 5301.56, Courts and practitioners have experienced difficulty interpreting this statute, which resulted in the Natural Resources Committee's preparation of this amendment.

The major changes addressed in the amendment are the following:

- 1) the original statute provided for the lapse to occur if no specified activities took place within “the preceding twenty years.” Questions arose as to whether that language meant 20 years preceding enactment of the statute, 20 years preceding commencement of an action to obtain the minerals or any 20-year period in the chain of title. To clarify this, the amendment provides that the effective period is 20 years immediately preceding the filing of a notice ...

See, Report attached hereto at Appendix.

The only rational interpretation of the 1989 ODMA is that the 20-year look-back period be measured from the point that an action to obtain the minerals is commenced by a landowner. Here, because Appellees never filed a suit before the 2006 ODMA was enacted, they cannot

prevail under the 1989 ODMA. Even using the 1989 ODMA in 2011, the Appellees would fail to show a lack of title transactions.

All of the cases allowing for automatic vesting struggle with the same question – Twenty years preceding what? For example, in *Chesapeake Exploration v. Buell*, Case No. 2:12 CV 916 (S.D. Ohio 2014), the court held:

Under either version of the ODMA, a twenty year clock begins to run the moment that the mineral rights are acquired by someone other than the land holder. If twenty years runs in which the rights are dormant and there is no “savings event” under 5301.56(B), the mineral rights vest in the matter prescribed in the statute. A 5301.56(B) savings event restarts the twenty-year clock from the date of the event.

Most of the other trial court decisions on this issue used a different method to determine the 20- year period. They use only the effective date of the 1989 ODMA. *Riddel v. Layman*, Licking County App. No. 94 CA 114, 1995 WL 498812 (5th Dist). *Eisenbarth* shows the double-edged sword of *Riddel*. In *Eisenbarth*, the appellate court held that a 1974 mineral lease meant that the surface owner could **never** use the 1989 ODNMA.)

Riddel conflicts with the statutory language of the 1989 ODMA. “A mineral interest may be preserved indefinitely from being deemed abandoned by the occurrence of ... successive filings of claims to preserve mineral interests.” ORC §5301.56(D)(1) (1989). If the statute was only concerned with the 1969-1989 period, only one claim would need to be recorded -- there would be no need for “*successive*” filings to “*indefinitely*” preserve mineral rights for later 20-year periods.

The above problems are completely alleviated by tying the 20-year look back to an action commenced by the landowners to reclaim the minerals. It is the only reasonable interpretation of the statutory language, and the one that this Court should utilize. If a surface owner did not file an action before 2006’s repeal, the surface owner must use the 2006 ODMA.

PROPOSITION OF LAW II

II. THE 1989 VERSION OF THE ODMA DID NOT PROVIDE MINERAL OWNERS WITH THE DUE PROCESS OF LAW REQUIRED UNDER THE STATE AND FEDERAL CONSTITUTION.

STATEMENT IN SUPPORT OF PROPOSITION OF LAW II

If the 1989 ODMA is read as somehow “automatically” transferring title of the minerals to the landowner, issues of due process arise. United States Supreme Court precedent on due process in the area of mineral rights separates the vesting of the right with the notice requirements of the statute. Many Ohio courts are interpreting the 1989 ODMA as requiring no notice. However, the 1989 ODMA has been repealed. Surface owners are attempting to argue that the lapse occurred and rights vested before the statute was repealed and without due process to the mineral owners.

it is essential to recognize the difference between the self-executing feature of the statute and a subsequent judicial determination that a particular lapse did in fact occur. As noted by appellants, no specific notice need be given of an impending lapse. If there has been a statutory use of the interest during the preceding 20-year period, however, by definition there is no lapse-whether or not the surface owner, or any other party, is aware of that use. Thus, no mineral estate that has been protected by any of the means set forth in the statute may be lost through lack of notice. It is undisputed that, before judgment could be entered in a quiet title action that would determine conclusively that a mineral interest has reverted to the surface owner, the full procedural protections of the Due Process Clause-including notice reasonably calculated to reach all interested parties and a prior opportunity to be heard-must be provided.

Texaco, Inc. v. Short, 454 U.S. 516, 533-34, 102 S. Ct. 781, 794, 70 L. Ed. 2d 738 (1982). Though Indiana’s statute was “self-executing,” a party wishing to take advantage of the statute would, nevertheless, have to pursue a quiet title action to “determine conclusively” the status of title. The mineral owner would obviously have a right to participate in such proceedings and would be afforded due process and the right to show that some savings event *had* occurred in the relevant time frame. If the 20 year look back period of the ODMA is measured from the

point that suit is filed, a dormant mineral owner would be afforded due process. Since the 1989 ODMA was repealed before the Appellees filed suit, they lost their rights under the 1989 ODMA.

The procedures under the 2006 ODMA provide notice to the holder of the mineral interest and allow him or her to protect that interest against a claim of abandonment by a surface owner. It is these private property rights that are expressly protected by the Ohio Constitution's directive that "[p]rivate property shall ever be held inviolate[.]" Ohio Const., Art. I § 19. This Court stated, "The right of private property is an *original* and *fundamental* right, existing anterior to the formation of government itself." *City v. Norwood v. Horney*, 110 Ohio St.3d 353 (2006), ¶36 (emphasis in original). "Ohio has always considered the right of property to be a fundamental right. There can be no doubt that the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces." *Id.*

Other courts have recognized the need to interpret the ODMA in a manner that recognizes a mineral owner's protected property rights:

In any event, Due Process requirements in both the federal and state constitutions unquestionably mandate notice and an opportunity to respond before a dispute about those rights can be resolved. Courts should construe statutes in the manner that best confirms their constitutionality.

Dahlgren, supra, at page 16, citing *Mahoning Education Association of Developmental Disabilities v. State Employment Relations Board*, Mahoning Cty. Case 11 MA 52, 2012-Ohio-3000 (7th Dist.), ¶ 19, affirmed on other grounds, 137 Ohio St.3d 257, 2014-Ohio-4654; *State v. Carnes*, Mahoning Cty. Case 05 MA 231, 2007-Ohio-604, (7th Dist.). The Appellees advocate a reading of the 1989 ODMA whereby a holder's valuable mineral rights can "automatically" be

forfeited, without any notice or ability to contest the landowner's claim. Such an interpretation does not pass constitutional muster for due process.

PROPOSITION OF LAW III

III. THE OHIO DORMANT MINERAL RIGHTS ACT IS NOT NOW AND NEVER WAS SELF-EXECUTING.

STATEMENT IN SUPPORT OF PROPOSITION OF LAW III.

Neither version of the ODMA is “self-executing.” The 1989 ODMA did not vest any rights with surface owners. It merely gave them an opportunity to seek the mineral rights through the operation of a law and a method to quiet title. The 1989 ODMA required a quiet title action. The 2006 ODMA allows that process to be skipped with a procedure for recording instruments. Both statutes only gave surface owners a chance to take mineral rights. To rule otherwise would force a property owner to take something he or she did not want. Therefore, application of the 2006 ODMA does not take away any property from surface owners -- they never acquired it.

Vested vs. Inchoate Rights

The Appellees have argued that they obtained vested rights in the mineral estate without lifting a finger, filing a claim, or taking any action. As such, they claim that it would be unconstitutional to take those rights away. In other words, it is constitutional to take the Appellants’ mineral rights without notice, but unconstitutional to give them back.

This problem is avoided by seeing the minerals as an “inchoate” right that the surface owner could obtain instead of a “vested” right. “The absence of [any savings under the 1989 ODMA for over 20 years] created an inchoate right; it could not and did not transfer ownership without judicial confirmation or at least an opportunity for the disowned party to contest their absence of the effect of their absence.” *Dahlgren v. Brown Farm*, Carroll County 2013 CVH

274455 (V.J. Markus), *reversed*, Carroll County App. Case 13 CA 896, 2014-Ohio-4001 (7th Dist.), *appeal pending*, 2014-1655.

Ohio's Marketable Title Act and the ODMA are integrated laws intended to be read together. *Dahlgren*, pg. 5. As that court noted: "Both [acts] support reliance on public documents rather than private communications for title transfers." *Id.*, page 6. The purpose of both acts is to allow the general public to more easily determine who owns certain property rights by reviewing the chain of title in the county recorder's office. To find that the 1989 ODMA automatically vests mineral rights with a surface owner without a court filing or recording presents several problems:

- It prevents clarity of title.
- It prevents dispute resolution.
- It runs contrary to the preference in the law against forfeitures.
- It presumes that the ODMA's "deemed abandoned" is the same as the Marketable Title Act's language that unprotected rights are "null and void" and "extinguished".
- It creates a situation where the record marketable title does not accurately state the status of the title.

Id., page 15. Also see *M&H Partnership v. Hines*, Harrison County Common Pleas Court Case No. CVH-2012-0059, at page 8 (attached).

The 1989 ODMA was not "automatic" or "self-executing"

A review of the language of the 1989 ODMA refutes the argument that the 1989 ODMA automatically vested the mineral rights in the surface owner after the passage of the required time periods, and that the statute is "self-executing". The legislature did not intend the 1989

ODMA to somehow cause all severed dormant mineral rights to automatically and arbitrarily vest back to the surface owners in 1992 in one fell swoop. This belief would completely bypass the recorder's office and belie the purpose of the statute to facilitate and create a clear mineral title record. The statute is not directed at having ownership of a mineral estate merge with the surface owners of the surface at every opportunity, but rather at allowing a claim where mineral owners have truly abandoned those rights.

The Appellees have continuously referred to the 1989 ODMA as “automatic” and “self-executing.” No such words are found in the statute. Instead, the statute “deemed” that the mineral rights would revert to the landowner upon the existence of certain conditions. ORC §5301.56(B). In other circumstances, courts have held that the use of the term “deemed” in a statute merely created a presumption that could be rebutted at trial, such as when one party claims he paid child support and the recipient claims that it was a gift. *Jacobs v. England*, Warren County Ct. App. Case CA92-11-097, 1993 WL 414258 (12th Dist.), followed *Finn v. Finn*, Mahoning County Ct. App. Case 94 CA 7, 1995 WL 350608 (7th Dist.).

To read the 1989 ODMA to “vest” mineral rights automatically would be a first in Ohio. A property owner is not “vested” with his neighbor's real estate by the operation of the law of adverse possession. The property owner must first file a quiet title action and prove the elements of adverse possession. Likewise, a property owner seeking to declare the abandonment of a mineral lease must follow a specific procedure before the lease can be cancelled in the recorder's office. ORC §5301.332. Land contract cancellations must also be recorded. ORC §5301.33. The Legislature would not have intended to “vest” property rights in only this instance without making it abundantly clear.

CONCLUSION

The Appellants respectfully request that this Honorable Court accept this appeal for further consideration on the propositions of law presented in this brief, to later grant the Appellants' requests, reverse the judgment of the Court of Appeals, and to enter judgment on behalf of the Appellants in the trial court. As this Court has similar cases before it that have already been exhaustively briefed, the Appellants have no objection to this Court accepting this case for review and staying the briefing schedule until it decides the issues raised in *Corban*, *Buell*, and *Shonderick-Nau*, and *Dahlgren*.

Respectfully submitted,



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PROOF OF SERVICE

A copy of the foregoing Notice was served by regular mail upon **Attorney David Butz** and **Attorney Matthew Onest** at Wilkins, Griffiths & Dougherty Co., LPA, 3775 Munson NW, Canton, OH 44718, for Appellees, this 24 day of November, 2014.



PAUL HERVEY / JILLIANN A. DAISHER

APPENDIX

Decision, Fifth District Court of Appeals, October 16, 2014.	P1
Final decision, Tuscarawas County Court of Common Pleas, January 11, 2014.	P18
Summary judgment decision, Tuscarawas County Court of Common Pleas, February 21, 2013.	P32
Summary judgment decision, <i>M&H Partnership v. Hines</i> , Harrison County Common Pleas Court Case No. CVH-2012-0059, January 14, 2014.	P55
Ohio State Bar Association's Natural Resources Committee report concerning the Dormant Mineral Act.	P65

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

FILED
DISTRICT COURT OF APPEALS
TUSCARAWAS CO., OHIO

OCT 16 2014

CHRISTOPHER WENDT, ET AL.

Plaintiffs-Appellees

-vs-

JUDITH DICKERSON, ET AL.

Defendants-Appellants

JUDGMENT ENTRY
James M. Hopkins
CLERK OF COURTS

Case No. 2014 AP 01 0003

For the reasons stated in our accompanying Opinion on file, the judgment of the Tuscarawas County Court of Common Pleas is affirmed. Costs assessed to Appellants.

Patricia A. Delaney

HON. PATRICIA A. DELANEY

W. Scott Gwin

HON. W. SCOTT GWIN

Sheila G. Farmer

HON. SHEILA G. FARMER

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

FILED
5TH DISTRICT COURT OF APPEALS
TUSCARAWAS CO., OHIO

OCT 16 2014

James M. Boyles
CLERK OF COURTS

CHRISTOPHER WENDT, ET AL.

JUDGES:

Plaintiffs-Appellees

Hon. W. Scott Gwin, P.J.
Hon. Sheila G. Farmer, J.
Hon. Patricia A. Delaney, J.

-vs-

Case No. 2014 AP 01 0003

JUDITH DICKERSON, ET AL.

Defendants-Appellants

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Tuscarawas County
Court of Common Pleas, Case No. 2012
CV 02 0135

JUDGMENT:

AFFIRMED

DATE OF JUDGMENT ENTRY:

APPEARANCES:

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Delaney, J.

{¶1} Defendants-Appellants Judith Dickerson, Mary Louise Foster, Elaine F. Harris, Claire M. Dickerson, Richard H. Dickerson, Robert J. Dickerson, Raymond Dickerson, Constance Clark, Deborah Snelson, Misty Engstrom, Ronald K. Dickerson, John L. Dickerson, and Wanda Dickerson ("the Dickersons") appeal the February 21, 2013 and January 15, 2014 judgment entries of the Tuscarawas County Court of Common Pleas.

FACTS AND PROCEDURAL HISTORY

{¶2} In 1928, John R. Dickerson obtained full ownership interest in approximately 82 acres of real property located in Section 20 of Cadiz Township, Harrison County, Ohio ("the Property"). Approximately four years later, John R. Dickerson transferred one-half of the Property to his wife, Marjorie I. Dickerson. John and Marjorie Dickerson were divorced prior to the transfer. On December 17, 1952, John and Marjorie Dickerson jointly transferred their interest in the Property to the Pittsburgh Consolidated Coal Company via a warranty deed; however, John and Marjorie Dickerson each retained a one-half interest in all of the oil and gas and the rights to drill and/or explore said oil and gas associated with the Property. John and Marjorie Dickerson transferred the rights to the Property's surface, coal, and all other non-oil and gas minerals. Pursuant to the 1952 transaction, the mineral rights were severed from the surface estate.

{¶3} John R. Dickerson passed away on September 7, 1976. His mineral rights to the Property were not included in his estate. Marjorie I. Dickerson passed away on August 24, 1994. Her estate was not probated at the time of her death. Judith

Dickerson, Mary Louise Foster, Elaine F. Harris, Claire M. Dickerson, Richard H. Dickerson, Robert J. Dickerson, Raymond Dickerson, Constance Clark, Deborah Snelson, Misty Engstrom, Ronald K. Dickerson, John L. Dickerson, and Wanda Dickerson ("the Dickersons") are the sole heirs of John R. Dickerson and Marjorie I. Dickerson.

{¶4} Pittsburgh Consolidated Coal Company strip-mined and reclaimed the property. In 1997, Pittsburgh Consolidated Coal Company sold the Property to Neil Porter via a limited warranty deed. In 2006, Neil Porter sold the Property to Plaintiffs-Appellees Christopher and Veronica Wendt ("the Wendts") via a survivorship deed. The deed to the property was recorded on April 21, 2006. The deed was subject to the reservation by "John R. Dickerson and Marjorie I. Dickerson, their heirs and assigns for all of the oil and gas with the right to drill for in Warranty Deed filed for record December 17, 1952 in Volume 133, page 69, Deed Records."

{¶5} From 1952 to 2011, the Dickersons took no action related to their mineral rights to the Property.

{¶6} In 2011, the Dickersons began enforcing their inherited mineral rights to the Property. The Dickersons gave John L. Dickerson a power of attorney to deal with the inherited mineral rights on behalf of all the Dickerson heirs. On February 28, 2011, the Dickersons recorded two documents with the Harrison County Recorder's Office, each entitled "Affidavit for Transfer of Real Estate Inherited." In May 2011, the Dickersons signed a lease with Chesapeake Exploration LLC for the mineral rights to the Property. The lease was recorded by Chesapeake on November 2, 2011.

{¶17} During 2011, the Wendts also sought to lease their mineral rights to the Property. The Wendts signed a mineral lease with Chesapeake in the spring of 2011. The lease failed because of the Dickersons' potential interest in the mineral rights.

{¶18} On October 11, 2011, the Wendts published a notification of abandonment in a local newspaper pursuant to R.C. 5301.56. On October 21, 2011, the Wendts recorded an Affidavit of Abandonment with the Harrison County Recorder's Office. The Affidavit asserted the Wendts owned all the oil and gas rights by the automatic operation of R.C. 5301.56.

{¶19} The Wendts executed a second lease with Chesapeake on October 31, 2011, but the lease was terminated due to the conflict in the mineral rights.

{¶10} On December 9, 2011, the Dickersons recorded a "Claims to Preserve Mineral Interest regarding any mineral interests inherited from Marjorie Dickerson and to Preserve Mineral Interest regarding any mineral interests inherited from John Dickerson" with the Harrison County Recorder's Office.

{¶11} On February 9, 2012, the Wendts filed a complaint against the Dickersons and Chesapeake Exploration LLC in the Tuscarawas County Court of Common Pleas. The complaint brought nine causes of action: declaratory judgment, quiet title, injunction, slander of title, unjust enrichment/quantum meruit, trespass, negligence/negligence per se, potential interference with business relationship, and constructive trust. The Wendts requested the trial court rule they were the lawful owners of the mineral rights. The Wendts argued pursuant to the 1998 version of the Ohio Dormant Mineral Act, the mineral rights merged with the surface estate no later than

March 22, 1992. The Dickersons filed a counterclaim alleging slander of title and intentional interference with business relationships.

{¶12} On February 24, 2012, the granddaughter of Marjorie I. Dickerson filed an application with the Harrison County Probate Court to relieve the estate of Marjorie I. Dickerson from administration.

{¶13} The Wendts filed a motion for summary judgment on December 23, 2012. The Dickersons filed a motion for summary judgment on December 17, 2012. The Dickersons' motion did not request judgment as a matter of law on their counterclaims.

{¶14} The Wendts dismissed Chesapeake as a party defendant on January 8, 2013.

{¶15} The trial court ruled on the pending motions for summary judgment on February 21, 2013. The trial court granted the Wendts' motion for summary judgment as it pertained to Wendts' claims for declaratory judgment, quiet title, and injunction. The trial court found the 1998 version of the Ohio Dormant Mineral Act applied and as such, the mineral rights merged with the surface estate on March 22, 1992. The Wendts were therefore the owners of the mineral rights underlying the surface estate. The trial court found there were genuine issues of material fact as to the Wendts' remaining claims. The trial court denied the Dickersons' motion for summary judgment. The trial court's decision on summary judgment is the subject of the within appeal.

{¶16} The trial court held a bench trial on the parties' remaining claims. The Wendts dismissed their claims for unjust enrichment and negligence. On January 15, 2014, the trial court issued its judgment entry that found the Wendts and the Dickersons were not entitled to judgment on their remaining claims.

ASSIGNMENTS OF ERROR

{¶17} The Dickersons raise two Assignments of Error:

{¶18} "I. THE TRIAL COURT ERRED BY FINDING THAT THE 1989 OHIO DORMANT MINERAL ACT APPLIES TO THIS CASE.

{¶19} "II. THE TRIAL COURT ERRED IN FINDING THAT THE 1989 ODMA WAS CONSTITUTIONALLY APPLIED TO THE APPELLANTS."

ANALYSIS

{¶20} The American energy boom from the drilling of Utica and Marcellus Shale has touched many aspects of life in the State of Ohio -- the economy, the environment, and now, the law. The history of Ohio is rich with the production of coal, oil, and gas. Ohio has managed to keep pace with the utilization of Ohio's natural resources, but the rapid development of the production of shale gas is testing Ohio's existing mineral rights laws. Energy development corporations are presenting Ohio landowners and mineral rights holders with the opportunity to lease the mineral rights for thousands of dollars per acre. Ohio landowners, mineral rights holders, and energy producers are looking to Ohio's mineral rights laws to answer their most important question: Who owns the mineral rights?

Ohio Dormant Mineral Act

{¶21} The law currently at the forefront of Ohio's energy boom is R.C. 5301.56, commonly referred to as the Ohio Dormant Mineral Act ("DMA"). The impetus for the creation of the DMA was a decision originating out of this Court and appealed to the Ohio Supreme Court: *Heifner v. Bradford*, 4 Ohio St.3d 49, 446 N.E.2d 440 (1983). In *Heifner*, the mineral rights were severed from the surface estate, causing two chains of

title. The mineral rights were transferred through the probate court. The surface estate was preserved by instruments filed in the recorder's office. Neither the surface chain of title nor the mineral rights chain of title referred to the other. The parties to the surface estate and the mineral rights both claimed the Marketable Title Act, functioned to give them marketable title to the mineral rights. The Fifth District held the surface deed transferred the entire estate, including the mineral rights. *Heifner* at 49. The Supreme Court reversed. It held the conveyance of the mineral rights that passed in 1957 under terms of will was a "title transaction" within meaning of Marketable Title Act; therefore, the beneficiaries' interest was not extinguished by operation of Marketable Title Act even though the surface estate had an unbroken chain of title of record of 40 years or more. *Heifner*, paragraph one and two of syllabus.

{¶22} The DMA was the General Assembly's response to *Heifner*. The DMA, effective March 22, 1989, was originally enacted as part of Ohio's Marketable Title Act. The 1989 DMA provides that a mineral interest held by one other than the surface owner "shall be deemed abandoned and vested in the owner of the surface" if no savings event occurred within the preceding 20 years. R.C. 5301.56(B)(1)(c). The six savings events are: (i) the mineral interest was the subject of a title transaction that has been filed or recorded in the recorder's office; (ii) there was actual production or withdrawal by the holder; (iii) the holder used the mineral interest for underground gas storage; (iv) a mining permit has been issued to the holder; (v) a claim to preserve the mineral interest was filed; or (vi) a separately listed tax parcel number was created. R.C. 5301.56(B)(1)(c)(i)-(vi).

{¶23} The 1989 DMA provided the following grace period: "A mineral interest shall not be deemed abandoned under division (B)(1) of this section because none of the circumstances described in that division apply, until three years from the effective date of this section." R.C. 5301.56(B)(2).

{¶24} The 1989 DMA was enacted to solve the title problems associated with severed mineral rights and to further the public policy interests in developing Ohio's minerals. The practical application of the 1989 DMA, however, caused confusion.

{¶25} In 2006, the General Assembly amended the DMA to fix the procedural problems associated with the 1989 DMA. The 2006 DMA clarified the 20-year period by calculating it as being the 20-years immediately proceeding the date when notice of intent is served or published by the surface owner on the mineral rights holders. It eliminated the three year grace period in R.C. 5301.56(B)(2). The 2006 DMA set forth a specific procedure for a surface owner to obtain the mineral interests. R.C. 5301.56(B) states the mineral interest "shall be deemed abandoned and vested in the owner of the surface," operates only if none of the savings events apply and "if the requirements established in division (E) of this section are satisfied." R.C. 5301.56(E) requires that

Before a mineral interest becomes vested under division (B) of this section in the owner of the surface of the lands subject to the interest, the owner of the surface of the lands subject to the interest shall do both of the following:

- (1) Serve notice by certified mail, return receipt requested, to each holder or each holder's successors or assignees, at the last known address of each, of the owner's intent to declare the mineral

interest abandoned. If service of notice cannot be completed to any holder, the owner shall publish notice of the owner's intent to declare the mineral interest abandoned at least once in a newspaper of general circulation in each county in which the land that is subject to the interest is located. The notice shall contain all of the information specified in division (F) of this section.

(2) At least thirty, but not later than sixty days after the date on which the notice required under division (E)(1) of this section is served or published, as applicable, file in the office of the county recorder of each county in which the surface of the land that is subject to the interest is located an affidavit of abandonment that contains all of the information specified in division (G) of this section.

{¶26} The 2006 DMA also requires the mineral holder who claims an interest has not been abandoned may file with the county recorder: (a) a claim to preserve or (b) an affidavit containing a savings event within 60 days after the notice of abandonment is served or published. R.C. 5306.56(H)(1). If no such timely document is recorded, then the surface owner "who is seeking to have the interest deemed abandoned and vested in the owner" shall file with the recorder a notice of the failure to file. R.C. 5301.56(H)(2). "Immediately after" such recording, "the mineral interest shall vest in the owner of the surface * * *." *Id.*¹

¹ However, this procedural mechanism was amended in 2014. R.C. 5301.56(H)(2) states that upon a holder's failure to file a claim to preserve, the surface owner seeking to have a mineral interest vested in them must file a notice of failure to file a claim to preserve in the county's recorder's office. Upon the recording of such notice, the mineral interest vests in the owner of the surface of the lands.

{¶27} The enactment of the 2006 DMA did not eliminate the conflict between the surface owner and the holder of the mineral interests. In order to determine who owns the mineral rights, the Ohio landowners, mineral rights holders, and energy producers are now asking: Which version of the DMA applies?

Litigation Regarding the DMA

{¶28} On September 3, 2014, the Ohio Supreme Court accepted the appeal of *Walker v. Shondrick-Nau*, a case originating out of the Seventh District Court of Appeals.² In *Walker*, a severed mineral interest was created by a reservation in a 1965 deed. On April 27, 2012, the surface owner filed a quiet title action seeking abandonment and vesting of the mineral interest to the surface owner. On appeal, the Seventh District affirmed the judgment of the trial court to find the 1989 DMA could still be used after the 2006 DMA amendments because the prior statute was self-executing and the lapsed right automatically vested with the surface owner. *Walker*, 7th Dist. Noble No. 13NO402, 2012-Ohio-1499.

{¶29} The Supreme Court accepted all propositions of law presented in the *Walker* appeal. Those issues are:

Proposition of Law No. 1: The 2006 version of the DMA is the only version of the DMA to be applied after June 30, 2006, the effective date of said statute.

² If a map of the potential Marcellus and Utica Shale in Ohio is compared to a map of the Ohio appellate districts, the observer will see that the counties of the Seventh and the Fifth District Courts of Appeals are at the epicenter of the mineral rights debate. The Court notes the property at question in the present appeal is located in Harrison County, a county within the territory of the Seventh District Court of Appeals. Other appellate districts that could be addressing these issues in the future are the Fourth, Eighth, Ninth, Tenth, and Eleventh.

Proposition of Law No. II: To establish a mineral interest as "deemed abandoned" under the 1989 version of the DMA, the surface owner must have taken some action to establish abandonment prior to June 30, 2006. In all cases where a surface owner failed to take such action, only the 2006 version of the DMA can be used to obtain relief.

Proposition of Law No. III: To the extent the 1989 version of the DMA remains applicable, the 20-year look-back period shall be calculated starting on the date a complaint is filed which first raises a claim under the 1989 version of the DMA.

Proposition of Law No. IV: For purposes of R.C. 5301.56(L3)(3) [sic], a severed oil and gas mineral interest is the 'subject of any ~~title~~ transaction which specifically identifies the recorded document creating that interest by volume and page number, regardless of whether the severed mineral interest is actually transferred or reserved.

Proposition of Law No. V: Irrespective of the savings events in R.C. 5301.56(B)(3), the limitations in R.C. 5301.49 can separately bar a claim under the DMA.

Proposition of Law No. VI: The 2006 version of the DMA applies retroactively to severed mineral interests created prior to its effective date.

Walker, Ohio Supreme Court Case No. 2014-0803.

{¶30} As of the date of the authoring of this opinion, the Ohio Supreme Court has three other cases before it that question the appropriate application of the DMA:

Chesapeake v. Buell, Case No. 2014-0067; *Corban v. Chesapeake*, Case No. 2014-0804; and *Dodd v. Crosky*, Case No. 2013-1730.

{¶31} The present appeal now gives the Fifth District Court of Appeals the opportunity to address which version of the DMA applies.

L.

{¶32} The Dickersons' first Assignment of Error argues the trial court erred by finding that the 1989 DMA applied to the case. We disagree.

{¶33} The trial court granted the Wendts' motion for summary judgment to find the 1989 DMA applied to automatically vest the mineral rights in the surface owner. We refer to Civ.R. 56(C) when reviewing a motion for summary judgment which provides, in pertinent part:

Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

{¶34} The moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court, which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). The nonmoving party then has a reciprocal burden of specificity and cannot rest on the allegations or denials in the pleadings, but must set forth "specific facts" by the means listed in Civ.R. 56(C) showing that a "triable issue of fact" exists. *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 115, 526 N.E.2d 798, 801 (1988).

{¶35} Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 674 N.E.2d 1164 (1997), citing *Dresher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264 (1996).

{¶36} In the Dickersons' appeal to this court, the Dickersons present arguments parallel to those outlined in the Seventh District Court of Appeals decisions in *Walker v. Shondrick-Nau, supra* and *Swartz v. Householder*, 2014-Ohio-2359, 12 N.E.2d 1243 (7th Dist.). As the appellants argued in *Walker* and *Swartz*, the Dickersons argue the trial court erred when it found the 2006 DMA was not retroactive and the 1989 DMA applied to determine the mineral rights automatically vested with the surface owners on March 22, 1992.

{¶37} Based on the Dickersons arguments, we are inclined to follow the persuasive authority of our colleagues in the Seventh District Court of Appeals to find the trial court correctly determined that the 1989 DMA applied and under the language

of the 1989 DMA, the mineral rights automatically vested with the surface owners on March 22, 1992.

{¶38} The Dickersons' first Assignment of Error is overruled.

II.

{¶39} The Dickersons argue in their second Assignment of Error the trial court erred when it found the 1989 DMA was constitutionally applied to the Dickersons. We disagree.

{¶40} Upon review of the record, the Dickersons did not argue the constitutionality of the 1989 DMA in their motion for summary judgment. The trial court did not address the constitutionality of the 1989 DMA in its February 21, 2013 judgment entry granting summary judgment in favor of the Wendts. A bench trial was held on the parties' remaining claims. The Dickersons raised the constitutionality issue in their post-trial rebuttal brief. In the trial court's January 15, 2014 judgment entry ruling on the remaining claims, the trial court did not address the constitutionality argument.

{¶41} There could be argument that the Dickersons failed to truly raise the constitutionality of the statute at the trial court level, therefore rendering the issue waived for purposes of appeal. However, the court will address the Dickersons' second Assignment of Error.

{¶42} The United States Supreme Court examined a similar dormant mineral statute enacted by the State of Indiana in *Texaco v. Short*, 454 U.S. 516, 102 S.Ct. 781 70 L.Ed.2d 738 (1982). The Supreme Court found Indiana's DMA was not unconstitutional as a state may treat as abandoned a mineral interest that has not been used for twenty years and for which no statement of claim has been filed; and thus, a mineral holder can validly lose his interest without advance notice from the surface owner. *Swartz*, 2014-Ohio-2359 at ¶ 41 citing *Texaco*, 454 U.S. 516, 102 S.Ct. 781.

{¶43} Accordingly, we overruled the Dickersons' second Assignment of Error.

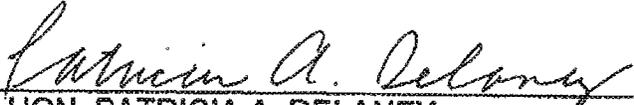
CONCLUSION

{¶44} The judgment of the Tuscarawas County Court of Common Pleas is affirmed.

By: Delaney, J., and

Gwin, P.J. and

Farmer, J., concurs.



HON. PATRICIA A. DELANEY



HON. W. SCOTT GWIN



HON. SHEILA G. FARMER

PAD:kgb/PM

FILED
COURT OF COMMON PLEAS
TUSCARAWAS COUNTY, OHIO

2014 JAN 15 PM 12 29

IN THE COURT OF COMMON PLEAS

TUSCARAWAS COUNTY, OHIO

JEANNE M. STEPHEN
CLERK OF COURTS

GENERAL TRIAL DIVISION

CHRISTOPHER WENDT, et al.,	:	CASE NO. 2012 CV 02 0135
	:	
PLAINTIFFS	:	JUDGE
	:	EDWARD EMMETT O'FARRELL
	:	
	:	<u>JUDGMENT ENTRY - FURTHER NON-</u>
	:	<u>ORAL CONSIDERATION CONDUCTED</u>
	:	<u>ON 1/13/2014 PERTAINING TO 10/11/2013</u>
	:	<u>BENCH TRIAL ON REMAINING</u>
	:	<u>CLAIMS OF PLAINTIFFS, DEFENDANTS'</u>
	:	<u>COUNTERCLAIMS AND</u>
	:	<u>CONSIDERATION OF MOTIONS TO</u>
	:	<u>STRIKE AND FOR SANCTIONS-</u>
vs.	:	<u>PLAINTIFFS ARE NOT ENTITLED TO</u>
	:	<u>JUDGMENT ON COUNTS FOUR AND</u>
	:	<u>EIGHT OF THEIR COMPLAINT -</u>
	:	<u>DEFENDANTS ARE NOT ENTITLED</u>
	:	<u>TO JUDGMENT ON THEIR</u>
	:	<u>COUNTERCLAIMS - MOTIONS TO</u>
	:	<u>STRIKE AND MOTION FOR</u>
	:	<u>SANCTIONS OVERRULED - ORDERS</u>
	:	<u>ENTERED</u>
	:	
JUDITH DICKERSON, et al.,	:	
	:	
DEFENDANTS	:	

This matter was further considered by Edward Emmett O'Farrell, Judge, Court of
Common Pleas, Tuscarawas County, Ohio, General Trial Division, on 1/13/2014 on a Non-Oral
basis relative to the following:

- ◆ 10/11/2013 Bench Trial
- ◆ Plaintiffs' Trial Brief submitted to the undersigned on 10/11/2013 at the Bench Trial
- ◆ Plaintiffs', Christopher and Veronica Wendt, Proposed Findings of Fact and Conclusions of Law, with Summation filed 10/31/2013
- ◆ Defendants' Notice of Submission of Findings of Fact and Conclusions of Law and Closing Statement filed 10/31/2013
- ◆ Plaintiffs, Christopher and Veronica Wendt's Rebuttal Argument filed 11/12/2013
- ◆ Defendants' Response Brief on Plaintiffs' Closing Arguments filed 11/12/2013
- ◆ Plaintiffs', Christopher and Veronica Wendt, Motion to Strike Portions of Defendants' Rebuttal Argument or in the Alternative, Request for Leave to File Surrebutal (sic) to Defendants' Rebuttal Argument filed 11/15/2013
- ◆ Defendants' Response to Plaintiffs' Motion to Strike Rebuttal Argument and Request for Leave to File Surrebutal (Sic); Defendants' Motion to Strike Plaintiffs' Pleading; Defendants' Motion for Sanctions filed 11/25/2013
- ◆ Plaintiffs', Christopher and Veronica Wendt, Response in Opposition to Defendants' Motion to Strike Plaintiffs' Pleadings and Motion for Sanctions filed 12/4/2013

A Bench Trial was conducted on 10/11/2013. Plaintiffs, Christopher P. Wendt and Veronica Wendt, were present in the Courtroom and represented by David Butz and Matthew W. Onest, Krugliak, Wilkins, Griffiths & Dougherty Co., L.P.A., Attorneys at Law, Canton, Ohio. Defendants Judith A. Dickerson, Mary Louise Foster, Elaine F. Harris, Celia M. Dickerson, Richard H. Dickerson, Robert J. Dickerson, Raymond Dickerson, Constance Clark, Deborah Snelson, Misty

Engstrom, Ronald K. Dickerson, Barbara K. Dickerson, John L. Dickerson, Wanda Dickerson, (collectively referred to as the "Dickerson Defendants") were represented in the Courtroom by **Paul B. Hervey** and **Jilliann Daisher**, Fitzpatrick, Zimmerman & Rose Co., L.P.A., Attorneys at Law, New Philadelphia, Ohio. Some, but not all, of the Dickerson Defendants were present in the Courtroom.

The Court

FINDS that Plaintiffs Christopher Wendt and Veronica Wendt filed a Complaint against the Dickerson Defendants and Chesapeake Exploration, LLC (hereafter "Chesapeake"). Count One of Plaintiffs' Complaint for **Declaratory Judgment** alleged that Plaintiffs are entitled to a declaration regarding their ownership of certain mineral rights. Count Two of Plaintiffs' Complaint alleged a cause of action for **Quiet Title** and requested that this Court quiet title to the mineral rights of real estate owned by Plaintiffs. Count Three of Plaintiffs' Complaint alleged a cause of action for **Injunction** and requested an injunction prohibiting Defendants from interfering, objecting or otherwise preventing Plaintiffs from leasing, conveying, or transferring their rights to the oil and gas underlying the real estate, or from taking any action under any existing leases. Count Four of Plaintiffs' Complaint alleged a cause of action for **Slander of Title**. Count Five of Plaintiffs' Complaint alleged a cause of action for **Unjust Enrichment - Quantum Meruit**. Count Six of Plaintiffs' Complaint alleged a cause of action for **Trespass**. Count Seven of Plaintiffs' Complaint alleged a cause of action for **Negligence / Negligence *Per Se***. Count Eight of Plaintiffs' Complaint

alleged a cause of action for **Potential Interference with Business Relationships**. Count Nine of Plaintiffs' Complaint alleged a cause of action for **Constructive Trust**.

FINDS that Plaintiffs' dismissed their claims against Defendant Chesapeake Exploration, L.L.C. only, as provided in the Parties' Stipulated Dismissal Entry filed on 1/8/2013.

FINDS that the Dickerson Defendants filed a Counterclaim against Plaintiffs Christopher and Veronica Wendt, which alleged Counterclaims for **Slander of Title and Intentional Interference with Business Relationships**.

FINDS that the Judgment Entry filed on 2/21/2013 granted summary judgment on Plaintiffs' claims for **Declaratory Judgment, Quiet Title, and Injunction**. Plaintiffs withdrew their claims for **Unjust Enrichment and Negligence** with prejudice to refiling.

FINDS that this matter proceeded on the Plaintiffs' remaining claims of **Slander of Title and Potential (sic) Interference with Business Relationships** and the Counterclaims of Defendants only.

FINDS that testimony was taken from Elaine Harris, Christopher Wendt, Veronica Wendt, Celia Dickerson, and Attorney Rex Miller. Plaintiffs' Exhibits 1 through 6 and 8 through 14 and Defendants' Exhibits A, E, G, H, K, and L were admitted into evidence.

FINDS that the following findings of fact are relevant to the Court's determination of the remaining issues in this case:

1. The dispute in this case pertains to the mineral interest of approximately 81.25 acres of real property located in Cadiz Township, Harrison County, Ohio.
2. Plaintiffs are the true and rightful owners of all mineral rights underlying the subject real estate. (See 2/21/2013 Judgment Entry).
3. John R. and Marjorie Dickerson divorced and sold the subject property in the 1950s. They each retained one-half of the mineral rights on the subject property by reservation and deed.
4. The Dickerson Defendants are the heirs of John R. and Marjorie Dickerson. However, none of the Dickerson Defendants actually had any mineral interests in the subject property after 3/22/1992. (See 2/21/2013 Judgment Entry).
5. On 2/28/2011, Plaintiffs recorded two documents with the Harrison County Recorder's Office, each entitled "Affidavit for Transfer of Real Estate Inherited." (Exhibits 2 and 3).

6. Plaintiffs signed a mineral lease with Chesapeake in the spring of 2011 that paid a bonus of \$2,000.00 per acre. However, this lease failed due to the Dickerson Defendants' potential ownership of the mineral interests.
7. The Dickerson Defendants also signed a lease with Chesapeake in May of 2011. The lease was recorded by Chesapeake on 11/2/2011.
8. Plaintiffs published a notification of abandonment in a local newspaper on 10/11/2011 under R.C. 5301.65.
9. Plaintiffs executed a second lease with Chesapeake with a signing bonus of \$5,800.00 per acre on 10/31/2011. Because of concerns regarding the true ownership of the mineral rights, the lease was terminated.
10. On 12/9/2011, Defendants recorded Claims to Preserve Mineral Interest regarding any mineral interests inherited from Marjorie I. Dickerson and to Preserve Mineral Interest regarding any mineral interests inherited from John R. Dickerson with the Harrison County Recorder's Office (Exhibits 4 and 5).
11. On or before 12/12/2011, Eric Johnson, an attorney representing the Dickerson Defendants, raised concerns to Defendants that they may not have clear title to the mineral rights due to errors of a previous attorney. (Exhibit 6).
12. On 12/21/2011, Plaintiffs recorded an Affidavit of Abandonment with the Harrison County Recorder's Office (Exhibit L), which asserted that Plaintiffs owned all of the subject real estate's oil and gas rights by the automatic operation of R.C. 5301.56.

13. Plaintiffs hired counsel and ultimately filed this lawsuit against the Dickerson Defendants on 2/9/2012.
14. On 2/24/2012, Defendants filed paperwork with the Harrison County Probate Court in an attempt to probate the estate of Marjorie I. Dickerson, alleging that the assets of the estate were \$35,000 or less.
15. During the pendency of this litigation, both sides negotiated new leases with Chesapeake at a price of \$5,000.00 per acre.
16. Although it was ultimately determined that Plaintiffs were the rightful owners of the mineral rights, the Dickerson Defendants had a good faith belief that they were the rightful owners of the mineral interests in the subject property under the reservation of mineral rights made by John R. and Marjorie Dickerson until this Court's 2/21/2013 Judgment Entry granting summary judgment in favor of Plaintiffs.

FINDS that slander of title is a tort action that may be brought against a person who has falsely and maliciously defamed the property, either real or personal, of another, and thereby caused him or her special pecuniary damage or loss. *Green v. Lemarr*, 139 Ohio App.3d 414, 430, 744 N.E.2d 212 (2d Dist., 2000), citing *Buehrer v. Provident Mut. Life Ins. Co. of Philadelphia*, 37 Ohio App. 250, 256, 174 N.E. 597, 599 (1930). "To prevail, a claimant must prove '(1) there was a publication of a slanderous statement disparaging claimant's title; (2) the statement was false; (3) the statement was made with malice or made with reckless disregard of its falsity; and (4) the statement caused actual or special damages.'" *Green*, at 430-431, citing *Colquhoun v. Webber*, 684 A.2d 405, 409

(Me. 1996). "The malice need not be that of a personal hatred, and an act will be deemed malicious if made in reckless or wanton disregard of the rights of another." *Consun Food Industries, Inc. v. Fowkes*, 81 Ohio App.3d 63, 72, 610 N.E.2d 463 (9th Dist. 1991), citing *Childers v. Commerce Mtge. Invests.*, 63 Ohio App.3d 389, 579 N.E.2d 219.

FINDS that a slander of title action must be proven by a preponderance of the evidence. *Bradford v. B & P Wrecking Co., Inc.*, 171 Ohio App.3d 616, 2007-Ohio-1732, 872 N.E.2d 331, ¶55.

FINDS that it may be appropriate to award attorney fees incurred for prosecuting a slander of title action if there is a finding of bad faith. *Green*, at 435-436.

FINDS that "[u]nder Ohio law, 'to establish a claim for tortious interference with a business relationship, a party must show: (1) a business relationship or contract; (2) the wrongdoer's knowledge of the relationship or contract; (3) the wrongdoer's intentional and improper action taken to prevent a contract formation, procure a contractual breach, or terminate a business relationship; (4) a lack of privilege; and (5) resulting damages.'" *Pasqualetti v. Kia Motors America, Inc.*, 663 F.Supp.2d 586, 602 (N.D. Ohio, 2009), citing *Bowshier v. Chrysler Financial Corp.*, 144 F.Supp.2d 919, 926 (S.D. Ohio, 2001); *Brookeside Ambulance, Inc. v. Walker Ambulance Serv.*, 122 Ohio App.3d 150, 155-156, 678 N.E.2d 248 (6th Dist. 1996); *See also Juhasz v. Quik Shops, Inc.*, 55 Ohio App.2d 51, 57, 379 N.E.2d 235 (9th Dist. 1977); *A & B-Abell Elevator Co. v.*

Columbus/Central Ohio Bldg. & Constr. Trades Council, 73 Ohio St.3d 1, 1995-Ohio-66, 651 N.E.2d 1283.

FINDS that “[f]actors to be considered in determining whether someone has acted improperly are the nature of the actor’s conduct, the actor’s motives, the interests of the others with which the conduct interferes, the interest sought to be advanced by the actor, the social interest in protecting the freedom of action of the actor and the contractual interest of the others, the proximity or remoteness of the actor’s conduct to the interference, and the relations between the parties.” *Laurel Valley Oil Co. v. 76 Lubricants Co.*, 154 Ohio App.3d 512, 2003-Ohio-5163, 797 N.E.2d 1033, ¶15 (5th Dist.)

FINDS that “purposeful interference with a third-party business relationship is privileged if undertaken in good faith to protect properly a legally protected interest which might otherwise be impaired or destroyed.” *Metropolitan Life Ins. Co. v. Triskett Illinois, Inc.*, 97 Ohio App.3d 228, 236, 646 N.E.2d 528 (1st Dist., 1994), citing *Elwert v. Pilot Life Ins. Co.*, 77 Ohio App.3d 529, 539, 602 N.E.2d 1219 (1991).

FINDS that punitive damages are recoverable only when the wrong complained of involves ingredients of fraud, malice, insult, or a wanton and reckless disregard of the plaintiff’s rights. *Saberton v. Greenwald*, 146 Ohio St. 414, 428, 66 N.E.2d 224 (1946); *See also Logsdon v. Graham Ford Co.*, 54 Ohio St.2d 336, 339, 376 N.E.2d 1333 (1978); *See also Smithhisler v. Dutter*, 157

Ohio St. 454, 459-460, 105 N.E.2d 868 (1952). A jury must determine that a defendant acted with malice before it can determine the amount of damages due to plaintiff. *Digital & Analog Design Corp. v. North Supply Co.*, 44 Ohio St.3d 36, 43, 540 N.E.2d 1358 (1989).

FINDS that “[t]he necessary element of malice may be based upon evidence showing actual malice or malice by implication, *i.e.*, legal malice.” *Digital & Analog Design Corp.*, at 43-44. “Actual malice, necessary for an award of punitive damages, is (1) that state of mind under which a person’s conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.” *Preston v. Murty* (1987), 32 Ohio St.3d 334, 512 N.E.2d 1174, at the syllabus.

FINDS that although the Dickerson Defendants may have made false statements regarding the ownership of the subject mineral rights, Plaintiffs have not proven by a preponderance of the evidence that these statements were made with malice or reckless disregard of their falsity. The Dickerson Defendants had a good faith belief that they were or may be the true owners of the mineral rights at the time the statements were made. The Dickerson Defendants had a reasonable legal basis to believe that they were the rightful owners of the mineral rights.

FINDS that Plaintiffs should not be awarded judgment on Count Four of their Complaint for Slander of Title.

FINDS that Plaintiffs have not established a claim for tortious (potential) (sic) interference with a business relationship because they have not shown that the Dickerson Defendants acted improperly. The Dickerson Defendants had a good faith belief that their actions were undertaken to protect their legal interest in the subject mineral rights.

FINDS that Plaintiffs should not be awarded judgment on Count Eight of their Complaint for Potential (sic) (tortious) Interference with Business Relationships.

FINDS that Plaintiffs are not entitled to punitive damages or attorney fees.

FINDS that the Dickerson Defendants have not established their Counterclaims for Slander of Title or Intentional Interference with Business Relationships because Plaintiffs are the rightful owners of all of the mineral rights underlying the subject real estate.

FINDS that Defendants should not be awarded judgment on their Counterclaims.

FINDS, upon further review, that Plaintiffs' Motion to Strike Portions of Defendants' Rebuttal Argument or in the Alternative, Request for Leave to File Surrebuttal to Defendants' Rebuttal Argument should be **Overruled, in part**, as it pertains to Plaintiffs' request to strike and **Granted, in part**, as it pertains to Plaintiffs' request for the Court to consider Plaintiffs' Surrebuttal.

FINDS, however, that the Court is not persuaded by Defendants' request that the Court revisit and reverse its 2/21/2013 Decision granting summary judgment in the Plaintiffs' favor on Counts 1, 2, and 3 of the Complaint.

FINDS that Defendants' Motions to Strike Plaintiffs' Pleading and for Sanctions should be **Overruled**.

It is therefore

ORDERED that Plaintiffs are not entitled to judgment on Count Four of their Complaint for Slander of Title, and, consequently, Count Four is **Dismissed** with prejudice to refiling.

ORDERED that Plaintiffs are not entitled to judgment on Count Eight of their Complaint for Potential (sic) (tortious) Interference with Business Relationships, and, consequently, Count Eight is **Dismissed** with prejudice to refiling.

ORDERED that Plaintiffs are not entitled to punitive damages or attorney fees, and, consequently, these Claims are **Dismissed** with prejudice to refiling.

ORDERED that Defendants are not entitled to judgment on their Counterclaims, and, consequently, these Claims are **Dismissed** with prejudice to refiling.

ORDERED that Plaintiffs' Motion to Strike Portions of Defendants' Rebuttal Argument or in the Alternative, Request for Leave to File Surrebuttal to Defendants' Rebuttal Argument is Overruled, in part, as it pertains to Plaintiffs' request to strike and Granted, in part, as it pertains to Plaintiffs' request for the Court to consider Plaintiffs' Surrebuttal.

ORDERED that Defendants' Motions to Strike Plaintiffs' Pleading and for Sanctions are Overruled.

ORDERED that Court costs are assessed as follows:

- ◆ Plaintiffs - 0%
- ◆ Defendants - 100%

ORDERED that the Clerk of Courts shall close this case file and remove it from the pending docket of the undersigned.

ORDERED that there is no just reason for delay under Civ. R. 54 (B).


Edward Emmett O'Farrell, Judge
11/15/80/4
Date

cc: Court Administrator's Office
Attys. David E. Butz, and Matthew W. Onest
Attys. Paul Hervey and Jillian A. Daisher
Clerk of Courts
Court

EEO'F/rb

This matter was further considered by Edward Emmett O'Farrell, Judge, Court of Common Pleas, Tuscarawas County, Ohio, General Trial Division, on 1/7/2013 on the Court's regular Oral hearing motion docket relative to the following:

- ◆ **Plaintiffs' Motion for Summary Judgment** filed 12/3/2012
- ◆ **Appendix to Plaintiffs' Motion for Summary Judgment** filed 12/3/2012
- ◆ **The Dickerson Defendants' Motion for Summary Judgment Against Plaintiffs** filed on 12/17/2012
- ◆ **Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment** filed on 1/4/2013
- ◆ **The Dickerson Defendants' Reply to Plaintiffs' Motion for Summary Judgment** filed on 1/4/2013
- ◆ **Defendants' Notice of Supplemental Authority** filed on 1/9/2013
- ◆ **1/7/2013 Oral Hearing**

Plaintiffs were represented in the Courtroom by **David Butz, Nathan Vaughan,** and **Matthew W. Onest,** Krugliak, Wilkins, Griffiths & Dougherty Co., L.P.A., Attorneys at Law, Canton, Ohio. Defendants Judith A. Dickerson, Mary Louise Foster, Elaine F. Harris, Celia M. Dickerson, Richard H. Dickerson, Robert J. Dickerson, Raymond Dickerson, Constance Clark, Deborah Snelson, Misty Engstrom, Ronald K. Dickerson, Barbara K. Dickerson, John L. Dickerson, Wanda Dickerson, (collectively referred to as the "Dickerson Defendants") were represented in the Courtroom by **Paul B. Hervey** and **Jillian Daisher,** Fitzpatrick, Zimmerman & Rose Co., L.P.A., Attorneys at Law, New Philadelphia, Ohio.

The Court

FINDS that Plaintiffs Christopher Wendt and Veronica Wendt filed a Complaint against the Dickerson Defendants and Chesapeake Exploration, LLC. Count One of Plaintiffs' Complaint for **Declaratory Judgment** alleges that Plaintiffs are entitled to a declaration regarding their ownership of certain mineral rights. Count Two of Plaintiffs' Complaint alleges a cause of action for **Quiet Title** and requests that this Court quiet title to the mineral rights of real estate owned by Plaintiffs. Count Three of Plaintiffs' Complaint alleges a cause of action for **Injunction** and requests an injunction prohibiting Defendants from interfering, objecting or otherwise preventing Plaintiffs from leasing, conveying, or transferring their rights to the oil and gas underlying the real estate, or from taking any action under any existing leases. Count Four of Plaintiffs' Complaint alleges a cause of action for **Slander of Title**. Count Five of Plaintiffs' Complaint alleges a cause of action for **Unjust Enrichment - Quantum Meruit**. Count Six of Plaintiffs' Complaint alleges a cause of action for **Trespass**. Count Seven of Plaintiffs' Complaint alleges a cause of action for **Negligence / Negligence Per Se**. Count Eight of Plaintiffs' Complaint alleges a cause of action for **Potential Interference with Business Relationships**. Count Nine of Plaintiffs' Complaint alleges a cause of action for **Constructive Trust**.

FINDS that Plaintiffs' dismissed their claims against Defendant Chesapeake Exploration, L.L.C. only, as provided in the Parties' Stipulated Dismissal Entry filed on 1/8/2013.

FINDS that the Dickerson Defendants filed a Counterclaim against Plaintiffs Christopher and Veronica Wendt, which alleges two Counterclaims for **Slander of Title and Intentional Interference with Business Relationships.**

FINDS that Plaintiffs request summary judgment in their favor against the Dickerson Defendants under Civ. R. 56. Plaintiffs argue that there is no genuine issue as to any material fact as to the application of the 1989 Ohio Dormant Mineral Act, which extinguished the Dickerson Defendants' mineral reservation, and that Plaintiffs are entitled to judgment as a matter of law. Plaintiffs argue that the Dickerson Defendants' mineral interests were abandoned under the Dormant Mineral Act as of 1992. Plaintiffs argue that since the Defendants abandoned their mineral interests, Plaintiffs are entitled to declaratory judgment. Plaintiffs argue that they are also entitled to summary judgment on their claims for Quiet Title, Injunction, Slander of Title, Unjust Enrichment, Intentional Interference with Business Relationships, and Constructive Trust, based upon the application of the 1989 Dormant Mineral Act.

FINDS that the Dickerson Defendants request summary judgment in their favor under Civ. R. 56. The Dickerson Defendants argue that they are the rightful owners of the mineral rights that are the subject of this dispute. The Dickerson Defendants argue that Plaintiffs knew that they did not own the mineral rights when they purchased the property. The Dickerson Defendants do not seek summary judgment on their slander and intentional interference claims; however, they ask the Court

to issue 1) a declaration and determination that the Dickerson Defendants are the rightful holder of fee simple title to the mineral rights on the Property, and that the Plaintiffs be declared to have no estate, right, title or interest in the mineral rights; 2) a judgment forever enjoining the Plaintiffs from claiming any estate, right, title or interest in mineral rights on the property; and 3) an order to the Harrison County Recorder striking the Plaintiffs' Affidavit of Abandonment from the Deed Records of Harrison County.

FINDS that under Civ. R. 56(C), a summary judgment may be granted if (1) no genuine issue exists as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) "it appears that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the party against whom the Motion for Summary Judgment is made, that conclusion is adverse to the non-moving party." *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). Likewise, Civ. R. 56(C) provides that summary judgment shall not be rendered if it appears from the evidence that there is a genuine issue of fact that remains to be litigated.

FINDS that the moving party has the burden of showing that no genuine issue exists as to any material fact. *Harless v. Willis Day Warehousing Co., Inc.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978). The moving party requesting a summary judgment must inform the trial court of the basis for its motion and identify portions of the record demonstrating the lack of a genuine issue of fact on a material element of the nonmoving party's claim. *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 662

N.E.2d 264 (1996). If the moving party satisfies this initial burden, the nonmoving party then has a reciprocal burden to set forth specific facts that show that there is a genuine issue for trial. *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 674 N.E.2d 1164 (1997). If the nonmoving party does not respond in this way, summary judgment, if appropriate, shall be entered against the nonmoving party. *Vahila*, at 429.

FINDS that the Court may not weigh the evidence, assess the credibility of the parties or choose among reasonable inferences when determining whether to grant summary judgment. *Dupler v. Mansfield Journal Co., Inc.*, 64 Ohio St.2d 116, 121, 413 N.E.2d 1187 (1980). The Court must construe the evidence in a light most favorable to the nonmoving party and resolve any doubts in favor of the nonmoving party. *See Morris v. Ohio Casualty Ins. Co.*, 35 Ohio St.3d 45, 47, 517 N.E.2d 904 (1988).

FINDS that Civ. R. 56(C) provides, in pertinent part, that “[s]ummary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule.” Unauthenticated documents that are not sworn, certified, or authenticated by an affidavit have no evidentiary value, and a trial court may not consider them in ruling on a motion for summary

judgment. *Sparks v. Erie County Board of County Commissioners*, 6th Dist. No. E-97-007, unreported, 1998 WL 15929, *7 (Jan. 16, 1998).

FINDS that the determination of the issues in this case depend upon whether the 1989 or the 2006 amended version of R.C. 5301.56 is applicable to the relevant facts of this case.

FINDS that the former version of R.C. 5301.56, which became effective on March 22, 1989, provided that:

“(A) As used in this section:

(1) ‘Holder’ means the record holder of a mineral interest, and any person who derives his 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.

(2) ‘Drilling or mining permit’ means a permit issued under Chapter 1509., 1513., or 1514. of the Revised Code to the holder to drill an oil or gas well or to mine other minerals.

(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:

(a) The mineral interest is in coal, or in mining or other rights pertinent to or exercisable in connection with an interest in coal, as described in division (E) of section 5301.53 of the Revised Code.

(b) The mineral interest is held by the United States, this state, or any political subdivision, body politic, or agency of the United States or this state, as described in division (G) of section 5301.53 of the Revised Code.

(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, or, in the case of oil or gas, from lands pooled, unitized, or included in unit operations, under sections 1509.26 to 1509.28 of the Revised Code, in which the mineral interest is participating, provided that the instrument or order creating or providing for the pooling or unitization of oil or gas interests has been filed or recorded in the office of the county recorder of the county in which the lands that are subject to the pooling or unitization are located.

(iii) The mineral interest has been used in underground gas storage operations by the holder.

(iv) A drilling or mining permit has been issued to the holder, provided that an affidavit that states the name of the permit holder, the permit number, the type of permit, and a legal description of the lands affected by the permit has been filed or recorded, in accordance with section 5301.252 of the Revised Code, in the office of the county recorder of the county in which the lands are located.

(v) A claim to preserve the interest has been filed in accordance with division (C) of this section.

(vi) In the case of a separated mineral interest, a separately listed tax parcel number has been created for the mineral interest in the county auditor's tax list and the county treasurer's duplicate tax list in the county in which the lands are located.

(2) A mineral interest shall not be deemed abandoned under division (B)(1) of this section because none of the circumstances described in that division apply, until three years from the effective date of this section.

(C)(1) A claim to preserve a mineral interest from being deemed abandoned under division (B)(1) of this section may be filed for record by its holder. Subject to division (C)(3) of this section, the claim shall be filed and recorded in accordance with sections 317.18 to 317.201 and 5301.52 of the Revised Code, and shall consist of a notice that does all of the following:

(a) States the nature of the mineral interest claimed and any recording information upon which the claim is based.

(b) Otherwise complies with section 5301.52 of the Revised Code;

(c) States that the holder does not intend to abandon, but instead to preserve, his rights in the mineral interest.

(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.

(3) Any holder of an interest for use in underground gas storage operations may preserve his interest, and those of any lessor of the interest, by a single claim, that defines the boundaries of the storage field or pool and its formations, without describing each separate interest claimed. The claim is prima-facie evidence of the use of each separate interest in underground gas storage operations.

(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.

(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.”

FINDS that the amended version of R.C. 5301.56, which became effective on June 30, 2006, contains additional provisions that were not in the former version. R.C. 5301.56 now requires the owner of the surface of the lands subject to the interest to take affirmative action before the mineral interest can be vested in the owner of the surface.

FINDS that the amended version of R.C. 5301.56(E) provides that:

(E) Before a mineral interest becomes vested under division (B) of this section in the owner of the surface of the lands subject to the interest, the owner of the surface of

the lands subject to the interest shall do both of the following:

(1) Serve notice by certified mail, return receipt requested, to each holder or each holder's successors or assignees, at the last known address of each, of the owner's intent to declare the mineral interest abandoned. If service of notice cannot be completed to any holder, the owner shall publish notice of the owner's intent to declare the mineral interest abandoned at least once in a newspaper of general circulation in each county in which the land that is subject to the interest is located. The notice shall contain all of the information specified in division (F) of this section.

(2) At least thirty, but not later than sixty days after the date on which the notice required under division (E)(1) of this section is served or published, as applicable, file in the office of the county recorder of each county in which the surface of the land that is subject to the interest is located an affidavit of abandonment that contains all of the information specified in division (G) of this section.

FINDS that under the amended version of R.C. 5301.56(H)(1), a holder or a holder's successors or assignees may protect their mineral interest by filing a claim to preserve the mineral interest or an affidavit within 60 days after the date that the owner of the surface lands served or published the notice required under R.C. 5301.56(E). *See* R.C. 5301.56(H)(1)(a)-(b).

FINDS that R.C. 1.58(A)(1) and (2) provides that "[t]he reenactment, amendment, or repeal of a statute does not, except as provided in division (B) of this section: (1) Affect the prior operation of the statute or any prior action taken thereunder;" or "(2) Affect any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder. . . ."

FINDS that a change in the law that deals with substantive rights does not affect such rights even though no action or proceeding has been commenced, unless the amending or repealing act expressly

provides that the rights are affected. *O'Mara v. Alberto-Culver Co.*, 6 Ohio Misc. 132, 133, 215 N.E.2d 735 (Ohio Com. Pl. 1966).

FINDS that “[a] ‘vested right’ can ‘be created by common law or statute and is generally understood to be the power to lawfully do certain actions or possess certain things; in essence, it is a property right.’” *State ex rel. Jordan v. Indus. Comm.*, 120 Ohio St.3d 412, 413, 900 N.E.2d 150 (2008), quoting *Washington Cty. Taxpayers Assn. v. Peppel*, 78 Ohio App.3d 146, 155, 604 N.E.2d 181 (1992).

FINDS that an exception or reservation in favor of a third person, who is not a party to a deed, is void. *Kirk v. Conrad*, 3d Dist. No. 1266, 1931 WL 2566, 9 Ohio Law Abs. 717, *2 (Feb. 17, 1931).

FINDS that the words “subject to” are generally interpreted to “mean ‘limited by,’ or ‘subservient or subordinate to’ and connote a limitation on a grantor’s warranty rather than a reservation of rights.” *Stracka v. Peterson*, 377 N.W.2d 580, 582-83 (N.D., 1985).

FINDS that in *Riddel v. Layman*, the Fifth District Court of Appeals found that a title transaction, as required under the former version of R.C. 5301.56, must have occurred within the preceding twenty years from the enactment of the statute, which occurred on March 22, 1989, in order to satisfy the second requirement of the statute which requires a filing or recording of the title transaction. *Riddel v. Layman*, 5th Dist. No. 94 CA 114, 1995 WL 498812, *3.

FINDS that R.C. 5303.01 provides, in relevant part, that: "An action may be brought by a person in possession of real property, by himself or tenant, against any person who claims an interest therein adverse to him, for the purpose of determining such adverse interest. Such action may be brought also by a person out of possession, having, or claiming to have, an interest in remainder or reversion in real property, against any person who claims to have an interest therein, adverse to him, for the purpose of determining the interests of the parties therein."

FINDS that R.C. 5303.01 further provides that "[t]he clerk of the court shall cause to be recorded in the deed records of each county in which any part of the real property lies, a certified copy of the judgment or decree determining the interests of the parties. The usual fees of the clerk and recorder shall be taxed as part of the costs of the case."

FINDS that the complainant has the burden of proof as to all issues in a quiet title action, and he must prove title in himself if the answer denies his title or the defendant adversely claims title. *Ochsenbine v. Cadiz*, 166 Ohio App.3d 719, 2005-Ohio-6781, 853 N.E.2d 314, ¶13, citing *Duramax, Inc. v. Geauga Cty. Bd. of Commrs.*, 106 Ohio App.3d 795, 798, 667 N.E.2d 420 (1995).

FINDS that a party seeking a permanent injunction must show by clear and convincing evidence that the injunction is necessary to prevent irreparable harm and that he or she does not have an adequate remedy at law. *Proctor & Gamble Co. v. Stoneham*, 140 Ohio App.3d 260, 267-268, 747 N.E.2d

268 (1st Dist., 2000). A permanent injunction is only issued after a party has demonstrated a right to relief under the applicable substantive law. *Proctor & Gamble Co.*, at 267.

FINDS that slander of title is a tort action that may be brought against a person who has falsely and maliciously defamed the property, either real or personal, of another, and thereby caused him or her special pecuniary damage or loss. *Green v. Lemarr*, 139 Ohio App.3d 414, 430, 744 N.E.2d 212 (2d Dist., 2000), citing *Buehrer v. Provident Mut. Life Ins. Co. of Philadelphia*, 37 Ohio App. 250, 256, 174 N.E. 597, 599 (1930). "To prevail, a claimant must prove '(1) there was a publication of a slanderous statement disparaging claimant's title; (2) the statement was false; (3) the statement was made with malice or made with reckless disregard of its falsity; and (4) the statement caused actual or special damages.'" *Green*, at 430-431, citing *Colquhoun v. Webber*, 684 A.2d 405, 409 (Me. 1996). "The malice need not be that of a personal hatred, and an act will be deemed malicious if made in reckless or wanton disregard of the rights of another." *Consun Food Industries, Inc. v. Fowkes*, 81 Ohio App.3d 63, 72, 610 N.E.2d 463 (9th Dist. 1991), citing *Childers v. Commerce Mtge. Invests.*, 63 Ohio App.3d 389, 579 N.E.2d 219.

FINDS that "[t]o prevail on a claim for unjust enrichment, a plaintiff must establish the following three elements: '(1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment.'" *Rogers v. National City Corp.*, 8th Dist. No. 91103, 2009-Ohio-2708, ¶27, quoting *Miller v. Key Bank N.A.*, 8th Dist. No. 86327, 2006-Ohio-1725, ¶43.

FINDS that “[u]nder Ohio law, to establish a claim for tortious interference with a business relationship, a party must show: (1) a business relationship or contract; (2) the wrongdoer’s knowledge of the relationship or contract; (3) the wrongdoer’s intentional and improper action taken to prevent a contract formation, procure a contractual breach, or terminate a business relationship; (4) a lack of privilege; and (5) resulting damages.” *Pasqualetti v. Kia Motors America, Inc.*, 663 F. Supp.2d 586, 602 (N.D. Ohio, 2009), citing *Bowshier v. Chrysler Financial Corp.*, 144 F.Supp.2d 919, 926 (S.D. Ohio, 2001).

FINDS that a constructive trust is an appropriate remedy when it is against the principles of equity that the property be retained by a certain person even though the property was acquired without fraud. *Ferguson v. Owens*, 9 Ohio St.3d 223, 226, 459 N.E.2d 1293 (1984), citing 53 Ohio Jurisprudence 2d (1962) 578-579, Trusts, Section 88; and V Scott on Trusts (3 Ed. 1967) 3412, Section 462.

FINDS that John R. Dickerson and Marjorie I. Dickerson executed a warranty deed on 12/17/1952, which transferred the property that is the subject of this dispute to Pittsburgh Consolidation Coal Company. The warranty deed provided that it was “RESERVING unto the Grantors herein, their heirs and assigns, all of the oil and gas as contained in and underlying the aforescribed premises, together with the right to drill for, operate, produce and market the same, and to do all things necessary or incidental thereto, provided, however, that the drilling, operating, producing and marketing thereof shall be conducted in such a manner that same will not interfere with the mining

operations, strip or otherwise, in any vein or seam of coal underlying said premises hereafter conducted by the Grantee herein, its successors or assigns." (Plaintiff's Exhibit B).

FINDS that there is no evidence in the record to suggest that the subject mineral interest was the subject of a title transaction that was filed or recorded in the office of the Harrison County Recorder within the twenty years prior to 3/22/1992.

FINDS, upon review, that there is no evidence in the record to suggest that there was any production of oil and gas on the subject property, on other lands covered by a lease to which the mineral interest was subject, or from lands pooled, unitized, or included in unit operations, under R.C. 1509.26 to 1509.28, in which the subject mineral interest is participating within the twenty years prior to 3/22/1992.

FINDS that there is no evidence in the record to suggest that the subject mineral interest was used in underground gas storage operations by John R. Dickerson, Marjorie I. Dickerson, or by any of their heirs or assigns within the twenty years prior to 3/22/1992.

FINDS that there is no evidence in the record to suggest that a drilling or mining permit was issued to John R. Dickerson, Marjorie I. Dickerson, or to any of their heirs or assigns within the twenty years prior to 3/22/1992.

FINDS that there is no evidence in the record to suggest that a claim to preserve the subject mineral interest was filed in accordance with R.C. 5301.56© by John R. Dickerson, Marjorie I. Dickerson, or by any of their heirs or assigns within twenty years prior to 3/22/1992.

FINDS that there is no evidence in the record that a separately listed tax parcel number was created for the subject mineral interest in Harrison County's tax list or the Harrison County Treasurer's duplicate tax list within twenty years prior to 3/22/1992.

FINDS, therefore, that under the former version of R.C. 5301.56(B)(1) and (2), any mineral interest that John R. Dickerson, Marjorie I. Dickerson, or any of their heirs or assigns, had in the subject property was deemed abandoned and vested in the owner of the surface of the subject property, as of 3/22/1992.

FINDS that Defendant John L. Dickerson filed an Affidavit for Transfer of Real Estate Inherited with the Harrison County Recorder on 2/28/2011 indicating that the Dickerson Defendants had inherited from John R. Dickerson, in the portions set forth in the Affidavit, an "undivided one-half interest in all oil and gas contained in and underlying the hereinafter described premises, together with the right to drill for, operate, produce and market the same, and to do all things necessary or incidental thereto." (Plaintiff's Exhibit F).

FINDS that Defendant John L. Dickerson also filed an Affidavit for Transfer of Real Estate Inherited with the Harrison County Recorder on 2/28/2011 indicating that the Dickerson Defendants had inherited from Marjorie I. Dickerson, in the portions set forth in the Affidavit, an "undivided one-half interest in all oil and gas contained in and underlying the hereinafter described premises, together with the right to drill for, operate, produce and market the same, and to do all things necessary or incidental thereto." (Plaintiff's Exhibit G).

FINDS, however, that neither John R. Dickerson or Marjorie I. Dickerson, nor any of their heirs or assigns had any mineral interests in the subject property after 3/22/1992.

FINDS that the Plaintiffs were not required to comply with the provisions contained in the amended version of R.C. 5301.56(E) before their mineral interests in the subject property became vested because the mineral interest became vested in the owner of the surface of the lands on 3/22/1992.

FINDS that the Survivorship Deed transferring the subject real estate from Neil D. Porter, Trustee, to Christopher P. Wendt and Veronica M. Wendt, which was executed on 4/21/2006, provided that the transfer was subject to a "Reservation by John R. Dickerson and Marjorie I. Dickerson, their heirs and assigns for all of the oil and gas with the right to drill for in Warranty Deed filed for record December 17, 1952 in Volume 133, page 69, Deed Records." (Plaintiff's Exhibit A).

FINDS that neither the 4/21/2006 nor any previous deed executed after 3/22/1992, which transferred the property at issue "subject to" the Dickersons' mineral interests, created or preserved the Dickersons' mineral interest.

FINDS that there are no genuine issues of material fact remaining regarding Count One of Plaintiffs' Complaint for Declaratory Judgment, and Plaintiffs are entitled to judgment as a matter of law on that count.

FINDS that Plaintiffs are entitled to a judicial declaration as follows:

- (a) The Plaintiffs are the true and rightful owners of all the mineral rights underlying the subject real estate;
- (b) The Dickerson Defendants have no interest in the subject real estate, no oil and gas reservation, and no mineral rights under the subject real estate;
- (c) The Dickerson Defendants did not have any right, title, or interest to any of the minerals under the subject real estate at the time that they entered into the lease agreement with Chesapeake Exploration, LLC; and
- (d) The Affidavits and oil and gas leases received by Chesapeake Exploration, LLC, and memorialized by the memorandum of leases attached to the Plaintiffs' Complaint are null and void, *ab initio*, of no effect, and convey no mineral rights underlying the subject real estate.

FINDS that there are no genuine issues of material fact remaining regarding Count Two of Plaintiffs' Complaint for Quiet Title, and Plaintiffs are entitled to judgment as a matter of law on that count.

FINDS that the mineral rights underlying the subject real estate should be quieted in favor of Plaintiffs because they are the sole owners of the mineral rights underlying the subject real estate.

FINDS that counsel for Plaintiffs should provide the Court with a Journal Entry with the legal description of the subject property herein quieted, which is sufficient for recording in the office of the Harrison County Recorder.

FINDS that there are no genuine issues of material fact remaining regarding Count Three of Plaintiffs' Complaint for Injunction, and Plaintiffs are entitled to judgment as a matter of law on that count.

FINDS that the Dickerson Defendants should be enjoined from interfering, objecting or otherwise preventing Plaintiffs from leasing, conveying, or transferring their rights to the oil and gas underlying the subject real estate, or from taking any action under any existing leases.

FINDS that genuine issues of material fact remain regarding Count Four (Slander of Title), Count Five (Unjust Enrichment - Quantum Meruit), Count Six (Trespass), Count Seven (Negligence /

Negligence *Per Se*), Count Eight (Potential Interference with Business Relationships) and Count Nine (Constructive Trust) of Plaintiffs' Complaint.

FINDS that Plaintiffs' Motion for Summary Judgment does not request summary judgment on the Dickerson Defendants' Counterclaim and the Dickerson Defendants do not request summary judgment on either of the claims contained in their Counterclaim, and therefore, the Court does not address herein whether either party is entitled to judgment as a matter of law on the Dickerson Defendants' Counterclaim.

FINDS that the Dickerson Defendants' are not entitled to any declaratory relief, as requested in their motion for summary judgment, as a matter of law.

FINDS that Plaintiffs' Motion for Summary Judgment should be **Granted, in part**, as it pertains to Count One (**Declaratory Judgment**), Count Two (**Quiet Title**), and Count Three (**Injunction**) of Plaintiffs' Complaint, and **Overruled, in part**, as it pertains to Count Four (**Slander of Title**), Count Five (**Unjust Enrichment - Quantum Meruit**), Count Six (**Trespass**), Count Seven (**Negligence / Negligence Per Se**), Count Eight (**Potential Interference with Business Relationships**) and Count Nine (**Constructive Trust**) of Plaintiffs' Complaint.

FINDS that the Dickerson Defendants' Motion for Summary Judgment Against Plaintiffs should be **Overruled**.

It is therefore

ORDERED that Plaintiffs' Motion for Summary Judgment is **Granted**, in part, as it pertains to Count One (**Declaratory Judgment**), Count Two (**Quiet Title**), and Count Three (**Injunction**) of Plaintiffs' Complaint, and **OVERRULED**, in part, as it pertains to Count Four (**Slander of Title**), Count Five (**Unjust Enrichment - Quantum Meruit**), Count Six (**Trespass**), Count Seven (**Negligence / Negligence Per Se**), Count Eight (**Potential Interference with Business Relationships**) and Count Nine (**Constructive Trust**) of Plaintiffs' Complaint.

ORDERED that the Dickerson Defendants' Motion for Summary Judgment Against Plaintiffs is **OVERRULED**.

ORDERED that the Court declares that:

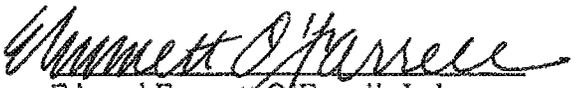
- (a) The Plaintiffs are the true and rightful owners of all the mineral rights underlying the subject real estate;
- (b) The Dickerson Defendants have no interest in the subject real estate, no oil and gas reservation, and no mineral rights under the subject real estate;
- (c) The Dickerson Defendants did not have any right, title, or interest to any of the minerals under the subject real estate at the time that they entered into the lease agreement with Chesapeake Exploration, LLC; and

(d) The Affidavits and oil and gas leases received by Chesapeake Exploration, LLC, and memorialized by the memorandum of leases attached to the Plaintiffs' Complaint are null and void, *ab initio*, of no effect, and convey no mineral rights underlying the subject real estate.

ORDERED that the mineral rights underlying the subject real estate are quieted in favor of Plaintiffs because they are the sole owners of the mineral rights underlying the subject real estate.

ORDERED that counsel for Plaintiffs shall provide the Court with a Journal Entry with the legal description of the subject property herein quieted, which is sufficient for recording in the office of the Harrison County Recorder.

ORDERED that the Dickerson Defendants are enjoined from interfering, objecting or otherwise preventing Plaintiffs from leasing, conveying, or transferring their rights to the oil and gas underlying the subject real estate, or from taking any action under any existing leases.


Edward Emmett O'Farrell, Judge

2/21/2013
Date

cc: Court Administrator's Office
Court Mediator. Andrea L. Fischer-Immke
Attys. David E. Butz, Nathan D. Vaughan, and Matthew W. Onest
Attys. Paul Hervey and Jillian A. Daisher
Court

IN THE COURT OF COMMON PLEAS
HARRISON COUNTY, OHIO
GENERAL DIVISION

14 JAN 16 PM 12:17
LESLIE J. JENNINGS
CLERK OF COURT'S
HARRISON COUNTY, OHIO

M & H PARTNERSHIP
Plaintiff

Case No. CVH-2012-0059

vs.

WALTER VANCE HINES, ET AL.
Defendants

JUDGMENT ENTRY

This matter is before the Court on Plaintiff's Motion For Summary Judgment filed on March 26, 2013 and Defendant's Motion For Summary Judgment filed March 7, 2013.

The Court has also considered the parties' replies and surreplies to said Motions including that if Defendant Chesapeake Exploration, LLC. The Court further recognizes the factual stipulations of the parties filed with the Court on March 21, 2013.

This matter is before the Court on a Complaint To Quiet Title filed by Plaintiff. Plaintiff contends that they are the surface and mineral owners of the disputed property. They claim ownership of the surface rights to the property through purchase on April 7, 2006. This ownership issue is not in dispute.

Plaintiff claims ownership of the mineral interest of the property pursuant to O.R.C. §5301.56 Ohio's Dormant Mineral Act as it was written in the 1989 version.

Defendants' Hines family do not dispute Plaintiffs surface right ownership. Defendant's Hines family do dispute Plaintiffs claim to the property's mineral rights.

Defendants' Hines family claim that Dormant Mineral Act does not apply to divest them of their mineral interest in the property because qualifying transactions have occurred in the necessary time frame.

Defendants' Hines family further argues that if no qualifying transactions are deemed to have occurred the correct version of ORC §5301.56 is the 2006 version and under said statute they properly preserved their mineral interest.

An examination of the 1989, 2006 ODMA §5301.56 is necessary as well as a review of interpreting case law in resolving the dispute.

O.R.C. §5301.56 (1989 version)

The factors to which Courts must look to decide whether a mineral interest holder had displayed sufficient activity to preserve their rights over a 20 year period or whether the mineral interest had grown stale based upon a lack of activity or interest by the mineral rights holder:

- (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.
- (iii) The mineral interest has been used in underground gas storage operations by the holder;
- (iv) A drilling or mining permit has been issued to the holder.

- (v) A claim to preserve the interest has been filed in accordance with division (c) of this section.
- (vi) In the case of a separated mineral interest, a separately listed tax parcel number has been created for the mineral interest in the county auditor's tax list and the county treasurer's duplicate tax list in the county in which the lands are located.

In the case at bar, items (ii), (iii), (iv), (vi) have conclusively not been completed by the mineral estate holder. Item (v) claim to preserve interest was not filed in the requisite time period.

Therefore, the item which is controlling pursuant to the 1989 act is item (i) whether the mineral interest has been subject of a title transaction that has been file or recorded in the office of the county recorder of the county in which the lands are located.

A brief discussion on transfers of interest is necessary

1. Surface Rights.

- A.) The surface rights were severed from the mineral rights by deed on June 1, 1961. The surface rights passed to Selway Coal Company with Vance and Eleanor Hines reserving the oil and gas rights.
- B.) Selway Coal Company passed the surface rights to Robert Fleagane on February 29, 1975.
- C.) Robert Fleagane to Shell Mining Company January 1, 1989.
- D.) Shell Mining to R & F Coal Company November 12, 1991.

E.) R & F Coal Company merger with Capstone Holding Company
February 9, 2000.

F.) Capstone Holding Company to Emanuel J. Miller Et Al. April 20,
2001.

G.) Capstone Holding Company to William and Judith Ledger August 6,
2001.

H.) Emanuel J. Miller Et Al to M & H Partnership April 7, 2006.

Deeds A, B, C, and D contain reservation clauses for oil and gas within the deed. Transaction E, F, G, and H did not recite the reservation. Thus the last title transaction noting the reservation of oil and gas on the surface property was November 12, 1991.

2. Oil and Gas Rights.

A. The surface rights were severed from the mineral rights by deed on June 1, 1961. The surface rights passed to Consolidation Coal Company with Vance and Eleanor Hines reserving the oil and gas rights.

B. A lease of the oil and gas rights was recorded from Walter v. Hines to Harry J. Iles on July 15, 1969.

C. An oil and gas lease from Walter Vance Hines, Richard Scott Hines and David Chris Hines and Richard Scott Hines as Power of Attorney for Drue Anne Hines Danz to Chesapeake Exploration L.L.C. dated October 31, 2011 and recorded February 14, 2012.

The Seventh District Court of Appeals in *Dodd v. Croskey* Case No. 12 HA 6 Ohio App. 7th Dist (2013) ruled on what constitutes and whether or not a mineral interest has been the “subject of” a title transaction which has been filed or recorded in the office of the county recorder of the county in which the land are located.

The Seventh District held that “The common definition of the word “subject” is, topic of interest, primary theme or basis for action. Under this definition the mineral interests are not the subject of the title transaction.

In the case at bar, the Court finds pursuant to the *Dodd* decision *supra*, that the last title transaction that the mineral interests were subject of occurred July 15, 1969. Wherefore, under the 1989 Dormant Mineral Act the Court must decide whether the 1969 transaction was a savings event.

The effect of the 1969 transaction relies on interpretation of the statute and its 20 year look back period.

Riddell v. Layman 5th Dist. App. (1995 WL 498812) is the only appellate decision which touches upon the appropriate 20 year look back period for the 1989 Dormant Mineral Act. The *Riddell* Court decided that “the title transaction must have occurred within the proceeding twenty years from the enactment of the statute, which occurred on March 22, 1989. Appellee Layman recorded the deed on June 12, 1973, was within the preceding twenty years from the date the statute was enacted.”

The Riddel case dealt with a 1994 complaint and a 1973 reservation. Wherefore, the Court specifically finds that a rolling 20 year period of look back is not authorized by the 1989 statute. The Court finds that the 20 year period for a look back is 20 years from enactment March 22, 1989. Wherefore, a title transaction that the mineral interest is subject of must have occurred on or after March 22, 1969 to serve as a savings event.

The Court finds that Walter Vance Hine's lease of mineral interest to Harry J. Isles on July 15, 1969 is a title transaction and that the mineral interest at issue in this matter were the subject of that title transaction. As such, the July 15, 2969 lease serves as a savings event pursuant to the 1989 dormant mineral act and the holding in Riddel Supra.

2006 Dormant Mineral Act.

In 2006, the Ohio legislature amended the dormant mineral act and provided additional due process safeguards to mineral interest holders.

The additional steps germane to this case are:

- 1) Recording of an affidavit of abandonment §5301.56 (E)(2).
- 2) Holder may file a claim to preserve mineral interests within 60 days of notice of affidavit of abandonment §5301.56 (H)(1).

In the case at bar, Defendant promptly filed their claim to preserve mineral interest within the 60 day time limit.

Plaintiff's further claim that answering Defendant's do not have standing in this matter in that they are not the successors in interest to the original holder's

of mineral interest Vance and Eleanor Hines. The Court finds that Plaintiff's argument to be without merit. The Court finds that through Ohio's Law of Succession that the mineral interest herein passed from Vance Hines and Eleanor Hines and then to their only heir their son Walter Vane Hines and then from Walter Vance Hines to his children the Defendant's herein. The Court specifically finds Defendant's to be the lineal descendants of the original holders and the successors in interest to the original holders mineral interest.

The Court finds pursuant to both the 1989 and 2006 Dormant Mineral Act the Defendants have preserved their mineral interest. Under 1989 Act, the Court finds the July 15, 1969 lease of minerals from Walter Vance Hines occurred within the statutory look back period as defined in Riddel and as such was a savings event under the statute. Under the 2006 Act, the Court finds that Defendant's properly preserved their mineral rights by filing a notice of preservation with the county recorder.

The Court finds the 2006 law is the applicable law in the case. In *Dodd v. Croskey* Seventh Dist App (2013) 12 HA 6 (9/12/2013) the Court applied the 2006 law in determining the parties claim. The claim involved a 1947 oil and gas reservation with no further title transactions that the mineral interest were subject.

The Court did not address its choice of the 2006 Act over the 1989 Act in *Dodd*. However, it is clear from their decision that the 2006 law was applied.

This Court is convinced that applying the 2006 law is the appropriate statute in this case for the following reasons.

R.C. 5301.56 is part of the Marketable Title Act. The Marketable Title Act is ORC 5301.47 – 5301.56. The act is to be read in total and not as separate independent statutes. The purpose of the act is to establish a marketable chain of title. ORC 5301.55 liberal construction “Sections 5301.47 to 5301.56 so inclusive, of the Ohio Revised Code shall be liberally construed to effect the legislative purpose of simplifying and facilitating land title transaction by allowing persons to rely on a record chain of title as described in Section 5301.48 of the Ohio Revised Code, subject only to such limitations as appear in Section 5301.49 of the Ohio Revised Code”.

The application of an “automatic” vesting clause of the 1989 Dormant Mineral Act is contrary to simplifying and facilitating land title transaction by allowing persons to rely on a record chain of title.

This Court does not believe it was the legislative intent at enactment to make surface holders automatically vested in the mineral rights pursuant to the 1989 Dormant Mineral Act. The terms automatic vesting, terminated, null and void, or extinguished were not used in the statute.

Those terms null and void and extinguished are used in other parts of the marketable title act but the Dormant Mineral Act uses the term abandoned.

The Court does not believe the difference in language to be unconscious. The Court finds pursuant to the Marketable Title Act that Plaintiff at the minimum must have filed a quiet title action prior to 2006 to have the 1989 law apply. Absent such action and determination, notice of the reversion of mineral

interest would not be apparent in the record chain of title and thus violate the purpose of the Marketable Title Act.

Since in this matter no action was filed until 2012, Plaintiff must conform to the applicable law currently in place to perfect their abandonment claim. And such the 2006 Dormant Mineral Act is controlling.

The Court finds this ruling is not in conflict with *Texaco v. Short* 454 U.S. 516 (1982). *Texaco v. Short* required due process before title vested in the surface holder. In the case at bar, Defendant Hines family was not given any due process consideration prior to this suit. There is no evidence of a Quiet Title Action filed between 1989 and 2006. In order for the Plaintiff's interest to vest some court action or recording of said interest must have occurred. Plaintiff failed to assert its claim prior to 2006 as such Plaintiff interest did not vest prior to 2006 and is subject to the 2006 amended statute.

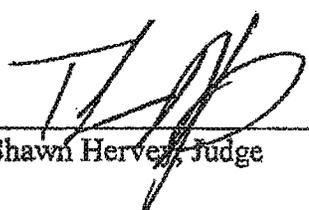
WHEREFORE, it is the ORDER of the Court that:

Plaintiff's Motion For Summary Judgment is denied.

Defendants, Hines Family, Motion For Summary Judgment is granted.

Defendants, Hines Family, is the lawful owner of the oil and gas interest at issue in this matter. Plaintiff's claim of ownership fails under the 1989 and 2006 Dormant Mineral Act. The Court holds the 2006 Dormant Mineral Act to be controlling.

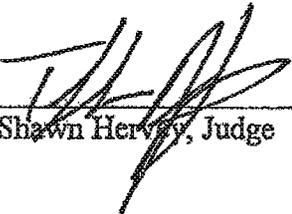
SO ORDERED.



T. Shawn Hervez, Judge

NOTICE: FINAL APPEALABLE ORDER

This is a final appealable order. For each party who is not in default, serve notice to the attorney for each party and to each party who represents himself or herself by regular mail service with certificate of mailing making notation of same upon case docket.



T. Shawn Herve, Judge

Stamped Copies:

Attorney Patrick E. Noser
Attorney T. Owen Beetham
Attorney Clay K. Kellar



Report of the Natural Resources Committee

To the Council of Delegates:

The Natural Resources Committee recommends to the Council of Delegates a proposal to amend Section 5301.56 of the Ohio Revised Code to clarify the procedure for unused mineral rights in real estate to "lapse" and vest in the owner of the surface estate.

Respectfully submitted,

M. Howard Petricoff, *Columbus*

Chair

Committee Comments:

For well over 100 years, there has been active mineral extraction (including coal, oil, gas, and other hard minerals) throughout much of Ohio. This activity has led to the frequent severance of mineral estates from the surface. Over the years, severed mineral interests have become fractionalized and abandoned as individual owners die and corporate owners go out of business, resulting in difficulties with title examination and the inability to develop the minerals.

In an attempt to address this situation, in 1989, the Ohio State Bar Association supported enactment of Ohio's "Mineral Lapse Statute" (ORC § 5301.56) which, in summary, provided that severed mineral rights will vest in the owner of the surface estate if there is no specified activity affecting the mineral rights for a span of 20 years. However, in the years since enactment of ORC § 5301.56, Courts and practitioners have experienced difficulty in interpreting this statute, which resulted in the Natural Resources Committee's preparation of this amendment.

The major changes addressed in the amendment are the following:

- 1) the original statute provided for the lapse to occur if no specified activities took place within "the preceding twenty years." Questions arose as to whether that language meant 20 years preceding enactment of the statute, 20 years preceding commencement on an action to obtain the minerals or any 20-year period in the chain of title. To clarify this, the amendment provides that the effective period is the 20 years immediately preceding the filing of a notice;
- 2) a definition of "minerals" and "mineral interest" are included in the amendment; and
- 3) a specific procedure for a landowner to follow to obtain the mineral interest is included in the amendment.

The Natural Resources Committee supports this amendment as a necessary clarification of the existing statute.

§ 5301.56 Mineral interests in realty.

(A) As used in this section:

(1) "Holder" means the record holder of a mineral interest, and any person who derives his 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.

(2) "Drilling or mining permit" means a permit issued under chapter 1509., 1513., or 1514. of the Revised Code to the holder to drill an oil or gas well or to mine other minerals.

(3) "Mineral Interest" means a fee interest in an estate of one or more minerals, however created and regardless of form, whether absolute or fractional, divided or undivided.

(4) "Minerals" includes gas, oil, coal, coalbed methane gas, other gaseous, liquid, and solid hydrocarbons, sand, gravel, clay, shale, gypsum, halite, limestone, dolomite, sandstone, other stone, metalliferous or nonmetalliferous ore, other material or substance of commercial value excavated in a solid state from natural deposits on or in the earth, and any other substance defined as a mineral by the laws of this State. As used in this section, "minerals" does not include the space that may be created by the withdrawal of minerals.

~~(B)~~ Any mineral interest held by any person, other than the owner of the surface of the lands subject to the interest, shall be deemed abandoned and vested in the owner of the surface estate after the procedures prescribed in division (E) of this section are followed, if none of the following applies:

~~(a)~~ The mineral interest is in coal, or in mining or other rights pertinent to or exercisable in connection with an interest in coal, as described in division (E) of section 5301.53 of the Revised Code; however, if a mineral interest includes both coal and other minerals, the non-coal mineral interests may be deemed abandoned and vested in the owner of the surface estate pursuant to this section;

~~(b)~~ The mineral interest is held by the United States, this state, or any political subdivision, body politic, or agency of the United States or this state, as described in division (G) of section 5301.53 of the Revised Code;

~~(c)~~ Within the ~~preceding~~ twenty years immediately preceding the date on which notice is served or published pursuant to division (E)(1) of this section, one or more of the following has occurred:

~~(a)~~ The mineral interest has been the subject of a title transaction that has been filed or recorded in the office of the county recorder of the county in which the lands are located;

~~(b)~~ 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, from a mine where a portion thereof is located beneath the lands, or, in the case of oil or gas, from lands pooled, unitized, or included in unit operations, under sections 1509.26 to 1509.28 of the Revised Code, in which the mineral interest is participating, provided that the instrument or order creating or providing for the pooling or unitization of oil or gas interests has been filed or recorded in the office of the county recorder of the county in which the lands that are subject to the pooling or unitization are located;

~~(c)~~ The mineral interest has been used in underground gas storage operations by the holder;

~~(d)~~ A drilling or mining permit has been issued to the holder, provided that an affidavit that states the name of the permit holder, the permit number, the type of permit, and a legal description of the lands affected by

the permit has been filed or recorded, in accordance with section 5301.252 [5301.25.2] of the Revised Code, in the office of the county recorder of the county in which the lands are located;

(ew) A claim to preserve the mineral interest has been filed in accordance with division

(C) of this section;

(fw) In the case of a separated mineral interest, a separately listed tax parcel number has been created for the mineral interest in the county auditor's tax list and the county treasurer's duplicate tax list in the county in which the lands are located.

~~(2) A mineral interest shall not be deemed abandoned under division (B)(1) of this section because none of the circumstances described in that division apply, until three years from the effective date of this section.~~

(C)(1) A claim to preserve a mineral interest from being deemed abandoned under division (B)(1) of this section may be filed for record by its holder. Subject to division

(C)(3) of this section, the claim shall be filed and recorded in accordance with sections 317.18 to 317.201 [317.20.1] and 5301.52 of the Revised Code, and shall consist of a notice that does all of the following:

(a) States the nature of the mineral interest claimed and any recording information upon which the claim is based;

(b) Otherwise complies with section 5301.52 of the Revised Code;

(c) States that the holder does not intend to abandon, but instead to preserve, ~~his~~ the holder's rights in the mineral interest.

(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.

(3) Any holder of an interest for use in underground gas storage operations may preserve the holder's interest, and those of any lessor of the interest, by a single claim, that defines the boundaries of the storage field or pool and its formations, without describing each separate interest claimed. The claim is prima-facie evidence of the use of each separate interest in underground gas storage operations.

(dD)(1) A mineral interest may be preserved indefinitely from being deemed abandoned under division (bB) of this section by the occurrence of any of the circumstances described in division (bB)(1)(c3) of this section, including, but not limited to, successive filings of claims to preserve mineral interests under division (eC) of this section.

(2) The filing of a claim to preserve a mineral interest under division (eC) 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 [5301.33.2] of the Revised Code.

(E)(1) Before a mineral interest becomes vested in the owner of the surface estate under division (B) of this section, the owner of the surface estate must file for record with the recorder of the county or counties in which the real estate is located an affidavit of abandonment after serving notice by certified mail, return receipt requested, to the mineral interest holder or the holder's record successors or assigns, at the last known address of the holder or the holder's successors or assigns, or if service is not obtained by certified mail, by giving notice by publication at least once in a newspaper of general circulation in the county in which the land is located, of the owner of the surface estate's intent to declare the mineral interest abandoned. If service

is obtained by certified mail, and if the mineral interest is held by more than one party, separate service shall be made upon each of the mineral interest holders.

(2)The notice or publication provided for under division (E)(1) of this section, shall be addressed to the holder, their record successors and assigns, and shall contain the name of the holder; a description of the land owned by the owner of the surface estate, which description shall contain a reference by volume and page to the record of the deed or other recorded instrument under which the owner of the surface estate claims title or otherwise satisfy the requirements of division (A)(3) of section 5301.52 of the Revised Code; a description of the mineral interest, which description shall include the volume and page of the recorded instrument upon which the Mineral Interest is based; a statement that none of the events described in division (B)(3) of this section have occurred within the twenty years immediately preceding the date on which the notice is served or published; and shall state the intention of the owner of the surface estate to file for record an affidavit of abandonment with the county recorder after thirty days and not more than sixty days from the date that notice is served or published.

(3)After thirty days and not more than sixty days from the date that the notice described in division (E)(2) of this section is served or published, the owner of the surface estate, or the owner of the surface estate's record successors or assigns, shall file with the county recorder an affidavit of abandonment setting forth that the owner of the surface estate, its successor or assign, is the owner of land subject to a severed mineral interest; the volume and page of the record upon which the mineral interest is based; that the mineral interest has been abandoned pursuant to division (B) of this section, reciting the facts constituting such abandonment; and that notice was served on the mineral interest holder or the holder's successors or assigns, or publication made and the manner and time thereof.

(a)If the holder, or the holder's successors or assigns, claims that the mineral interest has not been abandoned, the holder, or the holder's successors or assigns, shall, within sixty days from the date that the notice described in division (E)(2) of this section is served or published, notify the person who filed the affidavit of abandonment, and file for record a claim that complies with division (C)(1) of this section or file for record an affidavit that identifies which of the events described in division (B)(3) of this section have occurred within the twenty years immediately preceding the date on which notice is served or published pursuant to division (E)(1) of this section.

(b)If within sixty days from the date that the notice described in division (E)(2) of this section is served or published, the holder, or the holder's successors or assigns, does not file for record a claim that complies with division (C)(1) of this section or file for record an affidavit that identifies which of the events described in division (B)(3) of this section have occurred within the twenty years immediately preceding the date on which notice is served or published pursuant to division (E)(1) of this section, then at any time after the sixtieth day after the notice described in division (E)(2) of this section is served or published the owner of the surface estate shall cause the county recorder to note upon the margin of the record upon which the severed mineral interest is based the following: "This mineral interest abandoned pursuant to affidavit of abandonment recorded in vol. . . . page. . . ." Thereafter the mineral interest will vest in the owner of the surface estate, its successors or assigns, and the record of the mineral interest shall not be notice to the public of the existence of the mineral interest or of any rights thereunder and the record shall not be received in

evidence in any court of the state on behalf of the holder or the holder's successors or assigns against the owner of the surface estate, its successors or assigns. The abandonment and vestment provided for under this section shall only be effective as to the property of the owner of the surface estate filing the affidavit.

(4) For recording the affidavit of abandonment and for noting such cancellation upon the margin of the record, the recorder shall charge the fees provided by section 317.32 of the Revised Code.

(5) In a county in which the county recorder has determined to use the microfilm process as provided by section 9.01 of the Revised Code, the recorder may, where applicable, require that the notation "This mineral interest abandoned pursuant to affidavit of abandonment recorded in vol. . . ., page. . . ." be entered on the affidavit, and that the affidavit be recorded in the record provided for by section 317.08 of the Revised Code. Thereafter, the mineral interest will vest in the owner of the surface estate, its successors or assigns, and the record of the mineral interest is not notice to the public of the existence of the mineral interest or of any rights thereunder and the record shall not be received in evidence in any court of the state on behalf of the holder or the holder's successors or assigns against the owner of the surface estate, its successors or assigns. The abandonment and vestment provided for under this section shall only be effective as to the property of the owner of the surface estate filing the affidavit. The recorder shall charge the fee for a recording under this section as provided by section 317.32 of the Revised Code for the recording of deeds.