

In the
Supreme Court of Ohio

JOHN D. WALKER, JR.,	:	Case No. 2014-0803
	:	
Appellee,	:	On Appeal from the
	:	Noble County
v.	:	Court of Appeals,
	:	Seventh Appellate District
PATRICIA J. SHONDRICK-NAU,	:	
EXECUTRIX OF THE ESTATE OF JOHN	:	Court of Appeals
R. NOON AND SUCCESSOR TRUSTEE OF	:	Case No. 13 NO 402
THE JOHN R. NOON TRUST,	:	
	:	
Appellant.	:	

**MERIT BRIEF OF *AMICUS CURIAE* STATE OF OHIO
IN SUPPORT OF APPELLEE**

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INTRODUCTION

Itself largely dormant since its adoption, Ohio's Dormant Mineral Act has recently been at the center of a spike in litigation arising with the expansion of Ohio's oil-and-gas industry. That spike is illustrated by the many Dormant Mineral Act cases pending before this Court. Those cases will answer nearly all of the questions presented in this case about the Act (Propositions of Law I, II, IV, and V). Two questions not addressed in the other cases either should not be answered (Proposition of Law III) or are easily answered (Proposition of Law VI).

To begin with, Propositions of Law I and II ask whether and when different versions of the Act apply to reunite ownership of surface property and a severed mineral interest. The Court agreed to take on those timing questions in *Corban v. Chesapeake Exploration, L.L.C.*, No. 2014-0804. Its resolution of *Corban* will be dispositive of the same issues presented here.

Proposition of Law III also implicates when and how the original version of the Act operates—it asks what, if anything, the 1989 version of the Act required a surface owner to do before a severed mineral estate would be reunited with the surface. *See* Appellant Br. 22. But the Court should not address Proposition of Law III for two reasons. *First*, the Court's resolution of the first two Propositions of Law will render the third one moot. *Second*, Shondrick-Nau admits the Court “does not need to answer this question to resolve the appeal.” Appellant Br. 22-23. The Court is not in the business of rendering advisory opinions unnecessary to resolve the case before it. *State ex rel. Wood v. McClelland*, 140 Ohio St. 3d 331, 2014-Ohio-3969 ¶ 13.

The questions presented in Proposition of Law IV and Proposition of Law V will also be resolved by another case the Court has accepted for review. Proposition of Law IV asks what events qualify as savings events under R.C. 5301.56(B)(3)(a) (and will, as a result, reset the 20-year dormancy clock that measures when a severed interest reunites with a surface interest). Specifically, it asks whether the transfer of a surface estate resets the dormancy clock for a

severed mineral interest when the severed interest is merely referenced as part of the transfer but is not itself transferred. In *Dodd v. Croskey*, No. 2013-1730, the Court ordered supplemental briefing on that *same* issue. See *Dodd*, No. 2013-1730, Aug. 28, 2014 Order. And although Proposition of Law V is presented here as an independent Proposition of Law, the supplemental briefing in *Dodd* also addressed whether, irrespective of the Act, provisions of the Marketable Title Act (specifically R.C. 5301.49) can separately bar a claim under the Dormant Mineral Act. See *Dodd*, No. 2013-1730, State of Ohio Amicus Br. at 7.

Finally, Shondrick-Nau asserts for the first time in this Court that the 1989 version of the Act should not apply to severed mineral interests created before 1989. Appellant Br. 35-36. That argument was never raised below and is now waived. See *ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St. 3d 520, 2014-Ohio-2382 ¶ 14. Even if not waived, Shondrick-Nau's argument would nevertheless be meritless. There can be no dispute that the General Assembly intended for the original version of the Dormant Mineral Act to apply to mineral interests that were severed from a surface estate prior to 1989. If it had not, it would have had no reason to include in the statute a three-year grace period providing an opportunity for owners of *then-dormant* mineral interests to take steps to preserve those interests. R.C. 5301.56(B)(2) (1989).

The State of Ohio has filed amicus briefs in the other cases involving the Act, and will not repeat the arguments advanced in those prior briefs. In this case, as in the earlier cases, the Court should hold both that the version of the Act adopted in 1989 was self-executing when a severed mineral interest had been dormant for 20 years and that the mere restatement of a prior reservation of mineral rights in a subsequent deed transferring the *surface* property does not reset that dormancy clock.

STATEMENT OF AMICUS INTERESTS

As in the other cases in which Ohio has filed an amicus brief, the State’s interest in this case is twofold—one in a public-interest capacity and one in a landowner capacity. First, the State has an interest in “remedy[ing] uncertainties in titles and . . . [facilitating] the exploitation of energy sources and other valuable mineral resources.” *See Texaco, Inc. v. Short*, 454 U.S. 516, 524 n.15 (1982) (citation omitted). Second, as a property owner, the State’s interest in obtaining a clear interpretation of the Dormant Mineral Act is similar to the interests of any other property owners throughout Ohio. In many instances, ownership of the mineral rights underlying state land has reverted to the State by operation of the Dormant Mineral Act.

ARGUMENT

Amicus Curiae State of Ohio’s Proposition of Law 1 (corresponding to Shondrick-Nau’s Propositions of Law I, II, and III):

The 1989 version of the Dormant Mineral Act was self-executing and governs a claim that ownership of an abandoned mineral interest had automatically vested in the owner of a surface estate before the statute’s amendment in 2006, even if that claim is asserted after that 2006 amendment.

A. Under the plain text of the 1989 version of R.C. 5301.56, ownership of a severed mineral interest that was dormant for a 20-year period automatically reverted to the owner of the surface estate.

In *Corban v. Chesapeake Exploration, L.L.C.*, No. 2014-0804, the Court will decide whether “the 2006 version or the 1989 version of the [Dormant Mineral Act] appl[ies] to claims asserted after 2006 alleging that the rights to oil, gas, and other minerals automatically vested in the surface land holder prior to the 2006 amendments as a result of abandonment.” *Corban*, No. 2014-0804, July 23, 2014 Order Accepting Certified Questions of State Law. As the State explained in that case, the plain language of the 1989 version of the Act shows that it applies to that claim. *See Corban*, No. 2014-0804, State of Ohio Amicus Br. at 6-9. The 1989 version was self-executing—ownership of a severed mineral interest reverted to the surface owner

automatically after a 20-year dormancy period. *See* R.C. 5301.56(B)(1) (1989) (“[a]ny 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 no savings event occurred to reset the 20-year dormancy clock (emphasis added)). The State’s arguments in *Corban* fully apply here. *See Corban*, No. 2014-0804, State of Ohio Amicus Br. 6-16.

B. Shondrick-Nau’s waived any challenge to the constitutionality of the original version of R.C. 5301.56 by failing to raise that challenge in the trial court.

In her Proposition of Law II, Shondrick-Nau does make one argument not addressed in *Corban*: that the original version of the Dormant Mineral Act violated the Ohio Constitution’s prohibition on retroactive laws. *See* Ohio Const. art. II, § 28. For one simple reason, that argument should not be addressed in this case either: Shondrick-Nau has waived it.

“Failure to raise at the trial court level the issue of the constitutionality of a statute or its application . . . constitutes a waiver of such issue.” *State v. Awan*, 22 Ohio St. 3d 120, syl. (1986); *see ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St. 3d 520, 2014-Ohio-2382 ¶ 14. And although this Court “has the discretion to consider a forfeited constitutional challenge to a statute,” *State v. Quarterman*, ___ Ohio St. 3d ___, 2014-Ohio-4034 ¶ 16, exercise of that discretion is disfavored, *Goldfuss v. Davidson*, 79 Ohio St. 3d 116, syl. (1997). Excusing waiver is “sharply limited to the *extremely rare* case involving *exceptional* circumstances where the error, left unobjected to at the trial court, rises to the level of challenging the legitimacy of the underlying judicial process itself.” *Id.* at 122-23.

This case does not present exceptional circumstances. Shondrick-Nau simply chose not to make certain arguments below: Neither in her complaint nor in her summary-judgment motion did she argue that the 1989 version of the Dormant Mineral Act violated the Ohio Constitution. *See* App. Op. ¶ 55. Instead, she argued that she should prevail even under the

1989 version of the Act that she now attacks. App. Op. ¶ 57. Because she relied on the 1989 version in the trial court and failed to raise a constitutional challenge to that statute, the appellate court held that she waived any such challenge on appeal. App. Op. ¶¶ 55-58.

This Court should do the same. Shondrick-Nau does not even address the appellate court's waiver holding. See Appellant's Br. 4, 19-20. That failure alone is sufficient to preclude review of her constitutional argument. See *Quarterman*, 2014-Ohio-4034 ¶¶ 16-20 (noting that the appellant did "not present a proposition of law to this court responsive to" the appellate court's finding of waiver and faulting him for failing to "provide any argument that the court of appeals erred in rejecting his constitutional claims without ruling on the merits"). Even if Shondrick-Nau *had* sought review of the appellate court's waiver finding, she could not establish that the failure to address her waived constitutional claim affected "the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." See *Goldfuss*, 79 Ohio St. 3d 116 at syl..

C. Shondrick-Nau's Proposition of Law III asks for an advisory opinion on a question that will be rendered moot.

No matter how the Court resolves *Corban* (and by extension the first two Propositions of Law here), the question in Shondrick-Nau's Proposition of Law III will be moot. As Shondrick-Nau admits, if the Court holds that the 1989 version of the Dormant Mineral Act was self-executing, her Proposition of Law III will be "superfluous." Appellant Br. 22. The same is true if it reaches the opposite conclusion and holds that the amended version of the statute applies to claims asserted after 2006. Holding that the 1989 version was *not* self-executing means the Court should apply the *amended* version's procedures, not the *1989* version's procedures. In that case, it will not matter what procedures were required under the original version of the statute because the *current* version of R.C. 5301.56 would apply.

Indeed, Shondrick-Nau admits that her Proposition of Law III seeks an advisory opinion. *See* Appellant Br. 22-23 (stating that the Court “does not need to answer this question to resolve the appeal” but that it should do so because “Ohio is in need of clarity on the issue.”). But, as this Court has repeatedly stated, it “does not indulge itself in advisory opinions.” *In re Application of Columbus S. Power Co.*, 138 Ohio St. 3d 448, 2014-Ohio-462 ¶ 39 (citation omitted); *see also State ex rel. Wood v. McClelland*, 140 Ohio St. 3d 331, 2014-Ohio-3969 ¶ 13.

For these reasons, any pronouncement about Proposition of Law III, or about the 20-year dormancy period, would be inappropriate.

Amicus Curiae State of Ohio’s Proposition of Law 2 (corresponding to Shondrick-Nau’s Propositions of Law IV and V):

The mere restatement of a prior mineral reservation in a later transfer of surface property is not a savings event under R.C. 5301.56(B)(3).

The Court has ordered supplemental briefing in a pending case on the same questions presented in Propositions of Law IV and V. In *Dodd v. Croskey*, No. 2013-1730, the Court ordered briefing over whether “[a] restatement of a prior mineral reservation in later deeds is a ‘title transaction’ within the meaning of [R.C.] 5301.56 [of the 2006 version of the Act]” and thus qualifies as a savings event preventing reunification. *See id.*, Aug. 28, 2014 Order.

Proposition of Law IV. As the State explained in its supplemental amicus brief in *Dodd*, the restatement of a prior mineral reservation in a later transfer of surface property does *not* qualify as a savings event and thus does not reset the Act’s 20-year dormancy clock. *See* State of Ohio Amicus Br. at 3-9. Among other things, R.C. 5301.56(B)(3)(a) requires more than just a title transaction; it requires that the severed *mineral interest* be *the subject* of the title transaction. When surface property is transferred, it is the surface property—not the mineral interest—that is the subject of the transaction. Treating the transfer of the surface property as a savings event, moreover, would thwart the Act’s purpose by preserving severed mineral interests that are

unquestionably dormant. For these reasons, and others the State has articulated, *see Dodd*, No. 2013-1730, State of Ohio Amicus Br. at 3-9, the Court should hold that R.C. 5301.56(B)(3)(a) requires a *mineral interest* to be *the subject of* a title transaction, and that a savings event does not occur when a severed mineral interest is merely referenced in a transfer of a *surface* estate.

Proposition of Law V. The State has also already shown why Shondrick-Nau mistakenly argues that the State's reading is allegedly undermined by R.C. 5301.49 in the Marketable Title Act. *See Dodd*, No. 2013-1730, State of Ohio Amicus Br. 7. The statutes are concerned with two different things: The Marketable Title Act focuses on the nature and scope of title held by owners of a *surface* estate. The Dormant Minerals Act, on the other hand, focuses on whether *mineral-interest* owners have abandoned their interests.

Amicus Curiae State of Ohio's Proposition of Law 3 (corresponding to Shondrick-Nau's Propositions of Law VI):

The original version of the Dormant Mineral Act applies to severed mineral interests that were created prior to 1989.

The plain text of the Act as adopted in 1989 shows that the General Assembly intended for it to apply to *all* severed mineral interests, regardless of when they were created. That was the purpose of the grace period in R.C. 5301.56(B)(2). The General Assembly included a three-year grace period, providing holders of *existing* severed mineral interests that had been dormant for 20 years with an opportunity to preserve those interests. R.C. 5301.56(B)(2) (1989). Interpreting the Act as applying only to mineral interests created after 1989 would render the grace period meaningless. It is, however, a "basic rule of construction that a court will . . . avoid a construction that renders any provision meaningless, inoperative, or superfluous." *Burkhart v. H.J. Heinz Co.*, ___ Ohio St. 3d ___, 2014-Ohio-3766 ¶ 33.

The State's interpretation of the 1989 version of the Dormant Mineral Act is confirmed by the U.S. Supreme Court's decision in *Texaco v. Short*, 454 U.S. 516 (1982). The Indiana

statute at issue in that case, like the original version of R.C. 5301.56, “contained a two-year grace period in which owners of mineral interests that were then unused and subject to lapse could preserve those interests.” *Id.* at 518-19. The Supreme Court upheld the statute against a constitutional challenge, concluding in part that a two-year grace period was sufficient to protect holders of *existing* mineral interests. *Id.* at 532-33. There is no reason to read Ohio’s 1989 Act differently—it applied to interests severed before its effective date.

In support of her Proposition of Law VI, Shondrick-Nau misreads the appellate court’s decision. She argues that the court of appeals held that the 2006 version of the Act is “inapplicable to severed mineral interests created prior to June 30, 2006” because that version of the statute does not specifically provide for retroactive application. Appellant Br. 35. Not so. The court of appeals concluded that by the time the Act was amended in 2006 the mineral interest at issue here “had already been abandoned” and “had been vested with the surface owner for 14 years.” App. Op. at ¶ 41. It held that the vesting process outlined in the 2006 version of the Act did not apply to dormant mineral interests that had *already vested* in the owner of the surface estate prior to the amendment of the statute. *See* App. Op. ¶¶ 36-51. It based that conclusion in part on the fact that the General Assembly did not indicate that the amended statute’s vesting process was to apply retroactively to interests that had *already* vested. *See* App. Op. ¶¶ 37, 51. As discussed more fully in the State’s amicus brief in *Corban*, the appellate court’s decision is supported by the text of the 2006 version of the Act itself, which states that the procedures in that version must be followed “[*b*]efore a mineral interest becomes vested” in the owner of a surface estate. *See* R.C. 5301.56(E) (emphasis added); *see also Corban*, No. 2014-0804, State of Ohio Amicus Br. at 9.

Finally, much like her constitutional claim, Shondrick-Nau has waived her claim that the original version of the Act did not apply to severed mineral interests created before 1989. That argument was not raised in the court below. As discussed above, parties waive arguments when they raise them in this Court for the first time. *See ProgressOhio.org*, 2014-Ohio-2382 at ¶ 14.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the State's amicus briefs in *Corban v. Chesapeake Exploration, L.L.C.*, No. 2014-0804 and *Dodd v. Croskey*, No. 2013-1730, the Court should hold that the 1989 version of the Dormant Mineral Act was self-executing, and that the restatement of a prior mineral reservation in a later transfer of surface property is not a savings event under R.C. 5301.56(B)(3).

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of *Amicus Curiae* State of Ohio in Support of Appellee was served by U.S. mail this 1st day of December, 2014, upon the following counsel:

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