

**IN THE SUPREME COURT OF OHIO**

John D. Walker, Jr.,	:	
	:	
Appellee,	:	Case No. 2014-0803
	:	
v.	:	
	:	
Patricia J. Shondrick-Nau,	:	Jurisdictional Appeal from the
Executrix of the Estate of John R. Noon,	:	Seventh District Court of Appeals,
and Successor Trustee of the	:	Noble County, Case No. 13 NO 402
John R. Noon Trust,	:	
	:	
Appellant.	:	

---

**REPLY BRIEF  
OF APPELLANT PATRICIA J. SHONDRICK-NAU, AS EXECUTRIX OF THE  
ESTATE OF JOHN R. NOON, AND SUCCESSOR TRUSTEE OF  
THE JOHN R. NOON TRUST**

---

Matthew W. Warnock (0082368)\*  
*\*Counsel of Record*  
Daniel C. Gibson (0080129)  
Daniel E. Gerken (0088259)  
BRICKER & ECKLER LLP  
100 South Third Street  
Columbus, Ohio 43215-4291  
Telephone: (614) 227-2300  
Facsimile: (614) 227-2390  
mwarnock@bricker.com  
dgibson@bricker.com  
dgerken@bricker.com

COUNSEL FOR APPELLANT

Kenneth Cardinal (0010659)  
758 North 15th Street  
P.O. Box 207  
Sebring, Ohio 44672  
Telephone: (330) 938-2161  
Facsimile: (330) 938-1556  
cardinallaw@sbcglobal.net

James F. Mathews (0040206)  
BAKER, DUBLIKAR, BECK, WILEY & MATHEWS  
400 South Main Street  
North Canton, Ohio 44720  
Telephone: (330) 499-6000  
Facsimile: (330) 499-6423  
mathews@bakerfirm.com

COUNSEL FOR APPELLEE

Michael DeWine  
Attorney General of Ohio  
Eric Murphy, State Solicitor (0083284)\*  
\*Counsel of Record  
Samuel C. Peterson, Deputy Solicitor (0081432)  
30 East Broad Street, 17<sup>th</sup> Floor  
Columbus, Ohio 43215  
Telephone: (614) 466-8980  
Facsimile: (614) 466-5087  
E-mail: ericmurphy@ohioattorneygeneral.gov

COUNSEL FOR AMICUS CURIAE, STATE  
OF OHIO

Clay K. Keller (0072927)\*  
\*Counsel of Record  
Sandra K. Zerrusen (0070883)  
J. Alex Quay (0085130)  
Jackson Kelly PLLC  
17 S. Main Street, Suite 101-B  
Akron, OH 44308  
Telephone: (330) 252-9060  
Facsimile: (330) 252-9078  
Email: ckkeller@jacksonkelly.com

COUNSEL FOR AMICI CURIAE, ECLIPSE  
RESOURCES CORPORATION AND  
CHESAPEAKE EXPLORATION, L. L. C.

**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES .....	iii
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....	1
A.    The 2006 version of the DMA is the only version to be applied after June 30, 2006 because the 1989 version of the DMA was not "self-executing." .....	1
1.    The 1989 version of the DMA is ambiguous.....	2
2.    Appellant's interpretation is <i>most</i> consistent with the statutory text as a whole.....	4
3.    Appellant's interpretation is most consistent with the express objectives of the 1989 version of the DMA. ....	8
4.    Appellant's interpretation is consistent with the legislative history.....	10
5.    Appellant's interpretation is the only one that is consistent with Ohio's common law rules governing the interpretation of forfeiture statutes.....	11
6.    The consequences of construing the 1989 version of the DMA as "self-executing" are unreasonable and unlawful. ....	12
a.    Interpreting the 1989 version of the DMA to be "self-executing" is contrary to the Ohio Constitution's ban on retroactive legislation. ....	12
b.    Interpreting the 1989 version of the DMA to be "self-executing" achieves no public policy goals. ....	13
c.    Interpreting the 1989 version of the DMA to be "self-executing" produces inequitable results. ....	14
B.    A deed transferring the surface but specifically referencing a prior mineral reservation constitutes a savings event for purposes of R.C. 5301.56(B)(3).....	16
1.    The phrase "subject of" in R.C. 5301.56(B)(3)(a) does not require an actual transfer of the mineral rights in order to qualify as a "savings event." .....	16
a.    The interplay between R.C. 5301.55 and R.C. 5301.49 requires that a transfer of the surface which specifically references the severed mineral interest constitutes a "savings event" under R.C. 5301.56. ....	16

b.	The legislative history of the DMA supports Appellant's interpretation.	17
c.	Principles of statutory interpretation support Appellant's position.	18
d.	Appellee's argument regarding reservations in favor of a stranger is misleading and inaccurate.	19
CONCLUSION.....		20
CERTIFICATE OF SERVICE .....		21

**TABLE OF AUTHORITIES**

Page

**CASES**

*Clark v. Scarpelli*, 91 Ohio St.3d 271, 744 N.E.2d 719 (2001)..... 2, 3

*Corban v. Chesapeake Exploration, L.L.C.*, 2014-Ohio-3195 ..... 1

*Dodd v. Croskey*, 2013-Ohio-4257 (7th Dist.)..... 16, 18

*Eisenbarth v. Reusser*, 7th Dist. Monroe No. 13 MO 10, 2014-Ohio-3792 ..... 3, 5

*Farnsworth v. Burkhardt*, 2014-Ohio-4184 (7th Dist. 2014) ..... 5

*Fulmer v. Insura Prop. & Cas. Co.*, 94 Ohio St.3d 85 ..... 12

*In re Allen*, 415 B.R. 310 (N.D. Ohio 2009)..... 20

*State ex rel. Hornbeck v. Durflinger*, 73 Ohio St. 154 (1905)..... 6

*State ex rel. Toledo Edison Co. v. City of Clyde*, 76 Ohio St.3d 508, 668 N.E.2d 498 ..... 4

*State v. Jordan*, 89 Ohio St.3d 488, 733 N.E.2d 601 (2000) ..... 2

*Tribett v. Shepherd*, 7th Dist. Case No. 13-BE-22, 2014-Ohio-4320..... 11

**STATUTES**

R.C. 1.49 ..... 1, 2, 3, 17

R.C. 1.49(E) ..... 13

R.C. 1.51 ..... 17

R.C. 5301.47 through R.C. 5301.55 ..... 17

R.C. 5301.48 ..... 17

R.C. 5301.49(A)..... 17

R.C. 5301.56(B)(1) ..... 5

R.C. 5301.56(B)(1)(c)..... 5

R.C. 5301.56(B)(3)(a)..... 19

R.C. 5301.56(B)(3)(e)..... 18

R.C. 5301.56(C)..... 15

R.C. 5301.56(c)(ii).....	9
R.C. 5301.56(c)(iii).....	9
R.C. 5301.56(D)(1).....	7
R.C. 5301.56(H).....	15
R.C. 5301.56(H)(1).....	15
R.C. 5301.56(H)(2).....	15

**CONSTITUTIONAL PROVISIONS**

Section 28, Article II, Ohio Constitution.....	12
--	----

**OTHER AUTHORITIES**

<i>Analysis of Sub. S.B. 223 (As Reported by H. Civil &amp; Commercial Law), 1989</i> .....	10
<i>Analysis of Sub. S.B. 223 (As Reported by S. Judiciary), 1989</i> .....	10
Black's Law Dictionary (6 Ed.1990).....	12
<i>Oxford Dictionary and Thesaurus</i> .....	19

## ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

**A. The 2006 version of the DMA is the only version to be applied after June 30, 2006 because the 1989 version of the DMA was not "self-executing."<sup>1</sup>**

The Court's resolution of the first three propositions of law rests on two critical distinctions. First, is the distinction between a clear statute and an ambiguous statute. Appellee offers no plausible argument for why the 1989 version of the DMA is clear and susceptible of only one reading. In fact, Appellee's own merit brief makes the conclusion inescapable that the 1989 version of the DMA is, at a minimum, ambiguous and subject to more than one plausible reading. *See infra* footnote 2.

Second, is the distinction between a self-executing statute and a right that vests automatically upon the occurrence of some event (e.g., upon the filing of a lawsuit). Appellee confuses the two concepts by arguing that, because the 1989 version of the DMA provided that abandonment and vesting were automatic (i.e., did not afford a mineral rights owner any opportunity to regain his mineral rights upon the occurrence of some unidentified event), the law also must have been self-executing (i.e., required nothing but the passage of time in order for that automatic abandonment and vesting to occur). When the Court recognizes that the 1989 version of the DMA is ambiguous on this issue, and further recognizes that a statute that provides for automatic vesting (upon the filing of a lawsuit) is not necessarily self-executing, it has no choice but to consider the factors in R.C. 1.49. And, when the Court examines both the text and the

---

<sup>1</sup> Although the issue at the heart of Propositions of Law I and II (whether the 1989 version of the DMA was self-executing) may be decided by this Court in *Corban v. Chesapeake Exploration, L.L.C.*, 2014-Ohio-3195, as pointed out in the State of Ohio's amicus brief, the issue is ripe for decision in this case. In fact, this case provides the Court with a single proceeding in which it can comprehensively address numerous DMA-related legal issues, including whether the 1989 version of the DMA was self-executing.

factors in R.C. 1.49, it is clear that the General Assembly did not intend the 1989 version of the DMA to be self-executing.

**1. The 1989 version of the DMA is ambiguous.**

While Appellee asserts that the 1989 version of the DMA is clear and unambiguous on its face, his brief contains a litany of implicit concessions that the words of the statute alone are not sufficient to discern its meaning. For example, Appellee's first citation is not to the text of the allegedly "clear" statute, but rather to its legislative history. *See* Appellee's Merit Brief at 3–4. This is a quintessential resort to sources outside the text to establish the meaning of an ambiguous statute—an interpretive tool that is not necessary when the statute is "clear," as Appellee argues is this case. *See, e.g.,* R.C. 1.49. In addition, Appellee conspicuously avoids addressing, let alone even mentioning, the term "preceding" which appears in the statutory text. Instead, he employs a number of euphemisms in his descriptions of how the 1989 version of the DMA operated "clearly." *See, e.g.,* Appellee's Merit Brief at 19 ("one determines, looking forward from the date of such saving event . . ."). Those descriptions instead reveal that Appellee's so-called "clear meaning" argument fails based on the very language in the statute relied upon by Appellee.

Even more, Walker simply ignores this Court's long-standing recognition that a "statute is ambiguous when its language is subject to more than one reasonable interpretation." *Clark v. Scarpelli*, 91 Ohio St.3d 271, 274, 744 N.E.2d 719 (2001) (citing to *State v. Jordan*, 89 Ohio St.3d 488, 492, 733 N.E.2d 601, 605 (2000)). Significant disagreement among all DMA practitioners, trial courts,<sup>2</sup> and appellate judges (even in the same appellate district),<sup>3</sup> over the

---

<sup>2</sup> *See* Appellant's Merit Brief at 8, fn. 5, comparing competing trial court decisions.

meaning of statutory text is a strong indication that it is not susceptible of just one reading. Further, the General Assembly itself explicitly recognized the inherent ambiguity of the statute during the enactment of the 2006 version of the DMA. See *Eisenbarth*, 2014-Ohio-3792, at ¶ 108 (DeGenaro, P.J., concurring in judgment only) (citing H.B. 288 Rep. Mark Wagoner, Sponsor Testimony before the Ohio House Public Utilities Committee).

Finally, as addressed below, Appellee's emphasis on the words "deemed" and "vested" in the text of the 1989 version of the DMA do nothing to make up for the inherent deficiencies in, and ambiguity of, the statutory language. The question is not whether the statute provided for the automatic abandonment and vesting of mineral rights in surface owners, but what triggered that abandonment and vesting. Repeatedly asserting that deemed means deemed, and vested means vested, does nothing to advance his argument.

In light of the obvious ambiguity in the 1989 law, this Court cannot, and should not, limit its analysis to the text of the 1989 version of the statute as Appellee and its supporting amicus propose. See Appellee's Merit Brief at 3 and State of Ohio's Amicus Brief at 7. Instead, "where the words are ambiguous, a court is charged with construing the language in a manner that reflects the intent of the General Assembly" using other interpretive tools. *Clark*, 91 Ohio St.3d at 274. And, citing to R.C. 1.49, this Court recognizes that "[c]ourts review several factors [set forth in R.C. 1.49] to glean the General Assembly's intent, including the circumstances surrounding the legislative enactment, the history of the statute, the spirit of the statute (the ultimate results intended by adherence to the statutory scheme), and the public policy that induced the statute's enactment." *State ex rel. Toledo Edison Co. v. City of Clyde*, 76 Ohio St.3d

---

<sup>3</sup> See e.g., *Eisenbarth v. Reusser*, 7th Dist. Monroe No. 13 MO 10, 2014-Ohio-3792, ¶¶ 65–72 (DeGenaro, P.J., concurring in judgment only) (strongly disagreeing with Judge Vukovich and Judge Donofrio regarding the applicability of the 1989 version of the DMA).

508, 513-514, 668 N.E.2d 498. Appellee fails to even address these statutory factors which, when analyzed with the ambiguous text, lead to the inescapable conclusion that the 1989 version of the DMA was not intended to be "self-executing."

**2. Appellant's interpretation is *most* consistent with the statutory text as a whole.**

A textual analysis of the 1989 version of the DMA necessarily involves arguments relating to Propositions of Law Nos. I, II, and III.<sup>4</sup> Yet, the Appellee and its supporting amicus ignore the majority of the statutory text and claim that just six words ("shall be deemed abandoned and vested") lead to the conclusion that the statute was self-executing.

Appellant does not dispute the individual meanings of those words as emphasized in Appellee's Merit Brief. *See* Appellee's Merit Brief at 11 (focusing on the definitions of "shall" and "vested"). Instead, Appellant fundamentally disagrees with Appellee as to what triggers the deemed abandonment and vesting of the severed mineral rights. The Appellant's answer to this question (a surface owner taking formal legal action under the 1989 version of the DMA) that proves to be the best of the available alternatives because it: (1) preserves the commonsense understanding of the term "preceding" (and the indisputably *backward*-looking operation that it implies); (2) allows for the prospective application of the statute to successive, 20-year periods of dormancy; and (3) does the least violence to the text of the statute.

---

<sup>4</sup> Appellant is not asking this Court to issue an advisory opinion regarding the 20-year look-back under the 1989 version of the DMA. *See* State of Ohio's Amicus Brief at 5–6. This appeal is structured so that certain propositions of law only require an answer in specific situations. For example, if this Court determines that the 1989 version of the DMA no longer applies because it is not self-executing, then Proposition of Law No. III would not need to be decided. If, however, the Court deems the 1989 version of the DMA to remain applicable, then the Court must decide the starting point for the 20-year look-back period under the 1989 version of the DMA. As a result, Proposition of Law No. III is only rendered moot if this Court adopts the Appellant's arguments set forth in regard to Propositions of Law Nos. I and II.

The reasonableness of Appellant's interpretation bears itself out when the six words focused on by Appellee are analyzed in the context of the entirety of the statute—specifically, that a severed mineral interest "shall be deemed abandoned and vest in the owner of the surface, if none of [eight statutory savings events] applies . . . [w]ithin the preceding twenty years" R.C. 5301.56(B)(1), (B)(1)(c) (eff. March 22, 1989). Any viable interpretation must not only determine the triggering event for the "deemed" abandonment and vesting of the mineral rights, but also give meaning to the critical term "preceding" and allow for the possibility of successive 20-year periods of nonuse, which the statute clearly contemplates. Unfortunately, the Appellee's arguments fail to do so.

First, Appellee's preferred interpretation is often mischaracterized as a "rolling" 20-year look-back. This interpretation (which has been rejected by the Seventh District Court of Appeals) allows a surface owner to "pick any date that exists between March 22, 1989 and June 30, 2006 and then look back 20 years from that date." *Eisenbarth*, 2014-Ohio-3792, at ¶ 39. In reality, however, and as explained in detail by Appellee, this interpretation is actually a roll forward. Specifically, Appellee describes this interpretation as follows:

First, one determines whether or not a saving event occurred within the 20 years prior to the effective date of the statute (March 22, 1989; March 22, 1992 – factoring the three-year tolling period). If there was no saving event, then the interest lapsed and was automatically abandoned and merged. Second, if there was some saving event within that time frame, then one determines, looking forward from the date of such saving event, whether a subsequent saving event has occurred within 20 years. If no subsequent saving event occurred in the 20 years since the last saving event, the mineral interest is, again, automatically abandoned, and ownership of the interest is merged and vested with the surface owner.<sup>5</sup>

---

<sup>5</sup> This is the same roll forward interpretation set forth by Judge DeGenaro in her concurring opinions in *Eisenbarth*, 2014-Ohio-3792, at ¶ 72, and *Farnsworth v. Burkhardt*, 2014-Ohio-4184, ¶ 92 (7th Dist. 2014).

Appellee's Merit Brief at 19. In essence, the Appellee describes the relevant 20-year period as commencing on the date of the last statutory "savings event," and rolling *forward*.

Appellee offers no response to the charge that the rolling look forward, which he endorses, cannot be reconciled with the term "preceding" as used in the 1989 version of the DMA. To be sure, Appellee repeatedly describes how he believes the statute should have operated in practice, but nowhere gives a textual account of how a rolling look forward is in any way consistent with a statutory mandate to look back at the "preceding twenty years" from a particular, undefined point in time. *See State ex rel. Hornbeck v. Durflinger*, 73 Ohio St. 154, 159 (1905) (explaining that, "in the construction of a statute or constitution, meaning must, if possible, be given to every part and word"). Indeed, Appellee's interpretation of the statute is based almost entirely on what the law does *not* contain, rather than the words that the General Assembly actually employed.

The second major failure in Appellee's argument is that he nowhere explains why removing the word "preceding" and rewriting the statute to read "within the twenty years following the last savings event" is more consistent with the statutory text or more appropriate as a textual construction of the law.<sup>6</sup> For better or worse, this Court (and Appellee) must deal with the language chosen by the General Assembly and written in the 1989 version of the DMA (the word "preceding"). If the General Assembly intended to create a *forward*-looking twenty-year period, it easily could have done so. But it did not. Because Appellee's interpretation constitutes a wholesale replacement of the statutory language, it must be rejected.

---

<sup>6</sup> This is ironic in light of the Appellee's contention that Appellant's proposal adds words to the text of the 1989 version of the DMA. Appellee's Merit Brief at 17.

Second, Appellee appears to read the 1989 version of the DMA as providing for a fixed, 20-year look-back period starting on March 22, 1989 (the effective date of the statute) and looking back to March 22, 1969. *See* Appellee's Merit Brief at 16 ("[O]ne only need 'look back' 20 years prior to the passage of the code and expiration of the savings period of the 1989 DMA[.]"). In essence, only those mineral interests which already were dormant for at least 20 years as of the effective date of the 1989 version could be deemed abandoned and vested (assuming the mineral interest owner failed to take advantage of the three year grace period).

While this "fixed" look-back period has the virtue of giving meaning to the term "preceding" (by tying the look-back to the date of the enactment of the statute), it fails to allow for the possibility of successive 20-year periods of nonuse, which the statute clearly contemplates. *See, e.g.,* R.C. 5301.56(D)(1) (eff. March 22, 1989). Even the Appellee recognizes this fact. Appellee's Merit Brief at 17–18 ("Section (D)(1) would make no sense if the DMA operated for a fixed period. If the statute only addressed a single, 20-year period pre-dating the enactment of the statute, there would never be a need to file 'successive' claims to preserve under Division (C)"). In essence, the "fixed look-back" interpretation gives meaning to the word preceding, but completely writes out of the statute the language contemplating prospective application to successive periods of nonuse. As a result, it, too, must be rejected.

This leaves the Court with the best option: Appellant's interpretation of the look-back period as the "20 years preceding commencement on an action to obtain the minerals." From a purely textual perspective, reading into the statute an implied requirement that a surface owner file a claim in order to avail himself of the rights created thereunder requires the least supplementation of the ambiguous statutory text.

**3. Appellant's interpretation is most consistent with the express objectives of the 1989 version of the DMA.**

Amazingly, the very purpose of the 1989 version of the DMA, according to Appellee, was to be a self-executing statute. *See* Appellant's Merit Brief at 16. While convenient for his position, such a bold assertion is not supported by the record or the stated purpose of the legislation itself.

As noted in Appellant's Merit Brief, the purpose and objectives of the DMA are clearly and expressly set forth in R.C. 5301.55. According to the General Assembly itself, *any* interpretation of the 1989 version of the DMA must "effect th[is] legislative purpose[.]" *See* R.C. 5301.55.

Yet, relying on the Legislative Service Commission's analysis of the 1989 version of the DMA, the Appellee invents a new "object sought to be attained." Specifically, the Appellee states that the "DMA was designed to do more than facilitate title transactions—it was intended to provide that, when deemed abandonment occurs, the 'interest will vest in the surface owner.'" Appellee's Merit Brief at 5. In essence, the Appellee argues that the express objective of the 1989 version of the DMA was that of "self-executing" divestiture. Nothing could be further from the truth.

First, Appellee's argument ignores the language in R.C. 5301.55 making it applicable to "Sections 5301.47 to 5301.56, *inclusive*." There is no dispute that the DMA is found in R.C. 5301.56. And there is no dispute that the word "inclusive" renders R.C. 5301.55 applicable to all of the identified statutes, including the DMA. The only logical conclusion is that the express statutory objectives of the DMA are set forth in R.C. 5301.55.

Second, Appellee's theory of "self-executing" divestiture is not the object of the statute. The theory proposed by Appellee is just that—a theory designed to explain how the 1989 version

of the DMA operated. Appellee's theory not only does not serve as the statutory objective of the DMA, but actually severely frustrates the clearly articulated objectives sought to be attained. In fact, as set forth in Appellant's Merit Brief, interpreting the 1989 version of the DMA to divest mineral interest owners of their constitutionally protected private property rights without any action or legal notice directly contravenes the legislative intent because it: (i) undercuts the public's ability to rely on the record chain of title; and, (ii) complicates rather than simplifies transactions involving the oil and gas mineral rights. *See* Appellant's Merit Brief at 11–16.

The inherent flaw in Appellee's argument is best highlighted on page 10 of Appellee's Merit Brief, where he states that if the 1989 version of the DMA is "self-executing," a "title examiner, versed in the DMA, may determine ownership of oil and gas rights as easily from the absence of any recorded transaction in a severed mineral right (and lapse of the requisite time period) as from some form of recording 'claiming' an abandoned interest." This overly simplistic analysis ignores the realities of abstracting and assumes that the only savings event is a recorded title transaction. This is simply not true. *See* Appellee's Merit Brief at 6–7 (identifying six separate savings events under the 1989 version of the DMA).

The reality is that, under Appellee's interpretation, no one could actually ascertain from the record chain of title whether the surface owner regained the ownership of previously severed mineral rights. The reason is simple: a number of the "savings events" set forth in R.C. 5301.56 can only be determined by looking outside of the record chain of title. *See, e.g.*, R.C. 5301.56(c)(ii) (eff. March 22, 1989) (actual production or withdrawal of the minerals); R.C. 5301.56(c)(iii) (eff. March 22, 1989) (underground gas storage). As a result, the "self-executing" interpretation of the 1989 version of the DMA directly contradicts the essential objective of the DMA: allowing persons to rely on record chain of title. *See* R.C. 5301.55. Indeed, under

Appellee's construction, hundreds, if not thousands, of severed mineral interests would be "vested" in surface owners as of March 22, 1992, without anything—not one document—in the public record establishing such transfers.

On the other hand, Appellant's interpretation upholds both of the stated statutory objectives. Requiring a surface owner to take action before the mineral rights will be deemed abandoned ensures that the chain of title accurately reflects the state of ownership. And it does so without implying any new or additional grace period for severed mineral interest owners, while ensuring there is a recorded document that publicly identifies the precise date on which the surface and mineral estates merged. Such clarity and public certainty advances the productive development of properly-recorded severed mineral interests, just as the General Assembly intended. *See* R.C. 5301.55.

#### **4. Appellant's interpretation is consistent with the legislative history.**

The legislative history surrounding the 1989 version of the DMA (although sparse) also supports Appellant's interpretation. As an initial matter, the text of the 1989 version of the DMA (as introduced and enacted) does not state that the 1989 version of the DMA was intended to be "self-executing" or "automatic."<sup>7</sup> Further, and contrary to the assertions on pages 3-4 and 18 of Appellee's Merit Brief, the Legislative Service Commission's analysis of the 1989 version of the DMA does nothing to suggest that the statute was self-executing. Instead, the analysis simply cites to the "deemed abandoned and vested" language in the statute. The words "self-executing" and "automatic" appear nowhere in the legislative history (the bills or Legislative Service Commission's analyses).

---

<sup>7</sup> *See Analysis of Sub. S.B. 223 (As Reported by H. Civil & Commercial Law)*, 1989; *Analysis of Sub. S.B. 223 (As Reported by S. Judiciary)*, 1989.

Just as importantly, Judge DeGenaro from the Seventh District Court of Appeals more recently noted in her concurring opinion:

The timing of the enactment of both versions of the ODMA has presented Ohio's judiciary with a rare opportunity; virtually every case involving the statute has been filed *after* the amendments to the ambiguous statute have been enacted. Instead of engaging in the typical exercise of divining legislative intent by reading the proverbial tea leaves, the General Assembly has provided us with a billboard of the meaning of these terms by virtue of sponsor testimony and Legislative Services' analysis of the 2006 ODMA, let alone the express statutory language of R.C. 5301.56 the General Assembly enacted.

*Tribett v. Shepherd*, 7th Dist. Case No. 13-BE-22, 2014-Ohio-4320, ¶ 129 (DeGenaro, P.J., concurring in judgment only).

The legislative history of the 1989 version of the DMA, while limited, supports Appellant's interpretation—particularly in light of the 2006 amendments.

**5. Appellant's interpretation is the only one that is consistent with Ohio's common law rules governing the interpretation of forfeiture statutes.**

Contrary to Appellee's assertions, there is no doubt that the DMA is a forfeiture statute, and as a forfeiture statute, the DMA is thus subject to this Court's holdings that:

- "Forfeitures . . . are not favored in law or equity and statutory provisions therefor must be strictly construed." *State ex rel. Lukens v. Indus. Comm. of Ohio*, 143 Ohio St. 609, 611, 56 N.E.2d 216 (1944); and
- "Whenever possible, such statutes must be construed to avoid a forfeiture of property." *State v. Lilliock*, 70 Ohio St.2d 23, 26, 434 N.E.2d 723 (1982), *superseded on other grounds*, R.C. 2933.41(C) (statute repealed July 1, 2007).

See Appellant's Merit Brief at 16–17.

Despite this straightforward analysis, the Appellee still claims that the "1989 DMA does not operate as a forfeiture statute; rather, it is by its terms an abandonment law." Appellee's Merit Brief at 12. Although the 1989 version of the DMA uses the phrase "deemed abandoned," it is not an abandonment law. The word abandon means "to relinquish or give up with intent of

never again resuming one's right or interest. \* \* \* To give up absolutely; to forsake entirely; to renounce utterly; to relinquish all connection with or concern in; to desert." (Emphasis added). *Fulmer v. Insura Prop. & Cas. Co.*, 94 Ohio St.3d 85, 95 (citing Black's Law Dictionary (6 Ed.1990)). Yet, the 1989 version of the DMA requires no intent on the part of the severed mineral interest owner (e.g., Appellant) to forever and absolutely relinquish their vested ownership of the mineral rights. Here, the Appellant not only did not intend to forever and absolutely forsake his interest in the mineral rights, but took affirmative steps to preserve his ownership of the severed oil and gas mineral rights by timely filing an affidavit under the current version of the DMA stating his intent not to abandon those rights.

The 1989 version of the DMA is a forfeiture statute, because it results in the "divestiture of property without compensation" and the loss of a vested "right" to a private "property" interest based on the alleged "neglect of duty" of the severed mineral owner. As a result, this Court must heed the admonition to "*whenever possible*" find a construction that avoids a forfeiture. *Lilliock*, 70 Ohio St.2d at 26. That is, even if implying the existence of a limited procedural obligation on surface owners (e.g., taking formal legal action under the 1989 version of the DMA) were not the interpretation most consistent with the statutory text—which it is—the mere fact that it is *possible* to construe its provisions that way requires this Court to do so.

6. **The consequences of construing the 1989 version of the DMA as "self-executing" are unreasonable and unlawful.**
  - a. **Interpreting the 1989 version of the DMA to be "self-executing" is contrary to the Ohio Constitution's ban on retroactive legislation.**

As set forth in detail in Appellant's Merit Brief, Appellee's proposed interpretation of the 1989 version of the DMA violates Article II, Section 28 of the Ohio Constitution (prohibiting retroactive legislation). *See* Appellant's Merit Brief at 17–20. Amicus curiae, the State of Ohio,

however, raise a waiver argument regarding the constitutional argument embedded within Appellant's analysis of whether the 1989 version of the DMA is self-executing.

First and foremost, Appellant did not waive the right to raise the constitutional argument presented to this Court in the context of Propositions of Law Nos. I and II. The issue was raised in Appellant's motion for summary judgment before the trial court (albeit inartfully), and tackled head-on by Appellee in its memorandum contra, with an entire section titled: "Automatic, or Self-Executing, Mineral Lapse Statutes – Like the 1989 Version of R.C. 5301.56 – Are Constitutional." The constitutional issues then were fully briefed before the Seventh District Court of Appeals, and the waiver issue was not raised by any party to the appeal. *See* Appellant's Brief at 14–18; Appellee's Brief at 15–17; Appellant's Reply Brief at 1–2. The lower appellate court (and the State of Ohio) are simply incorrect that the argument was waived.

In addition, the constitutional question is not a direct challenge to the validity of an existing statute. Instead, the constitutional question only arises in the unusual context of interpreting an ambiguous and superseded statute—specifically, as one component of the analysis under R.C. 1.49(E). This statute allows a court to examine the "consequences of a particular construction" of an ambiguous statute. In this case, that analysis necessarily requires this Court to examine the constitutional shortcomings of construing the 1989 version of the DMA as self-executing. As a result, the constitutional concerns raised by Appellant should be considered in deciding the meaning of the ambiguous text of the 1989 law.

**b. Interpreting the 1989 version of the DMA to be "self-executing" achieves no public policy goals.**

Appellee contends that the "self-executing" theory of abandonment somehow achieves the State of Ohio's policy goal of encouraging oil and gas production by avoiding "the unproductive severance of oil and gas rights." Appellee's Merit Brief at 29. The reality is that

the oil and gas mineral rights underlying the property at issue in this case and every other DMA-related case will be leased and most likely developed. Oil and gas companies will find whoever is deemed to be the owner of the severed oil and gas mineral interests, enter into leases with them, and develop the oil and gas resources regardless of whether this Court determines the 1989 version of the DMA to be self-executing or not.

Further, surface owners already have the tool necessary to avoid any lack of development from allegedly dormant severed mineral rights. That tool is the 2006 (and current) version of the DMA. No one debates the usefulness of the 2006 version of the DMA as a tool to simplify and facilitate title transactions, and encourage the development of the State of Ohio's oil and gas resources. Surface owners should not be able to utilize (and do not need) the ambiguous and superseded 1989 version of the DMA today. This is the only result that harmonizes the express purpose of the DMA, ensures that the 2006 version of the DMA remains a useful and production statutory tool,<sup>8</sup> and achieves the public policy of encouraging the development of the State of Ohio's oil and gas resources.

**c. Interpreting the 1989 version of the DMA to be "self-executing" produces inequitable results.**

Reading the 1989 version of the DMA to require the surface owner to take some formal legal action in order to effectuate the vesting of the mineral rights produces the most equitable results—in this case and the many like it.

More specifically, on November 28, 2011, the Appellee sent a notice of abandonment of the mineral rights to Mr. Noon under the 2006 version of the DMA. Contrary to R.C.

---

<sup>8</sup> It is not insignificant to note that, while the 2006 DMA cannot retroactively undo abandonments and vestings that occurred under the 1989 version, it is absolutely the case that, in evaluating the public policy value of one interpretation over another, reading a superseded law in a manner that hinders the policy objectives and procedural choices of the General Assembly on that very issue going forward is not consistent with the prevailing public policy objectives.

5301.56(H)(2), the Appellee recorded an affidavit of abandonment in the Noble County Recorder's Office on January 3, 2012. In response, and pursuant to R.C. 5301.56(H)(1), Mr. Noon timely recorded an affidavit and claim to preserve the severed mineral interest on January 10, 2012 in the Noble County Recorder's Office—approximately 39 days after receiving the notice of abandonment and well before the 60-day limitation in R.C. 5301.56. Only then, after unsuccessfully attempting to utilize the 2006 version of the DMA, did the Appellee file a complaint to quiet title and for declaratory judgment seeking to divest John Noon of his mineral rights. This is the first time Appellee even attempted to use the 1989 version of the DMA.

Interpreting the 1989 version of the DMA as "self-executing" allows surface owners to inequitably sit on their rights indefinitely, which runs afoul of the equitable principles underlying the doctrine of laches. *See* Appellant's Merit Brief at 21–22. In this case, the Appellee (like most surface owners) did not assert or attempt to enforce any abandonment claim during the 17 years the 1989 version of the DMA remained in effect, or at any time prior to the filing of his lawsuit in 2013. In fact, the Appellee only raised claims under the 1989 version of the statute after: (1) unsuccessfully trying to utilize the 2006 (and current) version of the DMA; and (2) after the Appellant took steps necessary to both develop the severed mineral interests and/or preserve such interests under the 2006 (and current) version of the DMA by filing preservation claims/affidavits under R.C. 5301.56(C) and/or (H), and entering into an oil and gas lease. *See Walker v. Shondrick-Nau*, 2014-Ohio-1499, ¶ 6 ("On January 10, 2012, Noon filed an affidavit and claim to preserve mineral interest.").

Interpreting the ambiguous provisions of the 1989 version of the DMA as Appellee proposes is not only inconsistent with the text and history of the statute itself, but it produces absurd and inequitable results that the legislature clearly did not intend. Consideration of all

relevant factors leads to the inescapable conclusion that the General Assembly did not intend that the 1989 version of the DMA be "self-executing."

**B. A deed transferring the surface but specifically referencing a prior mineral reservation constitutes a savings event for purposes of R.C. 5301.56(B)(3).**

As the State of Ohio mentions in its amicus brief, the issue raised in Proposition of Law IV is before this Court in the case of *Dodd v. Croskey*, Case No. 2013-1730, which ordered supplemental briefing on that issue just a few days prior to accepting all propositions of law in this case. Although the Court may render a decision on Proposition of Law IV in *Dodd v. Croskey*, it is ripe for decision in this case. Just as importantly, and contrary to the State of Ohio's contention on page 2 of its amicus brief, Proposition of Law No. V is not currently before the Court in *Dodd v. Croskey* or any other proceeding. Although the two issues are related, this Court must address Proposition of Law No. V regardless of its decision in *Dodd v. Croskey*.

**1. The phrase "subject of" in R.C. 5301.56(B)(3)(a) does not require an actual transfer of the mineral rights in order to qualify as a "savings event."**

The Appellee, like the Seventh District Court of Appeals, continues to mischaracterize the savings event in R.C. 5301.56(B)(3)(a) by stating that, "[i]n order for the mineral interest to be the 'subject of' the title transaction the grantor must be conveying that interest or retaining that interest." See Appellee's Merit Brief, at 24 (citing to *Dodd v. Croskey*, 2013-Ohio-4257, ¶ 48 (7th Dist.)). This conclusion, however, ignores: (i) the interplay of R.C. 5301.55 and R.C. 5301.49; (ii) the legislative history of the DMA; (iii) longstanding principles of statutory interpretation; and (iv) important public policy considerations.

**a. The interplay between R.C. 5301.55 and R.C. 5301.49 requires that a transfer of the surface which specifically references the severed mineral interest constitutes a "savings event" under R.C. 5301.56.**

After focusing entirely on the text of the DMA in other portions of its merit brief, the Appellee conveniently ignores the straightforward statutory analysis of R.C. 5301.55 and R.C.

5301.49 in Appellant's Merit Brief at 30-31. Instead, Appellee claims that the "specific statute relating to dormant and lapsed oil and gas interests – the DMA – controls over the general statute [the Ohio Marketable Title Act]." Appellee's Merit Brief at 27. This is incorrect because it fails to acknowledge the actual standard set forth in R.C. 1.51. Specifically, R.C. 1.51 states: "If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict . . . is irreconcilable, the special or local provision prevails as an exception to the general provision[.]"

In this case, there is no irreconcilable conflict between the DMA and the MTA. R.C. 5301.55, which is part of the Ohio Marketable Title Act (the "MTA"), states: "Sections 5301.47 to 5301.56, inclusive, of the Revised Code, shall be liberally construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title as described in section 5301.48 of the Revised Code, subject only to such limitations as appear in section 5301.49 of the Revised Code." (Emphasis added.) R.C. 5301.48. It is clear that R.C. 5301.55 expressly applies to both the MTA (R.C. 5301.47 through R.C. 5301.55) and the DMA (R.C. 5301.56). As a result, both statutes are "subject . . . to such limitations as appear in section 5301.49 of the Revised Code." As a result, R.C. 1.51 does not and should not apply. Further, even if there is a conflict, there is a simple way to construe the DMA and MTA together to give effect to both—namely, to adopt Appellant's proposition of law and conclude that the limitation set forth in R.C. 5301.49(A) applies to the DMA.

**b. The legislative history of the DMA supports Appellant's interpretation.**

Notably, the Appellee makes no argument to counter the legislative history analysis set forth on pages 14-15 of Appellant's Merit Brief. As a result, there is no dispute that the

legislative history of the DMA confirms that the General Assembly deliberately eliminated the requirement that the mineral interest itself be conveyed in order to qualify as a savings event.

Further, R.C. 5301.56(B)(3)(e) allows for the preservation of a severed mineral interest by merely filing a claim to preserve. In doing so, the General Assembly clearly contemplated the preservation of severed mineral interests without requiring that they actually be transferred. It would be anomalous to conclude that the General Assembly supported retention of mineral interests *via* mere preservation claims but opposed retention of the same mineral interests if the exact same information were contained in an actual transactional document.

**c. Principles of statutory interpretation support Appellant's position.**

As anticipated, Appellee relies upon the Seventh District Court of Appeals' decision in *Dodd v. Croskey* for his argument argues that the severed mineral interest must not merely be referenced, but must be the only "subject" of the transaction. See Appellee's Merit Brief at. 24-26. In that case, the appellate court concluded:

[The phrase] "subject of" is not defined in the statute. Therefore, the phrase must be given its plain, common, ordinary meaning and is to be construed "according to the rules of grammar and common usage." The common definition of the word "subject" is topic of interest, primary theme or basis for action. *Webster's II New Riverside University Dictionary* 1153 (1984). Under this definition the mineral interests are not the "subject of" the title transaction. Here, the primary purpose of the title transaction is the sale of surface rights. While the deed does mention the oil and gas reservations, the deed does not transfer those rights. In order for the mineral interest to be the "subject of" the title transaction the grantor must be conveying that interest or retaining that interest.

*Dodd*, 2013-Ohio-4257, ¶ 48.

Although relying on the Seventh District Court of Appeals decision quoted above, and ignoring the other definitions of the word "subject" in that decision, Appellee looks to another definition in the American Heritage Dictionary. Relying on that dictionary, Appellee states that the "ordinary meaning given to the term 'subject' is otherwise stated as 'one concerning which

something is said or done,' or 'to be acted upon.'" This reference, however, fails to provide the full dictionary definition.

The American Heritage Dictionary actually defines the word "subject" to mean "[o]ne concerning which something is said or done; a person or thing being discussed or dealt with." (Emphasis added). Houghton Mifflin Harcourt, *Definition of Subject*, <https://www.ahdictionary.com/word/search.html?q=subject> (accessed December 22, 2014). This is consistent with the definition in the *Oxford Dictionary and Thesaurus* cited on page 26 of Appellee's Merit Brief, which defines the term "subject" as "a person or thing that is being discussed, studied, or dealt with."

At the end of the day, there can be numerous subjects of a book, a movie, a lawsuit, or even a title transaction. For example, the "subject of" Harper Lee's novel, *To Kill a Mockingbird*, could be racial injustice, social stereotypes, morality, the innocence of childhood, courage and compassion, life in the rural South, and trial lawyering. Similarly, the "subject of" this lawsuit could be private property rights, preservation notices, deeds, statutory interpretation principles, the 1989 version of the DMA, and/or the 2006 version of the DMA. Based on dictionary definitions and ordinary usage, the phrase "the subject of" as used in R.C. 5301.56(B)(3)(a) should not be read so narrowly and exclusively so as to mean the "primary" or "one and only one" subject. Doing so runs contrary to the common usage of the word "subject."

**d. Appellee's argument regarding reservations in favor of a stranger is misleading and inaccurate.**

On page 25 of Appellee's Merit Brief, it is stated that the "holder of the severed mineral interest is a stranger to any transaction in the surface alone and cannot be affected or benefitted by such a transaction. Reservations or exception [sic] purporting to be in favor of a stranger are ineffective and void." This statement, however, is both irrelevant to Propositions of Law No. IV

and V, and entirely misleading. Appellee noted that at least one Ohio court has stated that "a reservation made in favor of a third party . . . who is a stranger to the deed, will not operate to vest the third party with any interest in property." See *In re Allen*, 415 B.R. 310 (N.D. Ohio 2009). This is simply not the case here. The underlying 1965 severance deed transferred the surface of the property to Elwood W. and Mary Pilcher, while reserving the oil and gas mineral rights to John Noon. There was no stranger to the reservation. And, simply restating the specific volume and page number of the mineral reservation in the legal description of subsequent deeds transferring the surface in no way creates a new reservation in favor of a third-party stranger. For these reasons, this argument should be ignored.

### **CONCLUSION**

For the foregoing reasons, Appellant respectfully requests that this Court adopt each of the foregoing Propositions of Law, and reverse the lower appellate court's decision.

Respectfully submitted,

/s/ Matthew W. Warnock

Matthew W. Warnock (0082368)\*

*\*Counsel of Record*

Daniel C. Gibson (0080129)

Daniel E. Gerken (0088259)

Bricker & Eckler LLP

100 South Third Street

Columbus, Ohio 43215-4291

Telephone: (614) 227-2300

Facsimile: (614) 227-2390

E-mail: [mwarnock@bricker.com](mailto:mwarnock@bricker.com);

[dgibson@bricker.com](mailto:dgibson@bricker.com); [dgerken@bricker.com](mailto:dgerken@bricker.com)

COUNSEL FOR APPELLANT

**CERTIFICATE OF SERVICE**

I certify that a copy of this Reply Brief was filed through the Supreme Court of Ohio's e-Filing Portal pilot project and was sent by ordinary U.S. mail to counsel for Appellee and Amici Curiae, at the following addresses, on December 22, 2014:

Kenneth Cardinal  
758 North 15th Street  
P.O. Box 207  
Sebring, Ohio 44672

James F. Mathews  
Baker, Dublikar, Beck, Wiley & Mathews  
400 South Main Street  
North Canton, Ohio 44720

Michael DeWine  
Eric E. Murphy, Solicitor  
Samuel C. Peterson, Deputy Solicitor  
30 East Broad Street, 17<sup>th</sup> Floor  
Columbus, Ohio 43215

Clay K. Keller  
Sandra K. Zerrusen  
J. Alex Quay  
Jackson Kelly PLLC  
17 S. Main Street, Suite 101-B  
Akron, OH 44308

/s/ Matthew W. Warnock  
Matthew W. Warnock  
COUNSEL FOR APPELLANT