

IN THE SUPREME COURT OF OHIO

JON D. WALKER, JR.,)
)
 Appellee,)
)
 v.)
)
 PATRICIA J. SHONDRICK-NAU,)
)
 Appellant.)

CASE NO. 2014-0803
Appeal from the Noble County
Court of Appeals, Seventh Appellate District
(Case No. 13 CA 402)

**REPLY BRIEF OF *AMICUS CURIAE* CHESAPEAKE EXPLORATION, L.L.C. IN
SUPPORT OF APPELLANT
PATRICIA J. SHONDRICK-NAU**

Clay K. Keller (#0072927)
J. Alex Quay (#0085130)
Jackson Kelly PLLC
17 S. Main Street, Suite 101-B
Akron, OH 44308
Phone: (330) 252-9060
Fax: (330) 252-9078
Email: ckkeller@jacksonkelly.com

*Counsel for Amicus Curiae,
Chesapeake Exploration, L.L.C.*

Matthew W. Warnock (#0082368)
Daniel C. Gibson (#0080129)
Daniel E. Gerken (#0088259)
Bricker & Eckler, LLP
100 S. Third Street
Columbus, OH 43215
Phone: (614) 227-2300
Fax: (613) 227-2390
Email: mwarnock@bricker.com

*Counsel for Appellant,
Patricia J. Shondrick-Nau*

Kenneth Cardinal (#0010659)
Cardinal Law Office
758 North 15th Street
P.O. Box 207
Sebring, OH 44672
Phone: (330) 938-2161
Fax: (330) 938-1556
Email: cardinallaw@sbcglobal.net

and

James F. Mathews (#0040206)
Baker, Dublikar, Beck, Wiley & Mathews
400 S. Main Street
North Canton, OH 44720
Phone: (330) 499-6000
Fax: (330) 499-6423
Email: mathews@bakerfirm.com

*Counsel for Appellee,
Jon D. Walker*

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I. INTRODUCTION

Appellee's suggestion that his matter originates with his filing suit merely "for the purpose of confirming ownership of the oil and gas interests under the Ohio Dormant Mineral Act" is inaccurate. (Appellee's Merit Brief at 1). The severed mineral interest at issue was created in 1965 by John R. Noon when he conveyed the surface of the 44.226 acres and reserved "all coal, oil and gas and all other minerals underlying the premises." The mineral reservation is specifically cited in subsequent instruments transferring the surface and Appellee purchased the property in 2009. Appellee recognized that he did not own the mineral rights so on December 2, 2011, he served a notice of intent to abandon pursuant to R.C. 5301.56(E)(1) as the statute is currently in effect (the "2006 ODMA").

John Noon, the holder of the mineral interest, timely responded to the notice of intent to abandon by filing a claim to preserve on January 10, 2012. Only after Appellee's attempt to secure the mineral rights under the 2006 ODMA failed did he change course and claim that he actually has owned the rights the entire time pursuant to the prior version of R.C. 5301.56 (referred for convenience as the "1989 ODMA"). Accordingly, this matter does not represent a situation whereby the 1989 ODMA was a law regularly utilized, reviewed by courts or even understood. Instead, the automatic vesting interpretation under the 1989 ODMA has only recently been asserted by surface owners seeking a windfall in valuable mineral rights and it has generated an untold number of lawsuits. For exploration and development companies such as Eclipse and Chesapeake it has created great uncertainty and thwarted oil and gas development for thousands of acres of property.

II. ARGUMENT

Appellee's brief circumvents many of the substantive arguments made by Appellant and *Amici Curiae*. Appellee also ignores timely jurisprudence set forth in the concurring opinions of *Eisenbarth v. Reusser*, 7th Dist., 2014-Ohio-3792 and *Farnsworth v. Burkhart*, 7th Dist. 2014-Ohio-4184 and the dissenting opinion in *Tribett v. Shepherd*, 7th Dist. 2014-Ohio-4320, 20 N.E.3d 365. Ultimately, Appellee's position always comes back to reliance upon the assertion that the word "vested" is conclusive concerning the former statute's operation and legislative intent. A full reading of the statute, together with an understanding of what it seeks to accomplish, however, readily refutes a conclusion that the 1989 ODMA worked "automatically" or that it can still be applied in currently filed actions. For the sake of brevity *Amicus Curiae* replies to Appellee's brief on the following points.

Proposition of Law No. I: The 2006 version of R.C. 5301.56 controls in the ODMA proceedings and quiet title action initiated by Plaintiff after 2006.

and

Proposition of Law No. II: To establish a mineral interest as actually vested in the surface owner under the 1989 version of the ODMA, 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 to acquire the mineral interest, only the 2006 version of the ODMA can be used to obtain relief.

A. Automatic Vesting is Inconsistent with the Plain Language of the Statute

The plain language of the 1989 ODMA does not support an automatic vesting or transfer of the mineral rights to surface owners. In fact, the words "automatic" or "automatically" do not appear in the statute. Rather, section (B)(1) provides that only under certain circumstances a severed mineral interest "shall be *deemed* abandoned and vested in the owner of the surface of the lands subject to the interest." The grammatical construction of the phrase "deemed

abandoned and vested” provides that the word “deemed” modifies both “abandoned” and “vested.” While the phrase is suggestive of providing standards for an abandonment claim, it is less than conclusive and therefore cannot be construed as resolving any issue of ownership or the forfeiture of severed mineral rights. *See Dahlgren v. Brown Farm Properties*, Carroll C.P. No. 13 CVH 27445 (Nov. 13, 2013) at 15. In *Dahlgren*, the trial court compared this language to portions of the Marketable Title Act (which establish that certain unprotected rights are “null and void” or “extinguished”) with the 1989 ODMA’s language that severed mineral interests shall be “deemed abandoned.” *Id.* *See also, Eisenbarth* at ¶¶ 84-85 (DeGenaro, P.J., concurring) (further discussing that “deem” modifies the remaining language and only provides an inchoate right). Appellee’s interpretation of the phrase “and vested” under the 1989 ODMA is irreconcilable with the other provisions of the Ohio Marketable Title Act:

[. . .] it must be recalled that the ODMA is part of the OMTA, which, in other sections, notably use more emphatic language like ‘extinguished,’ and ‘null and void,’ which is appropriately characterized as automatic in nature. This stands in sharp contrast to the ‘deemed’ language used in the ODMA. R.C. 5301.49, 5301.50, 5301.55. To interpret the 1989 ODMA as self-executing would confound *495 the purpose of the OMTA, as well as the ODMA: to engender reliance upon publicly recorded documents rather than private ones for transactions affecting title to real property, such as ownership of severed mineral rights. Nothing in either version of the ODMA suggests that it should not be construed in *pari materia* with the OMTA. Notice remains the watchword of the entire OMTA, an omission in the 1989 version that was corrected by the General Assembly in the 2006 version.

Eisenbarth at ¶ 85 (DeGenaro, P.J., concurring) Moreover, Appellee’s suggestion that the trial court in *Dahlgren* provides the only reasoning contrary to a conclusion that “the 1989 ODMA was self-executing” is inaccurate. (Appellee Brief at 11) The trial courts in *M&H Partnership v. Hines*, Harrison C.P. No. 13 CVH 0059 (Jan. 14, 2014) and *Gentile v. Ackerman*, Monroe C.P. No. 2012-110 (Jan. 13, 2014). also rejected automatic vesting under the 1989 ODMA. Likewise,

the district court in *Corban v. Chesapeake Exploration, L.L.C.* certified questions to this Court regarding whether the 1989 ODMA and automatic vesting can even be applied in currently filed actions. The respective concurring and dissenting opinions in *Eisenbarth*, *Farnsworth* and *Tribett* further set forth extensive rationale rejecting the self-executing argument under the 1989 ODMA.

B. The 1989 ODMA Was Inoperative Without the Surface Owner Taking Action

Appellee's reliance upon the word "vested" does nothing to resolve the ambiguity in the 1989 ODMA as to the phrase, "within the proceeding twenty years." The question remains preceding what? *Tribett v. Shepard* at ¶92 (DeGenero P.J. dissenting) The ambiguity became well recognized and there are three plausible alternatives:

- 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.

See OSBA, Report of the Natural Resources Committee (Brief of Appellant A-78) Only the second alternative is consistent with the purpose of the law and the General Assembly's actions when amending the R.C. 5301.56 in 2006. If the meaning of the phrase "within the proceeding twenty years" is associated with the filing of an action to obtain the minerals both the ambiguity and procedural issues with the 1989 ODMA are resolved. By way of contrast, Appellee's reliance upon the word "vested" in the statute as the lynchpin to transform the 1989 ODMA so it operates as if it were the Indiana Mineral Lapsed Statute Act accomplishes the opposite result. It violates the purpose of the law, it disregards the reasons why the statute was changed and it creates a false choice between "automatic vesting" under the prior statute versus "no automatic vesting" under the current statute.

The most prudent course would be to refrain from seeking to “fix” the ambiguous and procedurally incomplete 1989 ODMA as discussed in *Eisenbarth’s* concurrence:

In light of the foregoing, any arguable ambiguity regarding ‘deemed abandoned and vested’ and whether it created an inchoate or automatic vested right was resolved by the General Assembly. The General Assembly stated that the 1989 version’s language was ambiguous because “*the statute did not clearly define when a mineral interest became abandoned and exactly how the process to reunite the mineral ownership with the surface ownership was to be accomplished.*” *Contra Swartz*. Thus, the General Assembly has expressed the remedial nature of R.C. 5301.56. Accordingly, it is error to apply the 1989 ODMA to any litigation filed after the effective date of the 2006 ODMA.

* * *

To construe the 1989 version as a self-executing statute providing for automatic vesting defeats the purpose of the 2006 ODMA. Why would the General Assembly create a mechanism for the mineral rights holder to revive that interest if it had already vested in the surface fee? As this court held in *Dodd*, “R.C. 5301.56(H)(1)(a) allows for a mineral interest holder to take a present action by filing a claim to preserve the mineral interest after notice, even though the claim was not filed within the 20 years immediately preceding notice, is supported by the general rule that the law abhors a forfeiture.” *Id.* at ¶ 35. This interpretation of express statutory language reinforces that the surface fee owner holds an inchoate right. To construe the 1989 ODMA as automatically self-executing renders the 2006 version meaningless and inoperative. *See Boley*. We do not need to determine the General Assembly’s intention with respect to the meaning and future operation of the 1989 ODMA after the effective date of the 2006 ODMA because the newer version of the statute has told us.

Id. at ¶¶ 110 and 114. Nonetheless, if interpretation and application of the 1989 ODMA remains the central issue, the limited language in the 1989 ODMA only works to fulfill its purpose when it is related to the filing of a quiet title action. Without taking this step, the 1989 ODMA did not effectuate a transfer or vesting of any mineral rights from holders to the owners of the surface. In response to this contention Appellee complains that there is nothing in the 1989 ODMA which requires the surface owner to do anything. That contention, however, does not prove Appellee’s position either—nothing in the 1989 ODMA states that it automatically transfers and vests the mineral rights in the owner of the surface. An insistence that the procedural ambiguities and lack

of clarity in the statute must be translated into making the statute operate automatically is meritless.

In view of the ambiguities inherent in the prior version of the statute, the only logical manner in which the 1989 ODMA procedurally works to effectuate its purpose is by the filing of a quiet title action. Incidentally, a quiet title action is the very procedure Appellee and every other surface owner now seeking to establish ownership of the mineral interests under the 1989 ODMA is utilizing. As written, the limited language used in 1989 ODMA does not effectuate an abandonment or vesting of title with the owner of the surface by itself. Even setting aside disputes for the moment over what is meant by “deemed abandoned and vested” or “within the preceding twenty years,” transfer of title to the owner of the surface can only occur “if” none of six enumerated savings events set forth in section (B) apply.

The available mechanism to determine whether enumerated events occurred, or did not occur, is through a judicial proceeding. Until the “if” circumstances are addressed under the statute there is no abandonment or vesting of the mineral interest “deemed” or otherwise. Notably, Appellee’s suggestion that a review of the mineral title record will answer all pertinent questions regarding the status of the mineral interest is false. (Appellant Brief 10) A review of the mineral title record will not provide any information regarding whether: a separate tax parcel has been created; there has been production or withdrawal of minerals; the interest has been used for underground gas storage; or a drilling or mining permit has been issued to the holder. R.C. 5301.56(B).

Appellee only initiated the necessary procedure to determine “if” none of the six enumerated events apply when filing suit in April of 2012. There was no prior vesting or transfer of the mineral estate in the owners of the surface under the 1989 ODMA because the

external circumstances to the title regard regarding the mineral interest were never addressed or concluded. Having initiated his action in 2012 pursuant to R.C. 5301.56, Appellee cannot now seek to invoke the procedure which was plainly required in order to make the 1989 ODMA operable. Having taken no action previously, the current law and procedure controls in the action Appellee filed in 2012 pursuant to R.C. 5301.56.

Moreover, the real procedural distinction in the different versions of the statute is that the ambiguous language of the 1989 ODMA *necessitated* the filing of the quiet title action to accomplish a transfer and vesting of the mineral rights in the owner of the surface. The amendments to the statute in 2006 ODMA clarified the procedure and altered them in a manner whereby the filing of a quiet title action is *not necessary*. By following the notice and affidavit procedures under the 2006 ODMA status of the mineral interest can be affirmed with the holder(s) or transferred to the surface owner as a matter of record. Likewise, commencement of an action necessitated by the ambiguous language in the 1989 ODMA, if it was completed before the 2006 ODMA, would also result in the mineral interest being clarified and/or transferred to the surface owner as a matter of record. Upon receiving a judgment for quiet title, “the clerk of court shall cause to be recorded in the deed records of each county in which any party of the real property lies, a certified copy of the judgment or decree determining the interest of the parties.” R.C. 5303.01.

For these reasons, and others discussed at length in the concurring opinions in *Eisenbarth* and *Farnsworth*, the appellate court erred in finding that the ambiguous language in the 1989 ODMA created automatic transfers and vesting of mineral rights. The language of the 1989 ODMA only provided an inchoate right which procedurally necessitated the filing of an action before any transfer and vesting of mineral rights occurred.

C. Automatic Vesting as Found by the Appellate Court is Contrary to the Purpose of the Law

The purpose of the Marketable Title Act, which includes the ODMA, is expressly set forth in R.C. 5301.55, which provides:

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.

Id. (Emphasis added.) The purpose of the ODMA is not to “automatically” reunite a severed mineral interest with the owner of the surface at the first opportunity of inactivity for any twenty-year period. Rather, the ODMA is a recording statute which is neutral regarding whether mineral rights are held by a surface owner, or by another person. The purpose of the ODMA is to create and maintain a clear title record as to ownership of mineral rights so that those rights can be developed without concerns that an adverse claim may arise. The conclusion of automatic vesting under the 1989 ODMA adopted by the appellate court in this matter, and other recent cases, directly undercuts the very purpose of the statute. It provides for a situation where a transfer of ownership in the mineral rights can occur *outside* the record chain of title, resulting in an unreliable record with regard to ownership. *Eisenbarth* ¶¶ 85 and 98 (DeGenero P.J. concurring) *See also*, Brief of *Amici Curiae* at 5-6.

To avoid the stated purpose of R.C. 5301.56 by R.C. 5301.55, Appellee claims that the “object sought to be attained” by the ODMA is somehow “different and specific.” (Appellee Brief at 5) To support his assertion Appellee relies upon an excerpt from the December 1988 “Summary of Enactments,” a publication of the Ohio Legislative Services Commission, which briefly summarizes all of the statutes enacted during the 117th General Assembly. The document attached as Appendix 2 to Appellee’s brief it is not a “legislative report,” nor does it provide any

meaningful “comments” concerning the legislature’s intent with regard to the statute as stated by Appellee. Rather, it is merely an abbreviated synopsis prepared by the legislative commission’s staff at the end of the assembly’s term. In contrast, the “As Introduced,” “As Reported by the Senate Judiciary,” “As Passed by the Senate,” and “As Reported by the House Civil and Commercial Law Committee” reports attached to Appellant’s Merit Brief *do* provide a legislative analysis of Substitute S.B. 223, which was subsequently enacted. Accordingly, Appellee’s reliance upon this document to change the nature and purpose of R.C. 5301.56 to something new and different than what is directly stated in R.C. 5301.55 is meritless.

Appellee’s extensive reliance upon *Texaco v. Short* and *Short v. Texaco, Inc.*, 273 Ind. 518, 522 is equally meritless. Clearly, Appellee would like the 1989 ODMA to be considered the equivalent of the Indiana Lapse Statute, but it is not:

Substantively, the language of the Indiana statute is unequivocal, and lends itself to an interpretation that vesting is automatic. Ind.Code 32–23–10–2 provides: “An interest in coal, oil and gas, and other minerals, if unused for a period of twenty (20) years, *is extinguished and the ownership reverts* to the owner of the interest out of which the interest in coal, oil and gas, and other minerals was carved. However, if a statement of claim is filed in accordance with this chapter, the reversion does not occur.” (Emphasis added.) *Id.* This language is consistent with other portions of the OMTA which, as explained above, use terms such as ‘null and void’ or ‘extinguished,’ and arguably warrant an automatic characterization, unlike the qualified phrase in R.C. 5301.56 ‘deemed abandoned and vested,’ which should not be construed as having a similar automatic effect.

In contrast to the Indiana statute, the Ohio General Assembly amended R.C. 5301.56 to clarify when a mineral interest became abandoned and delineate the exact process to reunite the severed mineral rights with the surface owner. Central to those modifications is that in all instances *before any allowable vesting can occur*, the surface owner must notify the holder of the severed mineral rights of the owner’s intention to declare the rights abandoned, even in the absence of a saving event within the now clearly defined look-back period, in order to afford the holder one final opportunity to preserve their mineral rights from abandonment. R.C. 5301.56(E)(2) and (G). Even where the holder failed to engage in one of the statutorily defined actions to preserve their mineral rights, including merely filing an affidavit preserving those rights, the Ohio General Assembly gave the holder 60 days to, in essence, revive their mineral interest.

This is the antithesis of a self-executing statute. Moreover, that the 1989 ODMA was not, nor intended to be, self-executing is evident from the testimony of the 2006 ODMA sponsor and the Legislative Services final bill analysis, discussed in more detail below. This vigorous statutory protection stands in stark contrast with Indiana's statute.

Ohio's General Assembly seized the opportunity to clarify its intent and correct R.C. 5301.56, thereby statutorily rejecting *Texaco*. The majority here and in *Walker* and *Swartz*, measuring R.C. 5301.56 against federal constitutional standards not at issue here, have created a forfeiture out of what were heretofore private property rights protected at common law from extinguishment by abandonment or nonuse; under the common law, affirmative action was required by the mineral rights holder before they could be divested of their interest. This is in direct contravention of the General Assembly's express decision to give Ohio citizens more statutory protections than the Indiana Legislature afforded its citizens.

Thus, *Texaco* has no bearing on which version of R.C. 5301.56 controls disputes over ownership of mineral rights brought after the Act's June 30, 2006 effective date.

Eisenbarth at ¶¶ 98-103. The non-binding authority from other jurisdictions proffered to divine the purpose and intent of R.C. 5301.56, while ignoring the Ohio authority on point and what the Ohio General Assembly has actually done, must be rejected.

Proposition of Law No. III: The 2006 version of the ODMA applies retrospectively to severed mineral interests created prior to its effective date.

Applying the current law to Appellee's action filed in 2012 does not involve an impermissible retroactive application of the law. Appellee's arguments in this regard are based upon the presumption that he already holds the mineral rights as a matter of law pursuant to automatic vesting under the 1989 ODMA. Once again, the sum and substance of Appellee's argument comes down to citing the word "vested" multiple times and contending that the rights which "vested" cannot now be taken from him. As discussed above, and in the brief of *Amici Curiae*, the language of the 1989 ODMA cannot be reduced to extracting the word "vested" from the statute. Rejection of the lower court's holding of automatic vesting under the 1989 ODMA

eliminates any arguments Appellee has made on this issue. “The 2006 version is no more retroactive than the 1989 version; both refer to a preceding 20 year period, which, depending upon the facts of a particular case, can occur prior to the effective date of either version.” *Eisenbarth* at ¶ 82 (DeGenero P.J. concurring). See also, Brief of *Amici Curiae* at 12-15, for a more detailed discussion of why the 2006 ODMA applies and operates retrospectively with regard to Appellee’s action.

III. CONCLUSION

The purpose of the ODMA, as part of the Marketable Title Act, is to address a potential title problem which can result from severed mineral estates. When interpreted within the context of the Marketable Title Act, the 1989 and 2006 ODMA can, and should, be applied in a consistent manner which is fair to all parties involved in these disputes so the title problem can be resolved. Resolving the potential title problem created by severed mineral estates, through a consistent application of R.C. 5301.56, advances the public policy of encouraging responsible oil and gas development within the state. The forfeiture result sought by Appellee which relies upon affirmation of automatic vesting under the 1989 ODMA should be rejected. Chesapeake Exploration, L.L.C., as *Amicus Curiae*, respectfully request that this Court affirm the propositions of law set forth herein.

Respectfully submitted,

/s/ Clay K. Keller

Clay K. Keller (#0072927)

J. Alex Quay (#0085130)

Jackson Kelly PLLC

17 South Main Street

Akron, OH 44308

Phone: (330) 252-9060

Fax: (330) 252-9078

Email: ckkeller@jacksonkelly.com

jaquay@jacksonkelly.com

*Counsel for Amicus Curiae,
Chesapeake Exploration, L.L.C.*

CERTIFICATE OF SERVICE

A copy of the foregoing was served by regular U.S. Mail on this 22nd day of December, 2014, upon the following counsel of record:

Kenneth Cardinal
Cardinal Law Office
758 N. 15th Street
P.O. Box 207
Sebring, OH 44672

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

Matthew W. Warnock
Daniel C. Gibson
Daniel E. Gerken
Bricker & Eckler, LLP
100 S. Third Street
Columbus, OH 43215

/s/ Clay K. Keller
Clay K. Keller (#0072927)