

IN THE SUPREME COURT OF THE STATE OF OHIO

WAYNE K. LIPPERMAN,	:	On Appeal from the Ohio Seventh District
	:	Court of Appeals and the Common Pleas
Appellants,	:	Court of Belmont County, Ohio
	:	
vs.	:	Seventh District Case No. 14 BE 0002
	:	
NILE E. BATMAN, et al.	:	
	:	
Appellees.	:	

MEMORANDUM OF APPELLANT WAYNE K. LIPPERMAN

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THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

The reason the matter of the interpretation of the 1989 version of the Dormant Mineral Act (5301.56) has become an issue is because of the ability of the oil and gas industry to reach the petroleum products located in the deep shale deposits located in Eastern Ohio. For over a century, Ohio was a location where shallow wells could be drilled, and they would be economically feasible. These wells generally did not produce large amounts of oil and gas, but they did produce enough that they were profitable.

Over the years, leases were signed, and some persons, when selling the land, kept their oil and gas rights. In addition, as in this case, some people accepted the transfer of oil and gas rights in return for services they had rendered. In Eastern Oil, there is a large number of old leases or reservations of rights relating to the oil and gas mineral rights.

For many years, this was not an area that received a lot of attention because there was not a great deal of money involved. The values were not of sufficient amounts to justify the time and expense necessary to try to clean up titles. In 1989, when the first DMA was passed, leases were signed that paid the landowner very little. The amount paid in what is called "delay rental" were as little as zero dollars to five dollars per acre, per year. Many leases were for five years with a five year renewal. Ten year leases were also being signed. In 2005, 2006 and 2007, landmen came through Eastern Ohio obtaining leases for five dollars per acre, per year, and with royalties of 12-1/2% of the net income produced.

Then things changed dramatically. Oil and gas companies developed the technology to be able to reach the deep shale deposits in this part of the State of Ohio, that were also located in New York, Pennsylvania and West Virginia. Starting in approximately

2011, the value of the oil and gas rights began to escalate. The new approach was for the oil and gas industry to have leases signed as "paid up". There was no annual delay rental payment. Instead, the oil and gas companies, and their brokers, were offering a lump-sum payment to keep the lease in effect for a period of time, often five years with the five year renewal. The amount paid for these leases vary from approximately \$2,000.00 per acre to approximately \$8,000.00 per acre at the present time.

The economics of the current atmosphere are exceptional. For instance, if a person owned 100 acres under the old leases, they would receive five dollars per year for five years, or a total of \$2,500.00, and a royalty of 12-1/2% of net revenues. The oil and gas lessee was able to deduct all expenses before paying landowner. Currently, if the landowner would negotiate an up-front payment of \$8,000.00 per acre, they would receive \$800,000.00 in up-front money for the first five years, and 20% of the gross income from royalties. If the lease were to be renewed in five years, they would receive the same amount or up to 10% more to renew the lease for the additional five years. They would also receive 20% of the gross income from royalties. That 20% is not subject to deductions for the costs involved.

The economic impact on Eastern Ohio is enormous. Governments are signing leases, some producing millions in bonus money. Once the infrastructure is completed, the amount of money being paid in royalties is going to be changing the nature of the entire area.

So determining who owns the mineral rights, what leases may still be in effect and what reservations of oil and gas mineral rights still exists is of great general interest. To the heirs of persons who reserved or retained mineral rights to the oil and gas companies

who hold the old leases, and to the public in general, the interpretation of the 1989 Dormant Mineral Act is of great interest.

The issue of how the effect of 1989 version of the DMA has become vital, and its interpretation by this Court will have a very significant impact on the citizens of Eastern Ohio.

STATEMENT OF THE CASE AND FACTS

The Appellant, Wayne K. Lipperman, is the owner of approximately 41.23 acres in Pultney Township, Belmont County, Ohio. The Appellees, Nile E. Batman and Katheryn Batman, claim a 50% interest in the oil and gas underlying said property based upon a reservation by J. A. Clark in a deed to Joe Lagza dated November 10, 1925, of record in Volume 265, Page 168, for a conveyance of 31.3 acres; and in a deed dated May 25, 1926, to Lawrence Higgins filed at the Belmont County Records Office in Volume 278, Page 290, for a conveyance of 7.86 acres. The Batmans further claimed their interest was preserved by an "Affidavit of Notice of Claim of Interest in Land" that was filed September 14, 1981, at Volume 602, Page 38, by Frances Batman, granddaughter of J. A. Clark and mother of Nile Batman. Frances Batman died testate in Nebraska on October 15, 1981, and a copy of her Will was filed in the Belmont County Records Office on April 9, 1989. An authenticated copy of her Will was filed on May 15, 1989, in the Belmont County Probate Court. However, there were no further probate proceedings.

The only developments to date of the oil and gas rights by either party are the signing of the lease by the Batmans to Reserve Energy Exploration Company dated April 7, 2006, and a signing of a lease by the Appellees, Mr. and Mrs. Batman, dated November

13, 2008, also to Reserve Energy Exploration Company. Both the leases have been assigned so that Appellees/Defendants Reserve Energy, Equity Oil and Gas, P.C. Exploration and XTO Energy may own an interest in the leasehold estate. However, it should be noted that Phillips Exploration, Inc., (by XTO Energy, Inc., its agent and attorney-in-fact), filed a release of their interest in the one-half of all oil and gas rights underlying the property on August 27, 2014. It would appear, therefore, that neither Phillips Exploration nor XTO Energy have any interest in this subject litigation.

The Plaintiffs filed a Complaint on February 15, 2012, as a quiet title action against Nile E. Batman and Katheryn Batman. Defendants filed Answers to the Complaint. On October 4, 2013, Plaintiffs filed a Motion for Summary Judgment, and on October 5, 2013, the Defendants, Reserve Energy Exploration Company and the Equity Oil and Gas, filed a Motion for Summary Judgment. The trial court entered a Decision on December 13, 2013, in favor of the Defendant, Reserve Energy.

This matter was filed in the Court of Appeals for the Seventh Appellate District of Belmont County on February 3, 2014. Briefs were filed by Reserve Energy Exploration Company, Equity Oil and Gas Funds, Inc., XTO Energy Inc., and P.C. Exploration Company, Inc., n.k.a. Phillips Exploration, Inc. Appropriate Reply Briefs were filed and the Court of Appeals rendered its Decision in favor of the Defendants on December 12, 2014, a copy of which is attached.

No brief was filed by Bruce Smith, of Geiger, Temple, Smith & Hahn, LLP, attorney for Nile and Katheryn Batman.

ARGUMENT IN SUPPORT OF PROPOSITION

OF LAW NO. 1

Proposition of Law No. 1. The 1989 Dormant Mineral Act was prospective in nature and operated to have a severed oil and gas interest “Deemed abandoned and vested in the owner of the surface” if none of the savings events enumerated in ORC Section 5201.56(B) occurred in the twenty (20) year period immediately preceding any date in which the 1989 Dormant Mineral Act was in effect.

The issue before this court is one that has been briefed by several other law firms and that have filed Notice of Appeal to this court. In addition, several *amici curiae* briefs have been filed. The question to be determined is whether the 20 year look-back period in the 1989 DMA is one that is fixed as of the date the law passed, or, if it is allowed for a “rolling” period a 20 year period so that it was a continuous 20 year period. Before reviewing the technical aspects of the DMA statute, the consideration of the general aspects of the statute may be of interest. The way the statute works, as set forth in the proposition of law, basically gives the holder of a mineral interest separate from the surface owner, 20 years for one of the required saving events to occur. If none of the saving events occur within a rolling 20 year period, the mineral rights that a person is claiming an interest in under the statute will be lost. The way the statute works as set forth in the proposition of law gives the holder of a mineral interest that has been severed from the surface estate, 20 years for one of the required saving events to occur. If none of the events occur within a rolling 20 year period, the rights that that person is claiming are deemed abandoned, by operation of law, vesting the mineral interest in the surface owner.

The Seventh Circuit Court of Appeals opined that this acts as a forfeiture. However, there are numerous situations where statutes are in place that effectively terminate a person’s rights if the person does not take action within a limited time. The laws setting up

the statutes of limitations are a prime example.

When a person is injured in a crash by another driver who is at fault, the injured party has certain rights for compensation for losses caused by the at-fault party. If the injured party does not file suit within two years of the date of the crash, then those rights are abandoned. The potential claim has expired and no longer exists.

One of the reasons for the statute of limitations laws is to allow persons against whom a claim might be made to move on. The legislature has determined that there needs to be an end to claims so that these claims do not hang over a person's head forever. The ending of these claims is not treated as a forfeiture. The statutes serve a purpose and are in the public interest.

The 1989 DMA is a parallel statute. The legislature wanted to encourage development of the oil and gas mineral rights. In addition, the operation of the statute helps simplify the title to said mineral rights. No such law exists in West Virginia. As a result, finding the heirs to an existing interest in the mineral rights can be nearly an impossible task. A right created over 100 years ago could go through several generations, and the search for the heirs and the transfers of interest can be extremely burdensome.

Furthermore, under the Seventh Circuit's interpretation of the 1989 DMA, the statute was effective for only one day. That alone seems to defy logic. Why would the legislature pass a statute that was only effective for one day. That runs contrary to what it was trying to accomplish, and would seem like it would make the whole process a waste of time.

The key issue in the 1989 DMA is the meaning of the phrase "within the preceding 20 years." But the Court of Appeals, by saying that the statute was a "forfeiture" statute,

then was able to argue that it had to be strictly construed. The court then decided that the phrase "preceding 20 years" only applied on the date the statute was enacted. Once it is clear that this statute is not a forfeiture statute, then the rules of interpretation change, and the statute can be liberally interpreted so as to accomplish the goals of the legislature. When taken in the context of the Marketable Title Act, the operation of the statute is not unreasonable. It does give those people claiming ownership of mineral rights 20 years to preserve their interest. If the mineral rights are not developed, and none of the other savings events occurs, then there is a simple way for the mineral owner to file a claim to preserve their rights. Once they do that, they then have an additional 20 years before they need to file another claim or some activity has to occur to start to develop those rights.

Section 5301.56 (D)(1) sets up that procedure.

"A mineral interest may be preserved indefinitely from being deemed abandoned under B(1) by the occurrence of any of the circumstances described in Division B (1)(c) of this Section, including but not limited to successful filings of claims to preserve mineral interests under Division C of this Section."

Seems like a slight burden to keep those mineral rights. The Common Pleas Court in this case, said in its Decision that the 20 year period was a rolling period:

"A static twenty (20) year look back period would have no need for a provision calling for indefinite preservation of mineral interest through successive filings of preservation claims. Based upon the same, this Court finds the 1989 Dormant Mineral Act to provide for a "rolling look back period"."

Based upon the language of the statute, and based upon the logic of the purpose the statute was passed by the legislature, the interpretation of the language of the statute should allow for a 20 year period to be a rolling or continuous period.

ARGUMENT IN SUPPORT OF PROPOSITION

OF LAW NO. 2

Proposition of Law No. 2 The act of recording an out-of-state Will is not a title transaction.

On April 2, 1989, the Will of Frances Batman was filed in the Belmont County Records Office. Frances Batman had died on October 16, 1981. Her death, under Ohio law, is the event which vested the mineral interest in his heirs. The mere act of filing her out-of-state Will cannot be title transaction, because it is her death on October 16, 1981, which actually resulted in the transfer of her property.

Ohio Revised Code §5301.47)(F), defines a title transaction a follows:

(F) "Title Transaction" means any transaction affecting title to any interest in land, including title by will or descent..."

To effect a transfer by will of a property interest the Ohio Revised Code has several provisions that must be read together for a complete understanding of the proper procedure.

ORC§ 2107.61 reads, "Unless it has been admitted to probate or record, as provided in sections 2107.01 to 2107.62 or 2129.05 to 2129.07 of the Revised Code, **no will is effectual to transfer real or personal property** ." (Emphasis added.) The record of a foreign will is necessary to effectually pass title to property in this state. When this is done, the doctrine of relation applies, and validates acts previously done. Union Sav. Bank & Trust Co. v. Baltimore & Ohio Southwestern R.R., 7 Ohio N.P. (n.s) 497 (1908).

"It is the provisions of the will that establish title, while the record thereof only make such title "effectual," and relates more particularly to the establishment of a proper chain of title in the state and county where the land is situated." This case further finds that "A title by devise is doubtless a new and independent title as distinguished from a title by descent, and is in abeyance until probate of the will, or record thereof in

this state in the case of a foreign will, but probate once finally had, or record in case of a foreign will, establishes the next link in the chain of title from the devisor, and makes the title of the devisee effective from the death of such devisor.” Id. at 507.

The Ohio Marketable Title Act, R.C. §5301.47 to §5301.56, specifically recognizes filings in the probate court as being recordings of records and recognizes title by will or descent as being a title transaction as set forth in §5301.47 (F) above. There is no reference to the certificate of transfer in the Marketable Title Act as being the instrument of transfer.

Based on the above, the proper finding as to what constitutes the “title transaction” was the death of the last recorded holder of the mineral interest, Frances Batman, on October 15, 1981.

The case of *Ohio Northern Univ. v. Ramga* (July 12, 1990), 3rd Dist. App. No 2-88-1, 1990, Ohio App LEXIS 2946 at *9, holds that, “Title to real estate generally passes by testate succession at the time of death.” This case was cited by the trial court in support of the proposition that the filing of the will was the title transaction. The trial court went so far as to quote the language on page 6 of the decision that says, “clearly connoting that a transfer itself was effected by admission of the will to probate and that certificate is merely a memorialization of such transfer which had previously occurred.” Id at 11-12. However, the court failed to properly apply the language set forth in the case as the transfer by will relating back to the time of death.

This is clarified in *Third Nat'l Bank & Trust Co. v. Gardner (Butler County 1970)*, Ohio Misc. 223, 53 Ohio Op. 2d 261, 262 N.E.2d 430, which held that title to real property relates back to the time of the testator's death and thus on the testator's death, devisees become immediately entitled to real property devised to them. “Under this rule the devisees

and legatees under a decedent's will become entitled to the property bequeathed or devised to them immediately upon testator's death. Admittedly, the exigencies of administration may postpone their enjoyment of these gifts until the fiduciary has determined what might be needed to pay debts, costs of administration, etc., but their rights to possession are vested as of testator's death." Id. at 230.

Given that the law is clear, then the undivided one fourth of the mineral interest underlying the property passed to Nile Batman upon the death of Frances Batman on October 15, 1981, not on April 09, 1989, when he filed a copy of her will with the Belmont County Recorder's Office.

While the filing of the Certificate of Transfer is not necessary to transfer real estate in Ohio, it would have provided notice that he owned mineral interests in many properties in Belmont County, including the one at issue here. ORC§ 2113.61(A)(1), reads:

- (1) When real property passes by the laws of intestate succession or under a will, the administrator or executor *shall* file in probate court, at any time after the filing of an inventory that includes the real property but prior to the filing of the administrator's or executor's final account, an application requesting the court to issue a certificate of transfer as to the real property.

Platt v. Estate of Petrosky) July 24, 1992(, 2nd Dist. App No. 91-CA-105,
Ohio

App LEXIS 3953, supports the proposition that the Certificate of Transfer is the memorialization of what occurred with respect to the real estate upon the death of decedent. Here, there is no question that Frances Batman's Will, in article VII, appoints her son Nile Batman as Executor, giving him, "...the power to sell, convey, and lease all and any part of the real or personal property at such prices and on such terms as it may deem best...." Thus, Nile Batman had the authority

to memorialize the transfer of his interest in the real estate which he inherited upon her death in 1981. Yet he did not request the issuance of a certificate of transfer, or any other memorialization of the vesting of the transfer of the real estate as he was so required. In fact he did not even file an inventory listing the real estate to which he claimed an interest. Therefore, there was no way to determine what interest he owned by any person checking title to real estate until the next action he took in 2008.

In other words, Nile Batman is attempting to profit from his failure to act in a timely manner. It is his unreasonable and unexplained delay of eight (8) years in recording Frances Batman's will within Belmont County that he now asserts as a savings event under Ohio Dormant Mineral Act. This Honorable Court cannot allow Nile Batman to benefit from his own fiduciary misfeasance. Though the doctrine of laches may not bar his claim, he unquestionably comes before this Honorable Court with the most sullied of hands.

ARGUMENT IN SUPPORT OF PROPOSITION NO. 3

XTO Energy, Inc. and Phillips Exploration, Inc. have no standing to appear in this case.

On September 3, 2014, Phillips and XTO filed a Release of any interest they had in the subject lease. Said lease was filed before the oral argument on this case before the Seventh District Court of Appeals. Said oral argument taking place on October 29, 2014.

During oral argument, counsel for Lipperman made the argument that said parties lack standing to appear because they no longer had any interest in the matter being litigated. The parties failed to inform case at the oral hearing.

The Appellant wants to renew his objection to the participation by XTO Energy, Inc. and Phillips Exploration, Inc. In this Appeal.

CONCLUSION

The lease signed by the Batman defendants in 2008 is not, and cannot be, a saving event under the Act, as it was signed more than twenty (20) years after the last title transaction, the death of Frances Batman on October 15, 1981.

Therefore, the mineral interest previously vested in the Appellant surface owners on October 15, 2001, due to the inaction of the Batman heir in the preceding 20 years as required by ORC §5301.56. Appellants' decedent properly executed an oil and gas lease for the entire interest on December 12, 2011. As such, Appellants respectfully request that this Honorable Court reverse the Trial Court's granting of Summary Judgment and enter Judgment upon Appellant's Motion for Summary Judgment as there is no question of material fact that remain outstanding, and when those facts are viewed most favorably to Appellees, Appellants are entitled to judgment as a matter of law.

The circumstances in the oil and gas fields in Eastern Ohio has brought attention to the 1989 DMA. A thorough evaluation of the statute, and the reasons behind its passage by this court, will settle what has become a huge controversy, and one that has resulted in much litigation. The passage of the 1989 DMA by the legislature appears to have been an attempt to clear old reservations from the record and to allow full

development of Ohio's mineral rights. The only way this can be accomplished is by determination by this court that the key reference to the term "preceding 20 years" means a rolling or continuous 20 year period.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing, **MEMORANDUM OF APPELLANT WAYNE K. LIPPERMAN**, was served by US mail and electronic mail this **23rd** day of **January, 2015**, upon the following:

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