

IN THE SUPREME COURT OF OHIO

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| MARK E. ALBANESE, EXECUTOR OF THE ESTATE OF JAMES F. ALBANESE, III., | : | Case No. 2015-0120 |
| | : | |
| Plaintiff-Appellant, | : | On Appeal from the |
| | : | Belmont County Court of |
| vs. | : | Appeals, Seventh Appellate |
| | : | District |
| NILE E. BATMAN, et al., | : | |
| | : | Court of Appeals Case No. |
| Defendants-Appellees. | : | 14 BE 22 |
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**APPELLEES', HESS OHIO DEVELOPMENT AND HESS OHIO RESOURCES, LLC,
MEMORANDUM IN OPPOSITION TO JURISDICTION**

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SCOTT D. EICKELBERGER (0055217)
WILLIAM J. TAYLOR (0015709)
DAVID J. TARBERT (0061613)
RYAN H. LINN (0088123)
Kincaid, Taylor & Geyer
50 North Fourth Street
P.O. Box 1030
Zanesville, Ohio 43702-1030
Facsimile: (740) 454-6975
scotte@kincaidlaw.com
Attorneys for Defendant-Appellee
Hess Ohio Developments and Hess Ohio
Resources

RICHARD L. LANCIONE
TRACEY LANCIONE LLOYD
Lancione, Lloyd & Hoffman
3800 Jefferson Street
Bellaire, OH 43906
Telephone: (740) 676-2034
Facsimile: (740) 676-3931
Attorneys for Plaintiff-Appellant
Mark E. Albanese, Executor of the Estate of
James F. Albanese III

BRUCE SMITH
Geiger, Teeple, Smith & Hahn, LLP
1844 W, State Street, Suite A
Alliance, Ohio 44601
Telephone: (330) 821-1430
Facsimile: (330) 821-2217
Attorney for Defendant-Appellee
Nile E. Batman

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RESPONSES TO PROPOSITIONS OF LAW NO. 1 AND NO. 2

The issues presented to the Court on Appellant's request for jurisdiction do not present a question of great public or general interest warranting Ohio Supreme Court jurisdiction under Art. IV, Sec. 2(B)(2)(e) of the Ohio Constitution. Accordingly, Appellee respectfully asks that the Court deny jurisdiction and the rulings of the Trial Court and Seventh District Appellate Court be upheld.

Appellant puts forth two propositions of law: 1) the 1989 Dormant Mineral Act was prospective in nature; and, 2) the act of recording an out-of-state Will is not a title transaction. *Appellant Jurisdictional Memo* at 5, 8. These propositions of law, however, do not present a question that is dispositive of the case at bar. While the Court has accepted jurisdiction on other 1989 Dormant Mineral Act ("1989 DMA") questions, the propositions submitted by Appellant herein are already settled law, inconsequential to the case at bar, barred by failure to raise at the trial court, and not of great public interest.

This case concerns a fractional mineral interest. Three-fourths of the severed mineral interest is held by Appellant Albanese, and the remaining one-fourth is held by Appellee Batman. Appellee Hess Ohio has oil and gas leases on both interests, and both leases contain warranties of title and after-acquired property provisions. Appellant continues to misuse judicial resources and time through appeals, arguments and motion practice, where, given the leases' language, a ruling will not affect the outcome.

Moreover, the issues presented are already settled law. The statutory language of the 1989 DMA plainly provides that the mineral interest cannot be abandoned when "within the preceding twenty years...[t]he mineral interest has been the subject of a title transaction that has been filed or recorded in the office of the county recorder of the

county in which the lands are located.” ORC 5301.56(B)(c)(i)(1989). Here there are undisputed title transactions within the preceding twenty years. Frances Batman recorded a Preservation Affidavit in 1981 and her out-of-state will transferring the property to her son, Nile Batman, was filed and recorded in the office of the county recorder in the county in which the lands are located in 1989.

Appellant suggests that hundreds of thousands of dollars are at issue in this case and thus this matter is of great importance. Appellant goes on further to suggest that Appellees are attempting to profit from a failure to act in timely manner. Appellant, however, is mistaken. Due to the warranty of title and after-acquired property provisions, in addition to the fact that the case concerns a one-fourth interest, there is at best only a potential royalty percentage at issue. Given there are currently no wells, the monetary value of that royalty is highly speculative. Furthermore, Appellees have not failed to act in this matter. Much different from the new-normal DMA case, Appellee’s predecessors took the necessary statutory steps to preserve the severed mineral interest and had title transactions/savings events. Batman Appellees filed a Preservation Affidavit, recorded the out-of-state will and put the world on notice. It has been Appellant who has sat idly by for twenty-five years only now to assert retroactive claims under a long replaced statute.

For these reasons, the reasons stated in this brief and other good cause, Appellee Hess Ohio respectfully asks that the Court deny jurisdiction and uphold the rulings of the Trial Court and Seventh District Appellate Court.

STATEMENT OF CASE AND FACTS

The severed mineral reservation that is the subject of this litigation was created by virtue of the deed from John A. Clark (J.A. Clark) and Eva Clark, husband and wife, to John S. Dunfee dated April 4, 1905, recorded May 8, 1905, Volume 155, Page 353 of the Belmont County Recorder's Office. The Clarks excepted and reserved "to grantor his heirs and assigns the one fourth interest in the privileges and production of all oil and gas that may be in and under said premises." The premises conveyed and mineral interest reserved under the Clark-Dunfee deed is situated in the Township of Smith, County of Belmont, and State of Ohio being part of the northwest quarter of Section ten (10), Range four (4) containing 104 acres.

John Clark's wife, Eva, and his daughter Mamie E. Sulsberger acquired the assets of his estate upon his death. *Belmont County Probate Court Case No. 27870; Affidavit and Notice of Claim of Interest in Land of Frances Batman* ("Batman Affidavit"). Eva Clark died intestate leaving the subject severed mineral interest to Mamie through the laws of intestate succession. *Id.* at ¶4. Mamie's daughter, Frances Batman, was the sole heir-at-law of Mamie's estate and, pursuant to the terms of Mamie's will, the subject severed mineral interest was left to her. *Id.* at ¶ 5-6; *Belmont County Probate Court Case No. 54986 (September 22, 1952) recorded Volume 41, Page 498 of Belmont County Will Records.*

On September 9, 1981, Frances Batman, being the record owner of the subject severed mineral interest, executed an Affidavit and Notice of Claim of Interest in Land (discussed above), recorded September 15, 1981 at Volume 602, Page 38 of the Belmont County Recorder's Office. In addition to reciting the above-described facts, the Batman Affidavit also preserved Frances' interest in the subject severed mineral interest (as well as numerous other reservations stemming from J.A. Clark). The Batman Affidavit provides: "This Affidavit is intended to be recorded in the Deed Records of Belmont County, Ohio for the purposes of

evidencing the descent of such mineral interests and of evidencing the claim of this Affiant [Frances Batman] in and to such interests as provided for in Sections 5301.47, et seq., Ohio Revised Code, the ‘Ohio Marketable Title Act’.” *Id.* at ¶7.

Frances Batman died testate in Nebraska on October 15, 1981. On April 10, 1989, the Last Will and Testament of Frances E. Batman was recorded in Volume 654, Page 670 of the Belmont County Recorder’s Office. An authenticated copy of the Batman Will was likewise admitted and filed with the Belmont County Probate Court on May 15, 1989. Said will provides in Article II: “In the event that my son, Nile E. Batman [Appellee herein], survives me for a period of thirty (30) days, then all of the residue of my estate, whether real or personal, and wherever situated, I bequeath and devise to my son to be his absolutely.”

Original Plaintiff, James F. Albanese III, acquired his interest in the surface of the lands, being 104 acres, Section 10, Range 4, Smith Township, Belmont County, Ohio, by virtue of General Warranty Deed dated August 18, 2006 and recorded in Volume 72, Page 990 of the Belmont County Official Record. Said deed notes the mineral exception and reservation. Mr. Albanese passed away during the pendency of this matter. Appellant herein, Mark E. Albanese as Executor of the Estate of James F. Albanese III was properly named Plaintiff in this matter at the trial court.

Appellee Hess Ohio holds oil and gas leases of both the Albanese mineral interest and the Batman severed mineral interest. The Batmans, entered into an Oil and Gas Lease with Mason Dixon Energy, Inc. on October 16, 2008 concerning their severed mineral interest in the subject property. The Lease was recorded March 3, 2009 at Volume 179, Page 805 of the Belmont County Official Record. The Lease was subsequently assigned to Marquette Exploration, LLC by virtue of Assignment of Oil and Gas Leases dated April 2, 2009 and

recorded April 7, 2009 at Volume 183, Page 533 of the Belmont County Official Record. Marquette Exploration, LLC was renamed Hess Ohio Resources, LLC. James F. Albanese III executed a Paid-Up Oil and Gas Lease with Hess Ohio Developments, LLC on or around December 12, 2011.

Consistent with the undisputed facts and mineral chain of title presented to the trial court, the trial court properly granted Hess Ohio's motion for summary judgment on April 28, 2014 and dismissed Appellant's complaint with prejudice. The trial court properly held that the Batman Affidavit and Batman Will are title transactions and thus a savings events preempting abandonment and vesting of the Batman fractional severed mineral interest under the 1989 DMA as urged by Appellant. On appeal, the Seventh District Appellate Court affirmed the trial court's ruling while noting that the look-back period under the 1989 DMA is fixed, not rolling. The appellate court did not address Appellant's contentions on the recording of the out-of-state will as Appellant raised these issues for the first time on appeal, and the court determined a fixed look-back period precluded consideration of that issue.

Appellant has now timely requested the Court grant jurisdiction for two propositions of law: 1) the 1989 Dormant Mineral Act was prospective in nature (rolling look-back); and, 2) the act of recording an out-of-state will is not a title transaction. As previously noted, Hess Ohio respectfully submits these issues are not of great public importance; that they present settled law; that they are not dispositive of the case at bar; and, that the second proposition was not raised at the trial court. As such, Hess Ohio respectfully asks the Court deny jurisdiction.

ARGUMENT AGAINST APPELLANT’S PROPOSITIONS OF LAW NO.1 AND NO. 2

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 enumerated in ORC Section 5201.56(B) (sic) occurred in the twenty (20) year period immediately preceding any date in which the 1989 Dormant Mineral Act was in effect.

Simply stated, Appellant’s Proposition of Law No. 1 is the contention that the 1989 DMA provided for a rolling look-back period. Appellant maintains that under the 1989 DMA, if there were no savings events during *any* twenty year period when the statute was in effect, then the severed mineral interest would *automatically* abandon and vest in the surface owner. Hess Ohio respectfully maintains that the 1989 DMA did not operate automatically and that claims must be brought under the current version of the DMA. Notwithstanding, the notion of a rolling look-period is not supported by the plain language of the statute or legislative intent.

The 1989 DMA provides that a severed mineral interest cannot be abandoned when “within the preceding twenty years...[t]he mineral interest has been the subject of a title transaction that has been filed or recorded in the office of the county recorder of the county in which the lands are located.” ORC 5301.56(B)(c)(i)(1989). Without clarification as to the preceding twenty years of what event, it is reasonable to conclude that the legislature simply meant within the preceding twenty years of enactment of the statute. The appellate court agreed. The court noted that it would reasonable for an individual reading the statute to presume that if they bought their mineral rights in 1974 they would be safe under the statute and would not have to reassert their rights twenty years later in 1994. *Eisenbarth v. Reusser*, 2014-Ohio-3792, P48 (Ohio Ct. App., Monroe County 2014).

Like previous surface owners, Appellant herein attempts to get around this plain language by arguing that the statute’s reference to filing successive claims to preserve can only mean the intent to have a rolling look-back period. However, as the appellate court points out

‘the statute is ambiguous as to whether the look-back period is anything but fixed’. *Albanese v. Batman*, 2013 Ohio 5517, P24 (Ohio Ct. App., Belmont County 2014) *citing Eisenbarth, supra*. “The use of the words ‘preceding twenty years,’ without stating the preceding twenty years of what, does not create a rolling look-back period. Rather, the imposition of successive look-back periods would have required language that the mineral interest is deemed abandoned and vested if no savings events occurred within twenty years after the last savings event.” *Id.* Any mention of successive claims to preserve could merely be a reference to preservations that were filed under the original Marketable Title Act (“MTA”). *Id.* In fact, that is the exact situation present in the case at bar.

The Batman Affidavit in 1981 was a preservation affidavit in full compliance with ORC 5301.52 and filed and recorded under the MTA prior to enactment of the DMA. The Batman Affidavit clearly states it is “intended to be recorded in the Deed Records in Belmont County, Ohio for the purposes of evidencing the descent of such mineral interests and evidencing the claim of this Affiant [Frances Batman] in and to such interests as provided for in Sections 5301.47, et seq., Ohio Revised Code, the ‘Ohio Marketable Title Act’.” In 1989 with the enactment of the 1989 DMA, it would have been unreasonable for Nile Batman to think he had to take any further steps to preserve his severed mineral interest as there was a Preservation Affidavit on record in the preceding twenty years.

Appellant’s proposition of law suggesting a rolling look-back period is without merit. If the legislature had intended a rolling look-back period, they could have provided such language. Rather, the language of the statute supports a fixed look-back period. As noted above, the reference to successive filings of claims to preserve does not defeat this plain language. Moreover, it is likely that the purpose of “the 1989 DMA may have been to give

three years to eliminate or refresh stale mineral claims in the original look-back period, and the legislature planned to enact a new version for the next twenty-year period if public policy reasons for abandonment still applied in the future. And, the legislature did then enact the 2006 DMA within twenty years of the former DMA, adding a new look-back, twenty years from the service of notice.” *Eisenbarth* at P50.

Accordingly, even if the 1989 DMA is treated as operating automatically, a position which Hess Ohio does not support, Appellant’s claims still fail as the 1989 act provides for a fixed look-back period. It is undisputed that the Batman Affidavit recorded in 1981 is a savings event within the fixed look-back period thereby successfully preserving the severed mineral interests under the original MTA. As such, Appellant’s claim to abandonment fail.

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

As a threshold matter, Hess Ohio respectfully submits that Appellant is raising issues for the first time on appeal. The appellate court agreed and, as such, did not consider Appellant’s arguments. *Albanese* at 21. A *de novo* review does not give an appealing party a second bite at the apple to raise issues the party could have raised at the trial court level but failed to do so. *State ex rel. Conroy v. Williams*, 185 Ohio App. 3d 69 (Ohio Ct. App., Mahoning County 2009). “Despite the fact that appellate courts review summary judgment decisions *de novo*, “[t]he parties are not given a second chance to raise arguments that they should have raised below.” *Id.* at 81 quoting *Litva v. Village of Richmond*, 172 Ohio App.3d 349, 2007 Ohio 3499, 874 N.E.2d 1243, P 18. (Internal citations omitted.) For the first time on appeal, Appellant conceded the title transaction by virtue of the Batman Will, but instead

argued that the transaction occurred upon Frances Batman's date of death, or October 15, 1981. Just as Appellant was barred from asserting this argument at the appellate court level, Hess Ohio respectfully submits Appellant is barred here.

Notwithstanding, the Batman Will is a savings event and title transaction for 1989 DMA purposes. The will was recorded in accordance with ORC 2107.61 requiring that in order to effectually pass real or personal property a will must first be admitted to probate or record. "No will shall be effectual to pass real or personal estate unless it shall have been duly admitted to probate or record as provided in this title." *UNION SAV. BANK & TRUST CO. v. BALTIMORE & OHIO SOUTHWESTERN R.R. CO.*, 1908 Ohio Misc. LEXIS 127 (Ohio Insolv. 1908). The Batman Will was filed for record in the County Court of Dakota County, Nebraska on October 21, 1981, and it was subsequently filed for record with the Belmont County Probate Court on May 15, 1989 in Case No. 94752. The Batman Will was authenticated by the Dakota County court at such time and was recorded on April 10, 1989 at Volume 654, Page 670 of the Belmont County Recorder's Office. Thus, the Will met the requirements of ORC 2107.61 and upon its recording in Belmont County became effective to pass real estate to Nile Batman. Despite Appellant's urging to the contrary, that is the very definition of a title transaction. The will gives all of the estate of Frances Batman, wherever situated, both real and personal, to her son, Nile Batman. In accordance with Ohio law, this bequest conveys the subject severed mineral interest to Nile Batman and, thus, the Batman Will is a title transaction and savings event under the 1989 DMA

The MTA is often used to provide the definition of a "title transaction". ORC 5201.47(f) defines a title transaction as "*any transaction affecting title to any interest in land including title by will or descent, title by tax deed, or by trustee's assignee's, guardian's,*

executor's, administrators, or sheriff's deed, or decree of any court, as well as warranty deed, quit claim deed, or mortgage." (emphasis added); *see also, Heifner v. Bradford* (1983), 4 Ohio St. 3d 49, 51 (1957 conveyance of the oil and gas rights which passed under terms of will must be considered a title transaction pursuant to the Marketable Title Act). Consistent with this definition, ORC 2107.61 and *UNION SAV. BANK, supra.*, Nile Batman did not have record title until the filing of the Will in probate and recording of the Will in the recorder's office. This is the title transaction and savings event for ODMA purposes and it occurred in 1989. Both the initial transfer by will at the time of death and the subsequent recording of the will to make title effectual constitute title transactions affecting an interest in land. *See e.g., Riddel v. Layman*, 1995 Ohio App. LEXIS 6121, 5-6 (Ohio Ct. App., Licking County July 10, 1995) (mineral interest was the subject of a title transaction in 1965 when deed executed and subject to a second title transaction when the deed was filed for record in 1973. Thus no abandonment of mineral interest in 1969-1989 fixed look back period).

While Hess Ohio respectfully submits Appellant is barred from asserting Proposition of Law No. 2 for the first time on appeal, Appellant's argument is nonetheless without merit. The recording of an out-of-state will is a transaction effecting an interest in property as it is required to effectually pass title to the real estate. Accordingly, the filing of the Batman Will and recording of the Batman Will in the Belmont County Recorder's Office is a title transaction and savings event for 1989 DMA purposes thereby precluding Appellant's claims for abandonment of the Batman fractional severed mineral interest.

CONCLUSION

For the foregoing reasons, the reasons stated in the trial court's findings, the reasons articulated by the Seventh District Appellate Court, and other good cause, Hess Ohio respectfully asks that the Court deny Appellant's request for jurisdiction. This matter is not of great public importance, the issues presented by Appellant are not dispositive of the case at bar and involve areas of the law that are already well-settled. Any uncertainty pertaining to the 1989 DMA that the Court has previously decided to hear is irrelevant to this matter. There are no genuine issues and the public record in this matter is undisputed. The Batman Will is a title transaction and thus a savings event. This occurred when the requirements of ORC 2107.61 were met and the Batman Will was admitted to probate and recorded. The recording of a will is a savings event. During all relevant times the Batmans complied with the statutory requirements and there are savings events evidencing that fact. As such, Hess Ohio respectfully asks that jurisdiction be denied or, in the alternative, that the ruling of the appellate court be upheld.

Respectfully submitted,

/s/ Scott D. Eickelberger

WILLIAM J. TAYLOR (0015709)
SCOTT D. EICKELBERGER (0055217)
DAVID J. TARBERT (0061613)
RYAN H. LINN (0088123)

Attorneys for Hess Ohio Developments, LLC
and Hess Ohio Resources, LLC

Kincaid, Taylor & Geyer

50 North Fourth Street

P. O. Box 1030

Zanesville, Ohio 43702-1030

Telephone: (740) 454-2591

Telecopier: (740) 454-6975

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of January, 2015, a copy of the foregoing Memorandum in Opposition to Jurisdiction was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's system.

/s/ Scott D. Eickelberger

WILLIAM J. TAYLOR (0015709)

SCOTT D. EICKELBERGER (0055217)

DAVID J. TARBERT (0061613)

RYAN H. LINN (0088123)

Attorneys for Hess Ohio Developments, LLC
and Hess Ohio Resources, LLC