ORIGINAL

IN THE SUPREME COURT OF OHIO

Mark E. Albanese, Executor of the Estate of James F. Albanese,	:	
Appellant,	:	
v.	:	Case No. 2015-0120
Nile E. Batman, et al.,	:	
Appellees.	:	

MEMORANDUM IN OPPOSITION TO JURISDICTION OF *AMICUS CURIAE* PALOMA PARTNERS III, LLC.

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STATEMENT OF THE CASE

Although R.C. 5301.56, Ohio's Dormant Mineral Act ("DMA"), is a focal point of numerous matters pending before this Court, this case should not be among them. For the reasons set forth below, *Amicus Curiae* Paloma Partners III, LLC ("Paloma") urges this Court to decline jurisdiction in this matter.

Specifically, Proposition of Law No. 1 is unnecessarily repetitive of an issue *already* before the Court in *Jon Walker, Jr. v. Patricia J. Shondrick-Nau, Executrix of the Estate of John R. Noon and Successor Trustee of the John R. Noon Trust*, Ohio Supreme Court Case Number 2014-0803 (the "*Noon* Appeal"). *See also Eisenbarth v. Reusser*, Ohio Supreme Court Case Number 2014-1767 (application for jurisdiction pending on the same issue). In fact, this Court scheduled the *Noon* Appeal for oral argument on June 23, 2015, so the issue will be timely decided. There is simply no need for the Court to accept jurisdiction over this case when the same issue is already pending before the Court.

Further, the legal issue raised in Proposition of Law No. 2 has been waived because it was not raised by the Appellant before either the trial court or intermediate appellate court.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Paloma is a private oil and gas exploration and production company founded in 2004, and headquartered in Houston, Texas. Most recently, Paloma has made a substantial investment in leasing oil and gas mineral interests in the Appalachian Basin, including Ohio. Paloma currently holds oil and gas leases involving more than 21,000 acres in Ohio. Among the leased acreage controlled by Paloma are hundreds of net mineral acres owned by the Appellees, including the oil and gas lease(s) covering the mineral rights subject to this action.

STATEMENT OF THE FACTS

Paloma adopts the statement of facts set forth in the Opinion from the Seventh District Court of Appeals in this case (the "Opinion"), a copy of which was filed with this Court on January 23, 2015. For the convenience of the Court, Paloma sets forth the relevant facts below:

- The Appellant owns the surface of approximately 104 acres of real property located in Smith Township, Belmont County (the "Property"), and ¾ of the oil and gas mineral rights underlying the Property. Opinion at ¶¶ 2 and 7.

- The Appellees claim to own ¼ of the oil and gas mineral rights underlying the Property through inheritance. *Id.* at ¶ 7.

- In 1981, Frances Batman (the mother of Appellee, Nile Batman) recorded an affidavit in the Belmont County Recorder's Office preserving her mineral interest (the "Preservation Affidavit"). *Id.* at ¶¶ 4 and 18.

- Neither Appellant nor Appellee dispute the fact the recordation of the Preservation Affidavit is a savings event under the DMA. *Id.* at ¶ 5.

- On April 10, 1989, a certified copy of Frances Batman's will was recorded in the Belmont County Recorder's Office. *Id.* at ¶ 18.

- On March 3, 2009, an oil and gas lease between Appellee and Mason Dixon Energy, Inc. was recorded in the Belmont County Recorder's Office. *Id.*

ARGUMENTS IN OPPOSITION TO JURISDICTION

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

The Appellant asks this Court to review the issue of whether the "act of recording an out-of-state Will is not a title transaction." This proposition of law is inappropriate for review by this Court, however, because the Seventh District Court of Appeals did not reach the issue. Specifically, the conclusion reached by the Seventh District involved the determination that the relevant look-back period under the 1989 version of the DMA is fixed ("from March 22, 1969 to March 22, 1989"). Simply put, the April 10, 1989 recordation of the will fell outside of the

lower appellate court's 20-year look-back period. As a result, this issue is not appropriate for this Court's review.

Perhaps more importantly, the issue raised in Appellant's second proposition of law has been waived. To date, Appellant has raised two arguments supporting the second proposition of law. The first argument (raised only before the trial court) contended that "the 1989 recordation of the will is not a savings event because the will was not properly probated in Belmont County, Ohio and there was no certified of transfer issued." *Id.* at ¶ 20. As the Seventh District noted, however, "[t]hat argument is abandoned on appeal." *Id.* Simply stated, the Appellant lost the right to make this argument by failing to raise it on appeal to the Seventh District Court of Appeals.

The second argument (raised for the first time before the Seventh District) claims that "it is the date of death, not recordation that is to be used to determine the twenty years of preservation of the interest. Or in other words, the recordation relates back to the date of death." *Id.* at ¶ 19. Again, the lower appellate court deemed this argument to have been waived because it was raised for the first time on appeal after not having been addressed in the trial court proceedings. *Id.* at ¶ 21.

Although Appellant attempts to revive both of these arguments in its jurisdictional memorandum, it is barred from doing so. *See e.g., State ex rel. Zollner v. Industrial Comm'n of Ohio*, 66 Ohio St. 3d 276, 277 (1993) ("A party who fails to raise an argument in the court below waives his or her right to raise it here."). As a result, the issue present in the second proposition of law has been waived, and jurisdiction should be declined.

<u>Proposition of Law No. I</u>: The 1989 Dormant Minerals 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.

Although Paloma acknowledges the debate over the relevant 20-year look-back period under the 1989 version of the DMA, this is not the case for resolving this question. That case (the *Noon* Appeal) is already before the Court.

As noted above, this Court already accepted review of the very issue raised in the Appellant's first proposition of law. In the *Noon* Appeal, the issue has been fully briefed, and is scheduled for oral argument on June 23, 2015.[1] *See also Leland Eisenbarth, et al. v. Dean Reusser, et al.*, Ohio Supreme Court No. 2014-1767 (pending jurisdiction before this Court on the exact same issue raised in Appellant's first proposition of law). Because this Court already has accepted jurisdiction over the issue raised in Appellant's first proposition of law, there is simply no need for the Court to do so again.

CONCLUSION

For the reasons discussed above, this case does not implicate any issues of public or great general import—the propositions of law are either (1) already before the Court, (2) not appealable, or (3) not of public or great general interest. Accordingly, Paloma respectfully requests that this Court deny jurisdiction in this case.

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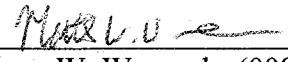
[1] The specific proposition of law accepted by the Court in the *Noon* Appeal is as follows: "To the extent the 1989 version of the DMA remains applicable, the 20-year look-back period shall be calculated starting on the date a complaint is filed which first raises a claim under the 1989 version of the DMA." Further, the *Noon* Appeal involves five other propositions of law on DMA issues, thereby making it a more appropriate vehicle for this Court to issue a comprehensive decision on the DMA.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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