

IN THE SUPRME COURT OF OHIO

Wayne K. Lipperman, <i>et al.</i> ,)	
)	Case No. 2015-0121
)	
Appellants,)	
vs.)	On Appeal from the
)	Belmont County Court of Appeals,
)	Seventh Appellate District
Nile E. Batman, <i>et al.</i> ,)	
)	Court of Appeals Case No. 14 BE 2
)	
Appellees.)	

MEMORANDUM OF APPELLEES
RESERVE ENERGY EXPLORATION COMPANY AND
EQUITY OIL & GAS FUNDS, INC. IN RESPONSE TO JURISDICTION

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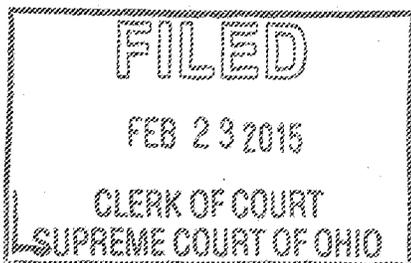


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**EXPLANATION OF WHY THIS CASE IS NOT
A CASE OF PUBLIC OR GREAT GENERAL INTEREST**

This case does not present a matter of public or great general interest. It involves a straightforward application of the 1989 version of the Dormant Mineral Act, Ohio Revised Code (“R.C.”) § 5301.56 (“1989 DMA”). Regardless of whether a fixed or rolling twenty-year look-back period is applied, the result remains the same – Defendant-Appellee Nile Batman’s reserved mineral interest is preserved. Therefore, this Court should decline jurisdiction and allow the decision of the Belmont County Court of Appeals, Seventh Appellate District (“Court of Appeals”), to stand.

For the reasons set forth in its decision, the Court of Appeals applied a fixed look-back period. It found that Nile Batman’s mineral interest was preserved because Frances Batman’s Affidavit and Notice of Claim of Interest in Land (“Affidavit”) was recorded with the Belmont County Recorder in 1981, within the twenty-year look-back period preceding the effective date of the 1989 DMA, *i.e.*, March 22, 1969 to March 22, 1989. The parties do not dispute that the Affidavit was a saving event under the 1989 DMA.

In its decision granting summary judgment to Defendants-Appellees Reserve Energy Exploration Company (“Reserve”) and Equity Oil & Gas Funds, Inc. (“Equity”), the Belmont County Court of Common Pleas (“Trial Court”) applied a rolling twenty-year look-back period. Starting with the recording of the Affidavit in 1981, the Trial Court looked forward in time to identify subsequent savings events that were recorded within the successive rolling look-back periods. The 1989 DMA is clear that in order to constitute a savings event capable of preserving a mineral interest, a title transaction or claim to preserve must be recorded with the county recorder during the applicable twenty-year look-back period. 1989 DMA, R.C. § 5301.56(B)(1),

(B)(1)(c)(i), (v). A “title transaction” is defined to include title by will. R.C. § 5301.47(F). The Last Will and Testament of Frances E. Batman (“Will”) was recorded with the Belmont County Recorder in April 1989, just days after the effective date of the 1989 DMA and within the three-year grace period established by the statute, *i.e.*, March 22, 1989 to March 22, 1992. It is undisputed that the Will was recorded within twenty years after the recording of the Affidavit in 1981. A subsequent title transaction – an oil and gas lease entered into by Defendants-Appellees Nile and Katheryn Batman (“Batmans”) and Reserve in 2008 (“Batman Lease”) – became a savings event when it was recorded with the Belmont County Recorder in 2008. It further is undisputed that the Batman Lease was recorded within the twenty-year period following the recording of the Will in 1989. Therefore, applying successive rolling look-back periods, the Trial Court found that the three savings events – the recording of the Affidavit, the Will, and the Batman Lease – preserved Nile Batman’s reserved mineral interest.

In order to defeat the foregoing savings events, Plaintiff-Appellant Wayne Lipperman (“Appellant”) argues that the date of Frances Batman’s death in 1981 should be the starting point from which the rolling look-back should begin to run. Appellant seeks to exploit the period of more than twenty years between the date of Frances Batman’s death in 1981 and the recording of the Batman Lease in 2008. The fundamental flaw in Appellant’s argument is that it completely ignores the statutory requirement that a title transaction be *recorded in the office of the county recorder* in order to constitute a savings event.

The reason for the 1989 DMA’s recording requirement is simple. Once a title transaction is recorded, the public is on notice that a potential savings event has occurred for purposes of the 1989 DMA. The date of recording provides a clear benchmark for determining whether a savings event falls within the applicable look-back period. This is particularly apparent in the

case of the recording of a decedent's will, which is executed by the testator during his or her lifetime, and, consequently, cannot contain the future date on which the testator actually dies. The recording of the Will fulfills the 1989 DMA's prerequisite to qualify the transfer by will as a savings event.

Despite applying competing theories regarding the look-back period (fixed versus rolling) the Trial Court and the Court of Appeals arrived at the same (and correct) result – Nile Batman's reserved mineral interest is preserved. Therefore, this Court should decline jurisdiction and allow the Court of Appeals' decision to stand.

STATEMENT OF THE CASE AND FACTS

Appellant is the owner of certain real property consisting of 41.84 acres, more or less, and situated in Belmont County, Ohio. On February 15, 2012, Appellant and Roseann Cook ("Cook")¹ commenced the underlying litigation in the Trial Court to determine the ownership of one-half of the mineral rights to Appellant's real property. Reserved by John A. Clark in the 1920s, ownership of those rights passed through several generations of John Clark's family. Nile Batman is the current owner of such rights. However, Appellant claims that those rights vested back to him pursuant to the 1989 DMA.

In September 1981 Nile Batman's mother, Frances Batman, recorded the Affidavit with the Belmont County Recorder. The parties agree that the recorded Affidavit constitutes a savings event under the 1989 DMA. Frances Batman died in October 1981. In April 1989 the

¹ Plaintiff Roseann Cook died in October 2014. Her estate is not a party to this appeal.

Will was recorded with the Belmont County Recorder.² In May 1989, an authenticated copy of the Will was admitted for record and filed with the Belmont County Probate Court.

In April 2006 Appellant and Cook entered into an oil and gas lease with Reserve, which lease was recorded in July 2006 with the Belmont County Recorder (“Lipperman Lease”). Certain rights in the Lipperman Lease subsequently were assigned to Equity, and later to Defendant-Appellee PC Exploration, Inc. (“PC Exploration”). Appellant has not asserted any claims in the instant action with respect to the Lipperman Lease.

In November 2008 the Batmans and Reserve entered into the Batman Lease, which was recorded in December 2008 with the Belmont County Recorder. Reserve subsequently assigned some of its rights in the Batman Lease to PC Exploration. The parties to the instant action agree that the recorded Batman Lease constitutes a title transaction and savings event under the 1989 DMA.

In the underlying action before the Trial Court, Appellant and Cook claimed that Nile Batman’s reserved mineral interest (“Batman Mineral Interest”) and the Batman Lease cloud Appellant’s title. Appellant and Cook asserted that there was a lack of an intervening savings event between the Affidavit and the Batman Lease that would have preserved the Batman Mineral Interest pursuant to the 1989 DMA. Therefore, Appellant and Cook sought to cancel the Batman Lease.³

² Article II of the Will provides: “In the event that my son, Nile E. Batman, 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.”

³ Answers were filed by the Batmans on March 15, 2012, by Reserve on March 19, 2012, and by PC Exploration and XTO Energy, Inc. (“XTO”) on March 21, 2012. On April 15, 2013, the Trial Court granted Equity’s Motion for Leave to File Its Answer Instanter (filed March 25, 2013) and denied Appellant and Cook’s Motion for Default Judgment (filed February 28, 2013). Equity filed its Answer on April 30, 2013.

Appellant and Cook filed a Motion for Summary Judgment with the Trial Court on October 3, 2013. Reserve and Equity filed their joint Motion for Summary Judgment on October 4, 2013. On December 16, 2013, the Trial Court issued its Judgment Entry (“Trial Court Decision”) granting Reserve and Equity’s Motion for Summary Judgment, and denying Appellant and Cook’s Motion for Summary Judgment. The Trial Court held that the Affidavit complies with the requirements of Section 5301.52 of the Ohio Revised Code, and, further, qualifies as a savings event pursuant to the 1989 DMA. Trial Court Decision, at 3-4. The Trial Court further found that the 1989 DMA employs a “rolling look back period” which requires that the Batmans identify a savings event during the time period between the recording of the Affidavit on September 14, 1981, and the expiration of the subsequent rolling twenty (20) year look back period, *i.e.*, September 14, 2001. *Id.*, at 4.

The Trial Court further held that the Will is a title transaction, and qualifies as a savings event pursuant to the 1989 DMA. *Id.*, at 7. The Trial Court held that the Batmans’ “failure to file a Certificate of Transfer does not negate the title transaction established by the filing of the Batman will with the Belmont County Recorder,” which occurred on April 9, 1989 (nineteen days following the effective date of the 1989 DMA). *Id.*, at 5. Once again, the Trial Court applied the rolling twenty-year look-back period, *i.e.*, from the recording of the Will on April 9, 1989 through the expiration of the period on April 9, 2009. *Id.*, at 7. The Trial Court held that the Batman Lease, recorded on December 3, 2008, constitutes a title transaction and savings event pursuant to the 1989 DMA. *Id.* Finally, the Trial Court held that Appellant and Cook were precluded from obtaining summary judgment against Equity because Appellant and Cook’s Motion for Summary Judgment focused instead on the validity of the Batman Lease.

Appellant and Cook filed their Notice of Appeal with the Trial Court on January 13, 2014. Following briefing and oral argument, the Court of Appeals issued its decision on December 12, 2014. The Court of Appeals affirmed the Trial Court's Decision, reaching the same result but for different reasons. Citing its recent decision in *Eisenbarth v. Reusser*, 7th Dist. App. No. 13 MO 10, 2014-Ohio-3792, the Court of Appeals held that the twenty-year look-back period is fixed (*i.e.*, March 22, 1969 to March 22, 1989), rather than the "rolling" period employed by the Trial Court. Nevertheless, it is undisputed that the recording of the Affidavit in 1981 is a saving event falling within the fixed look-back period. Therefore, the Court of Appeals held that the Batman Mineral Interest was preserved pursuant to the 1989 DMA. The Court of Appeals further determined that it need not reach the other substantive issue raised by the parties, *i.e.*, whether the recording of the Will in 1989 constitutes a savings event.

ARGUMENTS IN RESPONSE TO APPELLANT'S PROPOSITIONS OF LAW

Argument in Response to Proposition of Law Nos. 1 and 2: Regardless of Whether the DMA Employs a Fixed or Rolling Look-Back Period, the Batman Mineral Interest Is Preserved Pursuant to the 1989 DMA.

In focusing on the October 1981 death of the testator, Frances Batman, Appellant completely disregards the unambiguous language set forth in the 1989 DMA that specifically requires that a title transaction be recorded in the office of the county recorder in order to qualify as a savings event. Disregarding the actual date of recording for purposes of determining the date of the savings event would contravene the underlying purpose of that portion of the 1989 DMA, *i.e.*, that title transactions must be recorded in order to put the surface owner and the general public on notice of the existence of the mineral interest holders' claim with respect to the subject real property. The Will complies with all prerequisites of a title transaction pursuant to the 1989 DMA. The recording of the Will in the office of the Belmont County Recorder created

a savings event. Therefore, the Batman Mineral Interest was preserved, notwithstanding Appellant's argument to the contrary.

The 1989 DMA provided, in pertinent part:

(B)(1) Any mineral interest held by any person, other than the owner of the surface of the lands subject to the interest, shall be deemed abandoned and vested in the owner of the surface *if none of the following applies*:

(c) Within the preceding twenty years, one or more of the following has occurred:

(i) The 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;

(v) A claim to preserve the interest has been filed in accordance with division (C) of this section[.]

1989 DMA, R.C. § 5301.56(B)(1), (B)(1)(c)(i), (v) (emphasis added). Therefore, abandonment of the mineral interest under the 1989 DMA is avoided where a savings event has occurred within the twenty-year period immediately preceding the effective date of that statute — *i.e.*, between March 22, 1969, and March 22, 1989. *See, e.g., Riddel v. Layman*, 5th Dist. Licking No. 94 CA 114, 1995 Ohio App. LEXIS 6121, at *6 (July 10, 1995) (“Finally, the title transaction must have occurred within the preceding twenty years from the enactment of the statute, which occurred on March 22, 1989.”).⁴

Appellant claims that the Court of Appeals erred in applying a fixed look-back period to determine whether the Batman Mineral Interest was preserved. It is undisputed that the Affidavit

⁴ In addition, the 1989 DMA provided that “[a] mineral interest shall not be deemed abandoned under division (B)(1) of this section because none of the circumstances described in that division apply, *until three years from the effective date of this section.*” 1989 DMA, R.C. § 5301.56(B)(2) (emphasis added). Therefore, mineral interest holders were afforded a three-year “grace period” in which to pursue and perfect a savings event prior to the expiration of that “grace period,” *i.e.*, March 22, 1992. Accordingly, abandonment of the mineral interest is avoided where a savings event has occurred within the three-year the grace period — *i.e.*, between March 22, 1989, and March 22, 1992.

was recorded in 1981, well within the twenty-year fixed look-back period from the effective date of the 1989 DMA, *i.e.*, March 22, 1969 to March 22, 1989. The parties agree that the Affidavit constitutes a title transaction and savings event. Therefore, the Court of Appeals reached the obvious finding that the Batman Mineral Interest had been preserved.

In addition to the foregoing time period, the Trial Court utilized a “rolling” twenty-year period, which looks at the twenty-year period that follows the last recorded savings event, such as a title transaction or claim to preserve a mineral interest. Appellant argues that the Court of Appeals likewise should have applied a rolling look-back period. Appellant also argues that the Court of Appeals should have determined that the date of Frances Batman’s death in 1981 is the date from which the rolling look-back period begins.

However, Appellant’s arguments ignore the 1989 DMA’s explicit recording requirement. Specifically, the statute provides that, “[w]ithin the preceding twenty years, one or more of the following has occurred: (i) The 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*[.]” 1989 DMA, R.C. § 5301.56(B)(1)(c)(i) (emphasis added). Appellant refuses to acknowledge the importance of the latter phrase in establishing a savings event.

Appellant argues that Nile Batman should not be permitted to benefit from the eight-year delay between the death of Frances Batman in 1981 and the recording of her Will with the Belmont County Recorder in 1989. Appellant’s argument is untenable. One appellate court decision is directly on point and is dispositive of the issue raised by Appellant. In *Riddel v. Layman*, the Court of Appeals, Fifth Appellate District, was asked to decide whether a mineral interest holder adequately preserved that interest pursuant to the 1989 DMA. The court succinctly framed the issue as follows: “In order for Appellee Layman to retain her 49% mineral

interest in appellant's property, there had to be a title transaction that had been filed or recorded in the county recorder's office within the past twenty years from the enactment of the statute." *Riddel*, 1995 Ohio App. LEXIS 6121, at *5. The court analyzed compliance with the statute in three steps, each of which is examined herein.

a. Step One: There Must Be a Title Transaction.

The first step is determining whether the mineral interest had been the subject of a title transaction. Citing to the definition of "title transaction" set forth in R.C. § 5301.47(F) (part of the Marketable Title Act), the *Riddel* court found that "the 49% mineral interest was the subject of a title transaction in 1965 when Austin and Eula Layman executed a deed transferring the 111 acres to Hilda Layman. ... The execution of the deed in 1965 affected title to interest in the 111 acres and therefore was a title transaction as defined by the statute." *Riddel*, 1995 Ohio App. LEXIS 6121, at *5-6. Although not specifically highlighted by the court, the title transaction (the execution of the deed by the Laymans) occurred in 1965, four years *prior* to the outside edge (*i.e.*, March 22, 1969) of the twenty-year look-back period set forth in the 1989 DMA. The court did *not* hold that the title transaction was nullified for purposes of the 1989 DMA simply because it did not occur within the applicable look-back period. This is significant because it shows that: (1) there must be a title transaction in order to even qualify for preservation of the mineral interest under this portion of the 1989 DMA; and (2) it is an independent step in the analysis of whether a savings event was created.

Because the 1989 DMA did not contain a definition of the term "title transaction," courts routinely look to the definition contained in the Ohio Marketable Title Act:

(F) "*Title transaction*" means 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, administrator's, or sheriff's deed, or decree of any court, as well as warranty deed, quit claim deed, or mortgage.

R.C. § 5301.47(F) (emphasis added). While this definition refers to various deeds and a mortgage which routinely are recorded to document transfers of title to real property, it is important to note that this definition does not specify in what manner “title by will or descent” must be memorialized in the public record. Consistent with this definition, the 1989 DMA only requires that, for purposes of establishing the existence of a title transaction savings event, “[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.” 1989 DMA, R.C. § 5301.56(B)(1)(c)(i) (emphasis added). The use of the words “filed or recorded” in the alternative connotes the ability of a mineral interest holder to file a document with the county recorder in order to put third parties on notice of the existence of a title transaction.

b. Step Two: The Title Transaction Must Be Recorded with the County Recorder.

The second step is determining whether the title transaction (the Layman deed) had been recorded in the office of the applicable county recorder. As the *Riddel* court stated: “the deed was filed in the Licking County Recorder’s Office on June 12, 1973. This satisfies the second requirement of the statute which requires a filing or recording of the title transaction.” *Riddel*, 1995 Ohio App. LEXIS 6121, at *6. Therefore, the relevant inquiry does not end with establishing that a title transaction occurred. Looking to the unambiguous language of the statute, the *Riddel* court determined whether the title transaction had, in fact, been recorded in the office of the county recorder. Had the Layman deed not been recorded, the title transaction would not have been effective as a savings event.

This is the issue presented to this Court in the instant appeal — whether the death of Frances Batman, standing alone, constitutes a *savings event* pursuant to the 1989 DMA. Based

upon the *Riddel* analysis, it does not. The Will is the embodiment of the title transaction conveying the mineral interest to Nile Batman upon the death of Frances Batman. It is undisputed that the Will was recorded in the office of the Belmont County Recorder in accordance with the 1989 DMA. The recording of the Will closes the circle and qualifies the underlying title transaction as a savings event pursuant to the 1989 DMA. In light of the *Riddel* analysis, Appellant's arguments to the contrary fail as a matter of law.

c. Step Three: The Title Transaction Must Be Recorded Within the Applicable Look-Back Period.

The third step is determining whether the title transaction was recorded within the relevant look-back period pursuant to the statute. The *Riddel* court stated: "the title transaction must have occurred within the preceding twenty years from the enactment of the statute, which occurred on March 22, 1989. Appellee Layman recorded the deed on June 12, 1973, well within the preceding twenty years from the date the statute was enacted." *Riddel*, 1995 Ohio App. LEXIS 6121, at *6. Looking closely at this step in the analysis, it is evident that the appellate court was not focusing on whether the *title transaction* (the execution of the Layman deed) occurred within the twenty-year look-back period of March 22, 1969 to March 22, 1989. Clearly that did not happen, because the deed was executed in 1965, four years *prior* to the outside edge of that look-back period. Consistent with the second step of its analysis, the *Riddel* court looked to whether the document evidencing the title transaction (*i.e.*, the deed) was *recorded* within the applicable look-back period. This is important because the act of recording is, standing alone, not enough to create a savings event. Rather, the act of recording a title transaction within the applicable look-back period satisfies all three elements for the creation of a savings event pursuant to the 1989 DMA.

d. The Will Is Not Only a Title Transaction, But Also a Savings Event Pursuant to the 1989 DMA.

In the instant action, the Will satisfies all of the elements set forth in the statute and the *Riddell* analysis. First, Appellant concedes that the transfer of the mineral interest to Nile Batman upon the death of his mother Frances Batman constitutes a title transaction pursuant to the statute. Second, the actual recording of the Will with the Belmont County Recorder satisfies the requirement that the title transaction be made part of the public record. Had this not been done, Appellant and the general public would not have been put on notice that the title transaction (a transfer of title by will) had occurred. Finally, the actual recording of the Will occurred within the applicable look-back period. Given the Trial Court's application of a "rolling" twenty-year period from the date of the previous savings event, the relevant look-back period was from the recording of the Affidavit in September 1981 through the expiration of the subsequent twenty-year period in 2001. It is undisputed that the Will was recorded on April 9, 1989, within that look-back period. Therefore, all elements of the creation of the savings event were satisfied.

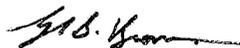
Appellant erroneously views the look-back period as commencing with the death of Frances Batman on October 15, 1981, and continuing through the expiration of the subsequent twenty-year period in October 2001. Appellant claims that no additional title transaction occurred within that specific time period. Aside from the fact that this erroneous construction of the statute completely ignores the unambiguous recording requirement, Appellant cannot disregard the fact that the Will actually was recorded in the office of the Belmont County Recorder on April 9, 1989. The recording of the Will was not a futile act. Rather, the 1989 DMA requires that this Court give effect to that recording as a savings event that preserves the Batman Mineral Interest. To hold otherwise would be to contravene the unambiguous statutory

language that permits successive filings to preserve the mineral interest. *See* 1989 DMA, R.C. § 5301.56(D)(1).

CONCLUSION

For the reasons set forth more fully above, this case does not present a case of public or great general interest. Therefore, Defendants-Appellees Reserve Energy Exploration Company and Equity Oil & Gas Funds, Inc. request that the Court decline jurisdiction of this case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing Memorandum of Defendants-Appellees Reserve Energy Exploration Company and Equity Oil & Gas Funds, Inc. in Response to Jurisdiction was duly served via regular U.S. Mail, postage prepaid, on this 23rd day of February, 2015, to:

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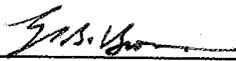
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