Supreme Court of Ohio Clerk of Court - Filed June 10, 2015 - Case No. 2014-1767

In the
Supreme Court of Ohio

LELAND EISENBARTH, *et al.*,	:	Case No. 2014-1767
	:	
Plaintiffs-Appellants,	:	On Appeal from the
	:	Monroe County Court of Appeals,
v.	:	Seventh Appellate District
	:	
DEAN REUSSER, *et al.*,	:	Court of Appeals Case
	:	No. 13 MO 10
Defendants-Appellees.	:	

REPLY OF *AMICUS CURIAE* STATE OF OHIO
IN SUPPORT OF APPELLANTS

RICHARD A. YOSS* (0003220)
**Counsel of Record*
CRAIG E. SWEENEY (0087841)
Yoss Law Office
122 N. Main Street
Woodsfield, Ohio 43793
740-472-0707
yosslawoffice@gmail.com

Counsel for Appellants Leland Eisenbarth, Michael Eisenbarth, and Keith Eisenbarth

MATTHEW W. WARNOCK* (0082368)
**Counsel of Record*
DANIEL C. GIBSON (0080129)
DANIEL E. GERKEN (0088259)
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215-4291
614-227-2300
mwarnock@bricker.com

Counsel for Appellees Dean F. Reusser, Marilyn Ice, Wilda Fetty, Robert Maag, Vernon Reusser, Paul Reusser, David Reusser, and Dennis Reusser

MICHAEL DEWINE (0009181)
Attorney General of Ohio

ERIC E. MURPHY* (0083284)
State Solicitor
**Counsel of Record*
SAMUEL C. PETERSON (0081432)
Deputy Solicitor
ELIZABETH R. EWING (0089810)
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
eric.murphy@ohioattorneygeneral.gov

Counsel for *Amicus Curiae* State of Ohio

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 1

The State of Ohio's Proposition of Law No. 1:

The original Dormant Mineral Act contained a rolling dormancy period, such that any severed mineral interests were deemed abandoned and vested in the owner of a surface estate if no savings event occurred within any twenty-year period. 1

The State of Ohio's Proposition of Law No. 2:

A lease is not a title transaction, and therefore does not qualify as a savings event under the 1989 Dormant Mineral Act. 4

CONCLUSION 5

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases **Page(s)**

Burkhart v. H.J. Heinz Co.,
140 Ohio St. 3d 429, 2014-Ohio-3766.....1

In re Application of Columbus S. Power Co.,
138 Ohio St. 3d 448, 2014-Ohio-462.....4

State ex rel. A.A.A. Investments v. City of Columbus,
17 Ohio St. 3d 151 (1985) 3

State ex rel. Wood v. McClelland,
140 Ohio St. 3d 331, 2014-Ohio-3969.....4

Texaco v. Short,
454 U.S. 516 (1982).....2, 3

Walker v. Shondrick-Nau,
No. 2014-0803 4

Statutes, Rules, and Constitutional Provisions

R.C. 5301.56 (1989).....1, 3, 4

R.C. 5301.56(B)(1)(c) (1989) 2

Other Authorities

William J. Taylor, Proponent Testimony on Behalf of Senate Bill 223 and House
Bill 521, An Ohio Dormant Mineral Act (1988) 1

INTRODUCTION

As discussed in the State's earlier amicus brief, the General Assembly's original intent in adopting the Dormant Mineral Act was to "encourage the development of minerals in Ohio which have been previously ignored due to defects in title." William J. Taylor, Proponent Testimony on Behalf of Senate Bill 223 and House Bill 521, An Ohio Dormant Mineral Act at 3 (1988). To best serve that purpose, the Act's supporters understood it as measuring dormancy beginning "after the last use of the interest." Taylor Testimony at 2 (comparing Act to Michigan Dormant Mineral Act). Appellees admit that the Seventh District's conclusion that the Act only applied to those mineral interests that were dormant when the Act was first adopted is flawed. *See* Appellee Br. 23. But they advocate a new interpretation of the Act that similarly contradicts the statute's text and purpose, as well as the contemporaneous understanding of its supporters. For the reasons set forth in the State's prior brief, and those set forth below, the Court should reject Appellees' argument and hold that a mineral interest was abandoned under R.C. 5301.56 (1989) whenever it had lain dormant for a consecutive period of twenty or more years.

ARGUMENT

<u>The State of Ohio's Proposition of Law No. 1:</u>

> *The original Dormant Mineral Act contained a rolling dormancy period, such that any severed mineral interests were deemed abandoned and vested in the owner of a surface estate if no savings event occurred within any twenty-year period.*

As Appellees now concede, the Seventh District's interpretation of R.C. 5301.56 (1989) was "flawed" and rendered portions of the statutory text meaningless. Appellee Br. 23. The Seventh District's failure to give effect to R.C. 5301.56 (1989) in its entirety is more than a "minor drawback" to the Seventh District's interpretation of the Act; it violates basic principles of statutory interpretation. *See Burkhart v. H.J. Heinz Co.*, 140 Ohio St. 3d 429, 2014-Ohio-3766 ¶ 31. But Appellees' preferred reading of the original version of the Dormant Mineral Act

does even more violence to the statutory scheme, and was not adopted by the Seventh District below. For at least two reasons, this Court should reject that reading now.

First, contrary to Appellees' suggestion, *see* Appellees Br. 18, a rolling dormancy period *does* answer the "critical question" about how to measure twenty years of abandonment under the original Dormant Mineral Act. If the question posed by R.C. 5301.56(B)(1)(c) (1989) is "preceding what?", then the State and others have already answered it – the answer is: twenty years preceding abandonment and vesting. As the State established in its amicus brief, under the original version of the Dormant Mineral Act "the word 'preceding' referred to the time period before the property was deemed abandoned and vested in the surface owner." *See* State of Ohio Amicus Br. 1-2 and 5-11. The State, Appellant, and other amici did not "ignore" this question as Appellees claim. *See* Appellees Br. 18. Instead, they provided a straightforward answer and that answer was "preceding abandonment." If anything, it is Appellees who, dissatisfied with the answer, choose to ignore it.

Appellees' preferred answer—measuring dormancy from the date that a surface owner initiates a quiet title action—is incompatible with the concept of a *self-executing* statute. Although they purport to concede for the sake of argument that the original version of the Dormant Mineral Act was self-executing (a legal question at issue in other cases but not this one), *see* Appellees Br. 17, their interpretation of the dormancy period guts that concession. Appellees argue that dormancy should be measured from the date that a surface owner undertakes some "implementing action," Appellees Br. 18, but the whole point of a self-executing statute is that it does not require any such implementing action. As the U.S. Supreme Court held in *Texaco v. Short*, 454 U.S. 516 (1982), when it rejected constitutional challenges to Indiana's comparable dormant mineral statute, "it is essential to recognize the difference

between the self-executing feature of the statute and a subsequent judicial determination that a particular lapse did in fact occur." *Id.* at 533. Appellees fail to recognize this difference. The Act simply cannot be self-executing *and* measure dormancy as Appellees suggest: If the original version of the statute was self-executing, then no implementing action was required for abandonment.

Second, decisions from both this Court and the U.S. Supreme Court confirm that the purpose of the Dormant Mineral Act is to identify and eliminate abandoned mineral interests. The Act expresses no preference about whether that goal is accomplished by encouraging interest holders to themselves develop or preserve those interests or by reuniting them with the surface estate property owners. In that respect, the Dormant Mineral Act cannot be properly characterized as a forfeiture statute because it is not the *statute* that causes mineral interests to be abandoned, but is instead *mineral interest owners* who abandon such interests through inaction. As the U.S. Supreme Court has recognized, dormant mineral acts like R.C. 5301.56 are merely an exercise of a state's traditional power "to permit unused or abandoned interests in property to revert to another after the passage of time." *Texaco*, 454 U.S. at 526. In that respect such statutes are no different than the long-standing doctrine of adverse possession. "In the case of adverse possession, property is not taken." *State ex rel. A.A.A. Investments v. City of Columbus*, 17 Ohio St. 3d 151, 152 (1985). Instead, it automatically vests after a specific period of time. The new owner is not *taking* but rather *exercising* possession. *Id.* Dormant mineral acts, like R.C. 5301.56 (1989), work in much the same way. And while it is true that the Dormant Mineral Act does not require mineral interest holders to subjectively intend to abandon their interest, neither does adverse possession. In both cases what matters is not an interest holder's *subjective*

intent, but instead *objective* evidence (as set forth in statute or at common law) that the property interest in question has been abandoned.

Finally, Appellees incorrectly suggest that the legal question at issue in Proposition of Law 1 has already been fully briefed in *Walker v. Shondrick-Nau*, No. 2014-0803. Appellees Br. 1. That case did *not*, however, provide the Court with an appropriate vehicle to address questions regarding the twenty-year dormancy period. The appellants in that case admitted that if the original version of the Dormant Mineral Act was self-executing then questions about how to measure dormancy would be "superfluous." *See* Appellant Shondrick-Nau Br. 22-23 (also stating that the Court "does not need to answer this question to resolve the appeal" but that it should do so because "Ohio is in need of clarity on the issue."). As this Court has repeatedly stated, it "does not indulge itself in advisory opinions." *In re Application of Columbus S. Power Co.*, 138 Ohio St. 3d 448, 2014-Ohio-462 ¶ 39 (citation omitted); *see also State ex rel. Wood v. McClelland*, 140 Ohio St. 3d 331, 2014-Ohio-3969 ¶ 13. Even so, the State as amicus emphasized in that case, as it again emphasizes here, there is simply no room for Appellees' unique interpretation of how to measure dormancy under R.C. 5301.56. If the 1989 version of the Act is self-executing and the Act required no implementing action by a surface owner, it is impossible to measure dormancy from the date of such an action.

<u>The State of Ohio's Proposition of Law No. 2:</u>

> *A lease is not a title transaction, and therefore does not qualify as a savings event under the 1989 Dormant Mineral Act.*

In their brief, the Appellees get the legal analysis backward; they address the propositions of law out of order, focusing first on Proposition of Law 2 and only then moving on to Proposition of Law 1. The Court's resolution of Proposition of Law 1 should be dispositive of this case, however, and it should not need to address the legal question presented in the second

proposition of law. If Appellants, the State, and the other amici are all correct that the original Dormant Mineral Act measured dormancy on a rolling basis, then it does not matter in this case whether a lease is a title transaction for the purposes of the original version of the Dormant Mineral Act. Even assuming that a lease *is* a title transaction, under a rolling dormancy period the mineral interests at issue in this case were still abandoned in 1994—twenty years after the lease in question was recorded. *See* App. Op. ¶ 125 (DeGenaro, J., concurring in judgment only).

CONCLUSION

For the foregoing reasons, and the reasons set forth in the State of Ohio's Amicus Brief, the Court should reverse the decision of the Seventh District Court of Appeals.

Respectfully submitted,

MICHAEL DEWINE (0009181)
Attorney General of Ohio

/s Eric E. Murphy
ERIC E. MURPHY* (0083284)
State Solicitor
**Counsel of Record*
SAMUEL C. PETERSON (0081432)
Deputy Solicitor
ELIZABETH R. EWING (0089810)
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
eric.murphy@ohioattorneygeneral.gov

Counsel for *Amicus Curiae* State of Ohio

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply of *Amicus Curiae* State of Ohio in Support of Appellants was served by U.S. mail this 10th day of June, 2015, upon the following counsel:

Richard A. Yoss
Craig E. Sweeney
Yoss Law Office
122 N. Main Street
Woodsfield, Ohio 43793

Counsel for Appellants Leland Eisenbarth, Michael Eisenbarth, and Keith Eisenbarth

Matthew W. Warnock
Daniel C. Gibson
Daniel E. Gerken
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215-4291

Counsel for Appellees Dean F. Reusser, Marilyn Ice, Wilda Fetty, Robert Maag, Vernon Reusser, Paul Reusser, David Reusser, and Dennis Reusser

/s Eric E. Murphy
Eric E. Murphy
State Solicitor