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IN THE SUPREME COURT OF OHIO

Leland <b>EISENBARTH</b> , et al.	I	On Appeal from the Ohio Seventh District
<i>Appellants</i> ,	I	Court of Appeals and the Common Pleas
v.	I	Court of Monroe County, Ohio
	I	
Dean <b>REUSSER</b> , et al.	I	Ohio Supreme Court Case No. 2014-1767
<i>Appellees</i> .	I	Seventh District Case No. 13 MO 10
	I	

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## II. STATEMENT OF THE FACTS

Appellants Leland Eisenbarth, Michael Eisenbarth and Keith Eisenbarth (“Appellants”) incorporate by reference herein the Statement of Facts and all defined terms set forth in *Appellants’ Merit Brief* that was filed with this Honorable Court on April 23, 2015. As a threshold matter, however, Appellees mislead this Court in their assertion that “both propositions of law accepted by the Court [in this case] are already fully briefed in two other cases.” See *Appellees’ Brief* at 1. Neither proposition of law raised by Appellants is currently before this Court. While Appellees (improperly) raise arguments similar to those of the appellants in *Walker v. Shondrick-Nau*, Sup. Ct. Ohio Case No. 2014-0803 [Proposition of Law No. 3 -- that some implementing action was required to vested a severed oil and gas interest in the owner of the surface], that case does not address whether the operative look-back period in the 1989 DMA is “fixed” from the date of enactment, or applies on a “rolling” basis.

Similarly, Appellants’ second proposition of law is also distinguishable from the first certified question presented in *Chesapeake Exploration, LLC v. Buell*, Sup. Ct. Ohio No. 2014-0067. In *Buell*, Powhatan Mining Company (“Powhatan”) reserved *all* the oil, gas, coal and other mineral rights. Powhatan transferred those rights to NA Coal, who then, as holders of the executive right to lease, executed an oil and gas lease. It is undisputed in *Buell* that NA Coal, at the time that lease was recorded, held title to all five attributes of the mineral estate, including the executive right to sign a lease. The issue in *Buell*, then, is whether an oil and gas lease executed by the holder of the executive right to lease constitutes a title transaction of that portion of the severed mineral estate. Obviously, NA Coal, by evidencing use of the severed oil and gas interest, has an argument that the reserved interest is not abandoned. To the contrary, the Appellees in this case are arguing that the actions of *Appellants* affect title to *Appellees’* claimed

interest by executing a lease. Essentially, Appellees argue that their interest cannot be abandoned despite inaction for a period of more than 55 years. The same is not true for NA Coal in *Buell*, who exercised the executive right by signing a lease. Appellees in this case did nothing.

### III. LAW AND ARGUMENT

#### a. Standard of Review

The Court applies a *de novo* standard of review in reviewing an award of summary judgment. *See Doe v. Shaffer*, 90 Ohio St. 3d 388, 390, 738 N.E.2d 1243, 1245 (2000) (citing *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241, 245 (1996)). *De novo* review means that this Court uses the same standard that the lower court should have used, and examines the evidence to determine if, as a matter of law, genuine issues exist for trial. *See Dupler v. Mansfield Journal Co., Inc.*, 64 Ohio St.2d 116, 413 N.E.2d 1187 (1980).

Accordingly, an appellate court reviewing the grant of summary judgment must follow the standards set forth in Civ.R. 56(C). *De novo* review does not, however, give a party the opportunity to raise theories of law that the party could have, but failed to, raise to the lower court. *See State of Ohio, ex rel. Conroy v. Williams, Mayor, et al.* 185 Ohio App.3d 69, 923 N.E.2d 191 (7th Dist. 2009). “Despite the fact that appellate courts review summary judgment decisions as *de novo*, ‘the parties are not given a second chance to raise arguments that they should have raised below.’” *Litva v. Richmond*, 172 Ohio App.3d 349 ¶18, 874 N.E.2d 1243 (7th Dist. 2007) (quoting *Aubin v. Metzger*, 2003 WL 22229400, ¶10 (3rd Dist. 2003)).

Appellants and Appellees have agreed throughout the pendency of this litigation (through all pleadings, dispositive motions, and arguments) that the 1989 DMA is “self-executing.” “Self-executing means merely that [a] section is ‘effective immediately without the need of any type of implementing action.’” *State ex rel. Vickers v. Summit Cty. Council*, 97 Ohio St. 3d 204, 209,

2002-Ohio-5583, 777 N.E.2d 830, 835 (2002) (citing BLACK'S LAW DICTIONARY 1364 (7th ed. 1999); also citing *State ex rel. Russell v. Bliss*, 156 Ohio St. 147, 151, 101 N.E.2d 289 (1951)). As a matter of convenience, Appellees now argue, “tying the 20-year look-back period to the date on which a surface owner takes legal action under the 1989 version of the DMA is the best interpretation.” *See Appellees’ Brief* at 18-22. A simple examination of the record reveals that no such argument was raised before the Monroe County Common Pleas Court or the Seventh District Court of Appeals. In fact, that argument is in direct contrast to Appellees’ previous position that the 1989 DMA was self-executing. *See Defendants’ Motion for Summary Judgment* at 19. The only issues properly before this Court are (1) whether the 1989 DMA operates on a “fixed” or “rolling” look-back basis and (2) whether any preserving event occurred thereby precluding abandonment. This Court should accordingly not entertain any arguments by the Appellees that the 1989 DMA required implementing any type of action.

- b. **Proposition of Law No. 1: The 1989 DMA was enacted to be prospective in nature and operated to have severed oil and gas interests “deemed abandoned and vested in the owner of the surface” if none of the savings events enumerated in R.C. 5301.56(B) occurred in the 20-year period immediately preceding any date in which the 1989 DMA was in effect (March 22, 1989 through June 29, 2006).**

This Court has repeatedly made it clear that, “[a]bsent ambiguity, a statute is to be construed without resort to a process of statutory construction.” *Ohio Dental Hygienists Assn. v. Ohio State Dental Bd.*, 21 Ohio St.3d 21, 23, 487 N.E.2d 301, 303 (1986). As the Court provided in *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d 413 (1944): “Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation.” In other words, “[a]n unambiguous statute is to be *applied, not interpreted.*” *New Boston Coke Corp. v. Tyler*, 32 Ohio St. 3d 216, 222-23, 513 N.E.2d 302, 309 (1987)(emphasis added). If a statute is unambiguous as to its operation (i.e. it is

self-executing), then this Court should apply the statute as written. The Court should not interpret a statute in a way that contradicts express statutory language.

Just as with all other statutes, every word and phrase of the 1989 DMA must be taken into account to determine legislative intent. *See State ex rel. Myers v. Spencer Twp. Rural School Dist. Bd. of Educ.*, 95 Ohio St. 367, 373, 116 N.E. 516 (1917). Appellees, relying exclusively on a report from the Natural Resources Committee (“2006 OSBA Report”), argue that this Court has three alternatives for *interpreting* the operative look-back period contained in the 1989 DMA: (1) 20 years preceding commencement on an action to obtain the minerals; (2) 20 years preceding enactment of the statute; or (3) any applicable 20-year period in the chain of title. *See Appellees’ Brief* at 17. While Appellees’ analysis is interesting, it is misguided. The quoted provision of *Appellees’ Brief* misleads this Court, asserting that the 2006 OSBA Report somehow advocates about a specific interpretation of the 1989 DMA. A simple review of that report indicates otherwise. While recommending an amendment, the 2006 OSBA Report does give an opinion about any specific interpretation of the 1989 DMA. The report especially does *not* provide that the “best and most textually consistent” interpretation of the look-back period is the 20 years preceding commencement of an action to obtain the minerals, as Appellees suggest.

Appellees’ entire analysis focuses on only a single word (“preceding”) in the 1989 DMA while simultaneously ignoring all other statutory language that eliminates any ambiguity.<sup>1</sup> When read in its entirety, there can be no doubt of the legislative intent of the 1989 DMA. The oil and gas rights are to “revert to the surface landowner if the mineral rights holder does nothing for 20 years. To *extend* these rights, a mineral holder would simply have to file an *extension* with the local county recorder.” Fiscal Note Sub. S.B. 223 (emphasis added). The 1989 DMA’s

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<sup>1</sup> Some of the pertinent language includes “indefinitely”, “successive filings”, and “has been”.

operation is clear and unambiguous. In the 20-year absence of an enumerated preserving event, the legislature determined that an oil and gas interest is “abandoned and vested in the owner of the surface.” Even if the Court elects to conduct an interpretive analysis based upon Appellees’ proposed three “alternative” look-back periods, the only interpretation that is consistent with the plain language of the 1989 DMA leads to the conclusion that, if there was *any* 20-year period without the occurrence of one of the R.C. 5301.56(B)(1) preserving events, then the mineral interest is abandoned and vested in the owners of the surface.

**i. Tying the 20-year look-back period to the date that a surface owner takes legal action under the 1989 DMA is in direct conflict with the plain language of the statute.**

Assuming *arguendo* that this Court considers an argument that was not raised to the lower courts, the 1989 DMA does not require implementing action. In this case, Appellees argue:

From a purely textual perspective, Appellants and amici are correct. But they completely ignore the fact that: (i) their preferred "rolling" look back/look forward fails to answer the critical question, "Preceding what?"; and (ii) *the best (and most textually consistent) interpretation of the look-back period is the "20 years preceding commencement on an action to obtain the minerals."* See 2006 OSBA Report.

*Appellees' Brief* at 18-19 (citing 2006 OSBA Report)(emphasis added).

Appellees continually ask the question, “preceding what?” in an attempt to create an ambiguity within the unambiguous language of the 1989 DMA. Appellees insert language into the statute, encouraging an *interpretation* of the 1989 DMA that reads, “within the twenty years preceding the date of a legal action” or “within the twenty years preceding the date of enactment.” Again, this Court should not *interpret* a statute that should be *applied* as written. The Court need only read the language immediately following “within the preceding twenty years” to ascertain the answer to the question “preceding what?” R.C. 5301.56(B)(1)(c) provides, “within the preceding *twenty years, one or more of the following has occurred*”

(emphasis added). Therefore, while the 1989 DMA is in effect, if one looks back 20 years and none of the enumerated preserving events has occurred, then the interest becomes vested in the owner of the surface. So, the answer to Appellee's question, "preceding what?" is "preceding *automatic abandonment and vestiture* under the plain language of the statute."

The statute is not tied to a "specific, affirmative act by a surface owner," as the Appellees suggest it *should be*. See *Appellees' Brief* at 22. The 1989 DMA itself is notably devoid of any implementing action requirement by the surface owner. Instead, the operation of R.C. 5301.56 is tied to the *mandatory* specific affirmative, acts by the *mineral holder*. If a mineral interest holder takes none of the mandatory acts, then the interest is abandoned and "vested in the owner of the surface." As an illustration of the problem with Appellants' position, consider three surface owners (X, Y, and Z) that read the 1989 DMA on September 1, 2000. After conducting due diligence, each of the three surface owners' attorneys discover that none of the preserving events outlined by division (B) have occurred in the preceding 20 years. Realizing that the statute is silent as to any implementing action, surface owner X's attorney advises his client that the record is clear and that based upon the plain language of the 1989 DMA, the severed interest belongs to him. Surface owner Y's attorney, although realizing that no implementing action is required, advises his client to record an affidavit indicating that none of the preserving events occurred in the previous 20 years, therefore ensuring that the record affirmatively reflects that the interest belongs to her. Surface owner Z's attorney advises the client to file a lawsuit (one that would be time consuming, expensive, and an unnecessary burden on the judicial system) against all the heirs of the individuals who reserved the interest in order to guarantee clear title. Appellees are asking this Court to insert non-existent language into the statute in order to validate only one of the three provided scenarios.

Other scenarios could also exist. Assume a surface owner wrote a letter to the mineral holder declaring the minerals abandoned or transferred the property (including the minerals) to a purchaser with general warranty covenants. Would these actions be considered sufficient “implementing action”? Based upon these hypothetical scenarios, it is easy to see that Appellees’ position creates a quagmire of uncertainty about what “implementing action” is appropriate. Of course, the statute offers no guidance regarding specific “implementing action” because, by a reading of the 1989 DMA’s plain language, none was required for the statute to have a severed oil and gas interest “abandoned” and “vested” in the owners of the surface. Appellee’s position that a self-executing statute requires implementing any type of legal action violates the well-accepted maxim that “silence of the General Assembly permits this court to interpret these statutes to promote justice and judicial economy.” *State v. Hughes*, 86 Ohio St. 3d 424, 430, 1999-Ohio-118, 715 N.E.2d 540, 544-45 (1999). The 1989 DMA is silent as to any judicial action. Despite this fact, the Appellees encourage an interpretation of the statute that, in the absence of a preserving event, litigation is *required* to determine that an interest was abandoned. Such a position does not promote judicial economy, but rather places the burden on the courts that was not intended by the legislature.

Appellees’ arguments that the 1989 DMA required implementing action is similar to the arguments set forth in the briefs of *Amici* Chesapeake Exploration, L.L.C. and Eclipse Resources Corporation in their joint *amicus* merit brief in *Walker v. Shondrick-Nau*, 2014-Ohio-1499 (7<sup>th</sup> Dist.2014) (Supreme Court Case No. 2014-0803). Those *amici* argue that if the legislature had *not* contemplated implementing action it would have used more “conclusive” language than “shall be deemed abandoned” to provide that a dormant mineral interest is “null and void” or “extinguished.” *Brief for Chesapeake Exploration, L.L.C., et al. as Amici Curiae supporting*

*Appellees, Walker v. Shondrick-Nau*, 2014-Ohio-1499 (7<sup>th</sup> Dist.2014) (Supreme Court Case No. 2014-0803) at 10. That position is, however, in direct contrast to the actual language of the Ohio Marketable Title Act (“OMTA”). R.C. 5301.53 provides:

The provisions of sections 5301.47 to 5301.56 of the Revised Code, shall not be applied *to bar or extinguish* any of the following:

- (A) Any lessor or his successor as reversioner of his right to possession on the expiration of any lease, or any lessee or his successor of his rights in and to any lease, *except as may be permitted under section 5301.56 of the Revised Code.*

(Emphasis added.)

Notably, Sub S.B. 223, the same bill that enacted the 1989 DMA, added the emphasized language to the above provision. The emphasized language invalidates Appellees’ position that the legislature should have used more conclusive language in the 1989 DMA. *See Appellees’ Brief* at 28-29. The amendment of R.C. 5301.53 is explicit acknowledgement by the legislature that the 1989 DMA “extinguishes” rights that are unused by a mineral holder.

In applying a statute, this Court is to give equal weight to words not used as the words that are used. *See Bailey v. Republic Engineered Steels, Inc.*, 91 Ohio St. 3d 38, 39, 2001-Ohio-236, 741 N.E.2d 121, 123 (2001) (citing *Cleveland Elec. Illuminating Co. v. City of Cleveland*, 37 Ohio St. 3d 50, 524 N.E.2d 441 (1988)). One need look no further than the language of the current version of R.C. 5301.56 (the “2006 DMA”) to recognize the difference between a self-executing statute and one that requires implementing action. The 2006 DMA provides:

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 of the lands subject to the interest *if the requirements established in division (E) of this section are satisfied and none of the following applies...*

(Emphasis added.)

Division (E) of the 2006 DMA requires that the surface owner send notice to all “holders” of a dormant oil and gas interest. By its very terms, the 2006 DMA *added* a non-judicial implementing action requirement *before* a mineral interest became vested in the owner of the surface.<sup>2</sup> The absence of such language indicates that *no action by the surface owner was required* to effectuate a vestiture under the 1989 DMA. The 1989 DMA is unambiguously self-executing. The Court should not insert words that are not used to change the 1989 DMA from a self-executing statute to a statute that requires some unspecified implementing action. No reasonable interpretation or application of the 1989 DMA can require a surface owner to take some action that was not contemplated by the plain language of the statute.

**ii. The fixed look-back period adopted by the Seventh District Court of Appeals is inconsistent with the plain language of the 1989 DMA.**

Appellants incorporate by reference those arguments contained in *Appellants’ Merit Brief* as they relate to the interpretation that the 1989 DMA operates for only a single day. Even Appellees concede that the “fixed” look-back period applied by the lower courts contradicts the language of R.C. 5301.56(D)(1). *See Appellees’ Brief* at 23. If the 1989 DMA recognized savings events occurring only between the years of 1969 and 1989, and only served to extinguish the interests not preserved during that 20-year period, then the provisions permitting the “*indefinite*” preservation of mineral interests through “*successive*” filings of claims to preserve are superfluous. Obviously, the words “indefinite” and “successive” are dispositive to the examination of the 1989 DMA regarding a “fixed” versus “continuous” look-back period.

Likewise, Appellees’ assert, “every marketable title act—and indeed every dormant mineral act—necessarily establishes a bright-line period under which there are clear winners and

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<sup>2</sup> R.C. 1.54 provides: “[a] statute which is reenacted or amended is intended to be a continuation of the prior statute and not a new enactment, so far as it is the same as the prior statute.”

losers.” *Appellees’ Brief* at 23. Appellees provide absolutely no statutory language or case law in support of such an assertion. The reason for this omission is that the statement is, quite simply, false. For example, the OMTA does not provide a restrictive “bright-line” period. Rather, the applicable 40-year period changes with the passage of time (subsequent deeds are recorded and a new deed becomes the “root of title”). The OMTA operates to extinguish any interest created prior to that root of title in the absence of certain savings events during the 40-year period thereafter. No Ohio court has ever held that the OMTA operates to extinguish only those interests created in the 40-year period immediately preceding September 29, 1961, the day the OMTA was enacted. This is because other language in the statute makes clear that it does not so operate. The explicit language of the 1989 DMA likewise provides for continuous operation.

**iii. The rolling look-back period proposed by Appellants and supporting amici is the best interpretation of the 1989 DMA, and is most consistent with the plain language of the statute.**

Appellees essentially submit three arguments as to why this Court should ignore the unambiguous language of the 1989 DMA and *not* apply a rolling look-back period: (1) the rolling look-back period is actually a “roll forward” look-back period, (2) the 1989 DMA facilitates a forfeiture, and (3) a rolling look-back period violates due process. All three arguments are meritless. Because the same controlling case law is dispositive of Appellants’ latter two arguments, Appellants will address those simultaneously.

**1. The unambiguous language of the 1989 DMA requires prospective application and a rolling look-back period**

Ohio law requires that “[a] statute is presumed to be prospective in its operation unless expressly made retrospective.” R.C. 1.48. Appellees spend a significant amount of time in their brief arguing that the 1989 DMA is actually a “roll forward” statute. Appellees’ argument attempting to distinguish “look-back” from “roll-forward” is apparently an attempt to confuse the

Court. Appellees adopt the position that, because the 1989 DMA was enacted to be prospective in nature, it cannot simultaneously “look-back” at the preceding 20 years. In essence, Appellees are correct that the 1989 DMA “rolls forward” as it applies to those oil and gas interests created or preserved from March 22, 1969 (20 years preceding the enactment of the 1989 DMA) through June 30, 1986 (20 years preceding the amendment of the 1989 DMA). The statute does not “roll forward” from March 22, 1989, it simply applies prospectively in nature, with every date after the statute’s enactment “looking back” at the preceding 20 years.

The 20-year dormancy period is to be applied to *any* twenty-year period of dormancy beginning “after the last use of the interest”. William J. Taylor, Proponent Testimony on Behalf of Senate Bill 223 and House Bill 521, An Ohio Dormant Mineral Act at 2 (1988)(“Taylor Testimony”). As noted in the Taylor Testimony, the 20-year period begins after the last use of the interest, not the 20-year period preceding implementing action and not the 20-year period prior to enactment. Appellees fail to provide any reasoning for the position that Appellants’ interpretation “constitutes a wholesale replacement of the statutory language.” *Appellees’ Brief* at 26. Instead, only Appellants’ position -- that the 1989 DMA operates to have an unused mineral interest vested in the owner of the surface after any 20-year period of non-use -- gives authority to *every* word and phrase contained in the 1989 DMA.

**2. The 1989 DMA is an abandonment statute and the rolling look-back period does not violate due process.**

Citing Judge DeGenaro’s concurring opinion, Appellees argue both that that the 1989 DMA is actually a forfeiture statute (notwithstanding the statute’s explicit language), and that the 1989 DMA is “so violative of due process it does not warrant further discussion.” *Appellees’ Brief* at 24, 27-28. Each of these positions conflicts with controlling authority. The Supreme Court of the United States (“SCOTUS”) in *Texaco, Inc. v. Short*, 454 U.S. 516 (1982)

specifically addressed both of Appellees' arguments, and found contrary to their position. Just as in this case, the appellants (the mineral owners) in *Texaco* argued both that (1) "the statute effected a taking [forfeiture] of private property for public use without just compensation," and (2) "the lack of prior notice of the lapse of their mineral rights deprived them of property without due process of law." *Id.* at 522. SCOTUS rejected both arguments, reasoning:

- 1) Through its Dormant Mineral Interests Act, [ ] the State has declared that this property interest is of less than absolute duration; *retention is conditioned on the performance of at least one of the actions required by the Act.* We have no doubt that, just as a State may create a property interest that is entitled to constitutional protection, *the State has the power to condition the permanent retention of that property right on the performance of reasonable conditions that indicate a present intention to retain the interest.* *Id.* at 525-526.
- 2) A legislature need do nothing more than enact and publish the law, and *afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply.* In this case, the 2-year grace period included in the Indiana statute forecloses any argument that the statute is invalid because mineral owners may not have had an opportunity to become familiar with its terms... *Id.* at 532.

(Emphasis added.)

Appellees continue to set forth the proposition that the legislature intended the word "abandonment" to actually mean "forfeiture." See *Appellees' Brief* at 27-28. Had the legislature intended a "forfeiture" statute, it could have easily used the word "forfeiture," just as it did in R.C. 5301.332.<sup>3</sup> Instead, the legislature specifically chose to use the phrase "shall be deemed abandoned and vested in the owner of the surface." Appellees are again attempting to put the burden on the Appellants to have taken some action to vest the Mineral Interest in Appellants. The statute requires no such implementing action. Rather, the 1989 DMA is explicitly silent as to any action that is required by the surface owner. Just as in *Texaco*, supra, the statute instead provides that the mineral holder's retention of the oil and gas rights is *conditioned* on the

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<sup>3</sup> R.C. 5301.332 provides a statutory process whereby an oil and gas lease can be declared "forfeited" due to lack of production, without the necessity of filing a lawsuit.

performance of at least one of the preserving events enumerated therein. In order to *retain* his/her severed interest, the mineral holder must *perform* one of the actions that *indicate a present intention to retain the interest*. If they do not, the State of Ohio has determined that the mineral holder abandons, or “relinquish[es] or give[s] up [the right] with intent of never again resuming [his/her] right or interest . . . [they] give [the interest] up absolutely.” *Fulmer v. Insura Property & Casualty Co.*, 94 Ohio St.3d 85, 95, 460 N.E. 2d 392 (2002).

SCOTUS also conclusively determined that a two-year grace period affords the citizenry a reasonable opportunity to familiarize itself with its terms and to comply. The three-year grace period found in R.C. 5301.56(B)(2) has the identical effect. A three-year grace period is no more “violative of due process” than the two-year grace period that was the subject of *Texaco*, *supra*. In fact, even assuming that an oil and gas lease signed by Appellants’ predecessors constitutes a title transaction, Appellees were given an *additional* two years to comply with the mandatory provisions of the 1989 DMA. They instead chose to take no action whatsoever. The prospective nature of the 1989 DMA neither creates the forfeiture of a property right, nor violates due process. From 1954 through 2009, Appellees failed to take any of the mandatory steps required to demonstrate a present intent to retain the Mineral Interest.

- c. **Proposition of Law No. 2: An oil and gas lease signed by someone other than a Holder (as defined by R.C. 5301.56(A)(1)) is not a “title transaction” of the severed oil and gas interest within the meaning of R.C. 5301.47(F), and is therefore not a savings event enumerated by R.C. 5301.56(B)(1)(c)(i).**

Despite Appellees’ claim that Appellants’ second proposition of law has been “fully briefed and argued” before this Court (*Appellees’ Brief* at 8), Appellees address Appellants’ *second* proposition of law *first*. Appellees further characterize transfers of the surface and the unreserved portion of the mineral estate as “title transactions” affecting title to the Mineral

Interest. Appellees intentionally elaborate on these two arguments because they understand that (1) Appellants' second proposition of law is moot if this Court holds that the 1989 DMA operates on a continuous basis, and (2) if this Court affirms a portion of the Seventh District's holding in *Dodd v. Croskey*, Supreme Court Case No. 2013-1730, 2013-Ohio 4257 (7th Dist. 2013) [that deeds in the chain of title transferring title to the surface do not constitute title transactions of a reserved interest], then this Court should also hold that the exercise of unreserved leasing rights (those held by someone other than the severed mineral interest holder) does not constitute a title transaction of a reserved mineral interest.

The 1989 DMA does not contain a definition of "title transaction." Rather, the definition is found in R.C. 5301.47, a portion of the OMTA:

(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.

(Emphasis added.)

The OMTA is a general statutory provision for extinguishing severed interests from an individual's chain of title; however, the 1989 DMA was enacted to be a specific provision to extinguish oil and gas interests. "It is a familiar rule of statutory construction that general terms or provisions in a statute may be restrained and limited by specific terms or provisions with which they are associated." *Heidtman v. City of Shaker Heights*, 99 Ohio App. 415, 424, 119 N.E.2d 644, 650 (8<sup>th</sup> Dist. 1954) aff'd, 163 Ohio St. 109, 126 N.E.2d 138 (1955). In *Rhodes v. Weldy*, 46 Ohio St. 234, 20 N.E. 461 (1889), paragraph two of the syllabus, this Court provides:

Where the same word or phrase is used more than once in the same act in relation to the same subject-matter, and looking to the same general purpose, if in one connection its meaning is clear, and in another it is otherwise doubtful or obscure, it is in the latter case to receive the same construction as in the former, *unless*

*there is something in the connection in which it is employed, plainly calling for a different construction.*

(Emphasis added).

Appellees attempt to insert only a portion of the definition of “title transaction” into the provisions of R.C. 5301.56(B)(1)(c)(i).<sup>4</sup> Appellees argue that the “language in R.C. 5301.56(B)(3)(a) clearly and unambiguously uses the phrase ‘any interest in property’”. *Appellees’ Brief* at 13. Appellees are either confused or are attempting to mislead this Court because neither R.C. 5301.56(B)(3)(a) (the 2006 DMA) nor R.C. 5301.56(B)(1)(c)(i) (the 1989 DMA) contains the phrase “any interest in property.” Appellees’ analysis broadens the definition of title transaction within the context of the 1989 DMA. Obviously, the 1989 DMA cannot have an easement, mortgage, lien, or other encumbrance to the surface owner’s title “abandoned and vested” in the owner of the surface. Rather, the 1989 DMA deals only with mineral interests, not “any interest in property,” and specifically provides:

(B) 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;

(Emphasis added).

Provisions of a statute that relate to the same subject matter must be construed together to give them full effect. *See State ex rel. Myers v. Spencer Twp. Rural School Dist. Bd. of Educ.*, 95 Ohio St. 367, 373, 116 N.E. 516 (1917). Courts must also evaluate statutes as a whole and give such interpretation as will give effect to *every word and clause in it*. *Id.* at 373 (emphasis added). The explicit language of the 1989 DMA restricts the type of “title transaction” that qualifies as a

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<sup>4</sup> In order to clear up any confusion, the provision R.C. 5301.56(B)(3)(a) is actually enumerated in the 2006 DMA; however, the corresponding provision of the 1989 DMA is R.C. 5301.56(B)(1)(c)(i).

preserving event. Instead of a title transaction that affects “any interest in property,” the legislature mandated that title to the reserved portion of the mineral estate itself must be the *subject of* a title transaction. The legislature further mandated that the only interest subject to abandonment is “any *mineral interest held by any person other than the surface owners.*” Appellees cannot simply insert a portion of the definition of “title transaction” into the specific provision (R.C. 5301.56) while simultaneously ignoring other dispositive language within the same text. When reading the provisions together to ascertain the legislature’s intent, the language of R.C. 5301.56(B) limits the definition of “title transaction” from being a transaction affecting “any interest” to a transaction affecting only a “*mineral interest held by any person other than the owner of the surface.*” Appellees’ attempt to include the portion of title to the mineral estate held by the owners of the surface to the definition of “mineral interest” is in direct contradiction with unambiguous statutory language.

Appellees’ insertion of “any interest in property” into R.C. 5301.56(B)(1)(c)(i) suggests to this Court that, if any portion of the mineral estate (or even the surface of the property) is transferred, then a severed mineral interest is preserved. In making this suggestion, Appellees ignore their own cited case law. “There are five essential attributes of a severed mineral estate: (1) the right to develop (the right of ingress and egress); (2) the right to lease; (3) the right to receive bonus payments; (4) the right to receive delay rentals; [and] (5) the right to receive royalty payments.” *Altman v. Blake*, 712 S.W.2d 117, 118 (Tex. 1986). In Ohio, a party can reserve any one of those divisible attributes of the undivided mineral estate. *See Wiseman v. Cambria Products Co.*, 61 Ohio App.3d 294, 298 (4th Dist. 1989) (citing *Kelly v. Ohio Oil Co.*, 57 Ohio St. 317 (1897)). In this case, William and Ella Eisenbarth exercised this right and reserved one-half of all the oil and gas rights except the right to execute an oil and gas lease

(being one-half of four of the five attributes of the fee mineral estate). Therefore, for purposes of the R.C. 5301.56(B), the fractional portion of the mineral estate that is a “mineral interest held by any person other than the surface owners,” is one-half of the right to develop the minerals, one-half of the right to receive bonus payments, one-half of the right to receive delay rental payments, and one-half of the right to receive royalty payments, but *not* the executive right to lease. Title to the executive right to lease and one-half (1/2) of the remaining four attributes was passed on to Paul and Ida Eisenbarth, then to Appellants as surface owners. The “mineral interest held by any person other than the owner of the surface” is the fractional interest that was reserved in the Reservation Deed, *not* the fee mineral estate.

To determine whether the Mineral Interest was the “subject of a title transaction,” during the relevant time period, the Court need examine only Appellees’ own analysis; specifically, after the recordation of the Reservation Deed in 1954, Mildred Reusser’s title to the Property was as follows:

- Mildred Reusser owned the Reserved ½ Mineral Interest, which included the right to develop the minerals, the right to receive bonus payments and the right to receive delay rental payments, and the right to receive royalty payments, but not the executive right to lease.

*Appellees’ Brief* at page 4-5.

*Absent the operation of the 1989 DMA*, on October 30, 1998, Mildred Reusser’s title to the Property was unchanged:<sup>5</sup>

- Mildred Reusser *still* owned the Reserved ½ Mineral Interest, which included the right to develop the minerals, the right to receive bonus payments and the right to receive delay rental payments, and the right to receive royalty payments, but not the executive right to lease.

*Appellees’ Brief* at page 6.

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<sup>5</sup> On Page 6 of Appellees’ Brief, Appellees mistakenly conclude that, “as of October 30, 1998...Mildred Reusser still owned” the same interest. By operation of the 1989 DMA, Mildred Reusser’s interest in the oil and gas rights was deemed abandoned as of January 24, 1994. Therefore, on October 30, 1998, Mildred Reusser owned nothing.

Notably, both *before and after* each “title transaction” alleged by the Appellees, Mildred Reusser’s *title* to the Mineral Interest was *exactly the same*. In other words, after the transactions that Appellees identify as “transactions affecting title” to Mildred Reusser’s interest, Mildred Reusser’s title to the Mineral Interest was *unaffected*. Title to Mildred Reusser’s interest was not the *subject* of the 1974 Lease regardless of Appellees’ characterization (“absurd”) of this fact. Mildred Reusser owned the same interest before and after execution of the 1974 Lease; therefore, her *title* to the Mineral Interest was not affected by the execution of that lease. While the Mineral Interest may have been *subject to* the 1974 Lease (and the subsequent deeds in the chain of title), *title* to that reserved interest was not the *subject of* that transaction.<sup>6</sup>

Similarly, Appellees attempt to characterize transactions that transfer title to the surface and the unreserved one-half (1/2) portion of the oil and gas estate as “title transactions” that qualify as preserving events of the severed Mineral Interest. As discussed in *Appellants’ Merit Brief*, it is “well established law in this state that when by the exception and severance of title in the mineral by the deed, the grantor . . . and the grantee . . . bec[o]me tenants in common in the mineral, each owning one-half.” *Gill v. Fletcher*, 74 Ohio St. 295, 306 (1906). It is undisputed in this case that Appellants and Appellees are co-tenants of the undivided mineral estate, with each owning certain portions of the fee mineral estate. However, contrary to Appellees’ line of reasoning, a well-accepted principle of Ohio law provides that “it is fundamental that a tenant in common cannot convey [or transfer title to] the interest of his cotenant.” *Holderby v. Montoso*, 1979 WL 206911 (4th Dist. 1979). In order for the Mineral Interest to be the subject of a title transaction, it would have to be the subject of a transaction that affects *title* to that particular interest. See *Dodd v. Croskey*, 2013-Ohio 4257 (7th Dist. 2013).

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<sup>6</sup> “Title” means “the union of all elements (as ownership, possession and custody) constituting the legal right between a person who owns property and the property itself.” BLACK’S LAW DICTIONARY 1522 (8th ed. 2004).

If Appellants can affect Appellees' title to the Mineral Interest, which Appellees argue is within Appellants' power, Appellants could simply transfer title of the Mineral Interest to themselves. That is an absurd result. Clearly, a transfer of Appellants' interest alone could not affect title to Appellees' interest. Appellees again read only one word of a statute to arrive at their misguided conclusion, arguing that certain transactions "affect" the Mineral Interest, while ignoring that in order to qualify as a preserving event, the transaction must "affect title" to the Mineral Interest. By their reasoning, a mortgage given by the Appellants to a bank would also "affect title" to the Mineral Interest. Transfers of the surface may "affect" the holders of the Mineral Interest in that they are now subject to a new co-tenant, those transfers do not "affect title" to the Mineral Interest itself.

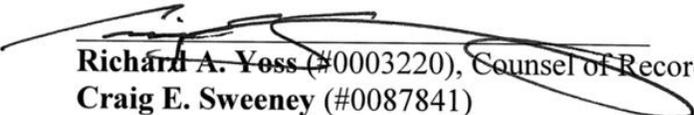
Notwithstanding that their position is in direct conflict with well-accepted principles of Ohio co-tenancy law, Appellants' argument also fails to make practical sense. Applying Appellees' theory practically, the *only* manner in which less than undivided oil and gas interest could be "deemed abandoned" would be for the surface owner to own the surface of a particular piece of property herself for an uninterrupted period of 20 years, never transferring or in any way affecting title to any portion of the property. Such a holding would essentially render R.C. 5301.56 inoperative. According to Appellees' reasoning, any time that there is a conveyance of anything less than the fee estate (surface and minerals), R.C. 5301.56 could never operate because transfers of the surface and/or the *un-severed* one-half (1/2) of the mineral estate would always affect title to the *severed* one-half (1/2) interest. Therefore, every time the surface of the property was sold, those transfers would qualify as a savings event under R.C. 5301.56(B)(1)(c)(i). This would preclude abandonment even though the mineral holders had done nothing to preserve the interest. As a result, Appellants encourage an overly narrow

interpretation of R.C. 5301.56. Such a restrictive view is not only contrary to the legislative purpose of having unused oil and gas interests “abandoned and vested in the owner of the surface,” but also runs contrary to the liberal construction requirement contained in R.C. 5301.55. An application of the 1989 DMA that precludes or severely limits abandonment of a fractional oil and gas interest clearly runs afoul of the legislative purpose of ORC §5301.56.

#### **IV. CONCLUSION**

Appellants (and any other title examiner) were able to rely upon the self-execution of the 1989 DMA having vested the Appellants with title to an interest that had remained dormant and unused for more than 55 years. At no time prior to receiving a notice that their interest was abandoned did the Appellees do *anything*, or take any action whatsoever, to preserve the interest that they now claim. It was only after the most recent oil and gas “boom” in Ohio that Appellees asserted a right to the Mineral Interest by filing a Claim to Preserve. Such was and remains the precise purpose of the 1989 DMA: to vest any unused, abandoned mineral interests held by another in the owner of the surface when none of the specified preserving events occurred during the 20 years immediately preceding any date that the 1989 DMA was in effect. Accordingly, the Mineral Interest has been abandoned and is vested in the Appellants as owners of the surface. The judgment of the Seventh District Court of Appeals should therefore be *reversed*.

Respectfully Submitted,



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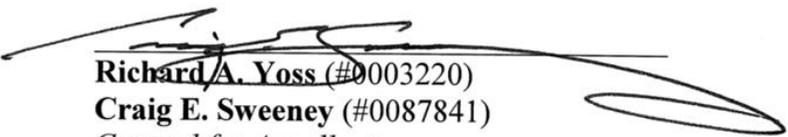
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