

IN THE SUPREME COURT OF OHIO

Leland Eisenbarth, et al., : Case No. 2014-1767  
: :  
Appellants, : Appeal from the Monroe County  
: Court of Appeals,  
v. : Seventh Appellate District  
: (Case No. 13MO10)  
Dean Reusser, et al., :  
: :  
Appellees. :

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## INTRODUCTION

As stated in Amici's<sup>1</sup> Brief, Amici takes no position on Appellants' second Proposition of Law. Amici write only as to Appellants' first Proposition of Law, which, if accepted, is dispositive of the case.

Throughout their Brief, Appellees argue that the 20-year period set forth in the Former DMA is "patently ambiguous." Appellees' Br. p.17. Appellees attempt to create a sense of ambiguity by repeatedly asking the question: "Preceding what?" They offer three possible answers to this question. Their preferred answer, surprisingly, differs from the answer given by the Seventh District below. Appellees now argue that the 20-year period is established by some sort of implementing action. This disregards the words chosen by the General Assembly and seeks to add language to the statute. Moreover, the issue of whether the statute required any implementing action is already before this Court in another case, namely *Walker v. Shondrick-Nau*, Case No. 2014-0803. Instead of defending the reasoning of the court below, Appellees are attempting to raise a separate proposition of law.

Appellees acknowledge that their second preferred answer, and the answer given by the Seventh District, that the 20-year period is fixed to the date of enactment of the Former DMA, is "flawed." Appellees' Br. p.23. This interpretation fails to give effect to the Former DMA in its entirety and violates basic principles of statutory interpretation. Appellees' Br. p.23. The remaining possibility, that the 20-years applies

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<sup>1</sup>The terms "Amici," "Former DMA," and "Savings Event" shall have the same meaning as in Amici's Brief.

to any period that elapses while the Former DMA is in effect, is the only answer that gives effect to all of the language in the Former DMA and that accomplishes the purpose of the statute: to encourage development of mineral interests which have become stale and dormant.

## ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

### Proposition of Law No. 1.

**The 1989 DMA 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 preserving events enumerated in R.C. 5301.56(B) occurred in the twenty (20) year period immediately preceding any date in which the 1989 DMA was in effect.**

When interpreting a statute, this Court’s primary goal is to give effect to the intent of the Legislature. *Christe v. GMS Mgt. Co., Inc.*, 88 Ohio St.3d 376, 377, 726 N.E.2d 497, 499 (2000). To determine the legislative intent, the Court first must look to the language of the statute. *Provident Bank v. Wood*, 36 Ohio St.2d 101, 105, 65 Ohio Op.2d 269, 398, 304 N.E.2d 378, 381 (1973). In considering the statutory language, it is the duty of the Court to give effect to the words used in a statute, not to delete words used or to insert words not used. *Cleveland Elec. Illum. Co. v. City of Cleveland*, 37 Ohio St. 3d 50, 524 N.E.2d 441 (1988), ¶ 3 of the syllabus.

Here, Appellees suggest that the 20-year period under the Former DMA must be tied to some implementing action by the surface owner. Appellees’ Br. p.18. Appellees essentially argue that the elapse of 20 years, regardless of how it is measured, does not result in any rights being abandoned or vested in the surface owner; instead, it creates an inchoate right. Nothing in the text of the Former DMA supports this argument.

Division (B)(1) of the Former DMA clearly states that, after 20 years, mineral interests are “deemed abandoned and vested in the owner of the surface . . .” if no Savings Events occur. The word “deemed” clarifies that the abandonment will be effective regardless of the mineral owner’s subjective intentions. The statute does not say that the surface owner must file a lawsuit to effect an abandonment. It does not specify any implementing action or how or when such action must be taken. No Court of Appeals has ever held that the statute requires any implementing action before abandonment occurs.<sup>2</sup> Thus, the Former DMA did not create an inchoate right.

Rather than construing the language that the General Assembly actually used and enacted, Appellees attempt to insert an additional provision into the Former DMA that does not exist. This Court should decline Appellees’ invitation to thoroughly and completely rewrite the Former DMA and to fundamentally change the operation of the statute. If the General Assembly intended to condition the abandonment and vesting of rights on some kind of unspecified implementing action, it would have done so.

Indiana’s version of the Former DMA works in the same way that Amici suggest. In *Texaco, Inc. v. Short*, 454 U.S. 516, 525, 102 S. Ct. 781, 70 L. Ed. 2d 738 (1982), the Supreme Court recognized that the statute was self-executing. Although notice reasonably calculated to reach all interested parties and a prior opportunity to be heard must be provided before judgment can be entered in a quiet title action, there is no

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<sup>2</sup>*Walker v. Shondrick-Nau*, 7<sup>th</sup> Dist. No. 13NO402, 2014-Ohio-1499, *Wendt v. Dickerson*, 5<sup>th</sup> Dist. No. 2014 AP 01 0003, 2014-Ohio-4615, and *Thompson v. Custer*, 2014-Ohio-5711, 26 N.E.3d 278 (11<sup>th</sup> Dist.).

requirement that any specific notice be given to a mineral owner prior to a statutory lapse of a mineral estate. *Id.*, at 520, 534.

Appellees next argue that the second best answer to their question “preceding what?”, is that the 20-year period should be tied to the date of the statute’s enactment. Appellees concede that this explanation is “flawed.” Appellees’ Br. p.23. They acknowledge that the Seventh District’s decision fails to comply with basic principles of statutory interpretation because it renders portions of the statutory text meaningless. Specifically, the Seventh District’s decision does not account for the “successive filings” language in division (D)(1) of the Former DMA. This is more than what Appellees attempt to dismiss as a “minor drawback.” Appellees’ Br. p.23. Thus, the “fixed” look-back period under the Former DMA, as adopted by the Seventh District, must be rejected.

Furthermore, as stated in Amici’s Brief, if applied literally, tying the twenty-year look-back period to March 22, 1989 creates an anomaly that effectively eliminates the three-year grace period under division (B)(2) of the Former DMA. Division (B)(2) says 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.” Suppose that, during the three-year grace period, a severed mineral interest owner files a claim to preserve. Under the Seventh District’s interpretation, the claim to preserve would not constitute a “circumstance” under division (B)(1) because it is not “within the preceding twenty years” of March 22, 1989, the date the statute was enacted. The claim to preserve,

therefore, would not prevent abandonment. If that were the case, what would be the point of creating the grace period in the first place? Under this scenario, division (B)(2) simply delays the inevitable effect of (B)(1) by three years. In order for division (B)(2) to provide any kind of safe harbor, the circumstances described under division (B)(1) must take into consideration events occurring after March 22, 1989. Appellees failed to address this glaring problem in their brief.

If, instead of applying a fixed twenty-year look-back from the date of the statute's enactment (March 22, 1989), it is fixed from the end of the three-year grace period, or March 22, 1992, there are yet more problems. In order to accept this interpretation, the Court would have to believe that, when the Legislature enacted the Former DMA on March 22, 1989 and referenced "the preceding twenty years" under division (B)(1), it was referring to the twenty years preceding a single date (March 22, 1992) exactly three years in the future. Under this scenario, the operation of the entire statute revolves around a single, fixed, future date, and yet this date is not specifically mentioned anywhere in the statute. It strains credulity to believe that, in the name of supposedly clarifying a statutory ambiguity, this is the most plausible interpretation.

Also, if division (B)(1) was truly intended to apply just once while looking back from a specific, fixed future date, there would have been no need to create a separate grace period under division (B)(2). Instead, division (B)(1) could have simply identified the period "Within the twenty years preceding March 22, 1992" or "Between March 22, 1972 and March 22, 1992." By separating the three-year grace period from the general provisions of division (B)(1), the statute is very deliberately constructed so as to provide

the necessary due process protection (the grace period) required to pass constitutional muster, and to continue the operation of the statute into the future. The grace period under division (B)(2) operated much like R.C. 5301.56 did when it was originally enacted in 1961. The 1961 version of R.C. 5301.56 provided a grace period before interests were extinguished under the Marketable Title Act. The 1961 version of the R.C. 5301.56 was no longer necessary after the grace period elapsed and was later repealed. For the same reason, the General Assembly eliminated the grace period under division (B)(2) when the law was updated in 2006.

The only answer to Appellees' question, "preceding what?", that gives effect to all of the language set forth in the Former DMA by the General Assembly, and that satisfies the purpose of the statute is the position taken by Appellants and Amici: any 20-year period that elapsed while the Former DMA was in effect. This gives the effect to the successive filing of claims to preserve under division (D)(1), because a mineral holder must file claims to preserve at least every 20 years if he or she wants to retain his or her interest. It also gives effect to the three year grace period under division (B)(2). It helps to accomplish the purpose of the Former DMA, because it allows for stale, dormant, and unused interests to be regularly cleared from the record chain of title, thus facilitating the development of oil and gas. This is the interpretation that has been adopted by the vast majority of the common pleas courts and federal district courts that have addressed the issue.

Appellees also attempt to characterize the Former DMA as a forfeiture statute and not as an abandonment statute. Appellees apparently dislike the General

Assembly's use of the word "abandoned." They ask this court to pretend instead that it is a forfeiture statute.

The Former DMA cannot be construed as a forfeiture statute; it does not even satisfy Appellees' own definition of "forfeiture." As Appellees point out, this Court has defined "forfeiture" as a divestiture of property without compensation in consequence of some default or act forbidden by law. *Ohio Transport, Inc. v. Pub. Utilities Comm.*, 164 Ohio St. 98, 106, 128 N.E.2d 22 (1955). Here, the mineral holders are under absolutely no legal duty or obligation to preserve their mineral interest. A severed mineral interest holder's decision to allow his or her interest to remain dormant for 20 full years is entirely within his or her control. If holders want to retain their interest, then they must cause the occurrence of a Savings Event under division (B) of the Former DMA. If they do not, it is not a "default," a breach a duty, or a crime. Their interest is not "forfeited" but is instead voluntarily relinquished. For the same reason, when a person's legal claim becomes barred by the statute of limitations based on the passage of time, it is not considered a forfeiture of rights.

Appellees argue that they never intended to relinquish the mineral interest that is the subject of this lawsuit. Appellees' Br. p.27. Again, the Former DMA's use of the word "deemed" abandoned makes it clear that, unlike abandonment at common law, the mineral holder's subjective intent is irrelevant. In *Texaco*, the U.S. Supreme Court held that states have the "power to condition the continued retention of that property right on the performance of reasonable conditions that indicate a present intention to retain the interest." *Texaco*, at 526 (emphasis added). The Former DMA sets the reasonable

conditions<sup>3</sup> that in the opinion of the General Assembly; indicate intent. Thus, regardless of their subjective intent, the mineral owners' failure to satisfy the conditions of the statute causes the lapse of the property right. The State does not divest the mineral holder's interest in property. Instead, the mineral holder, while presumably aware of the statute and its requirements, voluntarily relinquishes his or her interest by allowing the interest to remain dormant for 20 full years.

As discussed in Amici's Brief, there are many statutes that use the phrase "within the preceding [period of time]" that have never been interpreted to apply only to the period prior to their enactment. Amici provided six examples of where such interpretation would lead to absurd results. Appellees do not even address Amici's analysis regarding three of the statutes: 1) R.C. 4510.31(C)(1)(c) (a Court should not grant limited driving privileges if a person was convicted of three or more OVIs or other offenses "within the preceding six years"); 2) R.C. 3701.60 (hospitals would be required to offer uterine cytologic examinations for cancer to every female inpatient unless she had an examination within the year preceding August 25, 1976); and 3) R.C. 3916.01 (to determine if an individual is chronically ill under the Viatical Settlements Model Act, one would have to examine the year preceding September 11, 2008). There is simply no way to reconcile the Seventh District's strained interpretation of the Former DMA with the manner in which similar statutes have been interpreted.

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<sup>3</sup>Ohio law already sets other reasonable conditions on the permanent retention of property rights. These include adverse possession and the Marketable Title Act, of which the Former DMA is a part.

Appellees attempt to challenge Amici's analysis of three other similar statutes. Specifically, they say that R.C. 3324.03, which sets standards for determining if a student has "superior cognitive ability," is tied to the date of an annual report required under R.C. 3324.05. Appellees' Br. p.21. Under the statutes, a student must meet these standards within the "preceding 24 months." Appellees correctly note that R.C. 3324.05 requires the school district file an annual report specifying the number of students having "superior cognitive ability," but the defined standards under R.C. 3324.03 are not expressly tied to the date that the annual statements are filed under R.C. 3324.05. Thus, R.C. 3324.05 does not define the "preceding 24 months" in which the standards must be met.

Presumably, schools test whether a student has superior cognitive ability on a periodic basis, and reports are made annually. But, if this Court affirms the Seventh District's decision, R.C. 3324.03, read literally, would fix the testing period to determine "superior cognitive ability" to the 24 months preceding September 11, 2001. The schools would still have to file their report pursuant to R.C. 3324.05, but the testing period under R.C. 3324.03 would extend back more than fifteen years, all the way to September 11, 1999.

Appellees also challenged Amici's analysis of R.C. 2919.225(A)(2). Appellees' Br. p.22. They contend that home daycares must disclose past injuries before accepting new children. Under the principles of statutory interpretation used by the Seventh District in considering the Former DMA, that is not the case. Nothing in the statute expressly says that the 10-year period should be measured from an event occurring

subsequent to the date of enactment. So, under the Seventh District's analysis, the 10-year period would be measured from May 18, 2005, the date R.C. 2919.225(A)(2) was enacted.

Finally, in regard to R.C. 145.112, Appellees assert that the three-year period is tied to the date of the investment. Appellees' Br. p.22. Again, there is nothing in the statute that specifically ties the three-year period to any specific event. Appellees presume that the period starts at the date of the investment, but there are other possibilities. It could be the date the investment is first proposed, the date OPERS votes on making the investment, or the date the investment is made. The 3-year period is not explicitly tied to any specific event. Under the Seventh District's method of interpretation, the three-year period would have to be measured from the date that the statute was enacted. Thus, while Appellees attempt to argue that these statutes somehow support their position, instead they highlight the fundamental error in the Seventh District's attempt at statutory interpretation.

## **CONCLUSION**

Appellees would have this Court rewrite the Former DMA. They ignore the plain language that the General Assembly actually chose. This Court should instead follow the text of the statute as enacted. The only answer to Appellees' question "Preceding what?" that gives effect to all of the language set forth in the Former DMA and that satisfies the purpose of the statute is that the phrase "within the preceding twenty years" applies to any 20-year period that elapsed while the Former DMA was in effect.

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