

IN THE SUPREME COURT OF OHIO

Wayne Lipperman, et al.,	:	
	:	
Appellants	:	Case No. 2015-0121
	:	
v.	:	
	:	
Nile Batman, et al.,	:	On Appeal from the
	:	Belmont County
Appellees.	:	Court of Appeals,
	:	Seventh Appellate District

MERIT BRIEF OF APPELLEES RESERVE ENERGY EXPLORATION COMPANY AND EQUITY OIL & GAS FUNDS, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	v
STATEMENT OF FACTS	1
A. The Mineral Reservation.	1
B. Frances Batman Records an Affidavit and Notice of Claim of Interest in Land in Belmont County in 1981.	2
C. The Last Will and Testament of Frances E. Batman Is Recorded with the Belmont County Recorder in 1989.	3
D. The Batman Will Is Filed for Record with the Belmont County Probate Court in 1989.	3
E. Appellants Lease Their Mineral Rights to Reserve.	3
F. The Batmans Lease Their Mineral Rights to Reserve.	4
ARGUMENT	5
I. Appellees’ Arguments in Response to Appellant’s Proposition of Law No II.	5
A. Introduction.	5
B. Standard of Review.....	6
C. The 1989 Version of the Ohio Dormant Mineral Act.....	7
D. The Batman Will Is a Title Transaction, and Its Filing or Recording With the County Recorder Within the Specified Period Constitutes a Savings Event Pursuant to the 1989 DMA.....	8
1. The Batman Will Memorializes a Title Transaction, i.e., a Transfer of Title by Will.....	9
2. The Batman Will Was Filed or Recorded with the Belmont County Recorder.....	12
3. The Batman Will Was Recorded Within the Applicable Time Period Pursuant to the 1989 DMA.	13
E. The Filing or Recording of the Batman Will Was Sufficient to Preserve the Mineral Reservation Without the Need for A Separate Claim to Preserve.....	14
F. The Ohio Marketable Title Act Does Not Control Over the Ohio Dormant Mineral Act.	17
G. Filing or Recording an Out-of-State Decedent’s Will to Create a Savings Event Pursuant to the 1989 DMA Does Not Require Ancillary Administration of the Decedent’s Estate in Ohio.	21
H. A Certificate of Transfer Is Not Required to Create a Title Transaction or Savings Event Pursuant to the 1989 DMA.	24

II. Appellees' Arguments in Response to Appellant's Proposition of Law No III.	27
A. Appellant Waived Any Argument as to Appellees XTO and Phillips Participating in This Appeal, and as to Appellees Reserve and Equity Having Standing to Move for or Oppose Summary Judgment.....	27
B. Appellees Reserve and Equity Had Standing to Move for and Oppose Summary Judgment in This Litigation.	28
C. Appellant Asserted a Claim for Relief Against Appellees Reserve and Equity, Who Had Leasehold Interests in the Property Pursuant to the Batman Lease.....	32
D. Appellant Is Precluded from Citing to Facts Not Included in the Trial Court Record.....	32
CONCLUSION	35
CERTIFICATE OF SERVICE	36
APPENDIX	Appx. Page
Section 5301.56, Ohio Revised Code (eff. March 22, 1989) (Ohio Dormant Minerals Act).....	1

TABLE OF AUTHORITIES

Cases

<i>Akron Commercial Sec. Co. v. Ritzman</i> , 79 Ohio App. 80, 72 N.E.2d 489 (9th Dist. 1945).....	10, 25
<i>American Fiber Systems, Inc. v. Levin</i> , 125 Ohio St.3d 374, 2010-Ohio-1468, 928 N.E.2d 695	28
<i>Blausey v. Stein</i> , 61 Ohio St.2d 264, 400 N.E.2d 408 (1980).....	16
<i>Campbell v. Ohio State Univ. Med. Ctr.</i> , 10th Dist. Franklin No. 04AP-96, 2004-Ohio-6072	20
<i>Cavanaugh Bldg. Corp. v. Board of Cuyahoga Co. Commrs.</i> , 8th Dist. Cuyahoga No. 75907, 2000 Ohio App. LEXIS 241 (Jan. 27, 2000)	33
<i>Central Nat'l Bank, Sav. & Trust Co. v. Gilchrist</i> , 23 Ohio App. 87, 154 N.E. 811 (8th Dist. 1926).....	10, 25
<i>Citizens Fed. Sav. & Loan Assn. of Dayton v. Page</i> , 12th Dist. Warren No. CA83-03-018, 1984 Ohio App. LEXIS 8758 (Jan. 9, 1984)	30
<i>Clemens v. Nelson Fin. Group, Inc.</i> , 10th Dist. Franklin No. 14AP-537, 2015-Ohio-1232	16
<i>County of San Diego v. Elavsky</i> , 58 Ohio St.2d 81, 388 N.E.2d 1229 (1979).....	19
<i>Crabbe v. Lingo</i> , 76 Ohio App. 530, 61 N.E.2d 742 (12th Dist. 1945).....	21
<i>Darrow v. Fifth Third Union Trust Co.</i> , 1 Ohio Op. 2d 104, 139 N.E.2d 112 (Hamilton Co. C.P. 1954).....	22
<i>DIRECTV, Inc. v. Levin</i> , 128 Ohio St.3d 68, 2010-Ohio-6279, 941 N.E.2d 1187.....	28
<i>Dodd v. Croskey</i> , 7th Dist. Harrison No. 12HA6, 2013-Ohio-4257	9
<i>Dorrian v. Scioto Conservancy Dist.</i> , 27 Ohio St.2d 102, 271 N.E.2d 834 (1971)	26
<i>Edward H. Everett Co. v. Jadoil, Inc.</i> , 5th Dist. Licking No. CA-3211, 1987 Ohio App. LEXIS 5684 (Jan. 26, 1987).....	10
<i>Esber Beverage Co. v. Labatt USA Operating Co., L.L.C.</i> , 138 Ohio St.3d 71, 2013-Ohio-4544, 3 N.E.3d 1173	6
<i>Estate of Ridley v. Hamilton County Bd. of Mental Retardation</i> , 102 Ohio St.3d 230, 2004-Ohio-2629, 809 N.E.2d 2	27
<i>Goldberg v. Indus. Comm.</i> , 131 Ohio St. 399, 3 N.E.2d 364 (1936).....	15

<i>Grubic v. Grubic</i> , 8th Dist. Cuyahoga No. 73793, 1999 Ohio App. LEXIS 4200 (Sept. 9, 1999).....	33
<i>Heifner v. Bradford</i> , 4 Ohio St.3d 49 (1983)	10
<i>Hopkins v. Hopkins</i> , 4th Dist. Scioto No. 14CA3597, 2014-Ohio-5850	33
<i>In re Estate of Alton Donner</i> , 4th Dist. Scioto No. 1691, 1988 Ohio App. LEXIS 2393 (May 24, 1988)	12
<i>In re Estate of Radu</i> , 35 Ohio App.2d 187, 301 N.E.2d 263 (8th Dist. 1973).....	21
<i>In re Guardianship of Spangler</i> , 126 Ohio St.3d 339, 2010-Ohio-2471, 933 N.E.2d 1067	28
<i>In re Timken Mercy Medical Ctr.</i> , 61 Ohio St.3d 81, 572 N.E.2d 673 (1991).....	6, 27
<i>In Re: Estate of Kelly v. Estate of Kelly</i> , 8th Dist. Cuyahoga No. 41292, 1980 Ohio App. LEXIS 12245	11
<i>Lipperman v. Batman</i> , 7th Dist. Belmont No. 14 BE 2, 2014-Ohio-5500	5, 14, 15
<i>M.H. v. City of Cuyahoga Falls</i> , 134 Ohio St.3d 65, 2012-Ohio-5336, 979 N.E.2d 1261	7
<i>Mancino v. Lakewood</i> , 36 Ohio App.3d 219, 523 N.E.2d 332 (8th Dist. 1987).....	33
<i>Marusa v. Erie Insurance Co.</i> , 136 Ohio St.3d 118, 2013-Ohio-1957, 991 N.E.2d 232	6
<i>Morrow v. Becker</i> , 9th Dist. Medina No. 11CA0066-M, 2012-Ohio-3875	19
<i>Murray Energy Corp. v. City of Pepper Pike</i> , 8th Dist. Cuyahoga No. 90420, 2008-Ohio-2818.....	17
<i>Niskanen v. Giant Eagle, Inc.</i> , 122 Ohio St.3d 486, 2009-Ohio-3626, 912 N.E.2d 595	16
<i>Ohio Northern Univ. v. Ramga</i> , 3rd Dist. Auglaize No. 2-88-1, 1990 Ohio App. LEXIS 2946 (July 12, 1990).....	10, 25
<i>Patton v. Diemer</i> , 35 Ohio St.3d 68, 518 N.E.2d 941 (1988)	19
<i>Pearl v. J&W Roofing & Gen. Contr.</i> , 2d Dist. Montgomery No. 16045, 1997 Ohio App. LEXIS 672.....	33
<i>Platt v. Estate of Petrosky</i> , 2d Dist. Greene No. 91-CA-105, 1992 Ohio App. LEXIS 3953 (July 24, 1992)	25

<i>Revalo Tyluka, LLC v. Simon Roofing & Sheet Metal Corp.</i> , 193 Ohio App.3d 535, 2011-Ohio-1922, (8th Dist. App.)	17
<i>Riddel v. Layman</i> , 5th Dist. Licking No. 94 CA 114, 1995 Ohio App. LEXIS 6121 (July 10, 1995)	8, 10
<i>RNG Props., Ltd. v. Summit County Bd. of Revision</i> , 140 Ohio St.3d 455, 2014-Ohio-4036, 19 N.E.3d 906	34
<i>Rowe v. Striker</i> , 9th Dist. Lorain No. 07CA009296, 2008-Ohio-5928	31
<i>Smoske v. Sicher</i> , 11th Dist. Geauga Nos. 2006-G-2720 and 2006-G-2731, 2007-Ohio-5617	19
<i>Springfield Venture, LLC v. U.S. Bank N.A.</i> , 2d Dist. Clark No. 2014-CA-74, 2015-Ohio-1983	34
<i>State ex rel. Butler Twp. Bd. of Trustees v. Montgomery Co. Bd. of Commrs.</i> , 124 Ohio St.3d 390, 2010-Ohio-169, 922 N.E.2d 945	20
<i>State ex rel. Colvin v. Brunner</i> , 120 Ohio St.3d 110, 2008-Ohio-5041, 896 N.E.2d 979	28
<i>State ex rel. Ebbing v. Ricketts</i> , 133 Ohio St.3d 339, 2012-Ohio-4699, 978 N.E.2d 188	31
<i>State ex rel. Gibson v. Indus. Comm.</i> , 39 Ohio St.3d 319, 530 N.E.2d 916 (1988)	16
<i>State ex rel. Gutierrez v. Trumbull County Bd. of Elections</i> , 65 Ohio St.3d 175, 602 N.E.2d 622 (1992)	16
<i>State ex rel. Office of Montgomery County Pub. Defender v. Siroki, Clerk</i> , 108 Ohio St.3d 207, 2006-Ohio-662, 842 N.E.2d 508	33
<i>State ex rel. Plain Dealer Pub. Co. v. Barnes</i> , 38 Ohio St.3d 165, 527 N.E.2d 807 (1988)	35
<i>State ex rel. Porter v. Cleveland Dep't of Pub. Safety</i> , 84 Ohio St.3d 258, 703 N.E.2d 308 (1998)	16
<i>State ex rel. Quarto Mining Co. v. Foreman</i> , 79 Ohio St.3d 78, 1997-Ohio-71, 679 N.E.2d 706	15, 16
<i>State ex rel. Zollner v. Indus. Comm.</i> , 66 Ohio St.3d 276, 1993-Ohio-49, 611 N.E.2d 830	16
<i>State v. Boswell</i> , 121 Ohio St.3d 575, 2009-Ohio-1577, 906 N.E.2d 422	27
<i>State v. Harman</i> , 7th Dist. Mahoning No. 96-CA-184, 1999 Ohio App. LEXIS 2835 (June 21, 1999)	33, 34
<i>State v. Ishmail</i> , 54 Ohio St.2d 402, 377 N.E.2d 500 (1978)	33

<i>State v. Johnson</i> , 128 Ohio St.3d 107, 2010-Ohio-6301, 942 N.E.2d 347	28
<i>State v. Williams</i> , 51 Ohio St.2d 112, 364 N.E.2d 1364 (1977)	16
<i>Swartz v. Householder</i> , 7th Dist. Jefferson No. 13 JE 24, 2014-Ohio-2359	17, 18, 20
<i>Temple v. Wean United, Inc.</i> , 50 Ohio St.2d 317, 364 N.E.2d 267 (1977)	7
<i>Thomas v. Taylor</i> , 1st Dist. Hamilton No. C-000624, 2001 Ohio App. LEXIS 3880 (Aug. 31, 2001)	22
<i>Tokles v. Black Swamp Customs, LLC</i> , 6th Dist. Lucas No. L-14-1105, 2015-Ohio-1870	16
<i>Tribett v. Shepherd</i> , 7th Dist. Belmont No. 13 BE 22, 2014-Ohio-4320	18, 19
<i>Urda v. Buckingham, Doolittle & Burroughs</i> , 9th Dist. Summit No. 22547, 2005-Ohio-5949	31
<i>Walker v. Shondrick-Nau</i> , 7th Dist. Noble No. 13NO402, 2014-Ohio-1499	10
<i>Wendell v. AmeriTrust Co., N.A.</i> , 69 Ohio St.3d 74, 1994-Ohio-511, 630 N.E.2d 368 (1994)	11
<i>Westlake v. Mascot Petroleum Co.</i> , 61 Ohio St.3d 161, 573 N.E.2d 1068 (1991)	20
<i>Whitaker v. M.T. Auto., Inc.</i> , 111 Ohio St.3d 177, 2006-Ohio-5481, 855 N.E.2d 825	27
<i>Woodall v. Nulph</i> , 11th Dist. Portage Nos. 91-P-2334 and 91-P-2351, 1992 Ohio App. LEXIS 2791 (May 29, 1992)	30, 31

Statutes

Chapter 2129, Ohio Revised Code	21
Section 1.41, Ohio Revised Code	18
Section 1.49(D), Ohio Revised Code	20
Section 1.51, Ohio Revised Code	18
Section 1.52(A), Ohio Revised Code	18
Section 2107.11, Ohio Revised Code (eff. Oct. 1, 1979)	23
Section 2107.21, Ohio Revised Code	23
Section 2107.51, Ohio Revised Code (eff. Oct. 1, 1953)	11
Section 2107.61, Ohio Revised Code (eff. Oct. 1, 1953)	13, 24

Section 2113.61(D), Ohio Revised Code (eff. Aug. 9, 1963)	26
Section 2113.61(E), Ohio Revised Code (eff. Jan. 13, 2012)	26
Section 2113.61, Ohio Revised Code	25
Section 2129.04, Ohio Revised Code (eff. Oct. 1, 1953)	22
Section 2129.05, Ohio Revised Code (eff. Oct. 1, 1953)	13
Section 2129.11, Ohio Revised Code (eff. Oct. 1, 1953)	21, 22
Section 2129.19, Ohio Revised Code	26, 27
Section 5301.47(F), Ohio Revised Code	9, 10
Section 5301.49(D), Ohio Revised Code	10
Section 5301.56(B)(1)(c)(i)-(vi), Ohio Revised Code (eff. March 22, 1989)	15
Section 5301.56(B)(1)(c)(i), Ohio Revised Code (eff. March 22, 1989)	7, 9, 14
Section 5301.56(B)(1)(c)(v), Ohio Revised Code (eff. March 22, 1989)	7
Section 5301.56(B)(1)(c), Ohio Revised Code (eff. March 22, 1989)	8
Section 5301.56(B)(1), Ohio Revised Code (eff. March 22, 1989).....	7
Section 5301.56(B)(2), Ohio Revised Code (eff. March 22, 1989).....	8
Section 5301.56, Ohio Revised Code (eff. March 22, 1989) (Ohio Dormant Minerals Act).....	1
Sections 5301.47, <i>et seq.</i> , Ohio Revised Code (Ohio Marketable Title Act)	2, 9

Other Sources

<i>07/08/2015 Case Announcements, 2015-Ohio-2747</i>	13
2011 S.B. No. 124 (eff. Jan. 13, 2012)	11

Court Rules

Rule 12(C), Ohio Rules of Civil Procedure.....	30
Rule 56(B), Ohio Rules of Civil Procedure.....	29
Rule 56(C), Ohio Rules of Civil Procedure.....	7

STATEMENT OF FACTS

The briefing at this juncture in the instant appeal is focused on whether the Last Will and Testament of Frances E. Batman constitutes a title transaction and savings event pursuant to the 1989 version of the Ohio Dormant Mineral Act, Revised Code section 5301.56 (“1989 DMA”).¹

A. The Mineral Reservation.

John A. Clark acquired or reserved oil and gas interests in various tracts of real property located in Belmont County, Ohio. *See* Exhibit (“Ex.”) A (at ¶ 2) to the Affidavit of Lee Mahan (“Mahan Aff.”), attached as Exhibit 1 to the Motion for Summary Judgment of Appellees Reserve Energy Exploration Company (“Reserve”) and Equity Oil & Gas Funds, Inc. (“Equity”). In a warranty deed from J.A. Clark to Joe Lajza dated November 10, 1925, for the conveyance of a 31.3-acre parcel, John Clark “except[ed] one-half of all oil and gas in and under said real estate.” *Id.*, at Vol. 602, Page 164. Said parcel was located in Section 31, Township 3, Range 2, of Belmont County, Ohio. *Id.* In a subsequent warranty deed from J.A. Clark to Lawrence Higgins and Emma Higgins dated May 25, 1926, for the conveyance of a 7.86-acre parcel, John Clark “except[ed] and reserve[ed] one-half of all oil and gas in both tracts, with sole power in Grantor to lease and operate.” *Id.*, at Vol. 602, Pages 162-63. Said parcel also was located in Section 31, Township 3, Range 2, of Belmont County, Ohio. *Id.* The above-referenced mineral interests excepted and reserved by John Clark shall hereinafter be referred to as the “Mineral Reservation.”

¹ This Court stayed briefing with respect to Appellant’s Proposition of Law No. I, which deals with whether the 1989 DMA requires a fixed or “rolling” look-back period for purposes of preserving a mineral interest. Accordingly, this brief does not address that particular issue.

John Clark's wife, Eva Clark, and daughter, Mamie E. Sulsberger, ultimately acquired the assets of his estate. Mahan Aff., Ex. A (at ¶¶ 3-4). Eva died intestate; therefore, Mamie acquired Eva's interest in the Mineral Reservation. *Id.* (at ¶ 4). Mamie's daughter, Frances Batman, was the sole heir-at-law to Mamie's estate. *Id.* (at ¶ 6). "Under the terms of [Mamie's] Will the subject mineral interests were left to her daughter and sole heir-at-law, Frances E. Batman[.]" *Id.*

B. Frances Batman Records an Affidavit and Notice of Claim of Interest in Land in Belmont County in 1981.

On or about September 9, 1981, Frances Batman executed an Affidavit and Notice of Claim of Interest in Land ("Batman Affidavit"). In addition to reciting the above-referenced facts, the Batman Affidavit provides that it "is intended to be recorded in the Deed Records of Belmont County, Ohio for the purposes of evidencing the descent of such mineral interests and of evidencing the claim of this Affiant in and to such interests as provided for in Sections 5301.47 et seq., Ohio Revised Code, the 'Ohio Marketable Title Act'." *Id.* (at ¶ 7). Title abstracts of the Mineral Reservation relating to the 1925 and 1926 deeds were appended to the Batman Affidavit. *See id.*, at Vol. 602, Pages 161-64.² The Batman Affidavit was recorded in the office of the Belmont County Recorder on or about September 14, 1981, at Official Records Book 602, Page 38. Mahan Aff., Ex. A.

² The Abstractor's Note states the following: "This deed as fully abstracted on the following page and as recorded in Volume 278, pages 290, 291 and 292, Belmont County Deed Records, was originally recorded August 16, 1926, in Volume 265, pages 34, 35 and 36, but seal of Notary Public was omitted from same at the time of first recording." The Batman Lease (described below) references the Mineral Reservation as having been recorded at Volume 265, Page 34.

C. The Last Will and Testament of Frances E. Batman Is Recorded with the Belmont County Recorder in 1989.

On or about August 29, 1975, Frances Batman executed a Last Will and Testament of Frances E. Batman (“Batman Will”). See Ex. A to the Affidavit of Sherry Fay (“Fay Aff.”), attached as Ex. 2 to the Motion for Summary Judgment of Appellees Reserve and Equity. Article II of the Batman 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.” The Batman Will was recorded in the office of the Belmont County Recorder on or about April 10, 1989, at Vol. 654, Page 670. *Id.*

D. The Batman Will Is Filed for Record with the Belmont County Probate Court in 1989.

On or about May 15, 1989, an authenticated copy of the Batman Will was admitted for record and filed with the Belmont County Probate Court. Mahan Aff., Ex. B.

E. Appellants Lease Their Mineral Rights to Reserve.

On or about April 7, 2006, Appellant Wayne Lipperman (“Appellant”) and Roseann Cook, as lessors, entered into a certain oil and gas lease with Reserve, as lessee (“Lipperman Lease”), with respect to real property located in Belmont County, Ohio, and known as Permanent Parcel Nos. 26-01866.000 and 26-00266.000, consisting of an aggregate 41.84 acres, more or less (“Property”). The Lipperman Lease was recorded in the office of the Belmont County Recorder on or about July 11, 2006, at Official Records Book 65, Page 802 (Instrument No. 200600005951). Affidavit of William Haas (“Haas Aff.”), at ¶3 & Ex. A, attached as Ex. 3 to the Motion for Summary Judgment of Appellees Reserve and Equity.

Reserve subsequently assigned all of its right, title and interest in the Lipperman Lease to Equity, by and through a certain Assignment of Oil and Gas Leases dated January 26, 2007, and recorded in the office of the Belmont County Recorder on February 8, 2007, at Official Records Book 95, Page 459 (Instrument No. 200700001061). Haas Aff., at ¶4 & Ex. B; Affidavit of Alane King (“King Aff.”), at ¶4 & Ex. B, attached as Ex. 4 to the Motion for Summary Judgment of Appellees Reserve and Equity. Equity subsequently assigned the deep rights to the Lipperman Lease to Defendant PC Exploration, Inc., by and through a certain Partial Assignment of Oil and Gas Lease dated May 15, 2008, and recorded in the office of the Belmont County Recorder on May 28, 2008 at Official Records Book 153, Page 418 (Instrument No. 200800003872). King Aff., at ¶5 & Ex. C. Equity retained certain shallow rights and an overriding royalty interest in the Lipperman Lease. King Aff., at ¶5 & Ex. C.

Appellant has not asserted any claims with respect to the Lipperman Lease. Therefore, the Lipperman Lease was not at issue in the underlying litigation, and similarly is not at issue in the instant appeal.

F. The Batmans Lease Their Mineral Rights to Reserve.

On or about November 1, 2008, Appellees Nile E. Batman and Katheryn Batman (“Batmans”) entered into a certain oil and gas lease with Reserve (“Batman Lease”). Complaint, at ¶ 2, and Ex. to Complaint; Fay Aff., Ex. B; Haas Aff., at ¶5 & Ex. C. The Batman Lease was recorded in the office of the Belmont County Recorder on or about December 3, 2008, at Official Records Volume 172, Page 682. *See* Ex. to Complaint. The Batman Lease identifies the interest of the Batmans as being “One-Half (1/2) of all the oil and gas underlying the real property described below,” namely, Permanent Parcel Nos. 26-01866.000 and 26-00266.000, consisting of an aggregate 41.84 acres, more or less (*i.e.*, the Property). *Id.* The Batman Lease further

provides that it is “the purpose and intent of Lessor to lease, and Lessee does hereby lease, all mineral rights owned by Lessor which were reserved by J.A. Clark in Deed Volume 265, Page 34 of the Belmont County Deed Records as referenced above.” *Id.* The Batman Lease further provided for a five (5) year primary term. Haas Aff., at ¶5 & Ex. C.

Reserve subsequently assigned the deep rights to the Batman Lease to Defendant PC Exploration, Inc., by and through a certain Partial Assignment of Oil and Gas Lease dated January 12, 2009, and recorded in the office of the Belmont County Recorder on January 23, 2009 at Official Records Book 176, Page 404 (Instrument No. 200900000366). Haas Aff., at ¶6 & Ex. D. Reserve retained certain shallow rights and an overriding royalty interest in the Batman Lease. *Id.*

ARGUMENT

I. Appellees’ Arguments in Response to Appellant’s Proposition of Law No II.

A. Introduction.

In his Proposition of Law No. II, Appellant argues that “[t]he act of recording an out of state Will is not a title transaction.” Appellant claims that the Court of Common Pleas, Belmont County (“Trial Court”) erred in granting summary judgment in favor of Reserve and Equity. Specifically, Appellant claims that the Trial Court erred by holding that the Batman Will constitutes a title transaction and savings event pursuant to the 1989 DMA.³ Appellant’s

³ Appellant’s merit brief frames the issue as “whether the act of recording an out of state will constitutes a title transaction that would serve as a savings event under the 1989 Ohio Dormant Minerals Act (ODMA) or the 2006 ODMA.” Appellant’s Merit Brief, p. 6 (emphasis added). However, Appellant never asserted any claim for relief based upon the 2006 version of the Ohio Dormant Minerals Act. *See Lipperman v. Batman*, 7th Dist. Belmont No. 14 BE 2, 2014-Ohio-5500, ¶ 9 (“This complaint only sought to invoke the 1989 version of the DMA, it did not seek to apply the 2006 version of the act.”). Furthermore, Appellant failed to raise the 2006 DMA in his memorandum in support of jurisdiction. This Court has declined to consider issues raised by an

arguments fail as a matter of law. The Batman Will complies with all prerequisites of a title transaction pursuant to the 1989 DMA. Furthermore, the recording of the Batman Will in the office of the Belmont County Recorder created an actual savings event that preserved the Batmans' Mineral Reservation. In arguing that the death of the testator, Frances Batman, constitutes the applicable savings event, Appellant completely ignores 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 pursuant to the statute. 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. For these reasons and the reasons set forth more fully below, this Court should affirm the Opinion of the Judgment entry and the Court of Appeals of Belmont County, Seventh Appellate District ("Court of Appeals") filed December 12, 2014 ("Appellate Decision"), and the Judgment Entry filed by the Trial Court on December 16, 2013 ("Trial Court Decision").

B. Standard of Review.

This Court's "review of cases involving a grant of summary judgment is *de novo*." *Marusa v. Erie Insurance Co.*, 136 Ohio St.3d 118, 120, 2013-Ohio-1957, 991 N.E.2d 232, ¶ 7; *see Esber Beverage Co. v. Labatt USA Operating Co., L.L.C.*, 138 Ohio St.3d 71, 2013-Ohio-4544, 3 N.E.3d 1173, ¶ 9. "Summary judgment may be granted when '(1) [n]o genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a

appellant in his merit brief but not in his memorandum in support of jurisdiction. *See In re Timken Mercy Medical Ctr.*, 61 Ohio St.3d 81, 87, 572 N.E.2d 673 (1991) (declining to consider issues raised in appellant's merit brief but not in his memorandum in support of jurisdiction).

matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.” *M.H. v. City of Cuyahoga Falls*, 134 Ohio St.3d 65, 2012-Ohio-5336, 979 N.E.2d 1261, ¶ 12 (quoting *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977), citing Civ.R. 56(C)).

C. The 1989 Version of the Ohio Dormant Mineral Act.

Effective March 22, 1989, the 1989 DMA specifies several events which, when established, constitute savings events that preclude abandonment of a mineral interest. One such event is the filing or recording of a title transaction in the office of the county recorder within a time period set forth in the statute. With respect to savings events, 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, Ohio Rev. Code § 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, 1989.⁴ *See, e.g., Riddel v. Layman*, 5th Dist. Licking No. 94 CA 114, 1995 Ohio App. LEXIS 6121, *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.”).

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, Ohio Rev. Code § 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 under the 1989 DMA 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.

D. The Batman Will Is a Title Transaction, and Its Filing or Recording With the County Recorder Within the Specified Period Constitutes a Savings Event Pursuant to the 1989 DMA.

Pursuant to the 1989 DMA, three requirements must be satisfied in order that a title transaction can constitute a savings event that prevents abandonment of a mineral interest: (1) the mineral interest must be the “subject of” a title transaction; (2) the title transaction must be filed or recorded with the county recorder; and (3) the filing or recording must occur within the applicable time period set forth in the statute. Each requirement is discussed more fully below. As is demonstrated in the record, the filing or recording of the Batman Will in April 1989

⁴ “(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: * * * [.] 1989 DMA, Ohio Rev. Code § 5301.56(B)(1)(c).

satisfies each of the requirements, and, therefore, constitutes a savings event pursuant to the 1989 DMA.

1. The Batman Will Memorializes a Title Transaction, i.e., a Transfer of Title by Will.

The first requirement, that the mineral interest must be the “subject of” a title transaction, is a two-part inquiry: (1) whether the transaction fits within the statutory definition of “title transaction”; and (2) whether the transaction itself directly affects the mineral interest.

Because the 1989 DMA does not contain a definition of the term “title transaction,” courts routinely look to the definition contained in the Ohio Marketable Title Act, Ohio Revised Code sections 5301.47 to 5301.56 (“MTA”):

(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.

Ohio Rev. Code § 5301.47(F) (emphasis added). While it refers to various types of documents which routinely are filed or recorded, 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 as 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, Ohio Rev. Code § 5301.56(B)(1)(c)(i) (emphasis added). Thus, a mineral interest holder files or records a document with the county recorder in order to put third parties on notice of the existence of a title transaction.

“In order for the mineral interest to be the ‘subject of’ the title transaction the grantor must be conveying that interest or retaining that interest.” *Dodd v. Croskey*, 7th Dist. Harrison

No. 12HA6, 2013-Ohio-4257, ¶ 48. See *Walker v. Shondrick-Nau*, 7th Dist. Noble No. 13NO402, 2014-Ohio-1499, ¶ 27. Accordingly, a deed reserving a portion of the mineral interest to the grantor affects title to an interest in the real property, and, therefore, falls within the statutory definition of a title transaction. *Riddel v. Layman*, 5th Dist. Licking No. 94 CA 114, 1995 Ohio App. LEXIS 6121, *5-6 (July 10, 1995).

In the instant appeal, the Mineral Reservation was the subject of a title transaction. Appellant concedes that the transfer of title pursuant to a will can be a title transaction in that such transfer affects an interest in real property. See Appellant's Merit Brief, p. 6. Appellant questions whether the Batman Will was sufficient to effect such a transfer. Under well-settled Ohio law, it was sufficient and did accomplish the transfer. See, e.g., *Heifner v. Bradford*, 4 Ohio St.3d 49, 51 (1983) ("Thus, [under the Ohio Marketable Title Act,] the 1957 conveyance of the oil and gas rights which passed under the terms of Elvira Sprague's will must be considered a 'title transaction' under R.C. 5301.49(D).").⁵

It is settled in Ohio that "title to real estate generally passes by testate succession at the time of death[.]" *Ohio Northern Univ. v. Ramga*, 3rd Dist. Auglaize No. 2-88-1, 1990 Ohio App. LEXIS 2946, *9 (July 12, 1990). See *Central Nat'l Bank, Sav. & Trust Co. v. Gilchrist*, 23 Ohio App. 87, 90-91, 154 N.E. 811 (8th Dist. 1926) ("In this state, when a person makes a valid will, as was done in this case, it is the source of title of the property given to devisees and legatees therein named. The title of the real estate devised vests immediately in the devisees upon the probate of the will, and relates back to the time of the death of the testator."); *Akron Commercial*

⁵ See also *Edward H. Everett Co. v. Jadoil, Inc.*, 5th Dist. Licking No. CA-3211, 1987 Ohio App. LEXIS 5684, *9 (Jan. 26, 1987) (recorded agreement to convey real property, which included a reservation of oil and gas rights, was a title transaction within the meaning of Ohio Rev. Code § 5301.47(F)).

Sec. Co. v. Ritzman, 79 Ohio App. 80, 86, 72 N.E.2d 489 (9th Dist. 1945) (“While the title to the real property passes to the devisees under the will of the decedent immediately upon the death of the testator, it does so subject to the right of the Probate Court to order its sale for the purpose of paying debts of the decedent.”).

Appellant argues that the Batman Will is ineffective as a title transaction because it does not specifically mention the mineral rights that it conveys to Appellee Nile Batman. Such argument is to no avail because, at the time that the Batman Will was recorded with the Belmont County Recorder in 1989, Ohio law provided that “[e]very devise of an interest in real property in a will shall convey all the estate of the devisor therein, unless it clearly appears by the will that the devisor intended to convey a less estate.” Ohio Rev. Code § 2107.51 (eff. Oct. 1, 1953).⁶ This statute has been construed to mean “*an entire interest* will pass by a particular will provision, unless the intent to pass a lesser estate is clearly apparent in the will.” *In Re: Estate of Kelly v. Estate of Kelly*, 8th Dist. Cuyahoga No. 41292, 1980 Ohio App. LEXIS 12245, *5 (May 30, 1980) (emphasis added).

“To aid in determining [the testator’s] intent, the document [*i.e.*, the will] must be read in view of the law as it existed at the time it was executed with the presumption that the testator was knowledgeable of the law.” *Wendell v. AmeriTrust Co., N.A.*, 69 Ohio St.3d 74, 76, 1994-Ohio-511, 630 N.E.2d 368 (1994). Article II of the Batman 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.” Fay Aff., Ex. A. Appellant points to no evidence, whether in the Batman Will or

⁶ Several Ohio probate statutes cited herein subsequently were amended by Senate Bill 124, effective January 13, 2012.

elsewhere in the record on appeal, to substantiate any claim that Frances Batman intended to convey less than her entire estate, including all of her interests in real property, to her son, Appellee Nile Batman. The Batman Will contains no limitation on the scope of the conveyance of the Mineral Reservation intended by the testator. Therefore, Frances Batman, through the Batman Will, conveyed to her son and sole heir-at-law Appellee Nile Batman all of her interest in the Mineral Reservation applicable to Appellant's real property. *See In re Estate of Alton Donner*, 4th Dist. Scioto No. 1691, 1988 Ohio App. LEXIS 2393, *3 (May 24, 1988) (finding that similar language indicates an intent to convey a full interest in real property).

Therefore, the Batman Will memorializes a title transaction, *i.e.*, the transfer of title to Appellee Nile Batman by will. The Batman Will easily meets the statutory definition of a "title transaction." Furthermore, the transfer of title by the Batman Will affected an interest in real property, *i.e.*, the Mineral Reservation, which transfer was effective at the time of the death of Frances Batman. These components satisfy the first of the three requirements for the filing or recording of the Batman Will to constitute a savings event.

2. *The Batman Will Was Filed or Recorded with the Belmont County Recorder.*

The second requirement is that the title transaction be filed or recorded with the county recorder. This step is essential because it is meant to place the public on notice, through the public record, that a transaction affecting the mineral interest has occurred. Without making the title transaction a matter of record, such a transaction would be effective only as between the parties thereto. In the instant appeal, there is no question that the Batman Will was recorded in the office of the Belmont County Recorder in accordance with the 1989 DMA.

At the time of the recording in 1989, Ohio law provided that "[u]nless it has been admitted to probate or record, [in accordance with specified sections of the Ohio Revised Code],

no will is effectual to pass real or personal estate.” Ohio Rev. Code § 2107.61 (eff. Oct. 1, 1953). It is undisputed that, on its face, the Batman Will was filed in the County Court of Dakota County, Nebraska on October 21, 1981. *See* Fay Aff., Ex. A. It is further undisputed that the Batman Will subsequently was filed with the Belmont County Probate Court on May 15, 1989, in Case No. 94752. *See* Mahan Aff., Ex. B. A certification from the Nebraska court was appended to the Batman Will prior to its filing with the Belmont County Probate Court. *See id.*

Under Ohio law, “[a]uthenticated copies of wills, executed and proved according to the laws of any state or territory of the United States, relative to property in this state, may be admitted to record in the probate court of a county where a part of such property is situated. *Such authenticated copies, so recorded, shall be as valid as wills made in this state.*” Ohio Rev. Code § 2129.05 (eff. Oct. 1, 1953) (emphasis added). Therefore, the filing of the Batman Will with the Belmont County Probate Court resulted in the transfer of the Mineral Reservation from Frances Batman to her son and sole heir-at-law, Appellee Nile Batman. This filing satisfies the second of the three requirements for the filing or recording of the Batman Will to constitute a savings event.

3. *The Batman Will Was Recorded Within the Applicable Time Period Pursuant to the 1989 DMA.*

The third requirement is that the filing or recording of the title transaction occur within the applicable time period set forth in the 1989 DMA. This Court stayed briefing with respect to Appellant’s Proposition of Law No. I, which deals with whether the 1989 DMA requires a fixed or “rolling” look-back period for purposes of preserving a mineral interest. *See 07/08/2015 Case Announcements*, 2015-Ohio-2747. For purposes of argument in the instant brief, a literal reading of that statute requires that a title transaction be recorded either during the twenty years immediately preceding the enactment of the statute (*i.e.*, March 22, 1969 to March 22, 1989), or

within a subsequent three-year grace period (*i.e.*, March 22, 1989 to March 22, 1992). In the instant appeal, there is no dispute that the Batman Will was filed in the office of the Belmont County Recorder on or about April 10, 1989, at Vol. 654, Page 670. *See* Fay Aff., Ex. A. This filing falls within the statutory three-year grace period, and further satisfies the third of the three requirements for the filing or recording of the Batman Will to constitute a savings event.

E. The Filing or Recording of the Batman Will Was Sufficient to Preserve the Mineral Reservation Without the Need for A Separate Claim to Preserve.

For the first time on appeal, Appellant raises a confusing argument with regard to whether the Batman Affidavit is sufficient to establish ownership of the Mineral Reservation for purposes of subsequent filings, such as the Batman Will. *See* Appellant’s Merit Brief, p. 8. Appellant further argues that Appellee Nile Batman did not file a “preservation affidavit” in addition to the Batman Will. *Id.* Appellant’s arguments are without merit, for several reasons.

First, Appellant ignores the well-settled law that title to real property passes through a will, and that said transfer is confirmed by the admission of an out-of-state will to record in Ohio. *See* Argument Section I(D)(1), *supra*.

Second, in the appeal before the Court of Appeals, Appellant expressly conceded that the recording of the Batman Affidavit with the Belmont County Recorder constitutes a savings event pursuant to the 1989 DMA: “The [Trial] Court found that the Frances Batman affidavit of September 1981 was a savings event under ORC§5301.56 (B)(1) (c) (i) as it was filed within the 20 year look back period of the ODMA. *Appellants do not dispute this finding.*” Appellants’ 7th Dist. Ct. App. Brief, p. 9 (emphasis added). *See Lipperman v. Batman*, 7th Dist. Belmont No. 14 BE 2, 2014-Ohio-5500, ¶ 23 (“Here, all parties admit that the 1981 Frances Batman affidavit is a savings event.”). Any argument that the Batman Affidavit did not establish Frances Batman’s claim to ownership of the Mineral Reservation is belied not only by Appellant’s concession, but

also by the express language of the Batman Affidavit itself. *See id.* (“This affidavit states that it is ‘intended to be recorded in the Deed Records in Belmont County, Ohio for the purposes of evidencing the descent of such mineral interests and evidencing the claim’ of Frances Batman [in such interests] ...”).

Third, the 1989 DMA expressly permits the creation of a savings event when “one or more” of the six (6) events listed in the statute occurs, *i.e.*, (1) the filing or recording of a title transaction, (2) actual production or withdrawal of minerals, (3) underground storage operations, (4) issuance of a drilling or mining permit, (5) filing of a claim to preserve, and (6) creation of a separately listed tax parcel number. 1989 DMA, Ohio Rev. Code § 5301.56(B)(1)(c)(i)-(vi). Therefore, the plain language of the statute requires at a minimum only one of the foregoing events. The Batman Affidavit does not have to be a title transaction in order to constitute a savings event. The Trial Court found that the Batman Affidavit did comply with the applicable statutes. *See* Trial Court Decision, p. 19. Similarly, the filing or recording of a title transaction is sufficient to create a savings event, without resort to a cumulative filing of a claim to preserve to accomplish the same result.

Finally, Appellant’s novel argument that a will cannot be filed or recorded without a claim to preserve is completely inconsistent with Appellant’s concession in the lower appellate court that the Batman Affidavit, standing alone, constitutes a savings event pursuant to the 1989 DMA. Appellant has waived such an argument by failing to raise it in the trial court. It is well-settled that “[o]rdinarily, reviewing courts do not consider questions not presented to the court whose judgment is sought to be reversed.” *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 81, 1997-Ohio-71, 679 N.E.2d 706 (quoting *Goldberg v. Indus. Comm.*, 131 Ohio

St. 399, 3 N.E.2d 364, 367 (1936)).⁷ See *Niskanen v. Giant Eagle, Inc.*, 122 Ohio St.3d 486, 494, 2009-Ohio-3626, 912 N.E.2d 595, ¶34 (declining to consider an issue that was waived because it was not raised in the court below); *State ex rel. Porter v. Cleveland Dep't of Pub. Safety*, 84 Ohio St.3d 258, 259, 703 N.E.2d 308 (1998); *State ex rel. Zollner v. Indus. Comm.*, 66 Ohio St.3d 276, 278, 1993-Ohio-49, 611 N.E.2d 830 (“A party who fails to raise an argument in the court below waives his or her right to raise it here.”); *State ex rel. Gibson v. Indus. Comm.*, 39 Ohio St.3d 319, 320, 530 N.E.2d 916 (1988) (“We hold that this issue was not raised previously, and therefore has been waived.”); *Blausey v. Stein*, 61 Ohio St.2d 264, 266-67, 400 N.E.2d 408 (1980) (issue not raised in courts below is not properly before the Supreme Court).

Equally important is the prohibition against an appellant changing the theory of his case and presenting new arguments for the first time on appeal. *State ex rel. Gutierrez v. Trumbull County Bd. of Elections*, 65 Ohio St.3d 175, 177, 602 N.E.2d 622 (1992). See *Tokles v. Black Swamp Customs, LLC*, 6th Dist. Lucas No. L-14-1105, 2015-Ohio-1870, ¶ 24; *Clemens v. Nelson Fin. Group, Inc.*, 10th Dist. Franklin No. 14AP-537, 2015-Ohio-1232, ¶¶27-28. In his Merit Brief, Appellant implies that the Trial Court committed some error in that “[t]he lower court made no ruling but assumed that Frances Batman was the owner of the mineral interest

⁷ As this Court noted in *Quarto Mining*:

These rules are deeply embedded in a just regard for the fair administration of justice. They are designed to afford the opposing party a meaningful opportunity to respond to issues or errors that may affect or vitiate his or her cause. Thus, they do not permit a party to sit idly by until he or she loses on one ground only to avail himself or herself of another on appeal. In addition, they protect the role of the courts and the dignity of the proceedings before them by imposing upon counsel the duty to exercise diligence in his or her own cause and to aid the court rather than silently mislead it into the commission of error.

State ex rel. Quarto Mining Co. v. Foreman, 79 Ohio St.3d 78, 81, 1997-Ohio-71, 679 N.E.2d 706 (citing *State v. Williams*, 51 Ohio St.2d 112, 117, 364 N.E.2d 1364, 1367 (1977)).

because of the filing of 1981 affidavit, and held that the will was a title transaction.” Appellant’s Merit Brief, p. 8. Any error that Appellant argues is attributable to the Trial Court with respect to this argument has been waived. Appellant cannot now benefit from any alleged error that Appellant himself created or induced by failing to raise arguments before the Trial Court. *See Revilo Tyluka, LLC v. Simon Roofing & Sheet Metal Corp.*, 193 Ohio App.3d 535, 541-42, 2011-Ohio-1922, ¶ 26 (8th Dist. App.).

F. The Ohio Marketable Title Act Does Not Control Over the Ohio Dormant Mineral Act.

Contrary to Appellant’s arguments, the MTA does not impact whether the Batman Will is a title transaction and savings event pursuant to the 1989 DMA. Appellant confuses the issue by arguing that the Batman Will does not meet the MTA’s requirements to establish marketable title of Appellee Nile Batman’s interest in the Mineral Reservation. Both acts have a similar purpose of simplifying land transactions by extinguishing certain claims that have existed of record for a long period of time. *See, e.g., Murray Energy Corp. v. City of Pepper Pike*, 8th Dist. Cuyahoga No. 90420, 2008-Ohio-2818, ¶ 23 (“The purpose of the MTA is to improve the marketability of title by extinguishing certain outstanding claims due to a lapse of time.”); *Swartz v. Householder*, 7th Dist. Jefferson No. 13 JE 24, 2014-Ohio-2359, ¶ 20 (“[T]he legislative intent is clearly to reattach mineral interests back to the surface under a twenty-year look back.”). However, the 1989 DMA operates independent of the separate extinguishment process set forth in the MTA. The rules of statutory construction compel the conclusion that Appellant’s arguments regarding the MTA controlling the 1989 DMA are without merit.

Several statutes provide a framework for determining the interplay between the 1989 DMA and MTA. “Sections 1.41 to 1.59, inclusive, of the Revised Code apply to all statutes, subject to the conditions stated in section 1.51 of the Revised Code, and to rules adopted under

them.” Ohio Rev. Code § 1.41. “If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both.” Ohio Rev. Code § 1.51. Furthermore, “[i]f the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, *unless* the general provision is the later adoption *and* the manifest intent is that the general provision prevail.” Ohio Rev. Code § 1.51 (emphasis added). Indeed, “[i]f statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails.” Ohio Rev. Code § 1.52(A).

When viewed in light of these rules of statutory construction, the 1989 DMA prevails over the MTA, for several reasons. First, it is undisputed that the 1989 DMA is the later adoption. The 1989 DMA was enacted effective March 22, 1989, many years after the MTA was first enacted. *See Swartz v. Householder*, 7th Dist. Jefferson No. 13 JE 24, 2014-Ohio-2359, ¶ 20 (“Here, the DMA ... was enacted later”); *Tribett v. Shepherd*, 7th Dist. Belmont No. 13 BE 22, 2014-Ohio-4320, ¶ 36 (“There are no enactment dates which would indicate that the general statute controls over the specific statute.”).

Second, the 1989 DMA is a specific statute that prevails over the more general MTA. The Court of Appeals, Seventh Appellate District, recently distinguished these statutes in this regard:

The ODMA is a specific statute as to minerals and to determine if they are abandoned. In comparison, R.C. 5301.49 is a more general statute in the OMTA. There are no enactment dates which would indicate that the general statute controls over the specific statute. Furthermore, as the trial court notes, the ODMA has a higher standard. It requires the mineral interest to be subject of the title transaction. That element is not found in the OMTA. Thus, for those reasons, the ODMA controls in determining whether minerals are abandoned; the specific statute controls over the general statute.

Tribett, 2014-Ohio-4320, ¶ 36.

Third, the only way that effect can be given to both statutes is for the 1989 DMA to be construed as an exception to the MTA. The 1989 DMA provides one manner of preserving or extinguishing a mineral interest, independent of the MTA. It includes certain attributes or requirements not otherwise found in the MTA. *Id.* (“Furthermore, as the trial court notes, the ODMA has a higher standard. It requires the mineral interest to be subject of the title transaction. That element is not found in the OMTA.”). Under Appellant’s construction of the MTA, the 1989 DMA would be rendered meaningless with regard to its specific purpose, *i.e.*, to delineate a statutory process for preserving or abandoning mineral interests. “It is a primary rule of statutory construction that courts should not construe one statute in a way that would abrogate, defeat, or nullify another statute, where a reasonable construction of both is possible.” *County of San Diego v. Elavsky*, 58 Ohio St.2d 81, 86, 388 N.E.2d 1229 (1979). *See Smoske v. Sicher*, 11th Dist. Geauga Nos. 2006-G-2720 and 2006-G-2731, 2007-Ohio-5617, ¶ 54.

Fourth, the 1989 DMA does not include any provision expressly making it subject to the MTA. The General Assembly did not intend to create a scenario in which a reserved mineral interest could not be preserved from abandonment under the 1989 DMA unless it conformed to the requirements for marketable title set forth in the MTA. If it had intended to create such a scenario, then the General Assembly would have stated as much. *See Patton v. Diemer*, 35 Ohio St.3d 68, 70, 518 N.E.2d 941 (1988) (“Inasmuch as the legislature chose not to include such an exception it must be presumed that none was intended. Under such circumstances this court is not disposed to supply an exception where none exists by statute.”); *Morrow v. Becker*, 9th Dist. Medina No. 11CA0066-M, 2012-Ohio-3875, ¶ 31. The 1989 DMA does not contain any condition requiring that a reserved mineral interest can be preserved only if it satisfies the MTA’s requirements for marketable title. Accordingly, the 1989 DMA applies if its express

conditions are met (here, they are), regardless of whether the reserved mineral interest also has achieved or is capable of achieving marketable title status pursuant to the MTA. “It is well recognized that a court cannot read words into a statute but must give effect to the words used in the statute.” *State ex rel. Butler Twp. Bd. of Trustees v. Montgomery Co. Bd. of Commrs.*, 124 Ohio St.3d 390, 394, 2010-Ohio-169, 922 N.E.2d 945, ¶ 21. Therefore, the absence of that language from the 1989 DMA is significant.

Finally, the manifest intent of the legislature was not to have the MTA (the general provision) prevail. The intent of the 1989 DMA is not inconsistent with, but rather complements, the MTA. “Here, ... the legislative intent [of the DMA] is clearly to reattach mineral interests back to the surface under a twenty-year look back.” *Swartz v. Householder*, 7th Dist. Jefferson No. 13 JE 24, 2014-Ohio-2359, ¶ 20. It is well-settled that the Ohio General Assembly is presumed to have full knowledge of existing laws when enacting a statute or an amendment. *See Campbell v. Ohio State Univ. Med. Ctr.*, 10th Dist. Franklin No. 04AP-96, 2004-Ohio-6072, ¶ 26 (“The Ohio General Assembly is presumed to legislate and pass enactments with knowledge of all prior statutes that may affect or interact with the new enactment.”). *See also Westlake v. Mascot Petroleum Co.*, 61 Ohio St.3d 161, 168, 573 N.E.2d 1068 (1991) (“Likewise, the knowledge possessed by the General Assembly of former statutory provisions as interpreted by this court not only may be presumed but may be considered to have been the motivating factor behind the amendments. R.C. 1.49(D).”). To hold that the MTA overcomes the effect of the 1989 DMA would be to eviscerate the provisions of the 1989 DMA and nullify its process for determining abandonment of mineral interests. Therefore, the General Assembly enacted the 1989 DMA with full intent that it prevails over the MTA.

For all these reasons, Appellant's reliance upon the MTA, to the exclusion of the express and unambiguous provisions of the 1989 DMA, is unavailing.

G. Filing or Recording an Out-of-State Decedent's Will to Create a Savings Event Pursuant to the 1989 DMA Does Not Require Ancillary Administration of the Decedent's Estate in Ohio.

Appellant argues that the recording of the Batman Will does not constitute a title transaction because the estate of Frances Batman was not administered in Ohio through an ancillary probate estate proceeding. Appellant's Merit Brief, pp. 11-13. This argument demonstrates a fundamental misunderstanding of the role of ancillary administration in Ohio probate law. There is no requirement that the Batman Will be the subject of an ancillary administration in order to be deemed a title transaction and savings event under the 1989 DMA.

Ohio Revised Code Chapter 2129 governs ancillary administration. "The object of ancillary administration is to collect assets of nonresident decedents found within a state and to remit the proceeds to the domiciliary executor or administrator. Its principal purpose is to protect local creditors of nonresident decedents." *In re Estate of Radu*, 35 Ohio App.2d 187, 189, 301 N.E.2d 263 (8th Dist. 1973). *See Crabbe v. Lingo*, 76 Ohio App. 530, 533, 61 N.E.2d 742 (12th Dist. 1945) ("The purpose of the ancillary administration is to clear the title to property and, of course, to protect and pay Ohio creditors and, if necessary, to create a fund to pay the debts and legacies of the deceased.").

At the time of the filing of the Batman Will, Ohio law provided that "[i]f *no domiciliary administration* has been commenced, the ancillary administrator *shall* proceed with the administration in Ohio as though the decedent had been a resident of Ohio at the time of his death." Ohio Rev. Code § 2129.11 (eff. Oct. 1, 1953) (emphasis added). Courts have applied this statute to require ancillary administration only in the circumstances where: (1) a nonresident

decedent owned property in Ohio; *and* (2) no estate administration had been commenced in the decedent's domicile state. *See, e.g., Darrow v. Fifth Third Union Trust Co.*, 1 Ohio Op. 2d 104, 139 N.E.2d 112, para. 1 of syl. (Hamilton Co. C.P. 1954) ("Under the provisions of 2129.11 R. C., if no domiciliary administration of a nonresident decedent has been commenced, ancillary administration proceeds in Ohio as though the decedent had died as a resident of Ohio and the Ohio law governing the probate of estates, including the statute of descent and distribution, is applicable."); *Thomas v. Taylor*, 1st Dist. Hamilton No. C-000624, 2001 Ohio App. LEXIS 3880, *10 & n.13 (Aug. 31, 2001) ("We hold that, because Berry owned real property in Ohio, and because his will had not been probated in his state of domicile, the court below was required to admit the will to probate and to administer Berry's Ohio property."). Indeed, absent such circumstances, ancillary administration is optional. *See* Ohio Rev. Code § 2129.04 (eff. Oct. 1, 1953) ("When a nonresident decedent leaves property in Ohio, ancillary administration proceedings *may be had* upon application of any interested person in any county in Ohio in which is located property of the decedent, or in which a debtor of such decedent resides. ***") (emphasis added).

Furthermore, there was no requirement that the Batman Will be admitted to probate *in Ohio*, as opposed to some other state (such as Nebraska, the decedent's domicile). At the time of the filing of the Batman Will, Ohio law provided that:

A will shall be admitted to probate:

(A) In the county in which the testator was domiciled if, at the time of his death, he was domiciled in this state;

(B) In any county of this state where any real or personal property of such testator is located *if, at the time of his death, he was not domiciled in this state, and provided that such will has not previously been admitted to probate in this state or in the state of such testator's domicile;*

(C) In the county of this state in which a probate court rendered a judgment declaring that the will was valid and where the will was filed with the probate court.

Ohio Rev. Code § 2107.11 (eff. Oct. 1, 1979) (emphasis added). Subsections (A) and (C) of the statute are inapplicable here because Frances Batman was not a resident of Ohio at the time of her death; had she been, her Will would have been admitted to probate in Ohio, as opposed to Nebraska. Subsection (B) does not require the admission of the Batman Will to probate in Ohio because Frances Batman was not domiciled in Ohio and her Will was admitted to probate first in Nebraska. The evidence before the Trial Court demonstrates that the Batman Will had been admitted to probate in the Circuit Court of Dakota County, Nebraska *before* said Will was presented to the Belmont County Probate Court to be filed for record. *See* Mahan Aff., Ex. B.⁸ Specifically, the evidence before the Trial Court includes an order by the Belmont County Probate Court which states, in pertinent part: “it appearing to the Court that said [Batman] Will was duly executed and proved in accordance with the laws of the State of Nebraska and admitted to probate in the County Court of Dakota County in the State of Nebraska” Mahan Aff., Ex. B.

At the time of the filing of the Batman Will, Ohio law provided that “[u]nless it has been admitted to probate or record, [in accordance with specified sections of the Ohio Revised Code],

⁸ This is consistent with the procedure for admitting an authenticated copy of a will for record in a county where property is situated, where that will previously was admitted to probate in another county:

If real property devised by will is situated in any county other than that in which the will is proved, declared valid, or admitted to probate, an authenticated copy of the will and the order of probate or the judgment declaring validity shall be admitted to the record in the office of the probate judge of each county in which the real property is situated upon the order of that judge. The authenticated copy shall have the same validity in the county in which the real property is situated as if probate had been had in that county.

Ohio Rev. Code § 2107.21.

no will is effectual to pass real or personal estate.” Ohio Rev. Code § 2107.61 (eff. Oct. 1, 1953). It is undisputed that the Batman Will was admitted to record in the Belmont County Probate Court in 1989. The Trial Court had before it the above-referenced order of the Belmont County Probate Court, which states, in pertinent part: “it is ordered that said authenticated copies of said [Batman] Will and of said Order [admitting the Batman Will to probate in the Nebraska court] be admitted to record in this Court as provided by law,” Mahan Aff., Ex. B. As such, the Batman Will did effect the transfer of real estate to Frances Batman’s heir, Appellee Nile Batman. The fact that the Batman Will apparently was not probated in Ohio does not invalidate the transfer and title transaction effected by that will. Indeed, Section 2107.61 provided two options: (1) admitting the will *to probate* in the Ohio probate court; *or* (2) admitting the will *to record* in such court. Appellee Nile Batman complied with the second of these options.

For all these reasons, an ancillary administration in Ohio was not required in order to transfer the Mineral Reservation to Appellee Nile Batman through a transfer by will, memorialized in the Batman Will.

H. A Certificate of Transfer Is Not Required to Create a Title Transaction or Savings Event Pursuant to the 1989 DMA.

Appellant further argues that Appellee Nile Batman’s failure to request a certificate of transfer with respect to the Mineral Reservation somehow adversely affects the transfer of the Mineral Reservation through the Batman Will. Appellant’s Merit Brief, at p. 12. However, the lack of a recorded certificate of transfer here is inconsequential. As one Ohio judge noted, the purpose of a certificate of transfer is merely to memorialize a transfer in property that has already occurred pursuant to a will:

The certificate of transfer is provided by R.C. 2113.61(A) and is issued by the probate court, *not as a document transferring the real estate but as a certification that the real estate has been transferred either by devise under a will*

or by statutory intestate succession. R.C. 2113.62 provides that such certificate of transfer may be recorded by the county recorder. *The issuance of such certificate of transfer, however, is not a prerequisite to the transfer of title to the property, nor to the marketability or alienability of title to such real property.* R.C. 2113.61 commences with the words, “[w]hen real estate passes * * * under a will * * * [”] clearly connoting that the transfer itself was effected by admission of the will to probate and that the certificate is merely a memorialization of such transfer which has previously occurred.

Ohio Northern Univ. v. Ramga, 3rd Dist. Auglaize No. 2-88-1, 1990 Ohio App. LEXIS 2946, at *11-12 (July 12, 1990) (Whiteside, J., dissenting) (emphasis added).

Indeed, Judge Whiteside is not alone in viewing Section 2113.61 as having a limited effect in this regard. As the Court of Appeals for Greene County, Second Appellate District, explained:

Upon proper application, a probate court must issue a certificate of transfer for record in the county in which real estate is situated, which must recite the names of devisees and the interest in the parcel of real estate inherited by each. R.C. 2113.61. *Though the certificate of transfer is not a conveyance, it does constitute a memorialization by the probate court of what occurred with respect to a real estate title upon the death of the decedent.*

Platt v. Estate of Petrosky, 2d Dist. Greene No. 91-CA-105, 1992 Ohio App. LEXIS 3953, *3 (July 24, 1992) (emphasis added). Therefore, if the certificate of transfer is not a conveyance, then the will itself must be the vehicle by and through which title to the inherited real property passes to the beneficiary. *See, e.g., Central Nat'l Bank, Sav. & Trust Co. v. Gilchrist*, 23 Ohio App. 87, 90-91, 154 N.E. 811 (8th Dist. 1926) (“The title of the real estate devised vests immediately in the devisees upon the probate of the will, and relates back to the time of the death of the testator.”); *Akron Commercial Sec. Co. v. Ritzman*, 79 Ohio App. 80, 86, 72 N.E.2d 489 (9th Dist. 1945) (“While the title to the real property passes to the devisees under the will of the decedent immediately upon the death of the testator, it does so subject to the right of the Probate Court to order its sale for the purpose of paying debts of the decedent.”).

Establishing a savings event under the 1989 DMA does not hinge upon whether a certificate of transfer was requested in Ohio estate proceedings. Appellant cites to Section 2113.61, Ohio Revised Code, which applies to administration of a resident decedent's estate. It provides, in pertinent part, that "[a] foreign executor or administrator, if no ancillary administration proceedings have been had or are being had in this state, *may file* in accordance with this section an application for a certificate of transfer in the probate court of any county of this state in which real property of the decedent is located." Ohio Rev. Code § 2113.61(E) (eff. Jan. 13, 2012) (current version of statute).⁹ Importantly, well-settled rules of statutory construction provide that use of the word "may" in Section 2113.61(E) connotes an optional filing, as opposed to a mandatory one. *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St.2d 102, 271 N.E.2d 834, para. 1 of syl. (1971) ("In statutory construction, the word 'may' shall be construed as permissive and the word 'shall' shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that they receive a construction other than their ordinary usage.").

Section 2129.19, Ohio Revised Code, applies with respect to administration of a non-resident decedent's estate, *i.e.*, ancillary administration. While this statute requires an application for certificate of transfer to be filed, that requirement is premised on there being an ancillary administrator appointed by the probate court in the first place: "Prior to filing the ancillary administrator's final account, an ancillary administrator shall file in the probate court an application for a certificate of transfer as to the real property of the nonresident decedent situated

⁹ In 1989 when the Batman Will was filed, the statute provided, in pertinent part: "A foreign executor or administrator, when no ancillary administration proceedings have been had or are being had in Ohio, may, in accordance with this section, file such application [for a certificate of transfer] in the court in any county of this state in which real estate of the decedent is located." Ohio Rev. Code § 2113.61(D) (eff. Aug. 9, 1963).

in this state, in the same manner as in the administration of the estates of resident decedents under section 2113.61 of the Revised Code.” Ohio Rev. Code § 2129.19. As discussed more fully above, a certificate of transfer is not and was not required here because an ancillary administration of the Batman Will was neither required nor commenced in the Belmont County Probate Court.

II. Appellees’ Arguments in Response to Appellant’s Proposition of Law No III.

A. Appellant Waived Any Argument as to Appellees XTO and Phillips Participating in This Appeal, and as to Appellees Reserve and Equity Having Standing to Move for or Oppose Summary Judgment.

In his Proposition of Law No. III, Appellant contends that Appellees XTO Energy, Inc. (“XTO”) and Phillips Exploration, Inc. (“Phillips”) have no standing to appear in the case. However, in his merit brief, Appellant never argues why XTO and Phillips should not participate in this appeal. Appellant instead devotes this entire section to arguing that Appellees Reserve and Equity had no standing to file or oppose a motion for summary judgment — an issue never raised by Appellant in his Memorandum in Support of Jurisdiction filed to commence the instant appeal before this Court.

This Court has declined to consider issues raised by an appellant in his merit brief but not in his memorandum in support of jurisdiction. See *In re Timken Mercy Medical Ctr.*, 61 Ohio St.3d 81, 87, 572 N.E.2d 673 (1991); *Whitaker v. M.T. Auto., Inc.*, 111 Ohio St.3d 177, 179 n.2, 2006-Ohio-5481, 855 N.E.2d 825, ¶ 9 (“Although Whitaker offers this issue in his brief before this court, because he failed to raise it in his jurisdictional memorandum, it will not be addressed.”); *Estate of Ridley v. Hamilton County Bd. of Mental Retardation*, 102 Ohio St.3d 230, 233, 2004-Ohio-2629, 809 N.E.2d 2, ¶ 18; *State v. Boswell*, 121 Ohio St.3d 575, 578, 2009-Ohio-1577, 906 N.E.2d 422, ¶ 11 (“The state, however, failed to raise this issue in any

proposition of law, and res judicata is not even mentioned in the state's memorandum in support of jurisdiction. We accordingly decline to address it.”); *DIRECTV, Inc. v. Levin*, 128 Ohio St.3d 68, 78, 2010-Ohio-6279, 941 N.E.2d 1187, ¶ 40 (failure to challenge summary judgment decision in memorandum in support of jurisdiction or initial brief results in failure to preserve the issue for review); *In re Guardianship of Spangler*, 126 Ohio St.3d 339, 349, 2010-Ohio-2471, 933 N.E.2d 1067, ¶ 62 (O'Donnell, J., concurring in part and dissenting in part) (“As the board did not raise this issue in its memorandum in support of jurisdiction, it is not properly before us, and we should decline to address it now.”). See also *State v. Johnson*, 128 Ohio St.3d 107, 109, 2010-Ohio-6301, 942 N.E.2d 347, ¶ 3 n.2 (declining to address an argument not raised by the appellant in a separate assignment of error before the court of appeals).

Accordingly, this Court should disregard Appellant’s arguments with regard to Appellees Reserve and Equity’s standing to move for or oppose summary judgment in the litigation before the Trial Court. This Court further should dismiss Appellant’s Proposition of Law No. III in its entirety because Appellant has failed to present any argument in support thereof in his initial merit brief, *i.e.*, addressing the issue of whether Appellees XTO and Phillips may participate in the instant appeal to this Court. Any attempt by Appellant to address this issue in his reply brief is futile, for an appellant may not raise new arguments in a reply brief. *American Fiber Systems, Inc. v. Levin*, 125 Ohio St.3d 374, 2010-Ohio-1468, 928 N.E.2d 695, ¶ 21; *State ex rel. Colvin v. Brunner*, 120 Ohio St.3d 110, 2008-Ohio-5041, 896 N.E.2d 979, ¶ 61.

B. Appellees Reserve and Equity Had Standing to Move for and Oppose Summary Judgment in This Litigation.

Appellant argues that Appellees Reserve and Equity had no standing to move for or oppose summary judgment in the instant litigation. Appellant’s Merit Brief, p. 13. This argument is untenable. According to Appellant, Reserve and Equity could only move for

summary judgment as to the validity of the Batman Lease, which Appellant contends was not contested in the lawsuit. *Id.* To the contrary, the Complaint expressly calls for the *cancellation* of the Batman Lease. In the Complaint, Appellant claimed that as a result of the purported vesting of the Mineral Reservation to Appellant, “the lease dated November 1, 2008 [*i.e.*, the Batman Lease], ... is *invalid* with regard to all of the defendants, Reserve Energy Exploration Company, Equity Oil & Gas Funds, Inc., P.C. Exploration, Inc. and XTO Energy[.]” Complaint, ¶ 10 (emphasis added). In his prayer for relief, Appellant expressly sought not only “an order cancelling the subject lease,” but also “cancelling the assignments of the lease.” Complaint, p. 3. Therefore, Appellant’s assertion that Reserve and Equity had no claim to the Mineral Reservation and no interest adverse to Appellant is wholly inaccurate. *See* Appellant’s Merit Brief, p. 14.

It is axiomatic that Civil Rule 56(B) permits *any defendant* named in litigation to file a motion for summary judgment. That rule provides:

(B) For defending party. *A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party’s favor as to all or any part of the claim, counterclaim, cross-claim, or declaratory judgment action. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.*

Civ.R. 56(B) (emphasis added). Here, Appellant sought a cancellation of the Batman Lease. This relief necessarily requires a declaration that the Mineral Reservation was not preserved in accordance with the 1989 DMA. Appellant also sought to quiet title with respect to the Mineral Reservation. Therefore, Appellant asserted claims and a request for declaratory judgment against Reserve, Equity, and the other defendants. Appellant’s argument is nothing more than a futile attempt to avoid the clear language in Civil Rule 56(B).

“Civ.R. 56(B) states that ‘[a] party against whom a claim * * * is sought may at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.’ The rule does not indicate that certain parties may motion for summary judgment while other parties may not.” *Citizens Fed. Sav. & Loan Assn. of Dayton v. Page*, 12th Dist. Warren No. CA83-03-018, 1984 Ohio App. LEXIS 8758, *5 (Jan. 9, 1984). Civil Rule 12(C) similarly provides that “any party may move for judgment on the pleadings.” As the Court of Appeals for Warren County, Twelfth Appellate District, noted, “[a]gain, the only requirement for proper standing is that the movant be a *party*.” *Id.* (emphasis in original).

In *Page*, the movants, the Ethridges, were named as defendants in the foreclosure action because they had contracted to purchase the real property, subject to the existing mortgage, from the mortgagors, the Pages. The plaintiff-bank named both the Pages and the Ethridges as defendants in the action. Specifically, the bank included the Ethridges as defendants “because they were expected to claim an interest in the subject property by reason of the land contract agreement with the Pages.” *Id.*, at *5-6. There was no question that, as defendants, the Ethridges had standing to move for summary judgment: “Certainly they were parties to the action when their motion was made. Therefore, we must conclude that the Ethridges had standing under the Civil Rules to move for summary judgment or for judgment on the pleadings.” *Id.*, at *6,

In another case, the Court of Appeals of Portage County, Eleventh Appellate District, addressed whether an executor of a decedent’s estate, acting in that capacity, had standing to file a motion for summary judgment. The plaintiff had contended that only a person taking under the will had such standing. *Woodall v. Nulph*, 11th Dist. Portage Nos. 91-P-2334 and 91-P-2351, 1992 Ohio App. LEXIS 2791, *6 (May 29, 1992). However, the Revised Code authorized the

executor to defend the estate in the litigation filed by the plaintiff. *Id.*, at *6-7. The court of appeals found that Civil Rule 56(B) applied because the executor was “a defending party.” *Id.*, at *7. As a result, the executor had standing to file a motion for summary judgment: “Here, the executor is the party to defend the estate against appellant’s claim that he is entitled to take under the will. As such, the executor, as fiduciary, may motion for summary judgment.” *Id.*

Not only did Appellees Reserve and Equity have standing to file their motion for summary judgment, but also it was incumbent upon them to file their motion in order that the Trial Court could consider their arguments. “[I]t is axiomatic that the trial court may not grant summary judgment in regard to any claim, where a party has not moved for judgment in regard to that claim.” *Urda v. Buckingham, Doolittle & Burroughs*, 9th Dist. Summit No. 22547, 2005-Ohio-5949, ¶ 13; *see Rowe v. Striker*, 9th Dist. Lorain No. 07CA009296, 2008-Ohio-5928, ¶¶ 7-8.

Similarly, Appellant has no grounds to complain as to the Trial Court’s denial of Appellant’s motion to strike Reserve and Equity’s motion for summary judgment. Ultimately, “[t]he determination of a motion to strike is within the court’s broad discretion.” *State ex rel. Ebbing v. Ricketts*, 133 Ohio St.3d 339, 2012-Ohio-4699, 978 N.E.2d 188, ¶ 13. Nevertheless, where a motion for summary judgment is “properly filed and supported by Civ.R. 56(C) evidence,” a trial court does not abuse its discretion by denying a motion to strike a party’s motion for summary judgment. *Id.*, at ¶ 16. As this Court noted in *Ebbing* (quoting the court of appeals), “[t]he existence of opposing affidavits and allegations is not cause for striking a motion for summary judgment.” *Id.*

For all these reasons, Appellant’s argument that Appellees Reserve and Equity had no standing to move for or oppose summary judgment is without merit. The Trial Court properly

denied Appellant's motion to strike, and proceeded to render a summary judgment in favor of Appellees based upon the evidence and arguments presented.

C. Appellant Asserted a Claim for Relief Against Appellees Reserve and Equity, Who Had Leasehold Interests in the Property Pursuant to the Batman Lease.

In his merit brief, Appellant argues that no claim was asserted against Reserve or Equity in the underlying litigation; rather, the claim was asserted against only Appellees Nile and Kathryn Batman, who, according to Appellant, are the only parties having a claim to the Mineral Reservation. Appellant's Merit Brief, at 13, 14. Appellant's Complaint belies any such argument. For example, the Complaint states that "[t]he claims of the *defendants* as to the oil and gas create a cloud on plaintiffs title." Complaint, ¶ 4 (emphasis added). Appellant made no attempt to distinguish between one defendant and another with respect to this allegation.

Importantly, nowhere in the Complaint do we find any reference to the Lipperman Lease entered into by and between Appellant and Reserve, which lease subsequently was assigned to Equity and other defendants. Rather, Appellant specifically sought to cancel the Batman Lease and any assignments relating thereto. By naming Equity, P.C. Exploration, and XTO as defendants, Appellant believed that they each had, or could claim, an interest in the Batman Lease. Appellant cannot now backtrack from the allegations in the Complaint solely because Reserve and Equity successfully contested the validity of Appellant's claims for relief on summary judgment.

D. Appellant Is Precluded from Citing to Facts Not Included in the Trial Court Record.

Appellant further implies that standing to participate in an appeal is somehow affected by the fact that Appellees Reserve and XTO released their respective interests in the Batman Lease following the issuance of the Trial Court Decision but before oral argument in the appeal before

the Court of Appeals. See Appellant's Merit Brief, p. 15. This argument is without merit. The post-judgment disposition of the Appellees' respective interests in the Batman Lease is irrelevant to the instant appeal because such events are not part of the record reviewed by the Trial Court in rendering its decision on summary judgment. This Court has long held that "[a] reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter." *State v. Ishmail*, 54 Ohio St.2d 402, 377 N.E.2d 500, para. 1 of syl. (1978). "It is well-established that appellate courts will not consider evidence that a party did not submit to the trial court." *Hopkins v. Hopkins*, 4th Dist. Scioto No. 14CA3597, 2014-Ohio-5850, ¶¶ 20-21. Instead, an appellate court's "review is limited to the record before the trial court at the time of its decision[.]" *State v. Harman*, 7th Dist. Mahoning No. 96-CA-184, 1999 Ohio App. LEXIS 2835, *7 (June 21, 1999).

Following the holding in *Ismail*, this Court and appellate courts "may not consider facts extraneous to the record," such as when they are included in appellate briefs but are not part of the actual trial court record. *Cavanaugh Bldg. Corp. v. Board of Cuyahoga Co. Commrs.*, 8th Dist. Cuyahoga No. 75907, 2000 Ohio App. LEXIS 241 (Jan. 27, 2000), * 5-6. See *State ex rel. Office of Montgomery County Pub. Defender v. Siroki, Clerk*, 108 Ohio St.3d 207, 210, 2006-Ohio-662, 842 N.E.2d 508, ¶ 20 (disregarding new affidavit attached to merit brief); *Pearl v. J&W Roofing & Gen. Contr.*, 2d Dist. Montgomery No. 16045, 1997 Ohio App. LEXIS 672, *4-5 (Feb. 28, 1997) ("Mere allegations contained in an appellate brief cannot be considered by this court, as they have no evidentiary value."); *Mancino v. Lakewood*, 36 Ohio App.3d 219, 337, 523 N.E.2d 332 (8th Dist. 1987) (exhibits to merit brief are not part of appellate record, and will not be considered). Similarly, filings or proceedings subsequent to the trial court's judgment will not be considered on appeal from that judgment. *Grubic v. Grubic*, 8th Dist. Cuyahoga No.

73793, 1999 Ohio App. LEXIS 4200, *8 n.1 (Sept. 9, 1999) (effect of trial court proceedings subsequent to notice of appeal); *State v. Harman*, 7th Dist. Mahoning No. 96-CA-184, 1999 Ohio App. LEXIS 2835, *6-7 (June 21, 1999) (documents filed in the trial court subsequent to notice of appeal).

Therefore, this Court and appellate courts in Ohio routinely disregard documents or other evidence that are not part of the record actually considered by the trial court in rendering its decision. *See, e.g., RNG Props., Ltd. v. Summit County Bd. of Revision*, 140 Ohio St.3d 455, 460, 2014-Ohio-4036, 19 N.E.3d 906, ¶ 23 (“Because they were not duly made part of the record, we will disregard the conveyance-fee statements.”); *Springfield Venture, LLC v. U.S. Bank N.A.*, 2d Dist. Clark No. 2014-CA-74, 2015-Ohio-1983, ¶ 48 n.4 (“However, we cannot consider the transcript, as the trial court did not have access to it.”).

In the instant appeal, any actions taken by the Appellees subsequent to the issuance of the Trial Court Decision are irrelevant for purposes of determining whether the Trial Court properly entered summary judgment in favor of the Appellees. Post-judgment developments (such as releases of leasehold interests at issue in the litigation) do not divest an appellate court of jurisdiction to hear the pending appeal. This Court and appellate courts have proceeded to issue decisions as to the merits of appeals without considering additional evidence that an appellant attempts to introduce into the record post-judgment.

Indeed, because the Trial Court Decision found the Mineral Reservation to be preserved pursuant to the 1989 DMA, the dispute as to the validity of the Mineral Reservation continues notwithstanding whether or not the Batman Lease has expired or been released by Appellees XTO or Reserve. It is well-settled that despite a claim that an appeal is moot, an appellate court nonetheless may proceed to issue a decision where the issues raised in the appeal are capable of

repetition, yet evading review. *See, e.g., State ex rel. Plain Dealer Pub. Co. v. Barnes*, 38 Ohio St.3d 165, 527 N.E.2d 807, para. 1 of syl. (1988). Appellant does not regard this appeal to be moot, but rather proceeds to argue the appeal while also seeking to exclude opposing parties from participating in the appeal. For the foregoing reasons, Appellant's Proposition of Law No. III is wholly without merit and should be dismissed.

CONCLUSION

For all the foregoing reasons, this Court should: (1) affirm the Trial Court's Decision granting Reserve and Equity's Motion for Summary Judgment; (2) affirm the Trial Court's Decision denying Appellant's Motion for Summary Judgment; and (3) affirm the Trial Court's Decision dismissing Appellant's Complaint, in its entirety, with prejudice.

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CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing Merit Brief of Defendants-Appellees Reserve Energy Exploration Company and Equity Oil & Gas Funds, Inc. was duly served via regular U.S. Mail, postage prepaid, on this 7th day of October, 2015, to:

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APPENDIX



1 of 22 DOCUMENTS

PAGE'S OHIO REVISED CODE ANNOTATED
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*** ARCHIVE MATERIAL ***

* CURRENT THROUGH LEGISLATION PASSED BY THE 126TH OHIO GENERAL ASSEMBLY *
* AND FILED WITH THE SECRETARY OF STATE THROUGH DECEMBER 18, 2005 *
* ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2005 *

TITLE 53. REAL PROPERTY
CHAPTER 5301. CONVEYANCES; ENCUMBRANCES
MARKETABLE TITLE ACT

ORC Ann. 5301.56 (2005)

§ 5301.56. Mineral interests in realty

(A) As used in this section:

(1) "Holder" means the record holder of a mineral interest, and any person who derives his rights from, or has a common source with, the record holder and whose claim does not indicate, expressly or by clear implication, that it is adverse to the interest of the record holder.

(2) "Drilling or mining permit" means a permit issued under Chapter 1509., 1513., or 1514. of the Revised Code to the holder to drill an oil or gas well or to mine other minerals.

(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:

(a) The mineral interest is in coal, or in mining or other rights pertinent to or exercisable in connection with an interest in coal, as described in division (E) of *section 5301.53 of the Revised Code*;

(b) The mineral interest is held by the United States, this state, or any political subdivision, body politic, or agency of the United States or this state, as described in division (G) of *section 5301.53 of the Revised Code*;

(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;

(ii) There has been actual production or withdrawal of minerals by the holder from the lands, from lands covered by a lease to which the mineral interest is subject, or, in the case of oil or gas, from lands pooled, unitized, or included in unit operations, under *sections 1509.26 to 1509.28 of the Revised Code*, in which the mineral interest is participating, provided that the instrument or order creating or providing for the pooling or unitization of oil or gas interests has been filed or recorded in the office of the county recorder of the county in which the lands that are subject to the pooling or unitization are located;

(iii) The mineral interest has been used in underground gas storage operations by the holder;

(iv) A drilling or mining permit has been issued to the holder, provided that an affidavit that states the name of the permit holder, the permit number, the type of permit, and a legal description of the lands affected by the permit has been filed or recorded, in accordance with *section 5301.252 [5301.25.2] of the Revised Code*, 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;

(vi) In the case of a separated mineral interest, a separately listed tax parcel number has been created for the mineral interest in the county auditor's tax list and the county treasurer's duplicate tax list in the county in which the lands are located.

(2) 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.

(C) (1) A claim to preserve a mineral interest from being deemed abandoned under division (B)(1) of this section may be filed for record by its holder. Subject to division (C)(3) of this section, the claim shall be filed and recorded in accordance with *sections 317.18 to 317.201 [317.20.1] and 5301.52 of the Revised Code*, and shall consist of a notice that does all of the following:

(a) States the nature of the mineral interest claimed and any recording information upon which the claim is based;

(b) Otherwise complies with *section 5301.52 of the Revised Code*;

(c) States that the holder does not intend to abandon, but instead to preserve, his rights in the mineral interest.

(2) A claim that complies with division (C)(1) of this section or, if applicable, divisions (C)(1) and (3) of this section preserves the rights of all holders of a mineral interest in the same lands.

(3) Any holder of an interest for use in underground gas storage operations may preserve his interest, and those of any lessor of the interest, by a single claim, that defines the boundaries of the storage field or pool and its formations, without describing each separate interest claimed. The claim is prima-facie evidence of the use of each separate interest in underground gas storage operations.

(D) (1) A mineral interest may be preserved indefinitely from being deemed abandoned under division (B)(1) of this section by the occurrence of any of the circumstances described in division (B)(1)(c) of this section, including, but not limited to, successive filings of claims to preserve mineral interests under division (C) of this section.

(2) The filing of a claim to preserve a mineral interest under division (C) of this section does not affect the right of a lessor of an oil or gas lease to obtain its forfeiture under *section 5301.332 [5301.33.2] of the Revised Code*.

HISTORY: 142 v S 223. Eff 3-22-89.

NOTES: *Not analogous to former 5301.56 (129 v 1040; 130 v 1247; 135 v S 267; 135 v H 1231) repealed 142 v S 223,*

eff 3-22-89.

CROSS-REFERENCES TO RELATED STATUTES

Direct and reverse indexes, *RC § 317.18.*
Notice index, *RC § 317.20.1.*
Records to be kept by county recorder, *RC § 317.08.*
Sectional indexes, *RC § 317.20.*

TEXT DISCUSSION

Bar title tandards. *Ohio Real Estate § 4.09*
Marketable Title Act. *Ohio Real Estate § 5.01*

RESEARCH AIDS

Termination of mineral interests:
O-Jur3d: Mines § 5; O-Jur3d: Refer § 61