

IN THE SUPREME COURT OF THE STATE OF OHIO

WAYNE K. LIPPERMAN, : **Case No. 2015-0121**
: :
Appellant, : **Appeal from the Court of Appeals**
: **for the Seventh Appellate District**
vs. : :
: :
NILE E. BATMAN, et al., : **Court of Appeals**
: **Case No.: 14-BE-2**
Appellees. : :

APPELLANT’S BRIEF IN RESPONSE TO THE BRIEFS OF RESERVE ENERGY EXPLORATION COMPANY, EQUITY OIL AND GAS FUNDS, INC, AND NILE E. BATMAN AND KATHRYN BATMAN, PHILLIPS EXPLORATION AND XTO ENERGY, INC.

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Statement of Facts

Appellant has set forth his statement of facts in the Merit Brief, as the facts of this case are not disputed, Appellant will not repeat the facts here.

Argument

Proposition of Law No. 2: The act of recording an out-of-state Will is not a title transaction.

The issue before the Court on this Appeal is whether the act of recording an out of state will is or is not a title transaction. The Briefs filed by the Appellees do not give this court any reason to find that a recording of the will of Frances Batman was a title transaction.

Appellant has set forth the proposition in his merit brief that if done in accordance with Ohio law by taking the appropriate actions, the filing of an out of state will which would identify real estate which the testator was bequeathing by will could be classified as a title transaction. But the mere filing of a descendant's Will with no additional method of identifying what if any real estate the decedent owned at death cannot, standing alone, constitute a title transaction. Under the arguments set forth in Appellees' brief, a will such as the one filed in this case which bequeaths "all title and interest in real property," constitutes a title transaction even if the decedent owned no real property at the time of death. To affect a title in real estate, as required by ORC §5301.47, a decedent's will must specifically identify the property to be transferred for the world to have notice of its transfer upon recording.

Appellees then quote Heifner v. Bradford, 4 Ohio State 3rd 49 (1983), for the proposition that under Ohio well settled law, the filing of the Batman Will alone accomplished a transfer of the real property. Appellees are misstating what this case stands for. The Heifer case, Supra, does not

stand for the proposition that the act of simply filing a Will is sufficient to transfer an interest in the real estate.

In the *Heifner* case, Supra, the Court set forth that not only was an authenticated copy of the Will Filed, but additional documentation was filed to notice the transfer.

“An authenticated copy of Elvira Sprague’s will was filed in Muskingum County in 1957. In accordance with the terms of the will, an affidavit of transfer was filed and recorded in Muskingum County evidencing the transfer of the oil and gas rights by inheritance from Elvira Sprague to her daughters.”

In the Briefs of Appellees it is claimed that the Appellants admitted that that the filing of a Will is a title transaction. This is a misrepresentation of what the Appellant argued, Under Section A., of Appellant’s Merit Brief, the Appellant set forth his argument as to why the filing of the Frances Batmen Will in this case did not constitute a title transaction. The citation of *Union Sav. Bank & Trust Co. v. Baltimore & Ohio Southwestern R.R.*, 7 Ohio N.P. (M-S) 497 (1908) explains why the Will in this case did not meet the requirement to be a title transaction under the Marketable Title Act, of which the dormant Mineral Act is a part. Furthermore, that case established that once a Will is probated, then the transfer of the title is effective from the date of death of the Testator.

The Appellees also cites *Riddell v. Layman*, 5th Dist. Licking, No. 94 CA 114, 1995 Ohio App. LEXIS 6121, to support their position. However, that case was criticized by *Dodd v. Croskey*, 7th Dist. Harrison, 2013 Ohio App. LEXIS 4475, which supports Appellants position in this case as set forth in his Merit Brief that to be considered a title transaction, the mineral interest must be the “subject of” that transaction. *Id* at 48. The 7th District found that *Riddell* did not define what constituted a title transaction, finding:

“The common definition of the word "subject" is topic of interest, primary theme or basis for action. Webster's II New Riverside University Dictionary 1153 (1984). Under this definition the mineral interests are not the "subject of" the title transaction. Under this definition the mineral interests are not the "subject of" the title transaction. Here, the primary purpose of the title transaction is the sale of surface rights. While the deed does mention the oil and gas reservations, the deed does not transfer those rights.” *Id.* At 48.

In fact, Appellees Reserve Energy Exploration and Equity Oil and Gas agreed in their reply brief that the holder of a mineral interest records a document with the county recorder to put third parties on notice of the existence of a title transactions (see Appellees Brief, Page 9). The Will of Frances Batman was not drafted in a manner in which addresses the real estate as the subject of the document, in fact there is no specific reference to any parcel or mineral interest. A general statement in a will “that any property I may own at the time of my death” is not sufficient for the purposes of transferring by recording a copy of the Will in the county recorder’s office as there must be some way to identify the property. In this case, additional action was required of the executor of the Will to transfer any interest the testator owned at the time of her death. Therefore, standing alone it did not serve as notice of a claim to any interest which it is purported to affect.

Appellees argue that Batman was not required to file a certificate of transfer by Ohio Law. It is the position of the Appellant that it was necessary in this case as the will was not sufficient to effectuate a transfer for the reasons set forth above. If Nile Batman intended his filing to be a title transaction that is exactly could have done.

Appellees argues that Appellant is raising new issues for the first time before this Court. That is simply not the case. The Appellant has consistently argued from the time of the filing of his Motion for Summary Judgment, and the Motion for Summary Judgment filed by Appellees Reserve Energy and Equity Oil and Gas, and in his pleadings before the Court of Appeals, that the

filing of the Batman Will was not a title transaction within the meaning of the Marketable Title Act. Since this appeal does not turn on a factual issue, but rather question of law, this court has a complete and independent power of review. First Energy Corp. v. PUC, 95 Ohio St. 3d 401, (June 5, 2002).

Ordinarily, reviewing Courts do not consider questions not presented to the court whose judgment is sought to be reversed." Goldberg v. Indus. Comm. (1936), 131 Ohio St. 399, 404, 6 Ohio Op. 108, 110, 3 N.E.2d 364, 367. There are no new issues raised by Appellant in this appeal. Appellant has responded to the arguments set forth by Appellees at the trial court and Court of Appeals by setting forth his argument in support of Proposition of Law 2.

A Brief has also been filed in this Court by the Batman Appellees. It should be noted that the Batman's never responded to Appellant's Motion for Summary Judgment in the Common Pleas Court, nor did they file a Motion for Summary Judgment in the Common Pleas Court. Furthermore, they did not file a brief or make an appearance before the Court of Appeals. While the argument can be made that Batman's waive any argument before this Court due to their failure to oppose Appellant's Summary Judgment Brief at the Trial Court, level Appellant will respond to the argument put forth by the Batman's.

First, the Batman's claim that Appellant did not raise "issues" in the trial or Appellate Court, but they do not identify the issues. None the less, as previously stated, the issues of law in this case that this Court has accepted are the same issues raised by the Appellant at the trial court and appellate court level. The Appellate Court made no ruling on the issue of the will as a title transaction or the issue of standing of the defendant oil companies.

The Batman's Brief does not put forth any new arguments not already raised in the Briefs filed by the other Appellees. In fact, the argument seems to acknowledge that, for title to pass, the

Will must be probated. They argue that a Will may be filed three months after the appointment of an executor or administrator to protect against a purchase by a bona fide purchaser of property owned by the testator. This Will wasn't filed in Belmont County until seven and a half years after the death of the testator. There is no record that a fiduciary was appointed, or that an Estate was opened for Francis Batman.

The fact that this Court has not made a direct decision on this particular issue seems to be ignored as certain cases are cited in the Reply Briefs which do not apply to this issue. In Ohio N. Univ. v. Ramga, No 2-88-1, 3rd Dist. Auglaize, No. 2-88-1, 1990 Ohio App. LEXIS 2946 (July 12, 1990), the Court refers to the admission to probate of a Will, not the mere filing of the Will. In this case, the will was filed, but there was no probate proceeding. The Appellants agree that it is not necessary to file a certificate of transfer in all situations, it was necessary in this case as the Will made no identifying reference to the ownership of an interest in the minerals at issue in this case. Therefore, in this case, if the Batman heirs wanted to create a title of record, then a Certificate of Transfer was required. There was no record of a transfer of title in this case, but had Batman identified the real estate of the testator by a Certificate of Transfer this case would not be before the Court. Without the Certificate of Transfer, there was no title transaction.

Proposition of Law No. 3: XTO Energy, Inc. and Phillips Exploration, Inc. have no standing to appear in this case.

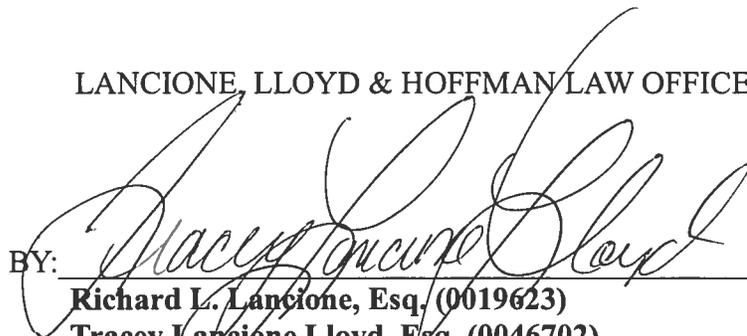
Appellant has consistently put forth the argument that Reserve Energy Exploration and its successors did not have standing with regard the issue of the ownership of the mineral interest as the issue of the ownership of the minerals did not affect the leasehold interest as both Batman and Lipperman signed same lease with Reserve Energy. In fact on July, 21, 2015, XTO moved this court for an order to dismiss them from the litigation, which this court denied. Appellant believes

that the leasehold interest holder lacked standing to bring the motion for summary judgement on the in the issue of the ownership of the mineral interest. As successors in interest to Reserve Energy, and owners of the leasehold at the time this litigation was in initiated, Appellee referred to those companies in its petition to the court.

Conclusion

The Appellate restates his request that the Court determine that the recording of the out of state will of Frances Batman was not a title transaction and that XTO Energy and Phillips Exploration have no standing to appear in this case as successors to Reserve Energy Exploration as it lacked standing to file a motion on the issue of the ownership of the mineral interest.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **APPLLEANT’S RESPONSE BRIEF**, was filed by electronic mail with the Court and also served by U.S. mail, this 27TH Day of October, 2015, upon the following:

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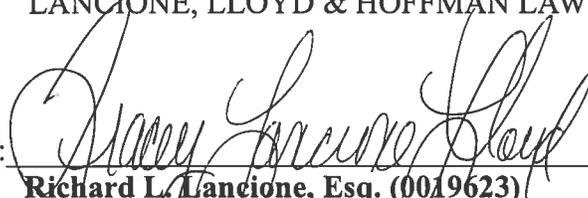
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