

IN THE SUPREME COURT OF OHIO

THOMAS DUNDICS, ET AL.) CASE NO.: _____
)
Plaintiffs-Appellants)
)
v.) On Appeal from the Mahoning County Court of
) Appeals, Seventh Appellate District
)
ERIC PETROLEUM CORP., ET AL.)
) Appellate Case No.: 2015 MA 156
Defendants-Appellees) Trial Case No.: 2014 CV 2981
)
)

APPELLANTS' MEMORANDUM IN SUPPORT OF JURISDICTION

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I. EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC INTEREST OR GREAT GENERAL INTEREST

In *Dundics v. Eric Petro. Corp.*, 7th Dist. Mahoning No. 15MA0156, 2017-Ohio-640 (Feb. 17, 2017), the Seventh District Court of Appeals held, for the first time by any Ohio appellate level court, that Ohio's oil and gas land professionals must obtain ostensibly pointless real estate brokering licenses pursuant to R.C. 4735.01 *et. seq.* This decision violates clear Ohio policy by increasing the costs and regulations associated with oil and gas development in Ohio. This decision failed to recognize the nature of Ohio's real estate licensing system, as well as the distinction between the services performed by traditional real estate brokers and oil and gas land professionals. It also failed to properly consider the complicated history in Ohio relating to how oil and gas leases are categorized depending on the legal issue involved. Consequently, the lower court's decision has the potential to effectively eliminate the entire profession of oil and gas professionals in Ohio or force them all to either become regular employees of oil development companies or licensed real estate brokers. This is an issue of first impression for this Court, the federal district courts in Ohio have split on the issue, and it is in the public interest that this Court take up this matter and find that oil and gas land professionals do not need to be licensed real estate brokers.

Furthermore, the lower court's decision failed to recognize any type of fraud exception to R.C. 4735.21's requirement of obtaining a real estate brokers' license. Ohio courts have a long history of refusing to allow wrongdoers to use the laws to shield their fraudulent activities. For that reason, courts have carved out fraud exceptions in the common law to statutes and legal doctrines. The Statute of Frauds, for instance, contains no explicit fraud exception, however, Ohio has long recognized a fraud exception to the statute to prevent wrongdoers from using the Statute of Frauds as a means to perpetuate fraud. A similar fraud exception should be

implemented to R.C. 4735.21 so that Ohio courts can continue to protect the public from would be fraudsters, like the Defendants-Appellees in this case, who would try to use R.C. 4735.21 to their unfair advantage.

Despite explicit evidence of fraudulent behavior, the Court of Appeals upheld the trial court's judgment entry granting the Defendants-Appellees' Civ. R. 12(B) motion to dismiss on the grounds that R.C. 4735.21 barred any claims including fraud. In affirming the dismissal of the appellant's claim, and thus refusing to recognize a fraud exception to the licensing requirement of real estate brokers, the lower court's decision establishes a precedent that could potentially encourage fraudulent behavior to the exploitation of independent oil and gas land professionals. The procedural posture of the dismissal means that no discovery was taken. Thus no matter how egregious the fraud, the Seventh District has given a pass to it if the fraud is perpetrated on unsuspecting independent oil and gas professionals acting in good faith but without a real estate broker's license.

Based on the foregoing, this Honorable Court should accept jurisdiction for two important reasons. First, Ohio's oil and gas land professionals do not engage in traditional real estate services, and they should therefore not be bound by Ohio's cumbersome real estate licensing rules and regulations which: (1) do not appear to have been intended to cover independent oil and gas land professionals, and (2) do not appear to provide any material level of protection needed by the oil and gas development companies retaining the services of these professionals. Second, even if this Court determines that Ohio's oil and gas land professionals should be bound by the real estate broker licensing statutes and regulations, then it is of paramount importance that this Court recognizes a fraud exception to R.C. 4735.21 to prevent

fraudulent exploitation of Ohio's oil and gas land professionals. For these reasons, this Honorable Court should accept jurisdiction in this case.

II. STATEMENT OF THE CASE AND FACTS

A. Summary of Facts

Appellant Thomas Dundics ("Dundics") is an engineer with extensive experience in the oil and gas industry who contracted with Appellee, Eric Petroleum Corp. and Bruce Brocker its owner and president (collectively "Brocker") to find suitable acreage for oil and gas development and production, assist Brocker, the oil and gas developer, in the negotiation of oil and gas leases, and analyze the value of acreage to be leased. In July of 2010, Dundics and Brocker orally agreed that Dundics would perform the above-described services and, in consideration therefore, Brocker would compensate Dundics with approximately \$10.00 per acre for lease acreage found and leased and a one-percent (1%) overriding working interest in all oil and gas wells placed on, unitized, or pooled with the leased acreage.

Dundics proceeded to use his expertise to investigate and locate acreage with valuable oil and gas development potential that has subsequently been leased by Brocker, making Brocker a very large amount of money the exact amount of which is not determinable because this action was dismissed before discovery took place. Brocker performed his obligations pursuant to the agreement only on a de minimis basis and paid Dundics a relatively small amount for the extremely valuable services rendered. Dundics, still not realizing he was not going to be fully compensated as agreed, even though Brocker continued to assure him that he would be, continued to help Brocker analyze and lease acreage. Brocker and Eric Petroleum, through its officers and employees, continued to meet with Dundics, approved the leased acreage Dundics analyzed for them, and then executed leases for that acreage.

The majority of work and services performed by Dundics was in his capacity as an oil and gas consultant to advise Appellees as to where and how to proceed in their strategy of obtaining oil and gas lease acreage. Dundics utilized his experience and expertise to aid Appellees in strategically seeking out the best oil and gas lease locations. The largest portion of Dundics' compensation was for work he performed in a consulting capacity to help Appellees work with two attorneys, Attorney Sebastiano and Attorney Tusek, on a large and highly profitable deal involving a large collection of oil and gas leases.

Dundics began to get nervous about all the time and energy he was investing into the above-described venture, especially in the aforementioned large and highly profitable deal. Dundics emailed Brocker multiple times to verify that Appellees would compensate Dundics for his services. To induce Dundics to continue, Brocker sent Dundics an email promising to pay him and suggesting he should be dreaming about how much Dundics was going to make rather than worry about the deal. In this particularly demonstrative email exchange, Dundics indicated that he had been working on the deal for months and the deal looks very promising. Brocker responded by telling Dundics:

Be thinking about how you want the assignment of the 1% override made out...Don't worry, I am still planning on honoring my deal with you and I am not proposing cutting your end. I would hope that you would be very happy with the substantial payment and override coming to you should this deal get signed.

Despite unequivocally representing to Dundics that Brocker and/or Eric Petroleum would pay him, as soon as Brocker and Eric Petroleum got what they needed from Dundics and the oil and gas lease deals got signed, Brocker and Eric Petroleum refused to pay Dundics. Dundics incurred costs, leveraged personal relationships and spent time away from his engineering practice to enrich Brocker.

Dundics has demanded an accounting, payments for money due, and documentation for the one-percent (1%) overriding interest in the oil and gas wells, both those drilled and those still to be drilled, on the leased acreage or land unitized or pooled with such leased acreage analyzed and eventually obtained by Brocker with Dundics' valuable assistance. Brocker refused to compensate Dundics for his services or provide an accounting. Appellees are sophisticated with in-house counsel and it is believed that discovery will show that Appellees intended from the very beginning to use R.C. 4735.21 to unjustly avoid payment. The trial court and Seventh District Court of Appeals' decisions, if allowed to stand, would allow Brocker to reap substantial benefit by defrauding Dundics.

B. Summary of Procedural History

Based on the foregoing, Dundics filed a complaint against Brocker on November 14, 2014 asserting claims for breach of contract, conversion, fraud, unjust enrichment, and quantum meruit. Brocker filed a Motion to Dismiss Dundics' claims on January 28, 2015 on the grounds that Appellants' claims were barred by R.C. 4735.21 because Dundics did not have a real estate broker's license. Dundics filed an opposition brief with an alternative motion for leave to amend his complaint on March 13, 2015.

The Magistrate granted Brocker's Motion to Dismiss on May 27, 2015. Dundics timely filed objections to the Magistrate's Decision on June 17, 2015. Dundics also filed a motion for leave to supplement the objections with new information on August 6, 2015 and Dundics included in this filing a proposed Amended Complaint. The delay in filing the new information was tied to Dundics' serious medical conditions including a stroke which hindered his ability to communicate with counsel. The trial court overruled Dundics' objections to the Magistrate's Decision and did not rule on Appellants' motion for leave to supplement Appellants' objections.

Appellants filed their Notice of Appeal to the Seventh District Court of Appeals on September 9, 2015. The parties submitted briefs and proceeded to oral argument on August 12, 2016. The Seventh District Court of Appeals affirmed the trial court's decision granting Appellee's Motion to Dismiss.

III. LAW AND ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Appellants set forth two propositions of law to support their averment that this Honorable Court should accept jurisdiction. First, Ohio's oil and gas land professionals do not engage in traditional real estate broker/agent services, and they should therefore not be required to obtain a real estate brokers' license to ply their trade for sophisticated oil and gas development businesses. Second, even if this Court determines that Ohio's oil and gas professionals should be bound by the real estate broker/agent licensing statute, then it is of paramount importance that this Court recognize a fraud exception to prevent predatory, fraudulent behavior against unsuspecting oil and gas land professionals. For these reasons, justice requires that this Court accept jurisdiction in this case.

- A. Proposition of Law No. 1: Oil and gas land professionals, who help obtain oil and gas leases mostly for sophisticated oil and gas development businesses, should not be required to be licensed real estate brokers. Ohio's statutory licensing requirements for real estate brokers, set forth in R.C. 4735.01 *et seq.*, were not intended to cover oil and gas land professionals, because they perform substantially different services than residential or commercial real estate agents and their activity is limited to a very small, specific area relative to real estate rights.**

The lower court's decision, holding that oil and gas land professionals are not entitled to any payment for their services unless they are licensed real estate brokers or agents, could lead to the abolition of the profession in Ohio, or it could substantially increase the costs of oil and gas development. Such a result can be avoided if this Court accepts jurisdiction and reverses the lower court's decision.

Importantly, while this Honorable Court has held that oil and gas leases constitute “real estate” under Ohio’s Dormant Mineral Rights Act, *see Chesapeake Exploration, L.L.C. v. Buell*, 144 Ohio St. 3d 490 (2014), neither this Court, nor any other appellate court in Ohio, has explicitly held that oil and gas leases constitute “real estate” under R.C. 4735.01, *et. seq.* The Federal District Courts for Ohio’s Northern and Southern Districts have debated whether oil and gas leases are “real estate” under this statute, or whether they are different and unique compared to other interests in real estate, and they have split on the decision. *Compare Wellington Resource Group, LLC v. Beck Energy Corp.*, 975 F. Supp. 2d 833 (S.D. Ohio 2013) (holding that R.C. 4735.21’s requirement for a real estate broker’s license did not apply to oil and gas leases); *with Binder v. Trinity OG Land Dev. & Exploration, LLC*, N.D. Ohio No. 4:11-cv-02621, 2012 U.S. Dist. Lexis 76183, (May 31, 2012) (holding that one who engages in the brokering of oil and gas leases is subject to the provisions of R.C. 4735.21).

In the case at bar, the Seventh District Court of Appeals weighed these competing cases, as well as the progeny of case law relied upon by both courts, and interpreted R.C. 4735.01(B)’s definition as broadly as possible:

...we return to the language of R.C. 4735.01(B)'s definition of ‘real estate.’ Real estate ‘includes leaseholds as well as any and every interest or estate in land.’ Buell reminds us that the Ohio Supreme Court has ‘long held that the use of the term ‘any’ in a phrase encompasses ‘every’ and ‘all’ examples of the subject described.’ Further, the word ‘includes’ indicates a partial list. This definition includes the various descriptions and explanations discussed above. Whether described as licenses, leases, fee simple determinable estates, or something else, any instrument affecting oil and gas necessarily affects the surface rights as well, either in terms of the right to access the surface for transportation, drilling, etc., or because it affects the value of the surface rights, it falls under the definition of ‘real estate.’ **Thus, to engage in any of the activities alleged here for compensation, one must have a broker's license.**

(*Dundics* at ¶ 23, internal citations omitted, emphasis added).

This broad and sweeping analysis may lead to the abolition of the profession of oil and gas land professionals in Ohio or force them all to either become regular employees of oil development companies or expend time and resources to obtain the ostensibly pointless license. As noted by *Amicus Curiae* in their merit brief filed in the Seventh District Court of Appeals, the approximately 450 members of the American Association of Professional Landmen in Ohio (which would only be a fraction of the affected population) simply do not engage in the same type of business as real estate brokers and their livelihoods would be put in jeopardy.

The Seventh District's analysis both stretches the ruling in of this Court in *Buell* beyond anything this Court would have intended and takes an overly facile view of courts' duty to interpret statutes. An objective reading of R.C. 4735.01 in light of the common law as developed in Ohio with respect to the nature of the interest created by oil and gas leases demonstrates that the statute is ambiguous.

Whether oil and gas leases constitute interests in real estate for the purposes of R.C. 4735.21 is subject to substantial doubt based on the Ohio's history of inconsistent treatment of oil and gas leases, and, as such, this Court should undertake efforts of statutory interpretation of R.C. 4735.21. As this Court has made clear regarding statutory language, "if the words [are] free from ambiguity **and doubt**, and express plainly, clearly, and distinctly the sense of the lawmaking body, there is no occasion to resort to other means of interpretation." *Risner v. Ohio Dept. of Natural Resources*, Ohio Div. of Wildlife, 144 Ohio St. 3d 278, 42 N.E. 3d 718 (2015), ¶12, emphasis added, quoting *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N.E. 574 (1902), ¶2 of the syllabus. The Court is also to presume that the legislature "knows the existing condition of the law, whether common law *** or statute law." *Wachendorf v. Shaver*, 149 Ohio St. 231, 248, 78 N.E. 2d 370 (1948), citing *State ex rel. Morris v. Sullivan*, 81 Ohio St. 79, 90 N.E. 146 (1909).

This Court has made clear that “[t]he General Assembly is not presumed to do a vane or useless thing and *** when language is inserted in a statute that is inserted to accomplish some definitive purpose.” *State v. Wilson*, 77 Ohio St. 3d 334, 336, 673 N.E. 2d 1347 (1997), quoting *State, ex rel. Cleveland Elec. Illum. Co. v. Euclid*, 169 Ohio St. 476, 479, 159 N.E. 2d 756 (1959).

When one views the nature and context of how Ohio has treated the property interest created by an oil and gas lease it is not disputed that it has been treated inconsistently throughout the course of Ohio’s legal history. The court in *Buell* acknowledged the idiosyncratic nature of oil and gas leases stating:

There is no question that oil and gas leases are unique, as they “seemingly straddle the line between property and contract: they are neither residential leases nor commercial contracts for the sale of goods.” Keeling & Gillespie, *The First Marketable Product Doctrine: Just What is the “Product”*, 37 St. Mary’s L.J. 1, 6 (2005). Oil and gas leases are unusual in that they are not technically leases at all.” Richardson, 46 Akron L. Rev. at 1144.

Id. at ¶41. The apparent inconsistency was even acknowledged by the Seventh District Court of Appeals in the decision below in observing that on their face this Court’s rulings in *Harris v. Ohio Oil Co.*, 57 Ohio St. 118, 48 N.E. 502 (1897) and *Back v. Ohio Feul Gas Co.*, 168 Ohio St. 81, 113 N.E. 2d 865 (1953) have had the appearance of conflict. *Ibis* at ¶ 17.

Indeed, the ambiguity in Ohio law was enough to cause a split in the two federal district courts in Ohio. As even further evidence of the ambiguity, the General Assembly amended a different section of the Revised Code, R.C. 5301.09, to clarify that for that particular section of the code they definitely did intend oil and gas leases to be considered interests in real estate. However, despite knowledge of the lack of clarity and its assumed knowledge of the court’s decision in *Wellington*, the General Assembly chose not to similarly amend R.C. 4735.01. Under the presumption that the General Assembly’s actions are to accomplish a definitive

purpose in full knowledge of existing common law, the simplest conclusion is that the General Assembly acknowledged the ambiguity created by oil and gas lease interests and chose to clarify in R.C. 5301.09, but not in R.C. 4735.01. In this context, R.C. 4735.01 is ambiguous and to the extent that legislative history of recent times is to be considered, it appears that the General Assembly did not intend for oil and gas leases to be considered interest in real estate for the purposes of R.C. 4735.01 and 4735.21.

Further indicia exists that the General Assembly did not intend for oil and gas leases to be considered interests in real estate for the purposes of R.C. 4735.01, *et seq.* as set forth herein below. In recognition of the fact that Ohio's landmen engage in separate and distinct services compared to real estate brokers, Ohio's General Assembly proposed legislation in 2012 seeking "to establish requirements governing oil and gas land professionals." 2011 H.B. No. 493. This legislation would have given the Chief of the Ohio Division of Oil and Gas Resources Management the authority to regulate "land professionals" and would have required landmen to register with the state. While this legislation did not pass, it evidenced the General Assembly's understanding that landmen performed services that were separate and distinct from the traditional real estate services performed by real estate brokers. The court in *Wellington, supra*, made a similar observation.

Imposing the requirements of R.C. 4735.01, *et seq.* on the oil and gas industry violates Ohio's public policy. With respect to the General Assembly's efforts to regulate the oil and gas industry, this Court has observed that it is "the public policy of the state of Ohio to encourage oil and gas production when the extraction of those resources can be accomplished without undue threat of harm to the health, safety and welfare of the citizens of Ohio." *Newbury Township Bd. of Township Trustees v. Lomak Petroleum*, 62 Ohio St. 3d 387, 389 583 N.E. 2d 302, 304

(1992). This Court further stated that “[t]o further this policy and to ensure some degree of uniformity throughout the state, local regulation of some aspects of oil and gas well exploration and development is preempted by the statutory plan embodied in R.C. Chapter 1509.” *Id.* Imposing additional regulations on the oil and gas industry by judicial fiat as the Seventh District has done is not conducive to Ohio’s public policy or the regulatory scheme that the General Assembly has already erected to govern the industry and serves only to benefit unscrupulous oil and gas development companies. This Court should stop this “loophole” for unfair and unjust enrichment and find that the unnecessary increased regulations and costs associated with requiring oil and gas land professionals to become licensed real estate brokers is improper and that R.C. 4735.01 *et seq.* does not and was never intended to apply to oil and gas land professionals.

B. Proposition of Law No. 2: This Court should recognize a fraud exception to R.C. 4735.21, which bars claims for compensation for certain services unless the claimant can show that they have a real estate broker’s license, to prevent predatory and fraudulent behavior.

This Court should recognize a fraud exception to R.C. 4735.21 to ensure that other oil and gas developers do not take advantage of Ohio’s oil and gas land professionals, most of whom would never suspect they might need to have an ostensibly pointless real estate broker’s license. Courts have made exceptions for fraud to multiple legal defenses to assure that a person cannot profit from intentional and malicious wrongdoing or use the law to help perpetrate fraud, and this Court should similarly hold that such an exception should be recognized under R.C. 4735.01, *et. seq.*

This Court has repeatedly recognized fraud exceptions to prevent similar injustice. For example, courts have implied an exception for fraud into R.C. 1335.05, the Statute of Frauds. Indeed this is a longstanding bedrock of Ohio common law as stated by this Court, “[t]he fraud

against which equity will grant relief, notwithstanding the statute of frauds, consists in the refusal to perform an agreement upon the faith of which the plaintiff has been misled to his injury, or the defendant has secured an unconscionable advantage...”. *Watson v. Erb*, 33 Ohio St. 35, (1877) syllabus ¶ 1. In *Wilson Floors Co. v. Sciota Park, Ltd.*, 54 Ohio St. 2d 451, 460, 377 N.E. 2d 514, 523 (1978), this court found an oral agreement enforceable despite the fact that it ran afoul of the statute of frauds, because it recognized that applying the statute of frauds would “effectuate a wrong.” The statute of frauds, R.C. 1335.05, which begins with similar language as R.C. 4735.21, does not explicitly contain a fraud exception, but to prevent injustice, the courts have established a fraud exception for the statute.

Courts have also made fraud exceptions to the merger by deed doctrine and the parole evidence rule. *E.g. Galmish v. Cicchini*, 90 Ohio St. 3d 22, 27, 734 N.E. 2d 782, (2000) (observing the fraud exception in the parole evidence rule); *Brumbaugh v. Chapman*, 45 Ohio St. 368, 13 N.E. 584, syllabus ¶1 (1887)(stating “in the absence of fraud or mistake, no recovery can thereafter be had upon it by the vendee of the vendor for a deficiency in the land conveyed; nor, upon the deed, unless it contains an express covenant as to the number of acres.”)

While some courts have held that an unlicensed plaintiff cannot assert a fraud claim under R.C. 4735.01, *et. seq.*, because a plaintiff cannot demonstrate that she/he is a licensed real estate broker, the Ohio Supreme Court has never held that a plaintiff is barred from asserting fraud claims when actions barred by R.C. 4735.21 are involved. It is anticipated that Eric Petroleum may argue that *Stanson, Inc. v. McDonald*, 147 Ohio St. 191, 70 N.E. 2d 359 (1946) is authority supporting the dismissal of Dundics’ fraud claim, but *Stanson* did not involve any allegations of fraud.

Dundics put forth direct evidence that Brocker brazenly defrauded Dundics by lying to Dundics about his intentions of “honoring [his] deal” and promising a “substantial payment and override” just to get Dundics to finish working on a large deal. Dundics relied on that representation to his detriment, incurring costs, leveraging relationships with friends and colleagues to get Brocker the acreage and losing time from his engineering practice. After Brocker sent the referenced email to entice Dundics to keep providing his valuable assistance to them, and as soon as Appellees got what they needed out of Dundics, they refused to pay Dundics on the grounds that he was not a licensed real estate broker. Appellees are sophisticated with in-house counsel and clearly intended all along to use the real estate broker statute to avoid paying Dundics for his valuable services which they wanted and for which they continuously negotiated.

If this Honorable Court denies jurisdiction and allows Brocker and Eric Petroleum to get away with this scheme, Brocker, Eric Petroleum, and other unscrupulous oil and gas developers will be enriched with a significant amount of ill-gotten gains at the expense of Ohio’s oil and gas land professionals. In weighing the public policy issues involved in dismissing Dundics’ fraud claim, this Honorable Court should grant jurisdiction and articulate a fraud exception to R.C. 4735.21.

IV. CONCLUSION

Based on the foregoing, and to protect the livelihoods of Ohio’s oil and gas land professionals, as well as to ensure that Ohioans do not have to incur the increased regulatory costs for oil and gas development associated with requiring said professionals to obtain real estate broker’s licenses, Appellants assert that this Court should accept jurisdiction in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing was mailed by ordinary U.S. mail to the following this 3rd day of April, 2017.

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