IN THE SUPREME COURT OF OHIO

David M. Blackstone, *et al.*	:	Case No. 2017-1639
	:	
Appellants	:	On Appeal from Seventh District
	:	Court of Appeals Case No. 14 MO 0001
v.	:	
	:	
Susan E. Moore, *et al.*	:	
	:	
Appellees	:	

BRIEF OF *AMICUS CURIAE* THE OHIO LAND TITLE ASSOCIATION IN SUPPORT OF APPELLANTS DAVID M. BLACKSTONE AND NICOLYN BLACKSTONE URGING REVERSAL OF THE DECISION OF THE SEVENTH DISTRICT COURT OF APPEALS

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STATEMENT OF FACTS

On April 3, 1915, Nick Kuhn and Flora Kuhn conveyed title to the surface rights in a 60 acre tract in Monroe County, Ohio to W. D. Brown by deed filed in Volume 82 Page 390 of Monroe County records on April 10, 1915 (Amd. Complaint Ex B; Opinion, 1). In that deed the Kuhns reserved to themselves a royalty interest:

> Except Nick Kuhn and Flora Kuhn, their heirs and assigns, reserve one half interest in oil and gas royalty in the above described Sixty (60) acres.

The surface rights were subsequently conveyed in 1926 and 1948. Both of those transfers included the Kuhn royalty reservation (Opinion, 1).

The surface rights were conveyed to Appellant David Blackstone in a deed filed in Volume 155 Page 329 of Monroe County Records on July 30, 1969 (Amd. Complaint Ex. D; Opinion, 2) who then transferred title to himself and his wife in survivorship (Amd. Complaint Ex. A).

On March 26, 1918, the Kuhns entered into an oil and gas lease with Ohio Fuel Supply Co. That lease was recorded in 1930 (Opinion, 1).

In 1976, Blackstone entered into an oil and gas lease with Chief Petroleum (Opinion, 2).

In 2012, the Blackstones entered into an oil and gas lease with Antero Resources Appalachian Corporation (Opinion, 2).

INTEREST OF AMICUS CURIAE

The Ohio Land Title Association ("OLTA") was founded in 1908. OLTA is a trade association representing members of the Ohio title insurance industry.

OLTA is active in the training and education of Ohio title professionals. The issues in this case are of interest to OLTA whose members rely upon the Marketable Title Act for title examinations and in underwriting title insurance policies.

The Seventh District Court of Appeals decision casts doubt on the stability of land titles and the application of the Marketable Title Act in Ohio.

LAW AND ARGUMENT

Proposition of Law #1:

> **In order to preserve a recorded interest contained in a chain of title, specific identification by a recording reference to a volume and page or instrument number for the interest sought to be preserved must be included in an instrument filed within the period outlined in R.C. § 5301.48(A)**

A. The Marketable Title Act was enacted to facilitate transactions

The Marketable Title Act ("Act") embodies rules and procedures which provide purchasers of real estate and real estate professionals with certainty regarding land titles. The Act provides a mechanism for the elimination of "ancient" interests which adversely impact real estate transactions.

At issue is the specificity required by R.C. § 5301.49(A) when a recorded instrument contains a cross reference to an interest that is beyond the statutory forty year search period found in the Act but where the information contained in the cross referencing instrument is so lacking in specifics that a purchaser cannot locate the interest without resorting to an extensive search of county records.

There is a divergence of opinions regarding that requirement in Ohio courts.

The Fifth District in *Duvall v. Hibbs,* No. CA-709, 1983 WL 6483 (5th Dist. July 8, 1983) held that the statute requires the inclusion of recording information in order for an interest to be preserved. That result is consistent with this court's decision in *Toth v. Berks Title Ins. Co.,* 6 Ohio St. 3d 338, 341, 453 N.E. 2d 639 (August 31, 1983). The Eleventh District also held that a specific reference by recording volume and page preserved a

restriction. *Blakely v. Capitan,* 34 Ohio App. 3d 46, 49, 561 N.E. 2d 248 (11th Dist. 1986) [the restriction in question was in a deed that formed the root of title].

In the Fourth District, however, the inclusion of generic information or an instrument reference meets the specificity requirement of the statute. *Patton v. Poston*, No. 1141, 1983 WL 3171, 2 (4th Dist. April 25, 1983). The Eighth District followed *Patton* in *Pinkney v. Southwick Investments, L.L.C.*, Nos. 85074, 85075, 2005-Ohio-4167, 2005 WL 1926507 ¶ 50 (8th Dist. 2005). The Seventh District also followed *Patton*, requiring generic information and a determination of whether more specific information was included in the cross reference, thus adopting the "Patton Factors".

The Ohio Land Title Association urges this Court to reverse the decision below and to hold that R.C. § 5301.49(A) requires specific identification by reference to a volume and page or instrument number to a cross referencing instrument in order to preserve that interest past the forty year search period called for in the Act.

B. R.C. § 5301.49(A) requires specific identification of an interest in order to preserve that interest

Ohio's Marketable Title Act ("Act") is codified in R.C. § 5301.47 *et seq.*

A marketable title is defined in R.C. § 5301.47(A) as:

> "a title of record, as indicated in section 5301.48 of the Revised Code, which operates to extinguish such interests and claims, existing prior to the effective date of the root of title, as are stated in section 5301.50 of the Revised Code."

"Any person having the legal capacity to own land in this state, who has an unbroken chain of title of record to any interest in land for forty years or more, has a marketable record title." R.C. § 5301.48(A).

Under the Act, a forty year search will extinguish all prior interests "subject to a few exceptions" which are set forth in R.C. § 5301.49. Simes and Taylor, *The Improvement of Conveyancing by Legislation,* (1960).

Thus, "[R]ecord marketable title shall be subject to:

> (A) All interests and defects which are inherent in the muniments of which such chain of record title is formed; provided that a general reference in such muniments, or any of them, to easements, use restrictions, or other interests created prior to the root of title shall not be sufficient to preserve them, unless specific identification be made therein of a recorded title transaction which creates such easement, use restriction, or other interest; and provided that possibilities of reverter, and rights of entry or powers of termination for breach of condition subsequent, which interests are inherent in the muniments of which such chain of record title is formed and which have existed for forty years or more, shall be preserved and kept effective only in the manner provided in section 5301.51 of the Revised Code."

R.C § 5301.49(A) (emphasis added).

Simes and Taylor confirmed the need for a specific cross reference in the Model Title Standards:

> THE FOLLOWING REFERENCES IN RECORDED INSTRUMENTS MAY BE DISREGARDED BY A PERSON WHO IS NOT A PARTY TO SUCH INSTRUMENT, AND IS NOT OTHERWISE SUBJECT TO, OR ON NOTICE OF, THE INSTRUMENT OR ON NOTICE OF, THE INSTRUMENT OR INTEREST REFERRED TO:
>
> (C) ANY REFERENCE TO A RECORDED INSTRUMENT WHICH IS NOT IN THE CHAIN OF TITLE OF SUCH PERSON, IF THE PLACE IN THE PUBLIC RECORDS TO WHICH REFERENCE IS MADE IS NOT SPECIFICALLY IDENTIFIED BY SUCH REFERENCE.

Simes & Taylor, Model Title Standards, Standard 3.4 (1960).

The requirement for "specific identification" was unnecessarily confused by the court in *Patton* which created criteria (the Patton Factors) for determining when a cross

reference is specific or general rather than simply requiring a definitive cross reference that could be easily located:

> "In construing the above quoted portion of appellants' deed, we deem such exception to be general in nature. The exception does not specify the type of mineral rights created, whether such mineral rights is an estate, profit, lease or easement. Nor does the exception specify to whom such mineral rights were originally granted or give reference to the instrument creating such interest. Under R.C. 5301.49(A), in order to be enforceable, a reference to a general interest of record must specifically identify the recorded title transaction which created such interest. In that the exception in appellants' deed fails to specifically refer to such recorded transaction, we must conclude that appellee's mineral interest is not preserved by the exception clause in appellants' 1952 deed."

Patton, 4.

The Patton Factors were adopted below with the Seventh District concluding that a cross reference contained in a recorded document is sufficiently specific if it includes: "(1) the type of mineral right created; (2) the nature of the encumbrance (an estate, profit, lease, or easement); (3) the original owner of the interest; **and** (4) whether it referenced the instrument creating the interest." *Blackstone v. Moore,* No. 14 MO 0001, 2017-Ohio-5704 ¶ 38 (7th Dist. 2017)(emphasis added).

By adopting and approving the Patton Factors, the Court below specifically rejected the result in *Duvall* which was decided two months after *Patton.* In *Duvall,* the Court held:

> "We conclude that the 'specific identification' contemplated in R.C. § 5301.49, requires sufficient reference so that a title examiner may locate the prior conveyance by going directly to the identified conveyance record in the recorder's office without checking conveyance indexes."

To further bolster the conclusion that the Patton Factors should prevail, the Seventh District referred to *Pinkney* where the Court held that general deed exceptions ("free from all encumbrances whatsoever except taxes and assessments . . .") did not preserve interests under the Act because the language did not meet the "Patton Factor" requirements:

> "The 1958 Deed exception neither identifies the recorded title transaction creating such restrictions nor specifically refers to the nature of the encumbrances created."

Pinkney ¶ 50.

The Seventh District mentioned but did not adopt the results in *Toth* and *Duvall.* The decisions in those cases should have been dispositive.

C. *Toth* and *Duvall* correctly interpreted R.C. § 5301.49(A)

A little more than a month after *Duvall* was decided and four months after *Patton,* this court held in *Toth:*

> "Plaintiff's interest in the Akron, Ohio property is subject to any use restrictions which are a part of the marketable record title of the Akron property in accord with R.C. 5301.47 to 5301.56. The only transactions which could have an effect on the Akron property are the 1928 transfer to Anna M. Camp from Henry H. Camp, the 1966 transfer by Anna M. Camp's estate and the 1974 transfer to the plaintiff. The 1928 deed had no mention of the setback use restrictions. The 1966 deed did contain a specific note which specifically referred to the setback use restrictions which are the center of this controversy."

Toth, 340.

In order to fully understand this court's decision in *Toth,* it is necessary to review the Ninth District decision because the language at issue there was identified in that decision:

> "Subject to all legal highways and are subject to restrictions on the Plat of Fairlawn Heights Allotment, Part 'B' Section 'D' and recorded in Plat Book 34, pages 75-7 of Summit County Records."
>
> And,
>
> "NOTE: The above plat shows a building line of 100 feet parallel and with the westerly line of Beck Road a building line of 60 feet parallel and with the northerly line of West Market Street for caption."

Toth v. Berks Title Insurance Co., C.A. No. 10488, 1982 WL 2693, 2 (9th Dist. 1982).

The Ninth District held that the cross reference contained in the 1966 deed to the plat volume and page, but not the 1924 deed where the restriction was created, was not sufficient to preserve the setback restriction as an encumbrance on title because the filing of the plat was not a "title transaction". This Court reversed, holding that "the setback use restrictions were specifically referred to in the 1966 deed" and that reference preserved the restrictions regardless of whether the 1924 deed was noted as having created the restrictions. Had Seventh District applied *Toth* here, the trial court decision would have been affirmed. Instead, the Court sidestepped the issue and rejected outright the result in *Duvall.*

D. R.C. § 5301.49 eliminates uncertainty in real estate transactions

Applying the Patton Factors to this case would require Mr. Blackstone to search title back to at least 1915 to find an instrument containing the Kuhn reservation, rather than to cut off his search in 1929.

Since the Act is progressive, as the years pass, the length of the Blackstone search would grow expansively under the result below. Such a requirement defeats the purpose of the Act and the stated goal of simplifying and providing certainty to land titles.

In an article discussing the Act, Allan F. Smith noted that R.C. § 5301.49(A) did away with general cross references in real estate instruments because the purpose of the Act was "to assure a reasonable title search." Smith, *The New Marketable Title Act,* 22 Ohio St. L. J. 712 (1961). Furthermore, the Act made "the job of title examination . . . easier" because "the haunting doubts which all have experienced when deciding that an ancient record defect should be passed over [could] now be eliminated." *Id.*

The Patton Factors do not eliminate uncertainty, they unnecessarily muddle the bright line test found in R.C. § 5301.49(A).

E. The Act must be liberally construed to meet the legislative purpose of simplifying real estate transactions

This Court held in *Dodd v. Croskey,* 143 Ohio St. 3d 293, 37 N.E. 3d 147, 154 (2015) that the Marketable Title Act "mandates liberal construction of its provisions. . . to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title."

That rule of construction supports the results in *Duvall* and *Toth* interpreting the "specific identification" requirement of R.C. § 5301.49(A) to require a specific document cross reference, by a volume and page or instrument number, in order to preserve an interest that is beyond the search period found in R.C. § 5301.48(A).

Conclusion

The purpose of Ohio's Marketable Title Act is to provide certainty in land titles. The requirement that a cross reference identify a specific recorded document which a purchaser or title examiner can readily locate without having to search blindly in county records provides that certainty. The Patton Factors do not.

In their work on the Model Title Standards, which this Court relied on in *Toth,* Standard 3.4 as drafted by Simes and Taylor, succinctly establishes a rule that is easily followed. Thus, any reference to a recorded instrument which is not in the chain of title for the subject property must include the place in the public records to which a cross reference is made in order to preserve that interest. Identifying a document by volume and page or instrument number satisfies the "place in the public records" where the reference is located.

Respectfully, therefore, The Ohio Land Title Association urges this Court to reverse the decision of the Seventh District Court of Appeals and hold that R.C. § 5301.4(A) requires a specific cross reference to recording information locatable in the public records by volume and page or instrument number, in order for an ancient interest to be preserved.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

A true and exact copy of the foregoing Brief of *Amicus Curiae* The Ohio Land Title Association was served by regular US Mail this 26th day of April, 2018, postage pre-paid as follows:

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