[Cite as *Carney v. Shockley,* 2014-Ohio-5830.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

TODD CARNEY,	)	
	)	CASE NO. 14 JE 9
PLAINTIFF-APPELLEE,	)	
	)	
VS.	)	O P I N I O N
	)	
RONNIE LEE SHOCKLEY, et al.,	)	
	)	
DEFENDANTS-APPELLANTS.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Case No. 12CV514.

JUDGMENT: Affirmed.

JUDGES:
Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: December 29, 2014

APPEARANCES:

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VUKOVICH, J.

{¶1} Defendants-appellants Mary Katherine Kerns and Beverly Lamotte appeal the decision of the Jefferson County Common Pleas Court granting summary judgment in favor of plaintiff-appellee Todd Carney, finding that appellants' mineral interests were abandoned. Appellants contend that the 1989 Dormant Mineral Act can no longer be applied after the 2006 amendments and ask that we reconsider our decision in *Walker v. Shondrick-Nau*, 7th Dist. No. 13NO402, 2014-Ohio-1499 and subsequent decisions reiterating that position. We maintain our prior rulings that the 1989 DMA can still be used to formalize prior abandonments. Appellants' conditional argument under the 2006 DMA is thereby rendered moot and was never reached by the trial court in any event. Therefore, the judgment of the trial court finding abandonment under the 1989 DMA is affirmed.

STATEMENT OF THE CASE

{¶2} In October of 2012, Todd Carney filed a complaint seeking to reunite the minerals underlying his 45 acres in Jefferson County with the surface of said land. Half of the minerals rights were held by Ronnie Lee and Bonnie Sue Shockley, who are the appellants in *Carney v. Shockley*, 7th Dist. No. 14JE8.[1] The other half of the minerals rights were held by Mary Katherine Kerns and Beverly Lamotte, the appellants in this case. These latter minerals were first severed in a 1951 deed.

{¶3} According to the stipulations of fact, no mineral events occurred thereafter until after Carney published a November 4, 2011 notice of intent to have the minerals declared abandoned under the 2006 DMA. Specifically, on December 22, 2011, Kerns and Lamotte filed separate claims to preserve their joint one-half mineral interest. Carney's complaint sought to declare this one-half of the minerals abandoned both under the 1989 DMA (as there were no savings events during any

[1]Upon request, the two cases were initially consolidated. However, two separate appellant briefs were filed, the minerals were reserved at different times resulting in different theories, the issues raised by the two sets of appellants are different, and the Ohio Attorney General is only involved in the Shockleys' case and is not involved in this appeal. More specifically, the reservation date in the Shockleys' case resulted in a rolling look-back argument that is not involved in this case as the appellants herein did not even have an event in the initial look-back period. We are therefore deconsolidating the cases and issuing separate appellate opinions.

possible look-back period of that act) and under the 2006 DMA (arguing that a post-notice claim to preserve is not akin to a savings event).

{¶4} Kerns and Lamotte filed a motion for summary judgment. They argued that they properly preserved their mineral interest under the 2006 DMA by filing a post-notice claim to preserve. As to the 1989 DMA, they urged that this version of the statute has not been in effect since 2006, noting that the DMA was amended in order to mandate pre-abandonment notice and to specify the date from which the twenty years is measured.

{¶5} They urged that although amendment will not generally affect the prior operation of a statute, if the amended version imposes a lesser burden, then the current version applies, citing R.C. 1.58(B) and arguing that the 2006 DMA reduced the forfeiture and thus forfeiture can only occur under the amended act. It was also argued that in actions commenced after amendment of a statute that relates to the relief being sought, the amended statute is applicable in the absence of a contrary expression of intent in the amendment; because the 2006 DMA contained no language that rights under the prior version remained, it was urged that the legislature made clear its intent that abandonments under the old law can no longer be declared.

{¶6} Carney filed a response and his own motion for summary judgment. He urged that the 2006 DMA did not undo what was already done under the 1989 DMA as the 2006 DMA contained no language expressly making it retrospective and thus it is prospective only. Carney noted that Kerns and Lamotte were improperly trying to invert the rule by their claim that the silence of the 2006 DMA as to the continued application of the 1989 DMA meant the 2006 DMA governs. It was also suggested that the reason the legislature did not make an expression of retroactivity was in order to ensure constitutionality because the amendment was not merely remedial but was substantive (as it would take away a vested right).

{¶7} Carney explained that he was merely asking the court to recognize what already occurred while the 1989 DMA was in effect. He stated that the 1989 DMA was self-executing and that the mineral interest was deemed abandoned with ownership automatically vesting in the surface owner if there was no activity within the look-back period. He noted how the United States Supreme Court in *Texaco* expressed that it

was important to recognize the distinction between the self-executing feature of the statute and a subsequent judicial determination that a particular lapse did occur. He cited the various trial court cases ruling that the 1989 DMA can still be utilized to determine if minerals were previously abandoned.

{¶8} Carney thus urged that the issue of whether there was a subsequent abandonment under the 2006 DMA need not be reached because the minerals had already been abandoned under the 1989 DMA. He then posited that even if the court disagreed with the 1989 abandonment claim and had to reach the 2006 DMA, the post-notice claim to preserve did not save the minerals from abandonment, claiming the new procedure merely prevented a county recorder from filing a unilateral notice of abandonment and gave the mineral holder the right to prove there was in fact a prior savings event.

{¶9} On November 4, 2013, the trial court granted Carney's motion for summary judgment and denied the motion filed by Kerns and Lamotte. The court held that the 1989 DMA operated automatically to abandon a severed mineral interest if, at any time prior to the 2006 amendments, there existed a twenty-year period during which the mineral interest was dormant, i.e. was not subject to a savings event. The court concluded that the mineral interest was abandoned and vested in the surface owner as of March 22, 1992 (after the three-year grace period ended) as there had been no savings events after the original 1951 reservation. As abandonment occurred under the 1989 DMA, the court ruled that the December 2011 recorded claims to preserve were null and void and should be stricken.

{¶10} The court explained that its decision was dependent on a remaining claim presented by the Shockleys and allowed the parties to submit further motions. The other parties and an intervening Ohio Attorney General then submitted motions on the remaining issue concerning the constitutionality of a rolling look-back period, which issue did not concern Kerns and Lamotte. The court's February 28, 2014 judgment upholding the rolling look-back period disposed of all parties and claims and made the November 4, 2013 entry final, and Kerns and Lamotte then filed the within appeal.

DORMANT MINERAL ACT

{¶11} The 1989 Dormant Mineral Act became effective on March 22, 1989 in R.C. 5301.56 as an addition to the Ohio Marketable Title Act, which is contained within R.C. 5301.47 through R.C. 5301.56. The 1989 DMA provides that a mineral interest held by one other than the surface owner "shall be deemed abandoned and vested in the owner of the surface" if no savings event occurred within the preceding twenty years. R.C. 5301.56(B)(1)(c) (unless the mineral interest is (a) in coal or (b) held by the government).

{¶12} The six savings events are as follows: (i) the mineral interest was the subject of a title transaction that has been filed or recorded in the recorder's office, (ii) there was actual production or withdrawal by the holder, (iii) the holder used the mineral interest for underground gas storage; (iv) a mining permit has been issued to the holder; (v) a claim to preserve the mineral interest was filed; or (vi) a separately listed tax parcel number was created. R.C. 5301.56(B)(1)(c)(i)-(vi).

{¶13} The statute provided the following grace period: "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." R.C. 5301.56(B)(2). There were no obligations placed upon the surface owner prior to the statutory abandonment and vesting.

{¶14} On June 30, 2006, amendments to the DMA became effective. No grace period was provided. The language in division (B), "shall be deemed abandoned and vested in the owner of the surface," now operates only if none of the savings events apply **and** "if the requirements established in division (E) of this section are satisfied." R.C. 5301.56(B).

{¶15} "Before a mineral interest becomes vested under division (B) of this section in the owner of the surface of the lands subject to the interest," the surface owner shall provide a specific notice and file a timely affidavit of abandonment with the county recorder. R.C. 5301.56(E). *See also* R.C. 5301.56(E)(1) (notice by certified mail return receipt requested to each holder or each holder's successors or assignees, at the last known address, but if service of notice cannot be completed to any holder, then notice by publication), (E)(2) (affidavit of abandonment must be filed at least 30

but not later than 60 days after date notice is served or published), (F), (G) (specifying what the notice and affidavit must contain). In addition, the new twenty-year period for finding abandonment looks back from the date of this notice.

{¶16} The 2006 DMA also adds that a mineral holder who claims an interest has not been abandoned may file with the recorder: (a) a claim to preserve or (b) an affidavit containing a savings event within 60 days after the notice of abandonment is served or published. R.C. 5301.56(H)(1). This court has interpreted this to mean that a post-notice claim to preserve acts as savings event itself. *See Dodd v. Croskey*, 7th Dist. No. 12HA6, 2013-Ohio-4257 (appeal pending in Supreme Court).

{¶17} If no such timely document is recorded, then the surface owner "who is seeking to have the interest deemed abandoned and vested in the owner" shall file with the recorder a notice of the failure to file. R.C. 5301.56(H)(2) (was called memorialization; changed to "notice of failure to file" on January 31, 2014). "Immediately after" such recording, "the mineral interest shall vest in the owner of the surface * * *." *Id.*

ASSIGNMENTS OF ERROR

{¶18} Appellants set forth the following two assignments of error:

{¶19} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR PLAINTIFF-APPELLEE."

{¶20} "THE TRIAL COURT ERRED IN NOT GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS-APPELLANTS."

{¶21} Appellants disagree with our decision in *Walker* that abandonments which took place under the 1989 DMA can still be formalized. Although not all properties involve abandonment under the 1989 DMA, appellants insist that the amended statute and the requirement of notice before abandonment would have no point if the old law which does not require notice can still be used to find prior abandonments. Appellants ask us to reconsider our holding in *Walker*, and they present three supporting arguments that they believe were not directly considered therein.

{¶22} First, appellants state that the 2006 DMA relates exclusively to the remedy being sought as it does not enlarge or impair substantive rights but merely

relates to the means and procedures for enforcing rights (such as the method of notice to the mineral holder, the contents of the notice, the subsequent affidavit of abandonment, and the mineral holder's method for post-notice preservation). They argue that where a statutory amendment relates exclusively to the remedy being sought, then the statute as amended is applicable regardless of when the action arose unless it contains a contrary expression of intent. In support, they rely on page 514 of the Ohio Supreme Court's *Cox* case.

{¶23} Appellants fail to disclose that their quotation was taken from the dissenting opinion. *See Cox v. Ohio Dept. of Transp.*, 67 Ohio St.2d 501, 511-515 424 N.E.2d 597 (1981) (Brown, J. dissenting). The majority in *Cox* cited R.C. 1.48 and 1.58 and concluded that an amended statute did not revive a claim lost under a prior statute of limitations. *Id.* at 505-506. The dissent expressed that those statutes were only intended to apply to substantive rights. *Id.* at fn. 6. Appellants (and the dissenting justice in *Cox*) also cite to a 1930 case, but R.C. 1.58 was not enacted at that time and the precursor statute applied therein had different language; in addition, R.C. 1.48 had not yet been enacted. *See Smith v. New York Cent. R. Co.*, 122 Ohio St. 45, 55, 170 N.E. 637 (1930).

{¶24} Carney responds that the 1989 DMA is self-executing as it stated that upon the lack of a savings event in the look-back period, the mineral interest "shall be deemed abandoned and vested" in the surface owner. Carney points to R.C. 1.48, which states: "A statute is presumed to be prospective in its operation unless expressly made retrospective." Carney characterizes appellants' position as an improper inversion of this rule and concludes that with no clear indication of retrospective application in the 2006 DMA, its amendments operate only prospectively. Carney also notes that even if there was such express language, only remedial statutes can be applied retrospectively and this statute is substantive as it takes away a vested right.

{¶25} Second, appellants state that the R.C. 1.58(B) exception overrides the general rule that amendment does not necessarily affect the prior operation of the statute. This statute provides:

> (A) The reenactment, amendment, or repeal of a statute does not, except as provided in division (B) of this section:
>
> (1) Affect the prior operation of the statute or any prior action taken thereunder;
>
> (2) Affect any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder;
>
> (3) Affect any violation thereof or penalty, forfeiture, or punishment incurred in respect thereto, prior to the amendment or repeal;
>
> (4) Affect any investigation, proceeding, or remedy in respect of any such privilege, obligation, liability, penalty, forfeiture, or punishment; and the investigation, proceeding, or remedy may be instituted, continued, or enforced, and the penalty, forfeiture, or punishment imposed, as if the statute had not been repealed or amended.
>
> (B) If the penalty, forfeiture, or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended.

{¶26} Appellants urge that the 2006 DMA reduced the forfeiture and thus forfeiture "if not already imposed, shall be imposed according to the statute as amended." R.C. 1.58(B). They believe that by making it harder to have minerals declared abandoned, the "forfeiture * * * is reduced." They thus interpret this to refer to not just a decreased forfeiture but also to a decreased *risk* of forfeiture. *See id.* In making this argument, appellants do not explain how abandonment of a mineral interest is a forfeiture imposed for an "offense." *See id.* Carney states that R.C. 1.58(A) thus dictates that the rights vested under the prior statute would not be affected by repeal or amendment.

{¶27} Lastly, appellants urge that a court should follow the rule that the law in effect at the time of a decision applies even if it was enacted after the events giving rise to the suit. *See Landgraf v. USI Film Products*, 511 U.S. 244, 273, 114 S.Ct. 1483 (1994). That case was also cited by the appellant in our *Walker* case to no avail. *See Walker*, 7th Dist. No. 13NO402 at ¶ 31. *Landgraf* dealt with a different situation

involving a new law that went into effect while the case was pending on appeal, and the Court found that the new law did not apply. *Landgraf*, 511 U.S. 249. In the portion of the opinion cited by appellants, the Court pointed both to the principle on applying the law at the time of decision *and* the principle involving the presumption against retroactivity when the statute fails to clearly state that it is retroactive, and the Court concluded that the former principle is not in conflict with the presumption against retroactivity when the statute in question is unambiguous as to retrospective application. *Id.* at 273.

{¶28} Additionally, the Court stated: "a requirement that Congress first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Id.* at 264. "Since the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent." *Id.* at 270.

{¶29} The Court also explained that "[t]he largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance." *Id.* at 271. The Court concluded by requiring "clear evidence of congressional intent" on retrospective application and stating: "The presumption against statutory retroactivity is founded upon sound considerations of general policy and practice, and accords with long held and widely shared expectations about the usual operation of legislation." *Id.* at 286.

DMA PRECEDENT

{¶30} This court has issued multiple opinions ruling that the 1989 DMA can still be used to declare mineral interests abandoned thereunder.[2] In *Walker*, we first concluded that the 1989 DMA can still be used after the 2006 amendments because the prior statute was self-executing and the lapsed right automatically vested in the

[2]And, thereafter holding the look-back period is fixed at twenty years before date of enactment (with a three-year grace period) rather than rolling. *See Eisenbarth v. Reusser*, 7th Dist. No. 13MO10, 2014-Ohio-3792. *See also Taylor v. Crosby*, 7th Dist. No. 13BE32, 2014-Ohio-4433; *Tribett v. Shepherd*, 7th Dist. No. 13BE22, 2014-Ohio-4320; *Farnsworth v. Burkhart*, 7th Dist. No. 13MO14, 2014-Ohio-4184.

surface owner. *See Walker v. Shondrick-Nau*, 7th Dist. No. 13NO402, 2014-Ohio-1499 (fka *Walker v. Noon*).

{¶31} In *Swartz*, this court maintained and explained the *Walker* holding. *See Swartz v. Householder,* 7th Dist. Nos. 13JE24, 13JE25, 2014-Ohio-2359. The holding was thereafter echoed in *Dahlgren v. Brown Farm Props., LLC*, 7th Dist. No. 13CA896, 2014-Ohio-4001, *Tribett v. Shepherd*, 7th Dist. No. 13BE22, 2014-Ohio-4320, and *Farnsworth v. Burkhart*, 7th Dist. No. 13MO14, 2014-Ohio-4184. This court opined that the 1989 DMA is the type of statute characterized by automatic lapsing and reversion to the surface owner known as a self-executing statute due to the language "shall be deemed abandoned and vested in the owner of the surface if none of the statutory conditions exist." *Swartz*, 7th Dist. Nos. 13JE24, 13JE25 at ¶ 27, citing *Walker* and *Texaco*, 454 U.S. 516 (Indiana's DMA was self-executing as it provided the mineral interest shall be extinguished and ownership shall revert upon the non-occurrence of savings events within the pertinent time period).

{¶32} We expressed that the 1989 DMA need not be seen as incomplete for failing to mention specific implementation provisions, pointing out that a court action, such as for declaratory judgment or quiet title to formalize the statutory vesting, already legally existed as a matter of course, and a statute need not explain to the reader how they can file a court action to have their vested rights formally declared. *Id.* at ¶ 22. *See also Texaco v. Short*, 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982) (which emphasized the difference between the self-executing feature of a dormant mineral act and a subsequent judicial determination that a lapse did occur).

{¶33} We reviewed R.C. 1.48 and R.C. 1.58 as applicable to the DMA. Pursuant to R.C. 1.58(A), the reenactment, amendment, or repeal of a statute does not affect the prior operation of the statute or any prior action taken thereunder. R.C. 1.58(A)(1). In addition, the reenactment, amendment, or repeal of a statute does not affect any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder. R.C. 1.58(A)(2). And, the reenactment, amendment, or repeal of a statute does not affect any proceeding or remedy in respect of any such privilege, obligation, or liability and the proceeding or remedy may be

instituted, continued, or enforced as if the statute had not been repealed or amended. R.C. 1.58(A)(4).

{¶34} Pursuant to R.C. 1.48, "[a] statute is presumed prospective in its application unless expressly made retrospective." In accordance, a statute must "specifically indicate" that it applies retroactively or it will be implemented as applying only prospectively. *See, e.g., State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, 896 N.E.2d 110, ¶ 15 (to overcome the presumption that it applies only prospectively, the legislature must "clearly proclaim" the retroactive application); *State ex rel. Cincinnati Enquirer v. Jones-Kelley*, 118 Ohio St.3d 81, 2008-Ohio-1770, 886 N.E.2d 206, fn. 2 (not retroactive because legislature did not specify that statute applied retrospectively and no indication that law was clarification as opposed to modification); *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, 849 N.E.2d 268, ¶ 40 (if a statute is silent on intent to apply retrospectively, then it applies only prospectively); *Bartol v. Eckert*, 50 Ohio St.3d, 33 N.E. 294 (1893).

{¶35} We concluded that the statute to be applied is the one existing at the time the cause of action accrued unless the new statute existing at the time the suit was filed enunciates that it applies to causes of action that accrued prior to the effective date. *Swartz*, 7th Dist. Nos. 13JE24, 13JE25 at ¶ 29, citing the above cases and adding *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, ¶ 179, 183 (where new statute clearly said that it applied to suits filed after its effective date, it had retroactive application to injuries that occurred prior to enactment). *See also Walker*, 7th Dist. No. 13NO402 at ¶45-50, reviewing *Cadles of Grassy Meadows, II, LLC v. Kistner*, 6th Dist. No. L-09-1267, 2010-Ohio-2251, ¶17 (a new statute of limitations for revivor of judgments, which shortened the time for such action, did not apply to judgments that became dormant prior to enactment where that new statute of limitations contained no clear expression of retrospective application, even though the statute was enacted before the revivor action was filed).

{¶36} This court stated that a vested interest can be a property right created by statute and a vested interest so completely and definitely belongs to a person that it cannot be impaired or taken away without the person's consent. *See Walker,* 7th Dist. No. 13NO402 at ¶ 40, quoting *State ex rel. Jordan v. Industrial Comm.*, 120 Ohio St.3d

412, 2008-Ohio-6137, 900 N.E.2d 150, ¶ 9; *Swartz*, 7th Dist. Nos. 13JE24, 13JE25 at ¶ 29. The 1989 DMA, with its three-year grace period, specifies that the mineral interest is deemed abandoned and the surface owner obtains a vested right if any of the listed circumstances apply, none of which are disputed on appeal here. *See* Former R.C. 5301.56(B)(1).

{¶37} On the other hand, the 2006 DMA deals with rights that have not yet been deemed abandoned and vested as it states, "Before a mineral interest becomes vested under division (B) of this section in the owner of the surface of the lands subject to the interest, the owner of the surface subject to the interest shall do both of the following * * *." *See Swartz*, 7th Dist. Nos. 13JE24, 13JE25 at ¶ 35, citing R.C. 5301.56(E). The current DMA thus eliminated automatic vesting after June 30, 2006, imposing new enforcement obligations on the surface owner, redrawing the savings event timeline, and pursuant to *Dodd,* allowing the mineral holder to eliminate the abandonment after the look-back period by recording a post-notice claim to preserve.

{¶38} But, this does not mean that it erased interests that were previously deemed abandoned and vested (merely because a suit had not yet been filed to formalize the reverter). *Id.* We announced that the most pertinent definition of the word "deem" here would be: "to treat [a thing] as being something that it is not, or as possessing certain qualities that it does not possess. It is a formal word often used in legislation to create legal fictions * * *." *Dahlgren*, 7th Dist. No. 13CA896 at ¶ 29, quoting Garner, *The Dictionary of Modern Legal Usage*, 254 (2d Ed.1995).

{¶39} The conclusion made was that when the 2006 version was enacted, any mineral interest that was treated as abandoned under the 1989 version stayed abandoned and continued to be vested in the surface owner, and once the mineral interest vested in the surface owner, it reunited with the surface estate pursuant to statute regardless of whether the event had yet to be formalized. *See Swartz*, 7th Dist. Nos. 13JE24, 13JE25 at ¶ 34, citing *Walker*, 7th Dist. No. 13NO402 at ¶ 41. It was pointed out that the 2006 DMA contains no language eliminating property rights that were previously expressly said to be vested, i.e. it contains no statement that its new requirements for surface owners and the new rights for mineral holders apply retrospectively. *See Swartz*, 7th Dist. Nos. 13JE24, 13JE25 at ¶ 34, citing *Walker*, 7th

Dist. No. 13NO402 at ¶ 51. It was therefore decided that absent express language eliminating the prior automatic abandonment and vesting of rights under the old act, the amendments do not affect causes already existing (regardless of whether a suit is filed before or after the amendments). *See id.*

{¶40} We explained that a look-back period (which already existed under the old statute) did not expressly or even implicitly make a statute retroactive. *Id.* at fn. 2. The notice of abandonment is the new trigger for the look-back, which item can only apply prospectively because one could not file a notice of abandonment with the 2006 DMA statutory effects and triggers before it was even created. In other words, the new DMA instituted *a new look-back initiator* (the notice of abandonment) to be employed prospectively in the future. *Id.*

{¶41} In *Dahlgren*, the trial court held that it can no longer declare minerals abandoned under the 1989 DMA. On appeal, we noted that the result reached by the trial court in *Dahlgren* may seem fair, equitable, and practical to some under a theory that it is the initial forfeiture that should be abhorred by the law rather than the later forfeiture of a property right obtained by forfeiture in the first place. *Dahlgren*, 7th Dist. No. 13CA896 at ¶ 31, citing *Swartz*, 7th Dist. Nos. 13JE24, 13JE25 at ¶ 36. We pointed out, however, that legislatures around the country found such initial abandonment and unification with the surface to be important to the state, and the United States Supreme Court agreed that the state has such legitimate interests. *Id.*

{¶42} We stated that 2006 amendments did not act as a type of implied statute of limitations for asserting rights granted under the 1989 DMA. *Id.* And, we disagreed with the trial court's conclusion that the lack of savings events at most created an inchoate right because judicial action or some type of recordation would be required in order to make the right vested. *Id.* (concluding that a vested right could not be eliminated by a non-retrospective statutory amendment, an amendment with no grace period unlike the 1989 DMA).

> [T]he terms "inchoate" and "vested" are generally opposites. *See, e.g., Bauman v. Hogue*, 160 Ohio St. 296, 301, 116 N.E.2d 439 (1953); *Walker*, 7th Dist. No. 13NO402 at ¶ 43. An inchoate right is a right that *has not fully* developed, matured, *or vested*. Black's Law Dictionary (9th

> Ed.2009) (online). We conclude that it is contrary to the plain language of the statute to hold that the surface owner's right to the abandoned mineral interests are inchoate even though the statute expressly stated that the right vested upon the lack of a savings event within the pertinent time period.

Dahlgren, 7th Dist. No. 13CA896 at ¶ 31, citing *Swartz*, 7th Dist. Nos. 13JE24, 13JE25 at ¶ 38.

{¶43} Finally, we noted that the *Dahlgren* trial court expressed concern about the opportunity to contest abandonment without recognizing that the very suit before it was the opportunity to so contest (and to establish that there were savings events in the pertinent time period). *Id. See also Walker*, 7th Dist. No. 13NO402 at ¶ 43 ("the *Dahlgren* court's characterization of the mineral rights under the 1989 version is contrary to the statute itself, which stated that the mineral rights are 'vested.' ").

{¶44} Accordingly, this court has repeatedly ruled that the abandonments under the 1989 DMA can still be formalized by the courts. Moreover, the Fifth District has recently adopted our decisions in *Walke*r and *Swartz* and ruled that the 1989 DMA can still be utilized by the courts to declare the mineral interests were abandoned thereunder. *Wendt v. Dickerson*, 5th Dist. No. 2014 AP 01 0003, 2014-Ohio-4615, ¶ 36-37.

{¶45} Lastly, we note that the Ohio Supreme Court accepted the appeal of *Walker* on September 3, 2014. The Court also accepted a federal certified question in *Corban v. Chesapeake Exploration, LLC*, Sup. No. 2014-0804 (J.E. July 23, 2014) in order to answer the question: "Does the 2006 version or the 1989 version of the ODMA apply to claims asserted after 2006 alleging that the rights to oil, gas, and other minerals automatically vested in the surface land holder prior to the 2006 amendments as a result of abandonment?" Until these cases are decided, our own precedent governs our answer to that question.

2006 DMA ARGUMENT

{¶46} Appellants' final argument is that if we reconsidered *Walker* and concluded that abandonments under the 1989 DMA can no longer be declared, then there was no abandonment under the 2006 Dormant Mineral Act either. They urge

that they filed a timely post-notice claim to preserve under R.C. 5301.56(H)(1)(A) and that this prevented abandonment. Pursuant to R.C. 5301.56 (H)(1):

> If a holder or a holder's successors or assignees claim that the mineral interest that is the subject of a notice under division (E) of this section has not been abandoned, the holder or the holder's successors or assignees, not later than sixty days after the date on which the notice was served or published, as applicable, shall file in the office of the county recorder of each county where the land that is subject to the mineral interest is located one of the following:
>
> (a) A claim to preserve the mineral interest in accordance with division (C) of this section;
>
> (b) An affidavit that identifies an event described in division (B)(3) of this section that has occurred within the twenty years immediately preceding the date on which the notice was served or published under division (E) of this section.

{¶47} In *Dodd*, we determined the effect of a post-notice claim to preserve under (H)(1)(a). Pursuant to this court's ruling in *Dodd*, this post-notice claim to preserve prevents abandonment under the 2006 DMA without regard to whether there were prior savings events. *See Dodd v. Croskey*, 7th Dist. No. 12HA6, 2013-Ohio-4257, ¶ 17-36, appeal pending in Supreme Court.

{¶48} Notably, this 2006 preservation argument was not ruled upon by the trial court because the court found abandonment under the 1989 DMA had already occurred. Where the trial court does not rule on a summary judgment argument because it finds it moot under another argument, it is not proper for the appellate court in the first instance to address the argument left unaddressed by the trial court. *See Yoskey v. Eric Petroleum Corp.*, 7th Dist. No. 13CO42, 2014-Ohio-3790, ¶ 40 citing *Bowen v. Kil–Kare, Inc.*, 63 Ohio St.3d 84, 89, 585 N..E.2d 384 (1992) (where the trial court declined to address an issue due to another ruling, the Court held that the question which had not been addressed was not properly before the appellate court); *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 360, 604 N.E.2d 138 (1992) (de novo review still entails a review of what the trial court decided; trial court initial

determination cannot be replaced by appellate court's de novo review; remand to trial court); *Tree of Life Church v. Agnew*, 7th Dist. No. 12BE42, 2014-Ohio-878, ¶ 27; *Teeter v. Teeter*, 7th Dist. No. 13CA887, 2014-Ohio-1471, ¶ 38 (trial court found a summary judgment motion issue moot, this court remanded for trial court to address in the first instance after reversing other summary judgment issue).

{¶49} Regardless, as we are maintaining our *Walker* holding here, appellants' conditional *Dodd* argument is moot because if abandonment already occurred under a self-executing 1989 DMA, the question of whether there was abandonment under the 2006 DMA need not be reached.

CONCLUSION

{¶50} As this court has specifically ruled that abandonments occurring under the 1989 Dormant Mineral Act can still be recognized to formally declare mineral interests abandoned (and reiterated that holding multiple times), stare decisis is governing here. Appellants' assignments of error are overruled, and the argument concerning the claim to preserve under the 2006 Dormant Mineral Act is rendered moot and was not ruled upon by the trial court in any event.

{¶51} For the foregoing reasons, the judgment of the trial court finding abandonment of the mineral interest owned by Mary Katherine Kerns and Beverly Lamotte under the 1989 Dormant Mineral Act is hereby affirmed.

Donofrio, J., concurs.
DeGenaro, P.J., dissents; see dissenting Opinion.

DeGenaro, P.J., dissents.

{¶52} I disagree with the majority's decision here, which follows this district's string of cases holding that the 1989 ODMA controls resolution of this and other cases filed after the effective date of the 2006 ODMA, for the reasons explained in the minority opinions in *Eisenbarth v. Reusser,* 7th Dist. No. 13 MO 10, 2014-Ohio-3792, 18 N.E.3d 477 (DeGenaro, P.J. concurring in judgment only), *Farnsworth v. Burkhart*, 7th Dist. No. 13 MO 14, 2014-Ohio-4184 (DeGenaro, P.J., concurring in judgment

only) and *Tribett v. Shepherd*, 7th Dist. No. 13 BE 22, 2014-Ohio-4320, (DeGenaro, P.J., dissenting).

{¶53} The 2006 ODMA should control resolution of disputes over severed mineral rights where, as here: a) the mineral rights were severed and the surface owner's fee interest was acquired before or during the time frame when the 1989 ODMA was in effect; and b) the surface owner did not claim the mineral rights were abandoned until after the effective date of the 2006 ODMA. Given the minority analysis in *Eisenbarth*, *Farnsworth* and *Tribett,* the majority has incorrectly validated the trial court's resolution of the parties' interests to the severed mineral rights based on the 1989 ODMA; the 2006 ODMA should control. As Kerns and Lamotte timely filed a preservation of claim under the 2006 ODMA, R.C. 5301.56(H), they continue to hold the severed mineral rights.

{¶54} Accordingly, title to the severed mineral rights should be quieted in Kerns and Lamotte.