

IN THE SUPREME COURT OF OHIO

Thomas Dundics, et al., :
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 :
 Plaintiffs-Appellants, : Case No. 2017-0448
 :
 :
 v. :
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 :
 Eric Petroleum Corp., et al., : On Appeal from the Mahoning County
 : Court of Appeals, 7th Appellate District
 : (No. 15 MA 0156)
 :
 Defendants-Appellees. :

**MERIT BRIEF OF AMICI CURIAE AMERICAN ASSOCIATION OF
PROFESSIONAL LANDMEN; OHIO OIL AND GAS ASSOCIATION;
SOUTHEASTERN OHIO OIL AND GAS ASSOCIATION;
DPS LAND SERVICES, LP; HALO LAND MANAGEMENT, LLC; AND
RESERVE ENERGY EXPLORATION COMPANY
IN SUPPORT OF APPELLANTS**

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Exploration Company*

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STATEMENT OF INTEREST OF AMICI CURIAE

This appeal presents an issue affecting the livelihoods of not only the hundreds of Ohio members of the American Association of Professional Landmen (“AAPL”), but also of all independent landmen in Ohio, whose profession would essentially be eliminated if the decision below is affirmed. The AAPL is a trade association with more than 15,000 members nationwide and over 400 members in Ohio that has served as the voice of the landman profession for 60 years.

Joining the AAPL as amicus curiae is the Ohio Oil and Gas Association (“OOGA”), a statewide trade association with more than 2,000 members who are engaged in all aspects of the exploration, development, and production of oil and natural gas in this state. Its membership includes small independent producers and major energy companies, as well as Ohio contractors, service and supply companies, manufacturers, utilities, accountants, insurers, engineers, and landowners. OOGA’s mission is to protect, promote, foster, and advance the common interest of those engaged in all aspects of the Ohio crude oil and natural gas producing industry.

Amicus curiae Southeastern Ohio Oil and Gas Association (“SOOGA”) is a non-profit organization comprised of nearly 400 local producers and businesses involved in oil and gas operations in southeastern Ohio and northern West Virginia. Since it was established in 1978, SOOGA has addressed issues and concerns unique to the mid-Ohio River valley. It firmly believes that the local oil and gas industry is vital to the continued economic growth and development of this geographic area and to the entire country.

Amicus curiae DPS Land Services, LP, is a full-service land company that is dedicated to the Appalachian Basin and provides services relating to oil and gas leasing, title abstracting, rights of way, and obtaining title curative documents for oil and gas leases. Amicus curiae Halo Land Management, LLC, is a land company that provides services relating to oil and gas leasing,

title abstracting, rights of way, drill site access and damage settlements, ownership reports, and title curative documents. Amicus curiae Reserve Energy Exploration Company is a privately held diversified energy company focused on the development of oil, natural gas, and renewable energy projects.

As explained below, the Court of Appeals' decision, as it now stands, puts independent Ohio landmen in the impossible position of being unable to seek compensation for their services relating to oil and gas leasing without being licensed as real estate brokers, while simultaneously requiring them to obtain a real estate broker's license that is unobtainable by performing that same oil-and-gas-leasing work. Amici curiae thus support appellants in urging the Court to reverse the absurd result reached by the Court of Appeals and restore the ability of landmen in Ohio to practice their chosen profession.

STATEMENT OF FACTS

Amici adopt the Statement of Facts in the Appellants' merit brief.

ARGUMENT

Proposition of Law #1:

Ohio's statutory licensing requirements for real estate brokers, set forth in R.C. Chapter 4735, do not apply to oil and gas landmen.

This Court should recognize that landmen negotiating oil and gas leases are not—and were never intended to be—subject to R.C. 4735.21. Indeed, independent Ohio landmen have worked for decades with the understanding that they are not subject to Ohio's real estate broker licensing laws. With the Court of Appeals' decision, however, those landmen are suddenly faced with the unexpected situation in which they are not entitled to payment for their services unless they also, by happenstance, hold a real estate broker's license, a license that requires experience

that does not relate to—and cannot be obtained by performing—oil and gas leasing. Those same professionals are also suddenly faced with the prospect of civil and criminal penalties for practicing the profession of a landman. *See* R.C. 4735.052; R.C. 4735.99(A). The General Assembly did not intend such an absurd and harsh result, and it expressly recognized that fact when it recently sought to, but did not, create a system to license and register landmen.

The Court of Appeals upended decades of practice and convention and expressly ignored legislative intent, legislative history, public policy, and the real-life consequences of its interpretation of the statute in reaching its decision, thereby making Ohio—by judicial fiat—the *only* known active oil-and-gas-producing state in which landmen are subject to a real estate licensing system.¹ This Court should reject that decision and instead recognize that the inherent difference in kind between traditional real estate deals and transactions involving oil and gas leases excludes oil and gas leasing from the scope of R.C. Chapter 4735.

A. Application of R.C. Chapter 4735 to Landmen Leads to an Absurd Result That Should Be Rejected.

The holdings below lead to the unreasonable, unintended, and absurd result that landmen are subject to a system of licensure under which they cannot obtain a license for the work they perform—oil and gas leasing—unless they also happen to be engaged in the unrelated profession of buying and selling commercial and residential property as real estate brokers.

“It is presumed that the General Assembly does not enact laws producing unreasonable or absurd consequences.” *State ex rel. Moore v. Sanders*, 65 Ohio St.2d 72, 77 (1981). “Hence

¹ A recent study reported that “none of the 34 states currently active in oil and gas production activities require formal landman registration”—or any other sort of licensure—with “only North Carolina and Maryland [currently] requir[ing] landmen to register with the state.” Eisenberg, *Land Shark at the Door? Why and How States Should Regulate Landmen*, 27 *Fordham Environmental Law Review* 157, 160, 183 (2016) (citing to a report issued by the North Carolina Department of Environment and Natural Resources).

it is the duty of the courts . . . to construe the statute as to avoid such a result.” *State ex rel. Cooper v. Savord*, 153 Ohio St. 367, 371 (1950). Indeed, “[t]he absurd result principle in statutory interpretation provides an exception to the rule that a statute should be interpreted according to its plain meaning,” and it “is premised on a guiding principle of statutory construction: that when the General Assembly enacts a statute, it does not intend to produce an absurd result.” *State ex rel. Clay v. Cuyahoga Cty. Med. Exam’rs Office*, Slip Opinion No. 2017-Ohio-8714, ¶ 22 (internal citations and emphasis omitted). *See also* R.C. 1.47 (“In enacting a statute, it is presumed that: . . . [a] just and reasonable result is intended; [and] [a] result feasible of execution is intended.”).

Thus, “[w]here the literal construction of a statute would lead to gross absurdity, or where, out of several acts touching the same subject matter, there arise collaterally any absurd consequences, manifestly contradictory to common reason, provisions leading to collateral consequences of great absurdity or injustice, may be rejected.” *Mishr v. Bd. of Zoning Appeals*, 76 Ohio St.3d 238, 240, 667 N.E.2d 365 (1996) (quoting *Slater v. Cave*, 3 Ohio St. 80, 83–84 (1853)). *See also State ex rel. Asti v. Ohio Dept. of Youth Servs.*, 107 Ohio St.3d 262, 2005-Ohio-6432, 838 N.E.2d 658, ¶ 33 (“When the statute’s language is plain, the sole function of the courts—*at least where the disposition required by the text is not absurd*—is to enforce it according to its terms.”) (emphasis added).

The absurd result reached below was made possible in part by the lower courts’ failure to recognize the fundamental differences between the type of work performed by landmen and by real estate brokers. Unlike real estate brokers, independent landmen commonly perform activities such as researching courthouse records to determine ownership of mineral rights, negotiating the terms of oil and gas leases, negotiating business agreements between operating

companies for oil or gas exploration and development, reviewing the status of title to mineral rights, providing title due diligence associated with ownership of mineral rights, and conducting surface inspections before drilling. *See* 2011 H.B. No. 493 § 1509.311(A); American Association of Professional Landmen, *About Landmen*, <http://www.americaslandman.com/about-landmen> (accessed January 2, 2018); Bylaws of the American Association of Professional Landmen (amended June 19, 2015), Article II, available at <http://www.landman.org/docs/default-source/forms/aapl-by-laws-june-2015-approved.pdf> (accessed January 2, 2018). Moreover, outside of the narrow context of negotiating oil and gas leases, interaction between landmen and the public is limited when performing those activities, which all involve or relate to oil and gas.

Real estate brokers, on the other hand, interact with the public in matters such as the sale and rental of housing accommodations and related real property, including the listing of real estate available for sale, and the operation, management, and rental of buildings or portions of buildings for tenancy by the public. *See* R.C. 4735.01(A); R.C. 4735.55. In the residential context, their primary purpose is to assist individuals with real estate transactions; for example, they can provide information regarding real estate values, taxes, insurance, utility costs, municipal services and facilities, the quality of neighborhood schools, the number of children in the area, and the safety of a neighborhood. *See* Ohio Department of Commerce Division of Real Estate & Professional Licensing, Home Buyer's Guide, available at http://www.com.ohio.gov/documents/real_HomeBuyersGuide.pdf (accessed January 2, 2018). Real estate brokers can explain the advantages and disadvantages of different types of mortgages, help prepare an offer to purchase, help with negotiations, and assist with arranging financing and inspections and during the closing process. *Id.* Because of their frequent and close interaction with the public on matters related to housing, they also must comply with the

Ohio fair housing law and the federal fair housing law, which prohibit discrimination in advertising the sale or rental of housing, in the financing of housing, or in the provision of real estate brokerage services. *See* R.C. 4735.55. A real estate broker’s work thus involves surface real estate transactions.

Only if R.C. Chapter 4735 is interpreted in accordance with its original intent—i.e., with oil and gas landmen excluded from its scope—does it produce a reasonable result that is feasible of execution in light of the fundamental differences between landmen and real estate brokers. *See* R.C. 1.47. Indeed, all of the available evidence supports such a finding. The historical understanding of Ohio courts regarding the nature of oil and gas leases from the 1800s through 2015, the inherent differences in kind between oil and gas leases on the one hand and traditional commercial and residential leases on the other, and the utter inapplicability to oil and gas leasing of the statutory and administrative experience and education requirements for a real estate broker’s license all lead to the conclusion that R.C. Chapter 4735 does not apply to landmen.

B. In Accordance with the Ohio Legislature’s Intent, R.C. Chapter 4735 Should Be Construed to Exclude Oil and Gas Leases and Landmen.

When R.C. Chapter 4735 was enacted—and, indeed, through 2015 when R.C. 5301.09 was amended and this Court issued its seminal decision in *Chesapeake Exploration, L.L.C. v. Buell*, 144 Ohio St.3d 490, 2015-Ohio-4551, 45 N.E.3d 185—the precise nature of an oil and gas lease under Ohio law was unsettled. *See, e.g., Buell* at ¶¶ 25, 28, 32 (recognizing, for example, that when the Dormant Mineral Act was enacted in 1989, an open question was “whether an oil and gas lease would meet the definition of a title transaction,” with a title transaction being “*any* transaction affecting title to *any* interest in land”) (emphasis in original). What was clear, however, was that oil and gas leases were not consistently or conclusively recognized as interests in land by Ohio courts for purposes of R.C. Chapter 4735. *See Wellington Res. Group LLC v.*

Beck Energy Corp., 975 F.Supp.2d 833 (S.D. Ohio 2013). Thus, the Ohio Legislature could not have intended R.C. Chapter 4735 to apply to oil and gas leases or landmen, and the Court should now recognize the original legislative intent and confirm that oil and gas leasing and landmen are excluded from the scope of R.C. Chapter 4735.

“A court’s goal when interpreting and applying a statute is to give effect to the legislature’s intent *when enacting the statute.*” *State v. Erskine*, 2015-Ohio-710, 29 N.E.3d 272, ¶ 26 (4th Dist.) (emphasis added); *see also Hocking Conservancy Dist. v. Dodson-Lindblom Assocs., Inc.*, 62 Ohio St.2d 195, 197, 404 N.E.2d 164 (1980) (citing *Richardson v. Doe*, 176 Ohio St. 370, 372–73, 199 N.E.2d 878 (1964)) (interpreting a statute based on a term’s meaning “*when [the statute] was enacted*”) (emphasis added). Faced with the very same question at issue here, the federal district court in *Wellington* performed the “thorough survey of Ohio case law” necessary to determine whether oil and gas leases should be considered “real estate” under R.C. Chapter 4735; demonstrating the historical uncertainty by Ohio courts, the court examined how such leases had been treated from 1889 through 2013 and ultimately determined that “oil and gas leases have not historically been considered interests in land in Ohio” and that Ohio law had not changed in recent years. 975 F.Supp.2d at 838, 839. Thus, “the legislature’s intent when enacting the statute” would have been to exclude oil and gas leases from the definition of “real estate” in accordance with the contemporary understanding of the nature of oil and gas leases by Ohio courts. *See, e.g., Hocking Conservancy Dist.*, 62 Ohio St.2d at 197.

The Ohio Legislature itself also recently provided evidence of its own understanding of R.C. Chapter 4735, and that understanding conforms with the court’s analysis in *Wellington*. The 129th General Assembly recognized that oil and gas leases, and the landmen who negotiate such leases, were not subject to R.C. Chapter 4735 when it introduced legislation in 2012

seeking “to establish requirements governing oil and gas land professionals.” 2011 H.B. No. 493. Notably, the legislation sought to “establish” requirements governing landmen—not to “amend” existing requirements. Nowhere in the proposed legislation was there any reference to R.C. Chapter 4735. That bill, therefore, provides further evidence that the Ohio Legislature believed R.C. Chapter 4735 to be inapplicable to oil and gas leases and landmen.

The proposed legislation would have given the Chief of the Ohio Division of Oil and Gas Resources Management authority to regulate “land professionals,” defined as persons primarily engaged in negotiating “the acquisition or divestiture of mineral rights regarding the extraction of oil or gas,” negotiating “business agreements that provide for the exploration for or development of oil or gas,” and “securing the pooling of interests in oil and gas.” 2011 H.B. No. 493 § 1509.311(A). Such a land professional, “colloquially known as a landman,” would have been required to register with the Chief of the Ohio Division of Oil and Gas Resources Management and identify the Ohio counties in which the person intended to work as a landman. *Id.* §§ 1509.311(A), (B), (C)(1). Had it been enacted, this law would have provided the authority and means to regulate and license landmen—authority and means that the General Assembly implicitly saw as lacking from R.C. Chapter 4735.

Here, the Court can reaffirm the legislature’s original intent—and avoid the unreasonable, unjust, and absurd result reached by the trial court and the Court of Appeals—by holding that oil and gas leases do not fall within the definition of “real estate” for the limited purposes of R.C. Chapter 4735. Such a holding would uphold the spirit of the statute and continue to protect the public in purchase and sale transactions involving all other types of real estate, without abolishing the profession of independent landman in Ohio.

C. Even as Interests in Real Estate, Oil and Gas Leases Are *Sui Generis* in the Context of Real Estate Broker Licensing.

The Court of Appeals refused to acknowledge the inherent differences in kind between oil and gas leases on the one hand and traditional commercial and residential leases—those that the Ohio Legislature sought to regulate—on the other hand. Whereas a traditional commercial or residential lease grants a right to possess and use space or land for a specific period of time, *see Kanistros v. Holeman*, 2d Dist. Montgomery No. 20528, 2005-Ohio-660, ¶ 15, “[a]n oil and gas lease is not a ‘lease’ in the traditional sense of a lease of the surface of real property . . . [instead] the lessee/grantee acquires ownership of all the minerals in place that the lessor/grantor owned and purported to lease, subject to the possibility of reverter in the lessor/grantor,” *Kramer v. PAC Drilling Oil & Gas, LLC*, 197 Ohio App.3d 554, 2011-Ohio-6750, ¶ 11 (9th Dist. 2011) (quoting *Nat’l Gas Pipeline Co. of Am. v. Pool*, 124 S.W.3d 188, 192 (Tex. 2003)). *See also Bernard Philip Dedor Revocable Declaration of Trust v. Reserve Energy Exploration Co.*, 11th Dist. Portage No. 2014-P-0001, 2014-Ohio-5383, ¶ 20; *Herman v. Grange Mut. Casualty Co.*, 11th Dist. Ashtabula No. 935, 1978 Ohio App. LEXIS 8995, at *3–4 (July 31, 1978) (“An oil and gas lease differs from the ordinary lease of land for use by the lessee.”); *Rayl v. East Ohio Gas Co.*, 46 Ohio App.2d 167, 172 (9th Dist. 1973) (distinguishing an oil and gas lease, as “an exploitation of the minerals under the surface of an owner’s land,” from “a rental agreement for the use of the lessor’s land”).

Thus, an oil and gas lease conveys a vested interest in a mineral estate from the landowner to the operator. While this interest carries with it a limited implied right to surface access to the extent necessary to remove the minerals, there is no transfer of any title in the surface estate. *See Kramer*, at ¶ 11 (citing *Harris v. Ohio Oil Co.*, 57 Ohio St. 118, 130, 48 N.E. 502 (1897) and *Moore v. Indian Camp Coal Co.*, 75 Ohio St. 493, 80 N.E. 6, Ohio L. Rep. 673

(1907)). And it is only transactions involving those “surface estates” that the Ohio Legislature sought to regulate through R.C. Chapter 4735.² See, e.g., R.C. 4735.01(R) (distinguishing between commercial real estate and residential real estate); R.C. 4735.021 (referring to tenants).

This Court has recently reiterated the inherent differences between oil and gas leases and traditional surface leases, recognizing that “[t]here 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.” *Buell*, 144 Ohio St.3d 490, 2015-Ohio-4551, ¶ 41 (emphasis added) (also recognizing that “[o]il and gas leases are unusual in that they are not technically leases at all”). Indeed, courts have explained that the term “lease” is a misnomer because “the interest created by an oil and gas lease is not the same as an interest created by a lease governed by landlord tenant law.” *In re Topco, Inc.*, 894 F.2d 727, 740 (5th Cir. 1990); see also *Jacobs v. CNG Transmission Corp.*, 332 F. Supp.2d 759, 772 (W.D. Pa. 2004) (citing *Hutchison v. Sunbeam Coal Corp.*, 519 A.2d 385 (Pa. 1986)).

The Court of Appeals thus neglected to acknowledge the well-settled proposition that an oil and gas lease is of a different nature and kind than other interests in real estate; as a result, it failed to recognize that oil and gas leases should be considered *sui generis* in the context of R.C. Chapter 4735 and, as a result, placed outside the regulatory framework set forth in that chapter of the Ohio Revised Code. By doing so, the Court of Appeals erred as a matter of law.

² Curiously, rather than focusing on the Revised Code section at issue, the Court of Appeals seemingly placed significant weight on an obscure 1942 Ohio Attorney General opinion that provided an interpretation of a predecessor provision of the General Code. See *Dundics v. Eric Petroleum Corp.*, 7th Dist. Mahoning No. 15 MA 0156, 2017-Ohio-640, ¶ 27 (referencing 1942 Ohio Atty.Gen.Ops. No. 5349).

D. The Inapplicability of Experience and Education Requirements for a Real Estate Broker’s License Demonstrates the Exclusive Statutory Focus on Residential and Commercial Surface Estates and the Absurdity of the Decisions Below.

The laws and regulations applicable to real estate brokers provide further evidence that R.C. Chapter 4735 was and is intended to govern those engaged in transactions involving interests in residential and commercial surface estates—and not transactions involving oil and gas leases. Because of the unique nature of an oil and gas lease, it is highly unlikely that any oil and gas landman who performs only the duties of a landman would ever be able to satisfy the experience requirements promulgated by the Ohio Department of Commerce Division of Real Estate and Professional Licensing to obtain a real estate broker’s license, making the lower courts’ interpretation of R.C. Chapter 4735 one that is impermissibly infeasible of execution. *See* R.C. 1.47(D).

1. None of the Experience Requirements Recognize Leasing of Oil and Gas Rights.

The experience required to obtain licensure as a real estate broker includes the completion of “[a]t least twenty real estate transactions, in which property was sold for another by the applicant while acting in the capacity of a real estate broker or salesperson.” R.C. 4735.07(B)(5)(a). The rules promulgated by the Ohio Department of Commerce further define the types of transactions which will satisfy the experience requirements, with none apparently satisfied by a lease of oil and gas rights:

- A sale of a real property and the improvements thereon . . . in which the applicant . . . was the procuring or selling agent;
- A sale of a real property and the improvements thereon . . . in which the applicant . . . was the listing agent;

- A lease of individual commercial or industrial property . . . in which the applicant . . . was the procuring agent;
- A lease of individual commercial or industrial property . . . in which the applicant . . . was the listing agent;
- Leases of residential property . . . in which the applicant . . . was the listing and/or procuring agent.

Ohio Adm. Code 1301:5-3-04(A). Furthermore, “[i]f leasehold transactions constitute sixteen or more of the required number of transactions, the applicant shall have completed three years full-time experience in property management.” Ohio Adm. Code 1301:5-3-04(B).

None of the approved “real estate transactions” have any relationship to the leasing of oil and gas rights. Moreover, even if oil and gas leases were somehow considered to be leases of “individual commercial or industrial property” or “residential property,” which this Court in *Buell* stated they were not, the experience would satisfy the requirements only if the landman also had three years of full-time experience in property management—experience wholly unrelated and irrelevant to oil and gas leasing. It is, therefore, apparent that the system of licensure is directed exclusively to possessory surface estates, not leases of oil and gas rights.

2. Not A Single Educational Requirement Involves Oil and Gas Leasing or Drilling.

The educational requirements to obtain licensure as a real estate broker include instruction on the following subjects—with the substantive property topics all directed to possessory surface estates: (1) real estate practice; (2) Ohio real estate law, municipal, state, and federal civil rights law, new case law on housing discrimination, desegregation issues, and methods of eliminating the effects of prior discrimination; (3) real estate appraisal; (4) real estate finance; (5) financial management; (6) human resource or personnel management; (7) applied

business economics; and (8) business law. *See* R.C. 4735.07; *see also* R.C. 4735.09 (setting forth requirements for a real estate salesperson, including association with a real estate broker and satisfaction of the first four educational requirements applicable to a real estate broker).

Because the system of licensure is focused on possessory surface estates, courses on civil rights laws and housing discrimination are mandatory, notwithstanding the fact that such coursework is entirely unrelated and irrelevant to the leasing of oil and gas rights.³ If either the Ohio Legislature or the Ohio Department of Commerce intended R.C. Chapter 4735 to be applicable to landmen, either or both could have included topics relevant to oil and gas leasing—or, at minimum, topics even tangentially related to oil and gas leases and leasing. The lack of any such topics is further evidence that landmen were not, and are not, intended to be subject to the requirements of R.C. Chapter 4735.

CONCLUSION

The Court of Appeals' decision would effectively eliminate the profession of landman in Ohio. The General Assembly did not intend this absurd result when it adopted the law requiring licensure for real estate brokers. For these reasons, amici curiae urge the Court to hold that transactions involving oil and gas leases—and the landmen who perform such transactions—are excluded from the regulatory framework established in R.C. Chapter 4735.

³ In contrast, educational opportunities offered to landmen include seminars on “Held by Production and Royalty Issues,” “Working Interest and Net Revenue Interest,” “Joint Operating Agreements,” and “Due Diligence.” American Association of Professional Landmen, *Education Events*, <https://personify.landman.org/personifyebusiness/Events/AAPLEventsCalendar.aspx> (accessed January 2, 2018).

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon the following via first-class U.S. mail, postage prepaid, this 16th day of January 2018:

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