**[Cite as *Headley v. Ackerman*, 2017-Ohio-8030.]**

STATE OF OHIO MONROE COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

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| MARK E. HEADLEY, ET AL., | ) | |
| | ) | |
| PLAINTIFFS-APPELLANTS, | ) | |
| | ) | CASE NO. 16 MO 0010 |
| V. | ) | |
| | ) | OPINION |
| GEORGE ACKERMAN, ET AL., | ) | |
| | ) | |
| DEFENDANTS-APPELLEES. | ) | |

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| CHARACTER OF PROCEEDINGS: | Civil Appeal from Court of Common Pleas of Monroe County, Ohio<br>Case No. 2014-086 |
| JUDGMENT: | Affirmed |
| APPEARANCES:<br>For Plaintiffs-Appellants | Attorney David Wigham<br>Attorney Lucas Palmer<br>Attorney J. Fraifogl<br>Attorney Jason Ramsey<br>222 South Main Street, Suite 400<br>Akron, Ohio 44308 |
| For Defendants-Appellees | Attorney Gregory Brunton<br>Attorney Daniel Hyzak<br>41 South High Street, Suite 240<br>Columbus, Ohio 43215 |
| JUDGES:<br><br>Hon. Gene Donofrio<br>Hon. Cheryl L. Waite<br>Hon. Carol Ann Robb | |
| | Dated: September 22, 2017 |

**[Cite as *Headley v. Ackerman*, 2017-Ohio-8030.]**
DONOFRIO, J.

**{¶1}** Plaintiffs-appellants, Mark and Valeria Headley, appeal from a Monroe County Common Pleas Court judgment granting summary judgment in favor of defendants-appellees, Rhonda Piatt, Linda Crawford, Jesse Baker, James Baker, Harold Baker, Loren Christman, Lila Kirkbride, Brian Christman, Carol Butler, Seth Everly and Laura Everly as heirs to the estate of Lena Christman, the Estate of Bertha Burkhart, Daniel Burkhart, Michael Burkhart, Damian Burkhart, Jennifer Burkhart-London, Jane Breece, Lisa Larey, Edith Busby, Carol Creger, Cindy Christman, and Jeanette Harris, on appellants' claim for royalties.

**{¶2}** Appellants own approximately 124.981 acres of property in Seneca Township (the Property). Appellants acquired the Property by warranty deed from Emma Criswell recorded August 18, 2010.

**{¶3}** An explanation of the Property's history is necessary.

**{¶4}** In 1876, the Property, and all interests associated with it, was owned by John Christman. John Christman died intestate on May 6, 1897. He left nine children and a wife, Eva Christman. His estate passed in equal shares to his children (the Christman heirs) and his wife received her dower interest.

**{¶5}** In 1922, the Christman heirs transferred the Property to L.E. Christman (one of John Christman's children) by quitclaim deed (the First Quitclaim Deed). The First Quitclaim Deed was executed on April 4, 1922, and recorded July 7, 1922. It contained the following exception:

> Exceptin [sic] and reserving however from the operation of this deed the one half of the oil and gas royalty in our respective interest in said premises, being the one sixteenth of the oil produced and the one half of gas royalty reserved in any lease now on said premises or that may hereafter made thereon, for the period of twenty years from this date * * *

(Pl. S.J. Motion, Fraifogl Aff. Ex. B)

**{¶6}** Shortly thereafter, L.E. Christman and his wife re-conveyed the

Property back to the Christman heirs by way of another quitclaim deed (the Second Quitclaim Deed). The Second Quitclaim Deed was executed on July 5, 1922, and recorded on July 8, 1922. It stated in part:

> The interests herein conveyed by grantors to grantees are the same interests conveyed by grantees and their respective wives and husbands to grantors by deed dated April 4, 1922 [the First Quitclaim Deed]. It being the intention of this deed to re-convey all and singular the real estate therein conveyed to grantees and in the proportion to each grantee as was conveyed by each grantee in said former deed. That is to say: The said P.F. Christman, J.F. Christman, George M. Christman, Rosa Stallings, Samuel Christman and Solomon Christman are each to receive by this deed their 1/9$^{th}$ heretofore conveyed to grantors herein in said deed mentioned, and the said Samuel Ackerman and George Ackerman are each to receive 1/63 interest by them respectively conveyed to grantors in said deed, and to Eva Christman is to be reconveyed the dower she held in said premises as widow of her deceased husband John Christman and which dower she released to grantors in said former deed.
>
> It being further understood and agreed that said grantors are reserving to themselves the full 1/9$^{th}$ interest to said premises, the same as they held before the execution of said former deed as heirs of said John Christman, deceased.

(Pl. S.J. Motion, Fraifogl Aff. Ex. D). The Second Quitclaim Deed did not contain any language regarding the royalty exception.

**{¶7}** L.E. Christman filed a partition action on June 2, 1922 (Partition Action), against the Christman heirs. (Pl. S.J. Motion, Fraifogl Aff. Ex. C). On October 30, 1922, the trial court, ruling on the Partition Action found that,

> it is in the interest of all parties to this proceeding to *retain* the one half of the royalty oil, gas and gasoline in and under said premises and it is therefore ordered that said estate be aparted subject to said one half royalty.

(Pl. S.J. Motion, Fraifogl Aff. Ex. C; Emphasis added).

**{¶8}** On December 7, 1922, a Writ of Partition and Dower was filed ordering the sheriff to sell the Property. In the Writ, the court again stated that "it is in the interest of all parties * * * to retain the one half of the royalty oil, gas and gasoline in and under [the Property], and it is ordered that said estate be aparted subject to said one half royalty." (Pl. S.J. Motion, Fraifogl Aff. Ex. C).

**{¶9}** The Property was sold at a sheriff's sale on March 10, 1923, to L.E. Christman. The sheriff's sale was made with the following language: "Excepting and reserving the one-half oil, and gas and gasoline royalty in and under the above described premises [the Property]." (Pl. S.J. Motion, Fraifogl Aff. Ex. E).

**{¶10}** Appellees in this case are the heirs of the Christman heirs.

**{¶11}** On March 14, 2014, appellants filed a complaint asserting they are the owners of oil, gas, and mineral rights underlying the Property.[1] Appellants asserted that after the 1923 sheriff's sale, there was no further conveyance of the Royalty Interest by any party. Additionally, they alleged the 20-year period of royalty ownership set out in the First Quitclaim Deed had expired. And they alleged that other than the Royalty Interest, no other part of the mineral estate was ever severed from the Property. Appellants asserted that the Royalty Interest terminated on April 2, 1942, pursuant to the 20-year term. At that time, appellants claimed, the Royalty Interest vested in the surface estate of the Property, which makes them the owners of the Royalty Interest. Appellants made a separate claim that under the 1989 Ohio Dormant Mineral Act (ODMA), the Royalty Interest was abandoned and vested with

1 Appellants filed this complaint against numerous other defendants beside appellees. Based on their failure to respond, the trial court granted appellants' motion for default judgment against many of those defendants and they are not parties to this appeal.

the surface estate. Thus, appellants sought to quiet their title to the Royalty Interest and declare any interest appellees might assert as null and void.

**{¶12}** Appellees filed an answer and counterclaim.[2] In their counterclaim, appellees asserted that they are the heirs from the sheriff's sale and Writ of Partition and Dower of Eva Christman. They first asserted that the Property is encumbered by an oil and gas lease between L.E. and Anna Christman and Burns Drilling Company. They claimed that the oil and gas lease is a savings event under both the 1989 and the 2006 ODMA that preserved the Royalty Interest. They next claimed that the 2006 ODMA applied and they have preserved their interest pursuant to it. Therefore, appellees asked the court to quiet title in their favor.

**{¶13}** Appellants filed a motion for summary judgment on their claims as well as on appellees' counterclaims. Appellees filed a motion for partial summary judgment noting that the trial court had stayed any issues pertaining to the 1989 and 2006 ODMA, pending decisions from the Ohio Supreme Court regarding those issues.

**{¶14}** In its February 8, 2016 judgment entry, the trial court found that the legal effect of the First and Second Quitclaim Deeds was clear and unambiguous. Specifically, the court found that the grantors of the First Quitclaim Deed conveyed away their interest in the Property to L.E. Christman who then immediately re-conveyed the exact same interest back to the grantors of the First Quitclaim Deed through the Second Quitclaim Deed. Therefore, the trial court found the effect of the two deeds was to maintain the status quo that existed prior to the First Quitclaim Deed, that being that P.F. Christman, J.F. Christman, George M. Christman, Rosa Stallings, Samuel Christman, Solomon Christman, and L.E. Christman all had a 1/9 interest in the Property, which included a 1/9 Royalty Interest. The court further found that following the execution of the Second Quitclaim Deed, all of the then-living heirs of John Christman possessed an interest in the Royalty.

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2 There was also another group of defendants known in the trial court as the "Lackey defendants" who did respond to the complaint. They are not parties to this appeal. Appellees were known in the trial court as the "Reminger defendants."

**{¶15}** The trial court went on to find that pursuant to the Partition Order, all of the Christman heirs who were named in the Partition Action each retained one-half of their oil, gas, and gasoline royalties associated with the Property.

**{¶16}** The trial court found that whatever interest was transferred to L.E. Christman pursuant to the First Quitclaim Deed was immediately transferred back to the original conveying parties in the same proportion as originally conveyed pursuant to the express language of the Second Quitclaim Deed. Therefore, the court found that after the execution of the Second Quitclaim Deed, each of the then-living heirs of John Christman owned an undivided interest in the Property, not subject to any limited reservation and this interest included any and all associated royalties.

**{¶17}** The court went on to find that the Partition Action joined all of the Christman heirs. It further found the Decree of Partition and the Sheriff's Deed both provided that the successful purchaser in the sheriff's sale was "[e]xcepting and reserving the one half oil, and gas and gasoline royalty" in the Property. Therefore, as the successful purchaser at the sheriff's sale, L.E. Christman took title to the Property as it was conveyed by the Sheriff's Deed and ordered by the Partition Action, which included only "one half oil, and gas and gasoline royalty."

**{¶18}** Based on these findings, the trial court denied appellants' motion for summary judgment and granted appellees' partial motion for summary judgment as to count one of appellants' complaint.

**{¶19}** With leave of court, appellants next filed their first amended complaint to assert a claim that, because the parties who reserved the Royalty Interest failed to use words of inheritance in the applicable deed, the royalty reservation only created a life estate interest that expired upon the deaths of the reserving parties. Appellants had argued this claim in their summary judgment motion but had not included it in their original complaint.

**{¶20}** The trial court issued another judgment entry on July 19, 2016. The court stated that after a consultation with all counsel, it was now prepared to issue a summary judgment ruling on the life estate issue. The court determined that the right

to receive oil, gas, and gasoline royalties from the Property was an existing right already possessed by the Christman heirs at the time of the Sheriff's Deed. Thus, the court found that the intent and effect of the Sheriff's Deed was to create an exception of something the Christman heirs already owned at the time of the conveyance, that being a proportionate share of the royalty interest. Because the conveyance restriction in the Sheriff's Deed was an exception, as opposed to a reservation, no words of inheritance were necessary to ensure that the exception would last beyond the lives of the granting parties.

**{¶21}** Therefore, the court found that the Royalty Interest was not limited to a life estate and did not terminate upon the death of each of the surviving parties. The court found there was "no just reason for delay" and that its judgment was a final, appealable order.

**{¶22}** Appellants filed a timely notice of appeal on August 18, 2016. They now raise two assignments of error, both asserting summary judgment in appellees' favor was in error.

**{¶23}** An appellate court reviews the granting of summary judgment de novo. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. Thus, we shall apply the same test as the trial court in determining whether summary judgment was proper.

**{¶24}** A court may grant summary judgment only when (1) no genuine issue of material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence can only produce a finding that is contrary to the non-moving party. *Mercer v. Halmbacher*, 2015-Ohio-4167, 44 N.E.3d 1011, ¶ 8; Civ.R. 56(C). The initial burden is on the party moving for summary judgment to demonstrate the absence of a genuine issue of material fact as to the essential elements of the case with evidence of the type listed in Civ.R. 56(C). *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). If the moving party meets its burden, the burden shifts to the non-moving party to set forth specific facts to show that there is a genuine issue of material fact. *Id*.; Civ.R. 56(E). "Trial courts should award summary

judgment with caution, being careful to resolve doubts and construe evidence in favor of the nonmoving party." *Welco Industries, Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 346, 617 N.E.2d 1129 (1993).

**{¶25}** Appellants' first assignment of error states:

> THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS-APPELLEES CONCERNING WHETHER THE APPLICABLE ROYALTY RESERVATION WAS LIMITED TO A TWENTY YEAR TERM.

**{¶26}** Appellants argue the trial court erred in finding that the express language of the First Quitclaim Deed did not limit the Royalty Reservation to 20 years. They claim the court was to give effect to the express language of the First Quitclaim Deed. Appellants assert the trial court never explained how the Second Quitclaim Deed could have eliminated the reserved Royalty Interest.

**{¶27}** Appellants claim the only theory under which this would be possible is by merger, which is the absorption of one estate by another. They assert whether there was an intent to create a merger is a question of fact. Appellants argue the trial court never conducted a merger analysis and, had it done so, the evidence would indicate a merger was not intended. They point out that in the Partition Action, the court stated that the defendants would "retain" the one-half royalty interest and in the Writ of Partition the court found it was in the parties' interest to "retain" the one-half royalty interest.

**{¶28}** Appellants further claim the parties' intent to limit the Royalty Reservation to 20 years was evidenced by various leases as well. They assert that one oil and gas lease was executed within the 20-year period following the partition action, on October 10, 1933. (Pl. S.J. Motion, Fraifogl Aff. Ex. G). All of the parties to the partition action signed this lease, those who held the Royalty Interest and the surface owner. Another oil and gas lease was executed after the 20-year period had expired, on September 8, 1944. (Pl. S.J. Motion, Fraifogl Aff. Ex. G). Only the

surface owner signed this lease because, appellants assert, the Royalty Interest had expired by then.

**{¶29}** The construction of a plain, unambiguous deed is a matter of law that we review without deference to the trial court. *Scarberry v. Lawless*, 4th Dist. No. 09CA18, 2010-Ohio-3395, ¶ 22, citing *Alexander v. Buckeye Pipe Line Co*., 53 Ohio St.2d 241, 374 N.E.2d 146 (1978), paragraph one of the syllabus. In construing a deed, we are to give effect to the parties' intent. *Id.* Courts are to presume that the deed expresses the intention of the parties at the time that they executed the deed. *Parker v. Parker*, 4th Dist. No. 99CA845, 2000 WL 1520046, *3 (Sept. 28, 2000).

**{¶30}** In the First Quitclaim Deed, the Christman heirs transferred the Property to L.E. Christman. The Deed contained a statement excepting and reserving "from the operation of this deed the one half of the oil and gas royalty in our respective interest in said premises, being the one sixteenth of the oil produced and the one half of gas royalty reserved in any lease now on said premises or that may hereafter made thereon, for the period of twenty years from this date." (Pl. S.J. Motion, Fraifogl Aff. Ex. B). Thus, the First Quitclaim Deed created a one-half royalty interest for each of the Christman heirs that would last for 20 years. The First Quitclaim Deed was executed on April 4, 1922, and recorded July 7, 1922.

**{¶31}** Two days before the First Quitclaim Deed was recorded, the Christman heirs and L.E. Christman executed the Second Quitclaim Deed, which was recorded the day after the First Quitclaim Deed was recorded. In the Second Quitclaim Deed, L.E. Christman re-conveyed the Property back to the Christman heirs.

**{¶32}** Pursuant to the doctrine of merger, a lesser estate will be absorbed into a greater estate when they meet and coincide in the same person. *Gallucci v. Freshour*, 4th Dist. No. 96CA18, 1997 WL 548730, *3 (Sept. 8, 1997). To constitute a merger, the two estates must be in one and the same person, at one and the same time, and in one and the same right. *Colopy v. Wilson*, 48 Ohio App.3d 148, 149, 548 N.E.2d 1322 (5th Dist.1989), citing 41 Ohio Jurisprudence 3d (1983) 547, Estates, Powers, and Restraints on Alienation, Section 135. The question of whether

there will be a merger of a lesser and greater estate under circumstances which might permit a merger is a matter of intention and substantial justice. *Id.* at 150.

**{¶33}** Although the trial court did not refer to the doctrine of merger by name, the court applied this doctrine. The trial court looked to the intent of the parties to the First and Second Quitclaim Deeds as evidenced by the language they employed.

**{¶34}** Appellants make arguments asserting the intent of the parties to the Quitclaim Deeds can be ascertained by the Partition Action and by various leases entered into after the Quitclaim Deeds and Sheriff's sale. But these arguments are misplaced.

**{¶35}** A deed is a contract. *Rice v. Rice*, 7th Dist. No. 2001-CO-28, 2002-Ohio-3459, ¶ 44. If a contract's language is clear and unambiguous, and not subject to multiple interpretations, the court will not consider extrinsic evidence, or evidence outside of the four corners of the document, to re-interpret the contract's terms. *Love v. Beck Energy Corp*., 7th Dist. No. 14 NO 415, 2015-Ohio-1283, ¶ 21.

**{¶36}** The Second Quitclaim Deed is clear and unambiguous. Therefore, neither we, nor the trial court, are permitted to look beyond the four corners of the Second Quitclaim Deed in ascertaining its terms.

**{¶37}** The Second Quitclaim Deed unequivocally stated that it conveyed "*the same interests conveyed* by grantees and their respective wives and husbands to grantors by deed dated April 4, 1922 [the First Quitclaim Deed]." (Emphasis added). The Second Quitclaim Deed went on to state that it was "the intention of this deed to *re-convey all* and singular the real estate therein conveyed to grantees and in the proportion to each grantee as was conveyed by each grantee in [the First Quitclaim Deed]." (Emphasis added). Finally, the Second Quitclaim Deed stated that L.E. Christman and his wife were reserving to themselves their 1/9 interest in the Property, "the same as they held before the execution of [the First Quitclaim Deed] as heirs of said John Christman, deceased."

**{¶38}** The Second Quitclaim Deed did not contain any language specifically referring to the royalty reservation of the First Quitclaim Deed. Nonetheless, its terms

are clear and unambiguous that it re-conveyed to each of the Christman heirs the *identical* interest they held prior to the execution of the First Quitclaim Deed. In so doing, the 20-year royalty interest the Christman heirs held pursuant to the First Quitclaim Deed merged with or was absorbed by each of their undivided 1/9 interests in the Property.

**{¶39}** Thus, the trial court did not err in determining that the Royalty Interest was not limited by the 20-year term set out in the First Quitclaim Deed.

**{¶40}** Accordingly, appellants' first assignment of error is without merit and is overruled.

**{¶41}** Appellants' second assignment of error states:

> THE TRIAL COURT ERRED BY FAILING TO GRANT SUMMARY JUDGMENT IN FAVOR OF APPELLANTS MARK E. HEADLEY AND VALERIA HEADLEY CONCERNING WHETHER THE APPLICABLE ROYALTY RESERVATION EXPIRED ON THE DEATHS OF THE RESERVING PARTIES.

**{¶42}** In this assignment of error, appellants argue alternatively that the Royalty Interest was limited to a life estate due to the lack of words of inheritance in the reservation. They claim the trial court erred in finding that the Royalty Interest was an exception. Instead, they argue the Royalty Interest was a reservation.

**{¶43}** Appellants note that prior to 1925, Ohio law required the use of words of inheritance to create a fee simple estate when conveying a reservation as opposed to conveying an exception. They note that a reservation creates a new right or interest while an exception separates part of an interest already in existence.

**{¶44}** Appellants argue the trial court erroneously determined that the Royalty Interest was not created by the First Quitclaim Deed or the Sheriff's Deed and, from this error, continued to err by ruling that the language in the Sheriff's Deed constituted an exception. Appellants contend that if the trial court correctly concluded that the Second Quitclaim Deed eliminated the Royalty Interest contained in the First

Quitclaim Deed, then the Sheriff's Deed was a reservation, not an exception, because it created the Royalty Interest.

**{¶45}** Prior to the enactment of G.C. 8510-1, now R.C. 5301.02, in 1925, if a reservation in a deed was to be anything other than a life estate in the grantor, the deed had to have contained words of inheritance. *Holdren v. Mann*, 7th Dist. No. 592, 1985 WL 10385, *1 (Feb. 13, 1985). On the other hand, if the deed contained an exception, it left title to that part of the realty excepted in the grantor and words of inheritance were not required. *Id.*

**{¶46}** This court previously discussed in detail the difference between a "reservation" and an "exception" in a deed:

> A reservation by definition is a "creation of a new right or interest (such as an easement) by and for the grantor, in real property being granted to another." Black's Law Dictionary (8th Ed.2004) 1333. An exception is the "retention of an existing right or interest, by and for the grantor, in real property being granted to another." *Id*. at 604. * * *
>
> "Although the terms 'excepting' and 'reserving' mean different things, the two terms are often employed 'indiscriminately.' *Ricelli v. Atkinson* (1955), 99 Ohio App. 175 [58 O.O. 305, 132 N.E.2d 123]. As a result, the terms employed, in and of themselves, do not definitively establish whether an exception or a reservation has been created. * * * Thus, 'whether the language creates a reservation or an exception depends upon the intention of the parties as evinced by a construction of the whole instrument in light of the circumstances of the case rather than upon the particular words used.' *Id*. at 179 [58 O.O. 305, 132 N.E.2d 123], citing *Gill v. Fletcher* (1906), 74 Ohio St. 295 [78 N.E. 433]; *Akron Cold Spring Co. v. Unknown Heirs of Ely* (1923), 18 Ohio App. 74. 'In case of doubt, it is said, the conveyance is to be construed most strongly as against the grantor, or in favor of the grantee on the theory, it seems, that the words used are to be regarded as the words

> of the grantor rather than of the grantee. Applying this rule, an exception or reservation in a conveyance is construed in favor of the grantee rather than of the grantor.' *Pure Oil Co. v. Kindall* (1927), 116 Ohio St. 188, 203 [156 N.E. 119], quoting 2 Tiffany, Real Property (2 Ed.Rev.1920), Section 437." *Campbell v. Johnson* (1993), 87 Ohio App.3d 543, 547, 622 N.E.2d 717.

*Am. Energy Corp. v. Datkuliak*, 174 Ohio App.3d 398, 2007-Ohio-7199, 882 N.E.2d 463, ¶¶ 74-75 (7th Dist.)

**{¶47}** In the case at bar, the plain language of the Sheriff's Deed lends no help to its interpretation. The Sheriff's Deed provides: "*Excepting* and *reserving* the one-half oil, and gas and gasoline royalty in and under the above described premises." (Emphasis added). Thus, the Sheriff's Deed employed both terms.

**{¶48}** As discussed in appellants' first assignment of error, the Royalty Interest created by the First Quitclaim Deed was extinguished by the Second Quitclaim Deed. Thus, at the time of the Sheriff's sale, no royalty interest existed pursuant to a prior Deed.

**{¶49}** Nonetheless, at the time of the Sheriff's sale the Christman heirs would have had the right to collect any royalties on their undivided 1/9 interests in the Property. Thus, in "excepting" or "reserving" a royalty interest in the Sheriff's Deed, the Christman heirs would not have been creating a new interest that they did not previously possess. Instead, they were retaining an existing interest that they wished to hold onto despite selling the rest of their interest in the Property. Because an exception is the retention of an existing right or interest, the trial court correctly concluded that grantors in the Sheriff's Deed retained an exception rather than created a reservation. Therefore, no words of inheritance were required to extend the Royalty Interest past a life estate.

**{¶50}** Accordingly, appellants' second assignment of error is without merit and is overruled.

**{¶51}** For the reasons stated above, the trial court's judgment is hereby affirmed.

Waite, J., concurs.

Robb, P.J., concurs.