

[Cite as *Devitis v. Draper*, 2017-Ohio-1136.]

STATE OF OHIO, MONROE COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

RICHARD F. DEVITIS, et al.)	
)	
PLAINTIFFS-APPELLEES)	
)	CASE NO. 13 MO 0017
VS.)	
)	OPINION
CHARLES WILLIAM DRAPER, et al.)	
)	
DEFENDANTS-APPELLANTS)	

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Monroe County, Ohio
Case No. 2012-429

JUDGMENT: Reversed and Remanded.

APPEARANCES:
For Plaintiffs-Appellees

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For Defendants-Appellants

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JUDGES:

Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: March 20, 2017

[Cite as *Devitis v. Draper*, 2017-Ohio-1136.]
DeGENARO, J.

{¶1} Defendants-Appellants, Charles William Draper, Mary Ellen (Draper) Beyer, Joseph G. Draper, James E. Draper, Bryon A. Draper, and Myron D. Draper, appeal the trial court's summary judgment in favor of Plaintiffs-Appellees, Richard F. DeVitis, Deborah L. DeVitis, and Terry Kaczmarczyk, and denying their cross-motion for summary judgment in an action involving Ohio's Dormant Mineral Act, R.C. 5301.56. As the Draper Heirs' assigned errors are meritorious in part, the trial court's judgment is reversed and the case remanded for further proceedings.

Facts and Procedural History

{¶2} Appellees are the surface owners of real property in Monroe County. The Draper Heirs claim to own a severed mineral interest concerning that real property. Specifically, the pertinent deeds reserved "one-half (1/2) (being the one-sixteenth) of the royalty oil and gas in and under the above premises[.]"

{¶3} Appellees attempted to use both the 1989 and 2006 versions of R.C. 5301.56 to have the severed mineral interest deemed abandoned and vested in Appellees as the surface owners. Specifically, on April 24, 2012, pursuant to the 1989 version, Appellees filed of record in Monroe County, an affidavit pursuant to R.C. 5301.252, which stated that none of the savings events outlined in R.C. 5301.56 (B)(1) had occurred in the 20-year period prior to June 30, 2006. Next, Appellees proceeded under the 2006 version; on May 3, 2012, Appellees published a notice of abandonment in the Monroe County Beacon, a newspaper of general circulation in Monroe County pursuant to R.C. 5301.56(E). On May 29, 2012, the Draper Heirs filed a preservation notice with the office of the Monroe County Recorder pursuant to R.C. 5301.56(H)(1)(a).

{¶4} On June 6, 2012, despite the Draper Heirs filing a preservation notice, Appellees filed an affidavit of abandonment with the Monroe County Recorder's Office. Further, on July 5, 2012, pursuant to R.C. 5301.56(H)(2), Appellees sent a letter to the Monroe County Recorder instructing her to note on the margin of the record that the severed mineral interest was abandoned pursuant to the affidavit of abandonment.

{¶15} On November 26, 2012, Appellees filed a complaint alleging that the severed mineral Interest was deemed abandoned under either the 1989 or the 2006 version of R.C. 5301.56; the Draper Heirs answered. The parties filed cross-motions for summary judgment.

{¶16} On August 13, 2013, the trial court granted summary judgment in favor of Appellees, concluding the oil and gas royalty interest was deemed abandoned by operation of both the 1989 and the 2006 versions of R.C. 5301.56 and that the filing of a preservation notice alone under R.C. 5301.56(H) as provided for by the 2006 DMA is not sufficient to preserve the severed interest without a showing of one of the savings events under R.C. 5301.56(B). This appeal was stayed pending the Ohio Supreme Court's decision in multiple cases regarding, inter alia, whether the 1989 or the 2006 version of R.C. 5301.56 controls.

{¶17} In *Corban v. Chesapeake Exploration, L.L.C.*, Slip Opinion No. 2016-Ohio-5796 (Sept. 15, 2016), ¶ 2, the Court held "the 2006 version of the Dormant Mineral Act, which is codified at R.C. 5301.56, applies to all claims asserted after June 30, 2006[.]" On October 24, 2016, this case was returned to the active docket.

2006 DMA Controls

{¶18} The trial court here discussed both versions of the statute, but insofar as it applied R.C. 5301.56(H)—a provision found only in the 2006 DMA—the trial court concluded that the 2006 version applied.

{¶19} In *Corban*, the Ohio Supreme Court held the 2006 version of R.C. 5301.56 controlled, reasoning in pertinent part:

In accord with this analysis, we conclude that the 1989 law was not self-executing and did not automatically transfer ownership of dormant mineral rights by operation of law. Rather, a surface holder seeking to merge those rights with the surface estate under the 1989 law was required to commence a quiet title action seeking a decree that the dormant mineral interest was deemed abandoned.

* * *

Dormant mineral interests did not automatically pass by operation of law to the surface owner pursuant to the 1989 law. Thus, as of June 30, 2006, any surface holder seeking to claim dormant mineral rights and merge them with the surface estate is required to follow the statutory notice and recording procedures enacted in 2006 by H.B. 288. These procedures govern the manner by which mineral rights are deemed abandoned and vested in the surface holder and apply equally to claims that the mineral interests were abandoned prior to June 30, 2006.

Id. at ¶ 28, 31.

{¶10} Appellees herein filed their complaint on November 26, 2012, well after the June 30, 2006 effective date of the 2006 version. Accordingly, the 2006 DMA governs resolution of this appeal. As the trial court considered both versions of the DMA in rendering its decision, we proceed to the merits of the parties' arguments.

Royalty Interest

{¶11} In their first of two assignments of error, the Draper Heirs assert:

The trial court erred in determining that a reserved oil and gas royalty interest may be subject to abandonment under either version of O.R.C. 5301.56.

{¶12} The issue of whether a royalty interest in an oil and gas estate is subject to abandonment under R.C. 5301.56 is an issue of first impression in Ohio.

{¶13} The DMA states that "[a]ny mineral interest held by any person, other than the owner of the surface of the lands subject to the interest, shall be deemed abandoned and vested in the owner of the surface of the lands subject to the interest" if none of the exceptions apply. R.C. 5301.56(B). A mineral interest is defined as "a fee interest in at least one mineral regardless of how the interest is created and of the form of the interest, which may be absolute or fractional or divided

or undivided." R.C. 5301.56(A).

{¶14} Although no Ohio appellate court has addressed whether royalty interests are subject to abandonment under R.C. 5301.56, in *Pollock v. Mooney*, 7th Dist. No. 13 MO 9, 2014-Ohio-4435, this court determined that a royalty interest was subject to extinguishment under Ohio's Marketable Title Act. *Id.* at ¶ 15. Notably, although we determined a royalty interest constitutes personal property, we nevertheless found that interest is subject to the MTA. *Pollock* at ¶ 10-17, citing *Pure Oil Co. v. Kindall*, 116 Ohio St. 188, 156 N.E. 119 (1927); *Buegel v. Amos*, 7th Dist. No. 577, 1984 WL 7725 (June 5, 1984); and *Traicoff v. Christman*, 7th Dist. No. 549, 1982 WL 6131 (May 13, 1982).

{¶15} This court went on to quote from Chapter 5301, the MTA, stating:

"[R]ecord marketable title shall be held by its owner and shall be taken by any person dealing with the land free and clear of *all interests, claims, or charges whatsoever*, the existence of which depends upon any act, transaction, event, or omission that occurred prior to the effective date of the root of title. *All such interests, claims, or charges, however denominated*, whether legal or equitable, present or future, whether such interests, claims, or charges are asserted by a person sui juris or under a disability, whether such person is within or without the state, whether such person is natural or corporate, or is private or governmental, are hereby declared to be null and void."

(Emphasis sic) *Pollock* at ¶ 21, quoting R.C. 5301.50.

{¶16} We specifically emphasized that the terms "all interests, claims, or charges whatsoever" and "[a]ll such interests * * * however denominated" indicate that the MTA does not differentiate between different types of interests but rather applies to all interests. *Id.*

{¶17} Expanding on the rationale in *Pollock*, we hold that oil and gas royalty interests can be subject to abandonment under R.C. 5301.56. First, given that its

statutory section is found within Chapter 5301, the DMA is part of the MTA. Although R.C. 5301.56 only applies to the specific mineral interests defined within it, parallels can be drawn because the statute's definition of a mineral interest includes the phrase "regardless of how the interest is created and of the form of the interest," R.C. 5301.56(A)(3), which is consistent with the MTA's use of the phrase, "[a]ll such interests * * * however denominated." R.C. 5301.50.

{¶18} Moreover, as this court has explained, a royalty interest is " 'one stick [in] the bundle' of the five attributes of a severed mineral estate: right to develop (with ingress and egress), right to receive bonus payments, right to receive delay rentals, right to receive royalty payments, and right to lease (known as the executive right)." *Eisenbarth v. Reusser*, 2014-Ohio-3792, 18 N.E.3d 477 (7th Dist.), ¶ 60, *aff'd*, 2016-Ohio-581, citing *Lesley v. Veterans Land Bd. of the State of Texas*, 352 S.W.3d 479, 54 Tex. Sup.Ct. J. 1705 (2011), fn. 1. Further, "the various incidents of ownership of a mineral interest can be separately transferred." *Eisenbarth* at ¶ 61, citing *Sharp v. Gayler*, 737 P.2d 120, ¶ 5–6 (Ok.App.1987). See also *Bayer v. S. Pleasant Dev. Group, LLC*, 2016-Ohio-1336, 61 N.E.3d 880, ¶ 35 (5th Dist.) (vendor's interest in oil and gas royalties, in which grantor held a life estate with no remainderman, was a future and alienable interest such that vendor could reserve the royalties for itself.)

{¶19} Accordingly, mineral interests, as defined in R.C. 5301.56 include an oil and gas royalty interest making that interest subject to abandonment. Therefore the Draper Heirs' first assignment of error is meritless.

Preservation of Severed Mineral Interest

{¶20} In their second and final assignment of error, the Draper Heirs assert:

The trial court erred in holding that the filing of a preservation notice alone cannot be the basis for establishing that the severed mineral interest has not been abandoned.

{¶21} The claim and affidavit filed by Myron Draper on behalf of the Draper Heirs in response to the notice of abandonment did not identify any savings events

found in R.C. 5301.56(B)(3), which had occurred in the 20-year period preceding the notice of abandonment; instead merely stating that they wanted to preserve their interest. They assert the statute does not require them to specify a savings event in their claim for preservation.

{¶22} The Ohio Supreme Court held in *Dodd v. Croskey*, 143 Ohio St.3d 293, 2015-Ohio-2362, 37 N.E.3d 147, that even where no savings event occurred in the 20 years preceding the notice of abandonment, R.C. 5301.56(H)(1)(a) nevertheless allows a severed mineral interest owner to preserve the severed interest by filing a claim to preserve the mineral interest in the 60 days after notice is served or published. *Id.* at ¶ 25-32.

Nothing in the act states that a claim to preserve filed under R.C. 5301.56(H)(1)(a) must refer to a saving event that occurred within the preceding 20 years. Nor do the notice procedures in R.C. 5301.56(H)(1)(a) require that the claim to preserve be itself filed in the 20 years preceding notice by the surface owner. The statute plainly states that such a claim can be filed within 60 days after notice. R.C. 5301.56(H). Thus, to preserve the mineral holder's interests, the plain language of R.C. 5301.56(H) permits either a claim to preserve the mineral interest or an affidavit that identifies a saving event that occurred within the 20 years preceding notice.

Id. at ¶ 30.

{¶23} In *Dodd*, the claim to preserve filed by the severed mineral interest holders was similar to the one filed by the Draper Heirs:

John William Croskey filed and recorded a document entitled "Affidavit Preserving Minerals." The Croskey affidavit outlined a history of transactions affecting the mineral rights underlying appellants' surface property. And it identified 36 persons as "current owners of the

minerals and oil and gas reserved by the deeds" set forth in the affidavit who "do not intend to abandon their rights to the mineral interest, but intend to preserve their rights."

Dodd, 143 Ohio St.3d 293, ¶ 16.

{¶24} Here, the Draper Heirs filed their affidavit and claim for preservation 26 days after the notice of abandonment was published. The Draper affidavit specifies the nature of the severed mineral interest, pertinent title transactions affecting the interest, the current surface owners, as well as six persons—the Draper Heirs—for whose benefit the notice was being filed. It states that "[t]his Affidavit is made pursuant to the provisions of the Ohio Revised Code Section 5301.52 for the purpose of preserving the royalty interest in oil and gas of the claimants mentioned herein."

{¶25} The above-described claim, like the one in *Dodd*, constitutes a valid claim to preserve under R.C. 5301.56(H)(1)(a) and therefore no savings event need be specified therein. *Dodd* at ¶ 30. Therefore the Draper Heirs have sufficiently preserved their interest under the 2006 DMA. Accordingly, the Draper Heirs' second assignment of error is meritorious.

{¶26} In sum, the Draper Heirs' first assignment of error is meritless, but their second assignment of error is meritorious. A royalty interest in an oil and gas estate is subject to abandonment under R.C. 5301.56. However, the trial court erred in concluding that the Draper Heirs failed to preserve their interest under the 2006 version of R.C. 5301.56(H). Accordingly, the judgment of the trial court is reversed and the case remanded for further proceedings.

Donofrio, J., concurs.

Waite, J., concurs.