[Cite as *Shilts v. Beardmore*, 2018-Ohio-863.]

STATE OF OHIO, MONROE COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

RICHARD F. SHILTS	)	CASE NO. 16 MO 0003
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
MARY E. BEARDMORE, et al.	)	
	)	
DEFENDANTS-APPELLANTS	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from the Court of Common Pleas of Monroe County, Ohio Case No. CVH 2014-397
JUDGMENT:	Affirmed.
APPEARANCES:	
For Plaintiff-Appellee:	Atty. Todd J. Abbott Yoss Law Office 122 North Main Street P.O. Box 271 Woodsfield, Ohio 43793
For Defendant-Appellant:	Atty. Bryan C. Conaway Knowlton, Bennett & Conaway 126 N. 9th Street Cambridge, Ohio 43725

JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Carol Ann Robb

Dated: March 5, 2018

[Cite as *Shilts v. Beardmore*, 2018-Ohio-863.]
WAITE, J.

{¶1} Appellant Marie I. Christman, the sole original defendant involved in this action, appeals a February 8, 2016 decision of the Monroe County Common Pleas Court to grant Appellee Richard F. Shilts's motion for summary judgment. During the pendency of this appeal, Lee Christman was substituted as the party Appellant. Appellant argues that the trial court erroneously determined the restatement of an interest in subsequent deeds does not constitute a savings event under the 2006 Dormant Mineral Act ("DMA") and that Appellee failed to serve notice of intent to declare the minerals abandoned pursuant to R.C. 5301.56(E)(1). Appellant also contends that the trial court erred in failing to apply the 1989 DMA. Finally, Appellant argues that the trial court improperly denied her constitutional claims based on a lack of standing. For the reasons provided, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} This appeal concerns the ownership of mineral rights beneath land located in Malaga Township, Monroe County. On March 28, 2014, Mary E. Beardmore, Enos W. Beardmore, Charles K. Beardmore, Gail Beardmore, Stephen R. Beardmore, Nora Beardmore, James M. Beardmore, Bessie Beardmore, Sara E. Moore, and Nathanial Moore conveyed the surface rights of the property to Samuel V. Beardmore. The deed contained the following reservation:

> Grantors, their heirs and assigns, reserve and except from this deed, the 6/7 of the 1/2 Royalty in oil and gas, in and under the interests hereby conveyed by each of the said Grantors, Said royalty being the

> 3/66 interest in all the oil under and a right to 6/7 of 1/2 of all the rentals received for Gas wells drilled on the interests hereby conveyed by each of said Grantors.

(March 28, 1914 Deed, p. 2.)

{¶3} After several conveyances, the surface rights were eventually conveyed to Appellee. On October 19, 2012, Appellee published a notice of intent to declare the mineral rights abandoned in the Monroe County Beacon pursuant to R.C. 5301.56(E). After receiving no response from the Beardmore/Moore heirs, on December 4, 2012, Appellee filed and recorded an affidavit of abandonment.

{¶4} On January 16, 2013, Appellee entered into an oil and gas lease with Antero Resources, Appalachian Corporation. However, Antero sent Appellee only one-half of the bonus payment and held the other half until Appellee filed a quiet title action against the Beardmore/Moore heirs. Accordingly, on October 7, 2014, Appellee filed a complaint against: Mary E. Beardmore, Enos W. Beardmore, Charles K. Beardmore, Gail Beardmore, Stephen R. Beardmore, Nora Beardmore, James M. Beardmore, Bessie Beardmore, Sarah E. Moore, J.W. Beardmore, Nathaniel Moore, Harmon Beardmore, Elmer Beardmore, John Beardmore, Rosco Beardmore, Eva W. Winland, Nellie E. Slater, Grace Kline, Bertha Christy, and Antero. The complaint also listed the "unknown heirs, devisees, executors, administrators, relicts, next of kin, and assigns" of these individuals. The complaint raised claims of abandonment pursuant to both the 1989 and 2006 versions of the DMA against the Beardmore/Moore heirs and contained a request for specific performance against Antero, which was later settled and dismissed. Appellee could

not locate the Beardmore/Moore heirs and served them via publication through the Monroe County Beacon.

{¶5} On January 6, 2015, Marie I. Christman, heir of Stephen R. Beardmore, filed an answer. Beardmore-Christman was the only defendant to answer the complaint.

{¶6} On September 30, 2015, Appellee filed a motion seeking summary judgment. Appellant filed a motion to quash Appellee's motion, but did not file her own competing motion for summary judgment. On February 8, 2016, the trial court granted Appellee's motion for summary judgment. The court had earlier entered default judgment as to the remaining defendants. During the pendency of this appeal, the executor of Appellant's estate informed this Court of Appellant's death. Counsel for Appellant's motion to substitute Marie I. Christman's executor as the party Appellant was granted.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED BY FINDING THAT THE MINERAL INTEREST WAS NOT THE SUBJECT OF A TITLE TRANSACTION IN THE 20-YEAR PERIOD IMMEDIATELY PRECEDING OCTOBER 25, 2012, THEREBY CONSTITUTING A PRESERVING EVENT UNDER OHIO REVISED CODE SECTION 5301.56(B)(3)(a).

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED BY FINDING THAT THE RESTATEMENT OF A PRIOR MINERAL INTEREST RESERVATION IN LATER DEEDS

IS NOT A "TITLE TRANSACTION" WITHIN THE MEANING OF OHIO REVISED CODE SECTION 5301.56.

ASSIGNMENT OF ERROR NO. 5

THE TRIAL COURT ERRED IN FINDING THAT THE PLAINTIFF SATISFIED THE REQUIREMENTS IN OHIO R.C. 5301.56(E).

ASSIGNMENT OF ERROR NO. 6

THE TRIAL COURT ERRED AS IT DID NOT CONSIDER DEFENDANTS' ARGUMENT THAT THE NOTICE OF ABANDONMENT THAT WAS PUBLISHED WAS NOT A PROPER NOTICE UNDER OHIO REVISED CODE SECTION 5301.56(F).

{¶7} Appellant's first, second, fifth, and sixth assignments of error involve application of the 2006 DMA and will be addressed together. First, Appellant argues that the trial court erroneously held that two deeds recorded after the 1914 deed referencing the Beardmore/Moore reservation did not constitute a savings event.

{¶8} Pursuant to R.C. 5301.56(B)(3):

> Within the twenty years immediately preceding the date on which notice is served or published under division (E) of this section, one or more of the following has occurred:
>
> (a) The mineral interest has been the subject of a title transaction that has been filed or recorded in the office of the county recorder of the county in which the lands are located.

(b) There has been actual production or withdrawal of minerals by the holder from the lands, from lands covered by a lease to which the mineral interest is subject, from a mine a portion of which is located beneath the lands, or, in the case of oil or gas, from lands pooled, unitized, or included in unit operations, under sections 1509.26 to 1509.28 of the Revised Code, in which the mineral interest is participating, provided that the instrument or order creating or providing for the pooling or unitization of oil or gas interests has been filed or recorded in the office of the county recorder of the county in which the lands that are subject to the pooling or unitization are located.

(c) The mineral interest has been used in underground gas storage operations by the holder.

(d) A drilling or mining permit has been issued to the holder * * *

(e) A claim to preserve the mineral interest has been filed in accordance with division (C) of this section.

(f) In the case of a separated mineral interest, a separately listed tax parcel number has been created for the mineral interest in the county auditor's tax list and the county treasurer's duplicate tax list in the county in which the lands are located.

{¶9} Appellant contends that deeds in the chain of title pertaining to the surface rights constitute a savings event. We have previously explained that when

surface rights are conveyed, the primary purpose of that transaction is the sale of surface rights. *Dodd v. Croskey,* 7th Dist. 12 HA 6, 2013-Ohio-4257, ¶ 48. Although the subsequent deed may reference oil and gas reservations, it does not transfer those rights. *Id.* Thus, the mineral rights are not the "subject of" the title transaction. *Id.*

{¶10} In accordance with *Dodd*, the surface transactions in the instant case merely repeated a prior reservation and did not reserve any new interests. They are not, then, title transactions for purposes of R.C. 5301.56(B)(3)(a).

{¶11} Appellant next argues the trial court erroneously found that Appellee complied with the notice requirement of R.C. 5301.56(E). Appellant argues that Appellee failed to attempt service by certified mail prior to providing notice by publication. Appellant urges that Ohio law requires a "whatever it takes" standard, where service must in all cases be attempted by certified mail, and does not allow a "reasonable diligence" standard. According to Appellant, Appellee was required by law to at least attempt to complete service by certified mail before notice could appropriately be served by publication.

{¶12} In response, Appellee argues that Ohio law permits notice by publication when the addresses of heirs cannot be located through reasonable diligence. Appellee maintains that he attempted to locate the heirs through public records and an online search. Appellee explains that he used the names of the original Beardmores/Moores in an attempt to locate as many heirs as possible, as there was no way to learn the names of all heirs since 1914. Further, Appellee

served the complaint on Appellant by means of publication and Appellant did not contest service.

{¶13} The 2006 DMA requires a landowner seeking to reunite the surface and mineral rights to comply with the notice requirements of R.C. 5301.56(E). Pursuant to R.C. 5301.56(E)(1), a surface owner attempting to reunite the surface with the mineral interests must:

> Serve notice by certified mail, return receipt requested, to each holder or each holder's successors or assignees, at the last known address of each, of the owner's intent to declare the mineral interest abandoned. If service of notice cannot be completed to any holder, the owner shall publish notice of the owner's intent to declare the mineral interest abandoned at least once in a newspaper of general circulation in each county in which the land that is subject to the interest is located.

{¶14} The language of R.C. 5301.56(E)(1) permits notice by publication when notice "cannot be completed" through certified mail. Here, Appellee attempted to locate the Beardmore/Moore heirs through public records and online search, but could not identify and locate heirs. According to an affidavit from Appellee's counsel, Appellee also conducted a search of the Ohio Department of Natural Resources, Oil and Gas Division, in connection with the property at issue. (9/30/15 Sweeney Aff., p. 1.) Counsel's search did not reveal any Beardmore/Moore heirs. Counsel also averred that the chain of title did not reveal these heirs. Finally, counsel completed a fruitless public records search, including a search of probate records. Accordingly, Appellee served the Beardmore/Moore heirs through publication in the Monroe

County Beacon. The publication named each of the Beardmores/Moores who reserved an interest in the 1914 deed and included their unknown heirs, devisees, executors, administrators, relicts, and next of kin. It is apparent from the record that Appellee took reasonable efforts to locate the Beardmore/Moore heirs in order to serve publication by certified mail but was unable to locate names and addresses in order to complete service by certified mail.

{¶15} At oral argument, Appellants likened this case to *Harmon v. Capstone Holding Co.*, 7th Dist. No. 14 NO 0413, 2017-Ohio-4155. However, *Harmon* is readily distinguishable from the instant case. In *Harmon*, the landowners served an oil and gas company that they knew had previously dissolved and no longer existed. The landowners took no steps to determine who had acquired the company's assets. Here, as evidenced by the Sweeney affidavit, Appellee took reasonable measures to determine the names and addresses of the Beardmore/Moore heirs. When counsel's search did not reveal information regarding these heirs, it became clear that service could not be completed through certified mail. Appellee then served notice by publication and listed not only each of the Beardmores/Moores, but broadly included their unknown heirs, devisees, executors, administrators, relicts, and next of kin. Pursuant to R.C. 5301.56(E)(1), this service is sufficient. It would be absurd to absolutely require an attempt at notice by certified mail when a reasonable search fails to reveal addresses or even the names of potential heirs who must be served. This record reflects that since Appellee was unable to complete service by certified mail, service by publication, was appropriately obtained instead.

{¶16} Accordingly, Appellant's first, second, fifth, and sixth assignments of error are without merit and are overruled.

ASSIGNMENT OF ERROR NO. 3

THE TRIAL COURT ERRED BY NOT DETERMINING WHETHER THE MINERAL INTEREST VESTED UNDER THE 1989 VERSION OF THE OHIO DORMANT MINERAL ACT.

ASSIGNMENT OF ERROR NO. 4

THE TRIAL COURT ERRED BY NOT DETERMINING THAT A RE-RESERVATION OF THE MINERAL INTEREST TO THE 1914 MINERAL INTEREST HOLDERS OCCURRED WHEN THE PROPERTY WAS CONVEYED BY THE DEEMED VESTED OWNERS OF THE MINERAL INTEREST UNDER THE 1989 OHIO DMA.

{¶17} Appellant argues that the trial court erroneously failed to apply the 1989 version of the DMA.

{¶18} The Ohio Supreme Court has held:

> [A]s 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.

Stalder v. Bucher, 7th Dist. No. 14 MO 0010, 2017-Ohio-725, ¶ 10, quoting *Corban v. Chesapeake Exploration, L.L.C.,* 149 Ohio St.3d 512, 2016-Ohio-5796, 76 N.E.3d 1089, ¶ 31. The Supreme Court also held that the provisions set out in the 1989 DMA were not self-executing and did not serve to automatically transfer ownership rights of dormant minerals by operation of law. *Stalder* at ¶ 10, citing *Corban* at ¶ 28.

{¶19} Appellee filed his claim on October 19, 2012. As such, the 2006 version of the DMA controls. Any arguments regarding the 1989 DMA are moot. Accordingly, Appellant's third and fourth assignments of error are without merit and are overruled.

ASSIGNMENT OF ERROR NO. 7

THE TRIAL COURT ERRED AS IT DID NOT CLARIFY WHO OWNS THE RIGHT TO DRILL THROUGH THE COAL FOR OIL AND GAS.

{¶20} Appellant argues that the trial court failed to specify who owns the right to drill through the coal contained in the property to reach the oil and gas. Appellant argues that she owns the coal and should retain the right to drill through it. Appellee responds by arguing that the trial court clearly held that Appellant abandoned all mineral interests pursuant to the 2006 DMA and those interests vested in Appellee.

{¶21} Appellant is relying on language from the 1914 Beardmore/Moore reservation which reserved "the right to drill through said coal for oil and gas." (March 28, 1914 Deed, p. 3.) We have already explained that this reservation served to carve out the mineral interests at the heart of this appeal. As those interests have been deemed abandoned Appellant has no right to the oil and gas at issue, and so,

cannot maintain any interest in the manner in which it is obtained. Accordingly, Appellant's seventh assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 8

THE TRIAL COURT ERRED DENYING THAT THE DEFENDANT HAS STANDING TO BRING A CONSTITUTIONAL CHALLENGE TO EITHER VERSION OF OHIO'S DORMANT MINERAL ACTS.

{¶22} Appellant contends that Civ.R. 5.1 and R.C. 2721.12, which require that any constitutional challenge to an existing law be served on the attorney general, are unconstitutional. In response, Appellee explains that the applicable laws do not limit the right to challenge the constitutionality of a statute, they simply require all necessary parties to be joined in the action.

{¶23} Appellant seeks to challenge the constitutionality of both the 1989 and 2006 versions of the DMA. Appellant correctly points out that Civ.R. 5.1 and R.C. 2721.12 absolutely require a plaintiff to join all necessary parties, which for the purpose of R.C. 5301.56, includes the attorney general. Regardless, any claims regarding the constitutionality of the 1989 DMA are moot based on our resolution of Appellant's third and fifth assignments of error. As to the 2006 DMA, the Ohio Supreme Court has held that "[a]pplying R.C. 5301.56 as amended by H.B. 288 to claims filed after its effective date does not impair vested rights in violation of the Retroactivity Clause contained in Article II, Section 28, of the Ohio Constitution." *Corban, supra,* at ¶ 32. Because the Supreme Court has already ruled on Appellant's constitutional challenge to the 2006 version of the DMA, this claim is also moot.

{¶24} Accordingly, Appellant's eighth assignment of error is without merit and is overruled.

Conclusion

{¶25} Appellant argues that the trial court erroneously found that the restatement of an interest in subsequent deeds does not constitute a savings event under the 2006 DMA. However, the restatement of an interest in a subsequent deed where that deed pertains only to the surface rights in the property does not constitute a savings event. Appellant additionally challenges the sufficiency of Appellee's service. Appellee's service by publication complies with R.C. 5301.56(E)(1). Appellant argues that the trial court erroneously failed to apply the 1989 DMA. Pursuant to *Corban, supra*, Appellant's argument is without merit. Finally, Appellant argues that the trial court improperly denied her constitutional claims due to a lack of standing. Appellant lacks standing because she failed to join a necessary party, the attorney general. Additionally, her constitutional claims are moot. Accordingly, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

Robb, P.J., concurs.