IN THE SUPREME COURT OF OHIO

David M. Blackstone, *et al.*,	:	On Appeal from the Monroe
	:	County Court of Appeals,
Appellants,	:	Seventh Appellate District
	:	
v.	:	Case No. 2017-1639
	:	
Susan E. Moore, *et al.*,	:	Court of Appeals
	:	Case No. 14 MO 0001
Appellees.	:	

BRIEF OF APPELLANTS, DAVID M. BLACKSTONE AND NICOLYN D. BLACKSTONE

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I. STATEMENT OF FACTS AND THE CASE

A. The Severed Royalty was reserved in 1915.

On April 3, 1915, Nick Kuhn and Flora Kuhn conveyed the 60-acre property at issue in this case (the "Property") to W.D. Brown. Supp. p. 240. The instrument reflecting this transaction is the 1915 Kuhn Deed. The 1915 Kuhn Deed contained a reservation of the Severed Royalty:

> Except Nick Kuhn and Flora Kuhn, their heirs and assigns reserve one half interest [sic] in oil and gas royalty in the above described Sixty (60) acres.

Appellees are the heirs of Nick Kuhn and Flora Kuhn and are claiming title to the Severed Royalty, as reserved in the 1915 Kuhn Deed.

B. Appellants' root of title was effective July 30, 1969.

Appellant, David M. Blackstone, first acquired title to the Property by deed on July 30, 1969. Supp. p. 247. Appellees have admitted that the July 30, 1969 deed in favor of David M. Blackstone is Appellants' "root of title" for purposes of the Ohio Marketable Title Act ("MTA"). Supp. p. 305, 343. Appellants' root of title provides the following reference:

> Excepting the one-half interest in oil and gas royalty previously excepted by Nick Kuhn, their heirs and assigns, in the above described sixty acres.

Subsequently, David M. Blackstone, married, conveyed the Property to David M. Blackstone and Nicolyn Dawn Blackstone, husband and wife, by deed dated January 8, 2001.[1] Supp. p. 238.

C. The trial court held that the Severed Royalty had been extinguished under the MTA.

On June 4, 2012, Appellants filed this action seeking relief under the 1989 version of the Dormant Mineral Act.[2] Supp. 1. On April 11, 2013, Appellants filed an amended

[1] The January 8, 2001 deed contains the exact same reference to the Severed Royalty as Appellants' root of title.

complaint (with leave of court) seeking relief under the MTA. Supp. 13. Subsequently, both parties filed motions for summary judgment. Supp. 5.

On January 22, 2014, the trial court granted summary judgment in favor of Appellants, extinguishing the Severed Royalty on the basis of the 1989 version of the Dormant Mineral Act and under the MTA. Appx. p. 5. Appellees appealed the trial court's judgment.

D. The Seventh District held that the Severed Royalty had not been extinguished under the MTA.

On June 29, 2017, the Seventh District held that the trial court erred in holding that the Severed Royalty was abandoned under the 1989 version of the Dormant Mineral Act. Appx. p. 19. It also held that the trial court erred in holding that the Severed Royalty was extinguished under the MTA. Specifically, the Seventh District concluded that the reference to the 1915 Kuhn Deed in Appellants' 1969 root of title was specific, rather than general. Appellants' record marketable title was therefore subject to the Severed Royalty under R.C. 5301.49(A).

The Seventh District held that the reference to the 1915 Kuhn Deed was specific even though it did not identify 1) the date the 1915 Kuhn Deed was executed, 2) the date the 1915 Kuhn Deed was recorded, or 3) the volume and page number where the 1915 Kuhn Deed was recorded. The Seventh District expressly rejected the Fifth District's holding in *Duvall v. Hibbs*, 5th Dist. Guernsey No. CA-709, 1983 Ohio App. LEXIS 13042 (July 8, 1983) that the "specific identification" contemplated by R.C. 5301.49(A) required sufficient reference so that a title examiner may locate the prior conveyance by going directly to the identified conveyance record in the recorder's office without checking conveyance indexes.

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[2] Appellants' Complaint was filed prior to this Court's holding in *Corban v. Chesapeake Exploration, L.L.C.*, 149 Ohio St.3d 512, 76 N.E.3d 1089, 2016-Ohio-5796, which held that surface owners could not assert an abandonment under the 1989 version of the Dormant Mineral Act after the statute was amended in 2006.

E. The Seventh District certified a conflict with *Duvall* and denied Appellants' application for reconsideration.

On July 10, 2017, Appellants filed a motion to certify conflict with *Duvall* and an application for reconsideration. Supp. p. 10. On September 18, 2017, the Seventh District granted Appellants' motion to certify conflict. Appx. p. 38. A notice of certified conflict was filed with this Court on September 27, 2017 in Supreme Court Case No. 2017-1362. On October 6, 2017, the Seventh District denied Appellants' application for reconsideration. Appx. p. 43. Appellants have timely filed this appeal from the denial of their application for reconsideration. Appx. p. 51.

II. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: The specific identification contemplated in R.C. 5301.49(A) requires sufficient reference that a title examiner may locate the prior conveyance by going directly to the identified conveyance record in the recorder's office without checking conveyance indexes.

A. Searching the chain of title back to the patent is extremely time-consuming and expensive.

All privately-held land titles (except those derived from accretion or adverse possession) can be traced back through a chain of owners to some original conveyance from a sovereign, typically the federal government or a state. The patent is a grant of title by the state. There are 211 volumes of deeds in the Monroe County Recorder's Office.[3] In Ohio, the only official indexes available to searchers in the courthouse are "name" indexes—— those based on the names of the parties to a given instrument.[4] Typically, such indexes consist of dual sets of name indexes; one set is arranged alphabetically by the name of the grantee(s) to each instrument and the other alphabetically by the name of the grantor(s). In Monroe County, however, the

[3] Monroe County is the second least populated county in Ohio. In more populated counties, there are many more volumes of deeds.

[4] The indexes kept by the recorder's office are described in R.C. Chapter 317.

names of all grantors and grantees are kept in just a single deed index consisting of 27 volumes up until October 31, 1993.[5]

1. First, a title examiner searches the deed index backward.

Since the current owner of a property must have been a grantee under a deed at some time in the past, the title examiner starts with the present year and searches the deed index backward, looking for the owner's name as a grantee. Once the owner's name is found, the title examiner must verify that the entry does, in fact, affect the land being searched by reviewing the deed to examine the legal description. If the owner has a common name or has bought a good deal of real estate in the county, this can become exceedingly tedious.

Once the owner's deed is found, the title examiner must look for the next link (going back in time) in the chain of title. He does this by taking the name of the grantor on the owner's deed and searching it in the index. Such grantor must have received title to the land prior to the time it was deeded to the present owner. Once the grantor's name is found in the index, the grantor on the next prior deed must be searched in the index (and so on) until the title examiner comes back to the original patent from the state. To create the complete chain of title for a property in Monroe County (going back to the patent) a title examiner may very well need to review all, or nearly all, of the 27 volumes in the deed index.

2. Second, a title examiner searches the deed index forward.

The title examiner now has a complete chain of title to the land, but that is only the first of three major steps in searching the record title. The second step involves determining whether any of the owners that have been identified in the chain of title made any adverse conveyances (such as out conveyances, easements, mortgages, or mineral conveyances). Such

[5] From November 1, 1993 forward, deeds in Monroe County were recorded in the Official Records and can be searched by a computer.

conveyances can only be discovered by, again, using the indexes. The title examiner begins with the grantee that first received a deed for the property from the sovereign in the patent. The index must be checked for each owner in the chain of title (going forward) to see if any of them made adverse conveyances. For the complete chain of title to a property in Monroe County, this would require a title examiner to again review all, or nearly all, of the 27 volumes in the deed index.

The index must then be used to determine whether any adverse conveyances that are discovered still affect the title today. The grant of a mortgage, for example, should be followed at some point by a release of the mortgage. Unless the title examiner finds a subsequent release, he must conclude that such adverse conveyance still exists and affects the current state of the title. So, a title examiner must search the conveyance indexes (again) for the grantee or mortgagee of each adverse interest.

3. Third, a title examiner reviews the recorded instruments themselves and searches other sources outside the county land records for defects and adverse interests.

The third and final step requires a title examiner to look at the full copies of each instrument that have been identified, checking them for necessary formalities, consistency of legal descriptions, etc. When a title examiner discovers a reference in the chain of title to an interest or restriction created by a prior instrument, he must review the instrument creating such interest or restriction in order to ascertain its nature. The references that often appear in subsequent deeds to prior interests, be they specific or general, are not always accurate or complete. Incredibly, references are sometimes made to prior interests that simply do not exist. It is also possible, for example, that language creating a life estate in minerals or royalties may be omitted in subsequent references, thus giving the mistaken impression that the reservation was made in fee.

Reviewing full copies of each instrument often presents an additional problem, especially when the instruments are very old (more than 100 years). Such instruments were often handwritten by a scrivener (usually, the attorney or an employee of the Recorder's office). See, for example, the previous instruments of title for the Property at Appx. pp. 231-235, 256-261. Many schools today no longer teach students cursive, but even for those who are old enough to know it, the handwriting can be very difficult to read. After a long period of time, the paper pages of the instruments, starting in the corners, begin to flake and disintegrate, and the ink begins to fade. This makes it more difficult to make legible photocopies, even when the original document was typed. See, for example, the faded instruments at Appx. pp. 232-233, 240, 256-261. Older instruments do not have all of the information that is now required under R.C. 5301.011 (enacted on September 18, 1961). For example, most deeds prior to 1961 did not contain a prior instrument reference so the only way you could locate the previous deed in the chain of title was to search the indexes. All of these problems make searching title back to the patent even more time-consuming and expensive.

In reviewing all the recorded instruments, the title examiner must also be alert for any references to unrecorded documents or interests. Assuming no problems in this area, the title examiner must then check for adverse interests in relevant sources outside the county land records, such as tax and assessment liens, bankruptcies, judgment liens, and so on. Even after all that, the title examiner's opinion will be limited by the possible existence of some off-record claims, such as those of parties in possession, undisclosed spouses or prior owners, etc.

B. The MTA is intended to shorten the period of title searches.

The MTA is land reform legislation taken primarily from the Model Marketable Title Act ("Model Act"), which was drafted by Lewis M. Simes and Clarence B. Taylor. *See Heifner v. Bradford*, 4 Ohio St.3d 49, 51, 446 N.E.2d 440 (1983) (citing Simes & Taylor, *The Improvement of Conveyancing by Legislation* (1960)). Ohio was the tenth marketable title act jurisdiction to adopt a statute patterned directly after the Model Act. Paul E. Bayse, *Clearing Land Titles* (1970), 431, Section 185.

Prior to the MTA's enactment, Ohio had become "one of the ever-increasing number of jurisdictions in which a derivation of titles from the original governmental source far exceeds any tolerable period of title examination." *Id.* Ohio's MTA generally shortens the review of a chain of title to the root of title, instead of going all the way back to the patent, by extinguishing all prior interests not subject to an exception. In Simes & Taylor, *The Improvement of Conveyancing by Legislation*, 3 (1960), the drafters of the Model Act explained that:

> Without a doubt the chief impetus for such legislation has been the increasing length of the record of instruments which must be examined before a land title can be approved. As is well known, the practice still prevails in a very large number of states to trace title back to a grant from the United States or a state. The period of search thus becomes longer and longer as time goes on; and eventually this practice will have to be abandoned and the period restricted.

Under the Model Act, once a title examiner identifies the root of title, he may conclude whether the owner has "marketable record title" without having to continue searching the indexes all the way back to the patent.

The purpose of the MTA is to "facilitate the marketability of title by fixing a period of time, 40 years, beyond which title search would not be required." See LSC Bill Analysis, Am. H. B. No. 81, 104th Leg. (Ohio 1961); *see also Minnich v. Guernsey Sav. &*

Loan Co., 36 Ohio App.3d 54, 55, 521 N.E.2d 489 (5th Dist. 1987) (citing Hausser & Van Aken, *Ohio Real Estate Law and Practice* (1985), T 7.02). At the time the MTA was enacted in 1961, Allan F. Smith, Dean and Professor of Law at The University of Michigan Law School, praised the legislation as follows: "No lawyer who has examined land titles can fail to appreciate the value of the Act since it permits him to concentrate his attention, with limited exceptions, on the effectiveness of recent title transactions and to dismiss from consideration numerous ancient defects in the chain of title which are often more apparent than real." Allan F. Smith, *The New Marketable Title Act*, 22 Ohio St. L.J. 712, 713.

1. The concept of "marketable record title" is expressly based on the 40-year period <u>subsequent</u> to the root of title.

The chain of title described in R.C. 5301.48 is <u>expressly limited</u> to those persons who have "an unbroken chain of title of record to any interest in land for <u>forty years or more</u>" (emphasis added). Altogether, the forty-year period is <u>directly</u> referenced at least six (6) times in the MTA including:

> 1) once in the definition of "root of title" under R.C. 5301.47(E),
> 2) twice in the description of a record chain of title under R.C. 5301.48,
> 3) once in the exception to extinguishment for possibilities of reverter and rights of entry or powers of termination for breach of a condition subsequent under R.C. 5301.49(A),
> 4) once in the exception to extinguishment for interests preserved by the filing of proper notice or by possession under R.C. 5301.49(B), and
> 5) once in the time-frame for the filing of a preservation notice under R.C. 5301.51(A).

Indirectly, the forty-year period is referenced at least eight (8) times because, outside its definition under R.C. 5301.47(E), the term "root of title" (the most recent title transaction recorded "<u>forty years</u>" prior to when marketability is being determined) appears:

> 1) once in the definition of "marketable record title" under R.C. 5301.47(A),

2) once in the exception to extinguishment for specific references under R.C. 5301.49(A),
3) once in the exception to extinguishment for the rights of any person arising from a period of adverse possession or user under R.C. 5301.49(C),
4) once in the exception to extinguishment for interests arising out of a subsequently recorded title transaction under R.C. 5301.49(D),
5) once in the extinguishment of interests under R.C. 5301.50, and
6) once in the time-frame for the filing of a preservation notice under R.C. 5301.51(A).

And, outside R.C. 5301.48, the "record chain of title" described under R.C. 5301.48 (an unbroken chain of title of record for "forty years" or more) appears:

1) once in the definition of "marketable record title" under R.C. 5301.47(A), and
2) once in the legislative purpose of the MTA under R.C. 5301.55.

The plain text of the statute clearly shows that "forty years" has some legal significance. Once a title examiner has searched back to the root of title, he may conclude whether the owner has "marketable record title" without having to continue searching the indexes all the way back to the patent.

2. *Heifner* does not hold that the purpose of the MTA is unrelated to shortening title searches.

In *Heifner*, this Court said in footnote 4 that the purpose of marketable title acts was not "solely" to shorten title examination. Instead, it viewed the purpose of the MTA as being broader, and approvingly cited to the Florida Supreme Court's decision *Miami v. St. Joe Paper Co.*, 364 So. 2d 439, 442 (Fla. 1978). *Miami* recognized that Florida's Marketable Title Act was a comprehensive plan for reforming conveyancing procedures, a statute of limitations, and a recording act that provided an easy method by which an owner may preserve his interest in land.

The decision in *Miami* went on to further recognize that the operation of the Model Act was also aimed at limiting title searches. Specifically, *Miami* quoted from Catsman, *the Marketable Record Title Act and Uniform Title Standards*, Volume 3, Florida Real Property Practice (1965) Section 6.2, which states that "The chief purpose of the act is to extinguish stale claims and ancient defects against the title to real property, and, accordingly, limit the period of search." *Miami*, 364 So. 2d 439, at 443 (emphasis added). So, although this Court has already recognized in *Heifner* that shortening title examination is not the sole purpose of the MTA, the shortening of title searches should still be considered its "chief purpose."

C. This Court must determine if the Severed Royalty is an exception to Appellants' marketable record title.

The MTA shortens the period of a title search through the establishment of "marketable record title." "Marketable record title" under R.C. 5301.47(A) means "title of record, as indicated in section 5301.48 of the Revised Code, which operates to extinguish such interests and claims, existing prior to the effective date of the root of title, as are stated in section 5301.50 of the Revised Code" (emphasis added). The record chain of title described in R.C. 5301.48 differs from a property's record chain of title going all the way back to the patent. The record chain of title described in R.C. 5301.48 is limited to the chain of title in the period subsequent to the root of title. Under R.C. 5301.50, which is the MTA's active ingredient, all interests in land that arose "prior to the effective date of the root of title" are extinguished, subject only to matters in R.C. 5301.49.

1. The MTA recognizes certain exceptions to marketable record title.

Appellees in this case do not dispute that: 1) Appellants have the legal capacity to own land in the State of Ohio, 2) Appellants' "root of title" was effective July 30, 1969, 3) Appellants have an unbroken chain of title of record to the root of title for more than forty years,

4) the Severed Royalty was severed from the Property prior to the effective date of Appellants' root of title, 5) no preservation notices were recorded within forty years of the root of title, and 6) the other exceptions to record marketable title in R.C. 5301.49(B) through (D) and R.C. 5301.53 are inapplicable. Instead, Appellees simply claim that the Severed Royalty is an exception to Appellants' marketable record title under R.C. 5301.49(A).

Revised Code 5301.49(A) prevents the extinguishment of any interests inherent in the root of title, or in any subsequent muniments, when "specific identification" is made to the recorded title transaction that creates the interests. In Dean Smith's example of this type of specific reference (which included the volume and page of the relevant prior instrument), he explained that the MTA was "designed to assure a reasonable title search, not to serve as a cure-all for title matters." 22 Ohio St. L.J. 712, 716-717. After all, if the title examiner can locate the prior instrument without having to check the dreaded indexes, the exception does not add significantly to his burden.

On the other hand, general references to prior instruments are commonly made merely to protect the grantor from liability on his covenants for title in a warranty deed (should there be burdens of that type on record). When they lack a specific identification of the earlier title transaction, this "throws the risk of title search on the purchaser." 22 Ohio St. L.J. 712, 717. Thus, because of their differing effect on the burden of examining title, specific references are preserved as an exception under R.C. 5301.49(A) whereas general references are not.

2. A specific reference under R.C. 5301.49(A) should include the volume and page number where the instrument creating the interest can be found, or at least the grantor, grantee, and date when the instrument was recorded.

"Specific identification" is not expressly defined in R.C. 5301.49(A), so this Court must interpret what the legislature meant in light of the purpose of the statute. Appellants submit that a specific reference should permit a title examiner to locate the prior instrument by going directly to the identified conveyance record in the recorder's office, without checking the conveyance indexes.

A specific reference under R.C. 5301.49(A) should include the volume and page number where the instrument creating the interest can be found. This would create a bright-line rule that can be easily applied by persons examining title. Courts have recognized that when dealing with potential uncertainties in title to land, bright-line rules are generally preferable. *See Nusekabel v. Cincinnati Pub. Sch. Employees. Credit Union*, 125 Ohio App.3d 427, 435, 708 N.E.2d 1105 (1st Dist. 1997)("we believe that a bright-line rule is preferable when property is affected"); *Schloss v. Sachs*, 63 Ohio Misc.2d 457, 462-463, 631 N.E.2d 212 (M.C. 1993)("especially concerning real estate, a 'bright-line' must be drawn somewhere….").

Moreover, requiring a volume and page number is consistent with the purpose of the MTA. After all, the reason for the distinction between general and specific references under R.C. 5301.49(A) is because of their vastly different impact on the process of locating the instrument creating the interest. Further, creating such a bright-line test will give effect to the legislative purpose of simplifying and facilitating land title transactions. See R.C. 5301.55. Requiring a volume and page number where the instrument is recorded will greatly facilitate the examination of title.

Alternatively, if this Court does not require reference to a volume and page number for specific references under R.C. 5301.49(A), it should, at a minimum, require the grantor, grantee, and date on which the instrument was recorded. This will not completely

eliminate the need to search the name indexes. It will, however, simplify the search by narrowing it to the particular indexes that were compiled at that time.

D. The 1915 Kuhn Deed is outside Appellants' record chain of title, as described in R.C. 5301.48.

In this case, and based on the provisions of the MTA, a title examiner would construct the chain of title for the Property by searching the indexes, starting from the present day and working his way back until he reached the 1969 root of title. Based on the reference to the Severed Royalty in the 1969 root of title, he would be aware of the "one-half interest in oil and gas royalty previously excepted by Nick Kuhn." But, the title examiner would not have discovered the 1915 Kuhn Deed in the course of his search to that point. Since Nick Kuhn's Severed Royalty in the Property was created prior to the 1969 root of title, his name would not appear anywhere in the title examiner's chain of title.

1. A title examiner cannot identify the 1915 Kuhn Deed without searching the conveyance indexes prior to the root of title.

The title examiner may surmise that the instrument reserving the Severed Royalty predates the root of title, but he would not know where that instrument could be located. Without a date, volume, or page number, the title examiner would have to continue searching the indexes prior to the 1969 root of title in order to eventually identify the 1915 Kuhn Deed.

The title examiner would not know how much further back he would need to search in the indexes in order to find the 1915 Kuhn Deed. In Monroe County, and in many other counties in Ohio, it is not as simple as entering Nick Kuhn's name into a computer. The title examiner would have to physically examine each and every deed index, one by one, from 1969 backward, to find the 1915 Kuhn Deed. This additional review of the indexes could add hours or days to the title examiner’s search.

2. Searching the conveyance indexes prior to the root of title imposes a very severe burden.

In this case, because Appellants searched for the 1915 Kuhn Deed (and for the Kuhn heirs, Appellees) in order to file this quiet title action, they have a copy of the 1915 Kuhn Deed, and they know that a title examiner would need to check an additional 11 or 12 volumes of the indexes, going back an additional 54 years prior to the 1969 root of title.[6] If the Kuhn Deed had been recorded in 1900, a title examiner would need to search the indexes an additional 69 years back. If the Kuhn Deed had been recorded in 1869, he would need to search the indexes an additional 100 years back. Oil and gas reservations can be found in deeds in the 1860s in Monroe County. Other land use restrictions, such as prohibitions on use of property or restrictions on the ability to sell alcohol on property, can be found in deeds as early as the 1840s or 1850s.

Searching the indexes prior to the root of title significantly adds to the cost of conducting a title search and can lead to delays in transfers of real property. Whereas a 40-year title search may be completed in a day or two for as little as $300 or $400, a search back to the patent will likely cost at least 10 times as much ($3,000, $4,000, or more) and take more than a week. For most consumers in most transactions of residential real estate, the cost is prohibitive and the delay is impractical. Title insurance policies are not a solution, since they create an exception for any defects arising prior to the period that has been searched. So, unless the consumer is willing to pay the cost and endure the delay, he must assume the risk of any ancient title defects. Thus, requiring a title examiner to search the indexes prior to the root of title deed results in a very severe additional burden on those involved in real estate transactions.

[6] In Monroe County, deeds recorded in 1915 were indexed in Volume 10, and deeds recorded in 1969 were indexed in either Volumes 21 or 22.

E. The Seventh District's interpretation of R.C. 5301.49(A) undermines the legislative purpose of the MTA.

The purpose of the MTA, as set forth in R.C. 5301.55, is to simplify and facilitate land title transactions. Revised Code 5301.55 expressly says how the statute should be interpreted (liberally) in order to effect this legislative purpose: by allowing persons to rely on a record chain of title "as described in R.C. 5301.48 of the Revised Code."

1. Appellants are unable to rely on their record chain of title described in R.C. 5301.48.

Under the Model MTA drafted by Lewis M. Simes and Clarence B. Taylor, the provision regarding a "general reference" under Section 2(a) is intended to protect a title examiner from the burdens of a complete title examination during the period that predates the root of title: "The proviso concerning a general reference is designed to avoid any necessity for a search of the entire record back of the forty-year period, and to eliminate the uncertainties caused by general references." Simes & Taylor, *The Improvement of Conveyancing by Legislation*, 12 (1960). Under the Model Title Standards promulgated by Simes and Taylor, a reference in a recorded instrument may be disregarded by a person who is not a party to such instrument, and is not otherwise subject to, or on notice of, the instrument or interest referred to, if the reference does not specifically identify the instrument's "place in the public records." Simes & Taylor, *Model Title Standards* (1960), Standard 3.4(c). In *Heifner*, this Court relied on the Model Title Standards and the Model Act in construing the exception under R.C. 5301.49(D). These sources should therefore constitute very persuasive authority in this Court's interpretation of R.C. 5301.49(A).

Appellants' root of title was recorded on July 30, 1969 and yet, under the Seventh District's holding, Appellants' title is subject to a reservation that arose in a deed more than 54

years prior thereto. By holding that the reference to the 1915 Kuhn Deed was specific under R.C. 5301.49(A), just because it included the holder's name and "was in the Blackstone's chain of title" (Appx. p. 35), Appellants are unable to rely on their record chain of title "as described in section 5301.48." Requiring a title examiner to check the conveyance indexes in the chain of title prior to the root of title undermines the purpose of the statute, as expressed in R.C. 5301.55.

2. In *Corban*, this Court reversed the lower courts' interpretation of the 1989 version of R.C. 5301.56 because it violated the purpose of the MTA.

In this Court's recent decision in *Corban*, it held that the lower courts had misinterpreted the 1989 version of R.C. 5301.56 (the Dormant Mineral Act) by holding that a dormant mineral interest may pass automatically and outside of the record chain of title. *Id.* ¶ 27. The automatic abandonment of mineral interests would affect the ability to rely on a record chain of title in a way that "the legislature did not intend." *Id.*

Requiring title examiners to search the conveyance indexes at least 54 years (or more) prior to the root of title does not facilitate land title transactions. It does not allow persons to rely on their record chain of title as described in R.C. 5301.48. The Seventh District's decision therefore undermines the legislative purpose of the MTA.

F. The Seventh District's decision is the first to ever hold that a reference is "specific" if it fails to identify the volume and page number of the title transaction creating the interest.

In all the previous decisions by Ohio courts, including *Landefeld v. Keyes*, 7th Dist. Monroe No. 548, 1982 Ohio App. LEXIS 13378 (June 17, 1982), *Patton v. Poston*, 4th Dist. Athens No. 1141, 1983 Ohio App. LEXIS 14545 (Apr. 25, 1983), *Pinkney v. Southwick Invs., L.L.C.*, 8th Dist. Cuyahoga Nos. 85074 and 85075, 2005-Ohio-4167, *Duvall v. Hibbs*, 5th Dist. Guernsey No. CA-709, 1983 Ohio App. LEXIS 13042 (July 8, 1983), and *Blakely v. Capitan*, 34 Ohio App.3d 46, 516 N.E.2d 248 (11th Dist. 1986), none held that a reference was specific under

R.C. 5301.49(A) when such reference did not include the volume and page number where the instrument could be found. The specific reference in *Landefeld* had a date (March 26, 1914), book (81), and page number (194-95). The specific reference in *Blakely* had a volume (183) and page number (241). By contrast, the general reference in *Landefeld* did not have a date, volume, or page number. The general reference in *Patton* did not have a date, volume, or page number. The general reference in *Pinkney* did not have a date, volume, or page number. The general reference in *Duvall* did not have a date, volume, or page number.

In *Toth v. Berks Title Ins. Co.*, 6 Ohio St.3d 338, 341, 453 N.E.2d 639 (1983), this Court held that the reference to a setback provision contained in a 1966 transfer was "specific, not general." *Id.* In its decision below, the Seventh District said that this Court in *Toth* "did not hold that a reference must include the volume and page number in order to be specific. The words 'volume' and 'page number' are found nowhere in *Toth*." Appx. p. 35. Yet, the record in *Toth* is clear that the reference in a 1966 deed to the relevant setback provision included both the book (34) and page number (75-77) of where the plat could be found in the Summit County records. This portion of the record in *Toth* was expressly set forth in the opinion below by the Ninth District Court of Appeals.[7] *See Toth v. Berks Title Ins.*, 9th Dist. Summit No. 10488, 1982 Ohio App. LEXIS 12623, at 3 (Aug. 4, 1982).

Why did this Court omit the reference to the plat's volume and page number in its decision in *Toth* holding that the reference was specific? Although the title insurance company indeed argued that the reference was general, its argument was not based on a lack of specificity with respect to recording information. Instead, the title insurance company argued that the

[7] Based on the specific reference in the court of appeal's decision, Appellees retrieved a copy of the 1966 transfer deed from the Summit County records, without conducting an examination of the indexes, and attached it to the appendix that accompanied their Seventh District brief. Supp. p. 360.

relevant plat could not be part of the muniments of the property owner's record title "because it is not a title transaction as defined in R.C. 5301.47(F)." *Toth*, 6 Ohio St.3d 338, 341. As this Court observed, however, the issue was not whether the plat itself was a "title transaction;" instead the issue was whether the use restrictions were "inherent in the muniments of which such chain of record title is formed." *Id.* Since "[t]he 1966 deed is a muniment," the restrictions referred to therein were an exception to the property owner's record marketable title under R.C. 5301.49(A).

This Court's failure to recite the book and page number of the recorded plat in *Toth*, as set forth in the 1966 deed, does not call into question the importance of recording information in determining when a reference is "specific" or "general." Instead, it simply reflects that the necessity of recording information was not disputed in *Toth*. Thus, there has never been a case anywhere in Ohio where the reference to a prior instrument has been called "specific" when it lacks the volume and page number.

G. Other states with similar statutes have recognized that "specific identification" of a prior instrument must include the volume and page number.

Other states that have enacted MTA legislation, and that include an exception to record marketable title similar to R.C. 5301.49(A), include Connecticut (Conn. Gen. Stat. 47-33d) , Florida (Fla. Stat. 712.03), Indiana (Burns Ind. Code Ann. 32-20-3-2), Iowa (Iowa Code 614.32), Oklahoma (16 Okl. St. Chap. 1, Appx., Art. IV, Stnd. 30.5), Utah (Utah Code Ann. 57-9-2), Wyoming (Wyo. Stat. 34-10-104), Rhode Island (R.I. Gen. Laws 34-13.1-3), North Carolina (N.C. Gen. Stat. 47B-3), and Kansas (K.S.A. 58-3404). Two of these statutes expressly state that a volume and page number is required in any specific reference. North Carolina's statute states that marketable record title does not extinguish:

> Rights, estates, interests, claims or charges disclosed by and defects inherent in the muniments of title of which such 30-year chain of record title is formed, provided, however, that a general reference in any of such muniments to rights, estates, interests, claims or charges created prior to such 30-year period shall not be sufficient to preserve them unless specific identification by reference to book and page or record be made therein to a recorded title transaction which imposed, transferred or continued such rights, estates, interests, claims or charges.

N.C. Gen. Stat. 47B-3(1) (emphasis added). Florida's statute similarly says that marketable record title does not extinguish:

> Estates or interests, easements and use restrictions disclosed by and defects inherent in the muniments of title on which said estate is based beginning with the root of title; provided, however, that a general reference in any of such muniments to easements, use restrictions or other interests created prior to the root of title shall not be sufficient to preserve them unless specific identification by reference to book and page of record or by name of recorded plat be made therein to a recorded title transaction which imposed, transferred or continued such easement, use restrictions or other interests; subject, however, to the provisions of subsection (5).

Fla. Stat. 712.03(1)(emphasis added).

> In Connecticut, marketable record title is subject to:
>
> All interests and defects which are created by or arise out of the muniments of which the chain of record title is formed; provided a general reference in the muniments, or any of them, to easements, use restrictions or other interests created prior to the root of title are not sufficient to preserve them, unless specific identification is made therein of a recorded title transaction which creates the easement, use restriction or other interest;

Conn. Gen. Stat. 47-33d(1). Like Ohio's MTA, there is no express requirement in the statute that a specific reference must include the volume and page number. Yet, in interpreting this statute, the Connecticut Supreme Court has held as follows:

> In the present case, it is undisputed that the trial court properly concluded that, as of October 1, 1996, the root of title for One Random Road was the 1954 deed. See footnote 13 of this opinion and the accompanying text. Furthermore, the plaintiff concedes that, within the relevant chain of title from the 1954 deed to the 1996 deed to the plaintiff, there were no specific references to the volume and page in the land records for the 1952 deed creating the easement over One Random Road. Because the language within the chain of title purporting to reserve an easement

> over One Random Road is considered a "general reference" to the encumbrance and is insufficient to preserve the easement; see General Statutes § 47-33d (1).

Coughlin v. Anderson, 270 Conn. 487, 507, 853 A.2d 460, 473-474 (2004) (emphasis added). In *Coughlin*, language reserving an easement over One Random Road had been included within the 1954 deed and subsequent deeds, but the Connecticut Supreme Court held that the easement had been extinguished because none contained the required reference to the specific volume and page within the land records for the 1952 deed that created the easement. *Id.* at 467. Thus, even when the statutory exception to marketable record title does not expressly require reference to a volume and page number, such requirement has nevertheless been judicially recognized.

H. Specific references to prior interests under the Uniform Marketable Title Act ("UMTA") require a volume and page number.

Ohio's MTA predates the UMTA that was finalized by the National Conference of Commissioners on Uniform State Laws in 1990. Nevertheless, the UMTA originally appeared as Part 3 of Article 3 of the Uniform Simplification of Land Transfers Act ("USLTA") promulgated by the National Conference of Commissioners on Uniform State Laws in 1977, and the USLTA was derived from the same Model Act prepared by Professor Lewis M. Simes and Clarence B. Taylor that was the basis for Ohio's MTA.

The UMTA retains some familiar features that strongly resemble Ohio's MTA. Among them is Section 4 titled "Matters to Which Marketable Record Title is Subject." Under Section 4(1) of the UMTA, marketable record title is subject to:

> all interests and defects that are apparent in the root of title or inherent in the other muniments of which the chain of record title is formed, but a general reference in a muniment to an easement, restriction, encumbrance, or other interest created before the effective date of the root of title is not sufficient to preserve it unless a reference by record location is made in the muniment to a recorded title transaction that created the easement, restriction, encumbrance, or other interest (emphasis added);

This provision is directly analogous to R.C. 5301.49(A). The significant difference here is the introduction of the concept of "record location," which is defined under Section 1(10) as "the location by book and page, document number, electronic retrieval code, or other specific place of a document in the public records accessible in the same recording office in this State where the document containing the reference to the location is found" (emphasis added). Comment 7 to Section 1 of the UMTA states that this term is defined "so as to limit the efforts of a title searcher who encounters in one document a reference to another."

The UMTA, as stated in the prefatory note, is intended to "codify the venerable New England tradition of conducting title searches back not to the original creation of title, but for a reasonable period only. The Model Act is designed to assure a title searcher who has found a chain of title starting with a document 30 years old that he need search no further back in the record." The prefatory note further explains that "[a]ny major exception [such as for mineral rights] largely defeats the purpose of marketable title legislation, by forcing the title examiner to search back for an indefinite period for claims falling under the exception."

In this case, R.C. 5301.49(A) is an exception to record marketable title described in R.C. 5301.48. Since Ohio's MTA was enacted for exactly the same purpose as the UMTA, any question of statutory construction must take this purpose into consideration, along with the effect of recognizing any exceptions or expanding any existing exceptions. Interpretations that are contrary to this purpose should be disfavored. This Court should therefore hold that the specific identification contemplated in R.C. 5301.49(A) requires sufficient reference that a title examiner may locate the prior conveyance by going directly to the identified conveyance record in the recorder's office without checking conveyance indexes.

Proposition of Law No. II: The exception to a person's marketable record title under R.C. 5301.49(A) does not include interests and defects, created by a recorded title transaction prior to the root of title, of which the person has actual knowledge, if the reference to such recorded title transaction is general rather than specific.

In its Opinion and Judgment denying Appellants' Application for Reconsideration, the Seventh District defended its initial decision by saying:

> the Blackstones knew of the Kuhns' interest in 1978/1979 because David Blackstone entered into negotiations with Appellants in a failed attempt to purchase their royalty interest. The Blackstones also admitted that they were able to locate and obtain a copy of the Kuhn Deed before they filed their complaint in this matter. As such, it is disingenuous for the Blackstones to now argue that the language in their Deed notifying them of Appellants' mineral interest was insufficiently specific.

Appx. pp. 46-47. Essentially, the Seventh District suggested that, regardless of how specific the reference to the 1915 Kuhn Deed was, Appellants' actual knowledge of the Severed Royalty and of the 1915 Kuhn Deed operated as an additional exception to record marketable title under R.C. 5301.49.

A. Actual knowledge of the Severed Royalty is not an exception to "record marketable title."

Interests prior to the root of title are generally extinguished under the MTA regardless of a person's knowledge of those interests. Revised Code 5301.50 states that:

> Subject to the matters stated in section 5301.49 of the Revised Code, such record 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.

None of the exceptions in R.C. 5301.49 prevent the extinguishment of an interest based on a person's knowledge of the interest. This Court cannot rewrite the statute to include an additional statutory exception when the legislature has declined to do so.

Under R.C. 5301.53(B) and (D), there is an exception to record marketable title for certain easements, or interests in the nature of an easement, that are "clearly observable" or that are evidenced by any pipe, valve, road, wire, cable, conduit, duct, sewer, track, pole, tower, or other physical facility. The Severed Royalty, however, is not an easement or an interest in the nature of an easement. The legislature could have included an actual knowledge exception under R.C. 5301.49 or R.C. 5301.53 for royalties or mineral interests, but it did not. Appellants' knowledge of the Severed Royalty in this case is therefore immaterial to determining whether it is an exception to Appellants' record marketable title.

B. The MTA serves a separate purpose from the recording statute, R.C. 5301.25.

The Seventh District's reliance on Appellants' knowledge of the Severed Royalty confuses the MTA with the recording statute, R.C. 5301.25. The MTA and the recording statute serve two separate and distinct purposes. The MTA is intended to facilitate land title transactions by allowing persons to rely on their record chain of title subsequent to the root of title, as described in R.C. 5301.48. The recording statute is intended to provide a public record of transactions affecting title to land and to modify the traditional rule that prevents even bona fide purchasers from getting better title than the seller owned. The recording statute protects bona fide purchasers of property by cutting off prior interests in land of which the purchaser had no knowledge.

Under the recording statute, a purchaser will not have constructive knowledge of an unrecorded interest in land, or an interest that is recorded but is outside the seller's chain of

title. But constructive knowledge is not the only issue. It is well established in Ohio that actual knowledge of an interest is also relevant to whether or not an interest outside the record chain of title is "fraudulent" as to a *bona fide* purchaser under the recording statute. *See Tiller v. Hinton*, 19 Ohio St.3d 66, 482 N.E.2d 946 (1985)("Pursuant to this statutory provision, a bona fide purchaser for value is bound by an encumbrance upon land only if he has constructive or actual knowledge of the encumbrance."). So, even if a purchaser does not have constructive knowledge of an interest that is outside the seller's chain of title, the purchaser will acquire the property subject to the interest if he has actual knowledge of it.

By contrast, it has long been recognized that actual knowledge is generally irrelevant to the operation of marketable title acts. In his criticism of marketable title acts, Walter E. Barnett, Associate Professor of Law at the University of New Mexico offered the following scenario in which the marketable title act divests the title of a record owner in favor of a grantee who holds a purely "wild" deed:

> Suppose that O is the record owner of Blackacre in 1920 and there are no competing claimants to the land. In that year, X, a con man, manages to part Y from a fair sum of money in return for a deed purportedly conveying Blackacre from X to Y. Y does not examine the title, but does record his deed immediately. In 1960, Y apparently can claim he has a "marketable record title" to Blackacre, which is free and clear of any claim or interest on the part of O. This astonishing result could not possibly occur under the recording acts alone. But since the purpose of the marketable title statutes is to eliminate the need for searching back to the sovereign, such statutes are not concerned with the quality of the title conveyed by the root. So long as the instrument serving as the root of title *purports* to convey an interest, it is effective to extinguish prior claims and interests. Thus, it is possible even for the grantee of a complete stranger to divest the title of the record owner.
>
> Y's success in the preceding example does not depend on his being a bona fide purchaser. Even if he actually knew of O's claim when he took his deed in 1920, he could still prevail. The reason behind this departure from the philosophy of the recording acts is that marketable title acts are designed to simplify title examination, and this design can be accomplished only by eliminating from their operation as much as possible all matters extraneous to the records and thus subject to being proved in court, such as the *bona fides* of any

> particular individual. Since most of the defects and interests that a marketable title act seeks to remove are obvious ones in the chain of record title, any holder or taker of that title has, ipso facto, constructive notice of them anyway.

Walter E. Barnett, *Marketable Title Acts Panacea or Pandemonium*, 53 Cornell L. Rev. 45, 57-58 (emphasis added). This example illustrates that "under marketable title acts, it is immaterial that the person claiming a marketable record title to land has constructive or even actual notice of the interest he wishes to extinguish." 53 Cornell L. Rev. 45, 60. Indeed, "notice of outstanding interests is always irrelevant to the extinguishment feature of the [marketable title] acts."[8] 53 Cornell L. Rev. 45, 64.

The recording statute is not a part of the MTA; it has absolutely nothing to do with how this Court should interpret R.C. 5301.49. Although actual knowledge is relevant to the operation of the recording statute, it is irrelevant to whether the Severed Royalty has been extinguished under the MTA. Neither Appellees nor the Seventh District have presented a single case or statute that creates an exception to record marketable title under the MTA for a royalty or mineral interest of which a person has actual knowledge.

C. Appellees could have easily preserved their interest in the Severed Royalty.

Appellees can hardly complain that the extinguishment of their interest in the Severed Royalty is unfair. Appellants may have had prior knowledge of the Severed Royalty, but so did Appellees. As this Court held in *Toth*, the MTA provides a "simple and easy" method by which the owner of an existing old interest may preserve it. This Court therefore concluded that, "[i]f he fails to take the step of filing the notice as provided, he has only himself to blame if his interest is extinguished." 6 Ohio St.3d at 342.

[8] An Iowa Court has held, in applying a similar statute, that "actual notice does not suffice to protect interests created prior to a root of title from being extinguished." *City of Lake View v. Houston*, Ct. App. Case No. 8-873/07-2026, 2008 Iowa App. LEXIS 1300, at 21 (Dec. 31, 2008).

The MTA has been in effect since 1961, a period of more than 55 years. At any point in the forty-year period immediately following Appellants' 1969 root of title, Appellees could have invoked the MTA's "simple and easy" method for preserving the Severed Royalty under R.C. 5301.51(A). When this Court issued the *Toth* decision in 1983, Appellees still had approximately 26 years in which they could have filed a notice to preserve their interest under R.C. 5301.51. As *Toth* explains, since they failed to do so, they have only themselves to blame if their interest in the Severed Royalty is extinguished.

D. Creating an actual knowledge exception for the Severed Royalty would violate the purpose of the MTA.

As this Court recognized in *Corban*, the MTA was intended to simplify and facilitate land title transactions by allowing reliance on the record chain of title. *Id.* ¶13. Allowing title to the Severed Royalty to be affected by facts or events that occur outside the chain of title is in derogation of this principle. A person's actual knowledge of prior interests (or lack thereof) does not appear anywhere in the chain of title.

Creating a new exception to record marketable title for royalty or mineral interests of which a person has actual knowledge would run contrary to the MTA's basic purpose. This Court should therefore hold that the exception to a person's marketable record title under R.C. 5301.49(A) does not include interests and defects, created by a recorded title transaction prior to the root of title, of which the person has actual knowledge, if the reference to such recorded title transaction is general rather than specific.

III. CONCLUSION

For all the foregoing reasons, this Court should reverse the Decision and Judgment Entry of the Seventh Appellate District and enter judgment in favor of Plaintiffs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies a copy of the foregoing **Brief of Appellants, David M. Blackstone and Nicolyn D. Blackstone** was electronically filed and served upon the following parties by sending a copy of same by ordinary U.S. mail, postage pre-paid, on this 30th day of April, 2018:

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(434038)

IN THE SUPREME COURT OF OHIO

David M. Blackstone, *et al.*,	:	On Appeal from the Monroe
	:	County Court of Appeals,
Appellants,	:	Seventh Appellate District
	:	
v.	:	Case No. 2017-1639
	:	
Susan E. Moore, *et al.*,	:	Court of Appeals
	:	Case No. 14 MO 0001
Appellees.	:	

APPENDIX

In the Court of Common Pleas
Monroe County, Ohio

David M. Blackstone, *et al,*	:	**Case No.: 2012-166**
	:	
Plaintiffs,	:	**Judge Julie Selmon**
	:	
v.	:	**Partial Default Judgment Entry (as to Nick Kuhn, Flora Kuhn, Leonna Wheatley, Luella Yontz, Mary Curran, Gilbert Yontz, Opal M. Yontz, Mahala Breaden, Allie Pryor, Howard Pryor, Meredith Edwards, Jack Edwards, Barbara Edwards, Elwood Edwards, and Miles Edwards) and Rule 54(B) Certification**
Nick Kuhn, *et al.*,	:	
Defendants.	:	

This action is before the Court on Plaintiffs' Motion for Default Judgment against Defendants, Nick Kuhn, Flora Kuhn, Leonna Wheatley, Luella Yontz, Mary Curran, Gilbert Yontz, Opal M. Yontz, Mahala Breaden, Allie Pryor, Howard Pryor, Meredith Edwards, Jack Edwards, Barbara Edwards, Elwood Edwards, and Miles Edwards. The Court has determined that (1) the Defendants, Nick Kuhn, Flora Kuhn, Leonna Wheatley, Luella Yontz, Mary Curran, Gilbert Yontz, Opal M. Yontz, Mahala Breaden, Allie Pryor, Howard Pryor, Meredith Edwards, Jack Edwards, Barbara Edwards, Elwood Edwards, and Miles Edwards, were properly served pursuant to the Ohio Rules of Civil Procedure, (2) Defendants, Nick

Kuhn, Flora Kuhn, Leonna Wheatley, Luella Yontz, Mary Curran, Gilbert Yontz, Opal M. Yontz, Mahala Breaden, Allie Pryor, Howard Pryor, Meredith Edwards, Jack Edwards, Barbara Edwards, Elwood Edwards, and Miles Edwards, have failed to answer or otherwise defend against the claims contained in said Complaint within thirty (30) days of the last date of publication of Service of Publication in the Monroe County Beacon, and (3) Defendants, Nick Kuhn, Flora Kuhn, Leonna Wheatley, Luella Yontz, Mary Curran, Gilbert Yontz, Opal M. Yontz, Mahala Breaden, Allie Pryor, Howard Pryor, Meredith Edwards, Jack Edwards, Barbara Edwards, Elwood Edwards, and Miles Edwards, are not in the military service of the United States, not an infant, not an incompetent person, and not an incarcerated convict. Therefore, the allegations of the Complaint are admitted by them to be true. Accordingly, upon mature consideration and after having reviewed the Affidavit submitted by Kristopher O. Justice, the Court is of the opinion and does hereby find in favor of Plaintiff.

It is therefore ORDERED and ADJUDGED that the defaulting Defendants' interest in the real property identified in the Complaint be quieted in favor of the Plaintiffs and against the defaulting Defendants; that a copy of this Judgment Entry be recorded in the Official Records of Monroe County, Ohio, and cross-referenced to the

various deeds identified in the Complaint, in accordance with Plaintiffs' instructions; and any other legal and equitable relief to which the Plaintiffs may be entitled.

Finally, pursuant to Ohio Rule of Civil Procedure 54(b), the Court has the discretion to enter a final judgment as against the defaulting Defendants, Nick Kuhn, Flora Kuhn, Leonna Wheatley, Luella Yontz, Mary Curran, Gilbert Yontz, Opal M. Yontz, Mahala Breaden, Allie Pryor, Howard Pryor, Meredith Edwards, Jack Edwards, Barbara Edwards, Elwood Edwards, and Miles Edwards, even though claims still pend against the other Defendants. The Court expressly determines that there is "no just reason for delay" to enter a final judgment against Nick Kuhn, Flora Kuhn, Leonna Wheatley, Luella Yontz, Mary Curran, Gilbert Yontz, Opal M. Yontz, Mahala Breaden, Allie Pryor, Howard Pryor, Meredith Edwards, Jack Edwards, Barbara Edwards, Elwood Edwards, and Miles Edwards.

SO ORDERED.

Dated this 19 day of NOV., 2012

Honorable Julie Selmon, Judge

Submitted by counsel:

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Instrument Book Page
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Filed for Record in
MONROE COUNTY, OHIO
ANN BLOCK, RECORDER
12-05-2012 At 11:47 am.
J ENTRY D 68.00
OR Book 232 Page 133 - 136

IN THE COURT OF COMMON PLEAS OF MONROE COUNTY, OHIO

David M. Blackstone, et al.

Plaintiffs,

vs. Case No. 2012-166

Susan E. Moore, et al.

Defendants.

JUDGMENT ENTRY
(Incorporating Findings of Fact and Conclusions of Law)

This matter is before the Court for a non-oral hearing on Plaintiffs' and Defendants' Motions for Summary Judgment. All parties were given reasonable time to file responses and replies to the Summary Judgment Motions.

Based on the facts herein, the arguments of counsel and the applicable law, this Court hereby makes the following Findings and Orders.

Facts and Background

On April 3, 1915, Nick Kuhn and Flora Kuhn conveyed the property at issue to D. Brown. The instrument reflecting this transaction is the Reservation Deed. The Reservation Deed contained the following reservation language:

> Except Nick Kuhn and Flora Kuhn, their heirs and assigns, reserve one-half interest in oil and gas royalty in the above described sixty acres.

Plaintiff, David M. Blackstone, first acquired title to the Property by Deed dated July 30, 1969, filed for recording on July 30, 1969, and recorded at Volume 155, Page 329 of

Monroe County
Common Pleas
Court
- - -
Julie R. Selmon
Judge

Original - Journal _____ Page _____

☞This Entry to be Filed with the Clerk of Courts

the Deed Records of Monroe County, Ohio. It is undisputed that the July 30, 1969 Deed in favor of David M. Blackstone is Plaintiffs' Root of Title for purposes of the Ohio Marketable Title Act, as defined in Revised Code § 5301.47(E).

Subsequently, David M. Blackstone, married, conveyed the Property to David M. Blackstone and Nicolyn D. Blackstone, husband and wife, by Deed dated January 8, 2001 ("2001 Deed"), and filed for recording March 20, 2001 at Volume 71, Page 465 of the Official Records of Monroe County, Ohio.

Defendants are the heirs of Nick Kuhn and Flora Kuhn and are claiming title to the Severed Royalty, as reserved in the Reservation Deed.

Plaintiffs, pursuant to the prior version of R. C. § 5301.56, effective March 22, 1989 to June 30, 2006 (hereinafter the " Former DMA "), seek to have the Severed Royalty declared abandoned and vested in Plaintiffs as surface owners. On May 9, 2012, in accordance with the Former DMA , Plaintiffs recorded an Affidavit of Facts Related to Title ("Affidavit"), pursuant to R. C. § 5301.252. In the Affidavit, Plaintiffs testified that none of the occurrences identified in division (B)(1)(c) of the Former DMA ("Savings Events") occurred in the 20-year period prior to June 30, 2006, the last day the Former DMA was in effect.

On or about July 6, 2012, Defendant, Susan Moore, filed a claim to preserve the Severed Royalty in the Monroe County Recorder's Office, claiming that Defendants, Susan E. Moore, Carolyn Kohler, Rebecca Englehart and Charles Franklin Yontz, owned an interest in the Severed Royalty (hereinafter referred to as the "Claim to Preserve"). The Claim to Preserve was filed and recorded at Volume 222, Page ~~178~~ 748 SD. of the Official Records

of Monroe County, Ohio. Defendants, J. K. Larrick and Ila Carpenter, never filed or recorded a claim to preserve. The status of the Severed Royalty is the subject of this litigation.

In their First Claim of Plaintiffs' First Amended Complaint, Plaintiffs seek an Order from this Court declaring that the one-half interest in the oil and gas royalty ("Severed Royalty") has become dormant and has vested in Plaintiffs, pursuant to R. C. § 5301.56.

In their Third Claim of Plaintiffs' First Amended Complaint, Plaintiffs seek an Order from this Court declaring that the Severed Royalty has been extinguished and is vested in Plaintiffs, pursuant to the Ohio Marketable Title Act.

In their Second Claim of Plaintiffs' First Amended Complaint, Plaintiffs seek an Order from this Court quieting title to the Severed Royalty in favor of the Plaintiffs and against Defendants.

Applicable Law and Analysis

Pursuant to Ohio Rule of Civil Procedure 56, Summary Judgment is appropriate when 1) there is no genuine issue of material fact; 2) the moving party is entitled to judgment as a matter of law; and 3) reasonable minds can come to but one conclusion and that conclusion is adverse to the non-moving party, said party being entitled to have the evidence construed most strongly in his favor. *State ex rel. v. Davila v. City of E. Liverpool*, 7th Dist. No. 10CO16, 2011 Ohio 1347, ¶13 (March 14, 2001) (citing *Horton v. Harwick Chemical Corp.* , 73 Ohio St. 3d 679, 1995 Ohio 286, ¶3 of the syllabus (1995).

First, this Court will analyze the parties' claims and arguments under the Ohio Dormant Mineral Act.

Plaintiffs rely on a number of decisions from this Court, as well as other Trial Court opinions and argue that the 1989 version of the Dormant Mineral Act applies. The Court is also mindful of the recent Seventh District Court of Appeals decision in *Dodd v. Croskey,* 2013-Ohio-4257.

This Court finds it necessary to briefly discuss and reconcile any confusion or misunderstanding concerning the current DMA and the Former DMA and the effect of the Seventh District's holding in *Dodd* .

First, there is a difference between a statute that is self-executing and one that is not. Under the Former DMA , rights to a Severed Mineral Interest become "vested in the owner of the surface" of the property by operation of law upon the lapse of 20 years without the occurrence of a savings event identified in division (B)(1)(c). This Court has previously held that the Former DMA is self-executing. See *Marty v. Dennis*, Monroe C.P. 2012-203 (April 11, 2013). It does not contain any requirement that the surface owner of property take any action before the mineral interest is deemed abandoned. *Id.*

Accordingly, under the Former DMA , a mineral interest is deemed abandoned and vested in the surface owner of the property if none of the savings events set forth in (B)(1)(c)(i) through (vi) occurred within any period of 20 years while the Former DMA was in effect, so long as the Severed Mineral Interest is not in coal or held by the United States, this State or any political subdivision.

If Defendants fail to present evidence of any savings events, the Severed Royalty shall be declared abandoned and vested in the Plaintiffs, under the Former DMA .

The Current DMA does not expressly state that property rights, vested under the

Former DMA , are affected by the Current DMA . If the General Assembly intended the 2006 amendment to affect the rights vested in Plaintiffs under the Former DMA , this Court finds that such intent must be expressly stated.

Many courts across the State of Ohio have recognized that title to a mineral interest can be quieted in favor of the surface owner of property under the Former DMA , even after the 2006 amendment. These cases include *Wendt v. Dickerson*, Tuscarawas C.P., No. 2012-CV-020135 (February 21, 2013), *Wiseman v. Potts*, Morgan C.P., No. 08-CV-0145 (June 29, 2010), *Walker v. Noon*, Noble C.P., No. 2012-0098 (March 20, 2013), *Bender v. Morgan*, Columbiana C.P., No. 2012-CV-378 (March 20, 2013) and *Marty v. Dennis*, Monroe C.P., No. 2012-203 (April 11, 2013). All of these cases state that a Severed Mineral Interest can be declared abandoned under the Former DMA , even after the enactment of the 2006 amendment.

Additionally, there may be instances where a Severed Mineral Interest, although not extinguished by the Marketable Title Act, is nevertheless abandoned under the Former DMA . As this Court held in *Pletcher v. Brown*, Monroe C.P. 2012-069 (February 7, 2013), the Ohio Marketable Title Act and Dormant Mineral Act are alternate means to extinguishing an interest in minerals. *Pletcher*, at 5. In *Farnsworth v. Burkhart*, Monroe C.P. 2012-133, this Court held that a Severed Mineral Interest was abandoned under the Former DMA even though it would not have been extinguished under the Marketable Title Act. The mineral interest at issue in that case was severed in 1980. The two statutes have different tests and examinations to determine if a Severed Mineral Interest may be extinguished or abandoned.

Meanwhile, the issue before the Appellate Court in *Dodd* was whether the statutory abandonment process described in division (H) has been effectively completed.

In *Dodd* , the surface owners filed an action against the holders of a Severed Mineral Interest after having served their notice of intent to claim abandonment, by publication, under division (E)(1). One of the Severed Mineral Interest Holders subsequently recorded a deed and an affidavit preserving minerals. The surface owners alleged that the deed was not properly completed, that it did not conform to the recording statute, and that it did not appear in the chain of title. The surface owners further alleged that the affidavit preserving minerals was not signed by all the Severed Mineral Interest Holders and that the affiant was not acting as their agent.

The surface owners in *Dodd* believed that they had fulfilled the requirements of the DMA . They asked the Court to strike the deed and the affidavit preserving minerals. The surface owners asked the Court to find that the affidavit was ineffective, and that the statutory abandonment process described in division (H)(2) had been successfully completed. After both parties filed Motions for Summary Judgment, the Trial Court rejected the surface owners' arguments and held in favor of the Severed Mineral Interest Holders.

On appeal, the surface owners argued that the Severed Mineral Interest Owner's affidavit preserving minerals was not a "savings event," referring to the filing of a claim to preserve or an affidavit under division (H)(1).

The Seventh District Court of Appeals issued its decision on September 23, 2013. The issue before the Court on appeal concerned the process by which mineral interest may

be deemed abandoned and deemed to have vested to the owner of the surface rights.

The Seventh District Court of Appeals rejected the surface owners' argument. Since division (H)(1) expressly states that its filings may be made "after the date on which notice was served or published," the Court held that it allows "a present act" by the mineral interest holder. *Dodd* , ¶28. The Court held that this present act "prevents the interest from being determined to be abandoned." *Id.* The Court was referring to an abandonment under the statutory process described in division (H); it did not address, and the surface owners did not argue, whether, the filing of a claim under division (H)(1), the mineral interest might nevertheless be deemed abandoned in an action to quiet title, based on the operation of division (B).

This Court finds that Defendants' reliance on *Dodd* and Defendants' understanding of the effect of the Former DMA is misplaced.

In this case, after careful analysis, this Court finds that from March 22, 1969, 20 years prior to the effective date of the Former DMA , to June 30, 2006, the last day the Former DMA was in effect, there has been no savings event under division (B)(1)(c).

First, there is no evidence that a well was ever drilled on the Property or pursuant to any Lease encompassing the Property. Accordingly, without a well drilled on the subject Property, this Court finds that there has been no production of oil or gas on the Property.

Next, to constitute a savings event under (B)(1)(c)(i) , the three (3) requirements which must be met are as follows: (1) the Severed Mineral Interest itself must be the subject of a title transaction; (2) the title transaction must affect title to an interest in land; and (3) the title transaction must be recorded in the office of the County Recorder in the

County in which the lands are located.

This Court finds that Plaintiffs signed an Oil and Gas Lease with Chief Petroleum Corporation ("Chief") on August 16, 1976. At the time this Lease was executed, Plaintiffs did not hold title to the Severed Royalty. Thus, the Court finds that the only interest that was the "subject of" the Chief Lease was Plaintiffs' own interest. Since the Severed Royalty was not conveyed or retained by virtue of the Chief Lease, this Court finds that the Severed Royalty was not the "subject of" said Lease. In order for a mineral interest to be the "subject of" the title transaction, the interest must be "conveyed or retained" by the parties to the transaction. See *Dodd v. Croskey* , 7th Dist. No. 12 HA 6, 2013-Ohio-4257 (September 23, 2013).

Additionally, the Chief Lease was executed on August 16, 1976. Therefore, it did not occur within the 20 year period prior to the final day on which the Former DMA was in effect, June 30, 2006. Accordingly, this Court finds that the Chief Lease was not a savings event under division (B)(1)(c)(i) .

Moreover, this Court finds that neither the Root of Title Deed nor the 2001 Deed were savings events as the subject of these two (2) deeds was the surface of the Property, and the grantors in the Root of Title Deed and the 2001 Deed owned no interest in the Severed Royalty and thus could not convey it.

Additionally, there is no evidence that the Property or the Severed Royalty were used at any time for the underground storage of gas. Moreover, from June 30, 1986 to June 30, 2006, no drilling or mining permits were issued for wells that encompassed this Property or the Severed Royalty.

Defendants admitted that no Claims to Preserve the Severed Royalty were recorded in the Monroe County Recorder's Office from March 22, 1969 to June 30, 2006, and no separately listed tax parcel numbers were created for the Severed Royalty from March 22, 1969 through June 30, 2006.

Based on the above, this Court finds there are no issues of material fact and Plaintiffs are entitled to judgment as a matter of law. Defendants have failed to produce any evidence of any savings events under (B)(1)(c) that would have prevented an abandonment under the Former DMA . Thus, pursuant to the Former DMA , Summary Judgment is hereby granted in favor of Plaintiffs and against Defendants on Plaintiffs' First Claim in Plaintiffs' First Amended Complaint.

Next, this Court will analyze the parties' claims pursuant to the Ohio Marketable Title Act.

The Ohio Marketable Title Act, outlined in Ohio Revised Code §§ 5301.47 through 5301.56, was created in order to simplify and facilitate land title transactions. Revised Code § 5301.55. The Marketable Title Act operates to extinguish any interest existing prior to the Root of Title unless that interest is:

1) Specifically stated or identified in the Root of Title;

2) specifically stated or identified in one of the muniments of record title within 40 years after the Root of Title;

3) recorded pursuant to Revised Code §§ 5301.51 and 5301.52;

4) one of the other exceptions provided for in Revised Code § 5301.49; or

5) one of the rights that cannot be extinguished by the Marketable Title Act as

provided for in Revised Code § 5301.53. *Semachko v. Hopko*, 35 Ohio App. 2d 205, 211 (1973).

In this case before the Court, it is undisputed that the Root of Title Deed was recorded on July 30, 1969. Additionally, there is no dispute that the Severed Royalty Interest existed prior to the effective date of the Root of Title. Thus, this Court finds that in order to preserve an interest existing prior to the effective date of the Root of Title (July 30, 1969), one of the savings conditions in R. C. § 5301.50 (as set forth above), must have occurred prior to July 30, 2009.

In this case, Defendants' claim to the Severed Royalty is based on whether the interest reserved in the Reservation Deed is 1) specifically stated or identified in the Root of Title; 2) specifically stated or identified in one of the muniments in the chain of record title within 40 years after the Root of Title; 3) recorded pursuant to R.C. § 5301.51 and § 5301.52; or 4) one of the exceptions provided for in R. C. § 5301.49 apply.

R. C. § 5301.49 provides that a general reference to a severed interest in the chain of title, created prior to the Root of Title, is not sufficient to preserve the severed interest. Rather, a specific reference to the interest is necessary to preserve it.

The Seventh District Court of Appeals, in *Landefeld v. Keyes*, 7th Dist. No. 548, 1982 Ohio App. LEXIS 13378 (June 17, 1982), distinguished between specific and general references to a severed oil and gas interest. In *Landefeld*, the Defendants appealed a judgment from this Court which extinguished certain oil and gas rights existing prior to the Root of Title. The Defendants claimed title to one-half of the oil and gas in and under 132 acres that was severed from the surface of the property. The

surface was subsequently split, and two separate chains of title were created, but both chains remained subject to the one-half oil and gas reservation. *Id.* One tract contained 49.25 acres and the other tract contained the remaining 83 acres. *Id.*

The deeds in the chain of title for the 49.25 acre tract contained the following reference to the original reservation: "Also subject to all coal, and oil and gas reservations heretofore made." *Id.* The subsequent deeds in the chain of title for the 83 acres contained the following reference to the reservation: "Excepting the coal and oil and gas rights as reserved by C. E. Ketterer and wife, in deed to Geo. J. Egger dated March 26, 1914 in Deed Book 81, Pages 194-95, Monroe County, Ohio." *Id.* at 2.

The Seventh District held that the references to the reservation for the 83 acres were specific. *Id.* at 2. The references for the 83 acres cited to the volume and page of the original reservation. However, the deeds in the chain of title for the 49.25 acres (the acreage that was the subject of the action) were general because they did not reference the volume and page number of the original reservation, and failed to meet the requirements of R. C. § 5301.49(A). See *Id.* The Seventh District affirmed this Court's decision that the Severed Mineral Interest was extinguished as it pertained to the 49.25 acre tract pursuant to the Marketable Title Act, but was not extinguished as to the 83 acres that contained the specific reference.

In the present case, this Court finds that Plaintiffs' Root of Title Deed contains the following language:

> Excepting the one-half interest in oil and gas royalty previously excepted by Nick Kuhn, their heirs and assigns in the above described sixty (60) acres.

This exact reservation language also appears in the next deed in the chain of title following the Root of Title, the 2011 Deed.

This Court finds that the aforementioned reservation language herein does not contain a specific reference that would enable a title examiner to locate the Reservation Deed without checking the indexes. There is no reference to a volume and page number. This Court has previously held that a reference will be deemed specific if a title examiner may locate the prior conveyance by examining the records of the Recorder's Office without checking the conveyance indexes. See *Pletcher v. Brown*, Monroe C.P. Case No. 2012-069 (February 7, 2013) (citing *Duvall v. Hibbs, et al.* , 5th Dist. No. CA-709, 1983 Ohio App. LEXIS 13042 (July 8, 1983).

Accordingly, this Court finds that the Severed Royalty Interest created in the Reservation Deed was not specifically stated, identified or referred to in either the Root of Title Deed or in the subsequent 2011 Deed. Such general references cannot prevent the extinguishment of the Severed Royalty at issue.

Additionally, the Court finds that the Severed Royalty was not preserved by Defendants pursuant to R. C. §§ 5301.51 and 5301.52, as Defendants have acknowledged that no preserving notices were filed during the forty year period immediately following the effective date of the Root of Title.

The Court finds that Defendants, Susan E. Moore, Carolyn Kohler, Rebecca Englehart, and Charles Franklin Yontz, filed a Claim to Preserve pursuant to R. C. § 5301.52, on July 6, 2012. However, the Claim to Preserve was filed approximately

three (3) years after the expiration of the forty year period required by R. C. § 5301.51(A). The Claim to Preserve was therefore not effective in preserving the Severed Royalty.

Furthermore, this Court finds that none of the other exceptions provided for in R. C. § 5301.49 apply to the Severed Royalty Defendants are claiming herein.

Accordingly, the Court hereby finds that the Ohio Marketable Title Act has extinguished Defendants' interest in the Severed Royalty. As there remain no genuine issues of material fact herein, Plaintiffs are entitled to judgment as a matter of law on Plaintiffs' Third Claim in Plaintiffs' First Amended Complaint.

Consistent with the above findings, judgment is granted in favor of Plaintiffs on their Second Claim in Plaintiffs' First Amended Complaint and the Court hereby quiets title to the Severed Royalty Interest in favor of Plaintiffs David M. and Nicolyn D. Blackstone and against Defendants, Susan E. Moore, Carolyn Kohler, Rebecca Englehart, and Charles Franklin Yontz, Tharcilla Larrick Smith, her unknown heirs, devisees, executors, administrators, relicts, next of kin and assigns, J. K. Larrick, and Ila Carpenter.

Defendants' counterclaims are hereby dismissed with prejudice.

The Court further finds that there is no just reason for delay, and that this "Judgment Entry Incorporating Findings of Fact and Conclusions of Law" is a final appealable order, as defined under Civil Rule 54.

The costs of this proceeding are assessed to the Defendants. Judgment is hereby granted the Clerk of this Court to collect on her costs.

IT IS SO ORDERED.

Honorable Julie R. Selmon
Enter as of the date of filing

Copies to: James S. Huggins, Esquire and Kristopher O. Justice, Esquire
THEISEN BROCK

Mark W. Stubbins, Esquire
STUBBINS, WATSON & BRYAN CO., LPA

Stephanie Mitchell, Esquire
TRIBBIE, SCOTT, PLUMMER & PADDEN

Monroe County
Common Pleas
Court
- - -
Julie R. Selmon
Judge

STATE OF OHIO, MONROE COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

DAVID M. BLACKSTONE, et al.	)	CASE NO. 14 MO 0001
	)	
PLAINTIFFS-APPELLEES	)	
	)	
VS.	)	OPINION
	)	
SUSAN E. MOORE, et al.	)	
	)	
DEFENDANTS-APPELLANTS	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Monroe County, Ohio Case No. 2012-166

JUDGMENT: Reversed.

APPEARANCES:

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

Dated: June 29, 2017

WAITE, J.

{¶1} Susan Moore, Rebecca Englehart, Carolyn Kohler, and Charles Franklin Yontz (collectively referred to as "Appellants") appeal a January 22, 2014 Monroe County Common Pleas decision to grant summary judgment in favor of Appellees David M. and Nicolyn Blackstone (collectively referred to as the "Blackstones"). Appellants contest the trial court's finding that their interests were abandoned pursuant to the 1989 Dormant Mineral Act ("DMA") and the Marketable Title Act ("MTA"). Pursuant to *Corban v. Chesapeake Exploration, L.L.C.*, __ Ohio St.3d __, 2016-Ohio-5796, __ N.E.3d __, Appellants' arguments have merit and the judgment of the trial court is reversed. Judgment is entered in favor of Appellants.

Factual and Procedural History

{¶2} This appeal concerns the ownership of mineral rights beneath 60 acres of land located in Seneca Township, Monroe County. On April 3, 1915, Nick and Flora Kuhn conveyed the surface rights to W. D. Brown but reserved a royalty interest through the following language: "Except Nick Kuhn and Flora Kuhn, their heirs and assigns reserve one half interest in oil and gas royalty in the above described Sixty (60) acres." (4/3/15 Kuhn Deed.) The deed was recorded on April 10, 1915. The surface rights were conveyed two additional times, once in 1926 and once in 1948. Both deeds included the Kuhn reservation. On March 26, 1918, the Kuhns entered into an oil and gas lease with Ohio Fuel Supply Co. The lease was recorded on October 30, 1930.

{¶3} In 1969, the surface rights were conveyed to Co-Appellee David Blackstone. The deed was recorded on July 30, 1969. In 1976, Blackstone entered into an oil and gas lease with Chief Petroleum Inc. which included the 60 acres obtained from the Kuhns. In 1978 or 1979, Gilbert Yontz, a Kuhn heir, preliminarily agreed to sell the Kuhn one-half royalty interest to Blackstone for $1,000. However, after discussing the sale with the remaining Kuhn heirs, Yontz raised the price to $2,500. Blackstone declined the offer. On January 8, 2001, Blackstone's deed to the surface rights was transferred into a joint and survivorship deed with his wife, Nicolyn Blackstone. The deed was recorded on March 20, 2001. On February 10, 2012, the Blackstones entered into an oil and gas lease with Antero Resources Appalachian Corporation. The lease involved 246 acres, again including the 60 acres obtained from the Kuhns. The lease was recorded on February 13, 2012.

{¶4} On May 9, 2012, the Blackstones recorded an affidavit of intent to declare the mineral interests abandoned. On June 4, 2012, the Blackstones filed a complaint against the following: Appellants (who are Kuhn Heirs), Nick Kuhn, Flora Kuhn, Leonna Wheatley, Tharcella Larrick Smith, Luella Yontz, Mary Curran, Gilbert Yontz, Opal M. Yontz, Mahala Breaden, Allie Pryor, Howard Pryor, Meredith Edwards, Jack Edwards, Barbara Edwards, Elwood Edwards, and Miles Edwards. The complaint sought declaratory judgment and quiet title. On June 29, 2012, Appellants filed an answer, counterclaim, and cross-claim. In the cross-claim, Appellants requested dismissal of the complaint as to defendants Leona Wheatley, Tharcella Larrick Smith, Mary Curran, Nick Kuhn, and Flora Kuhn, because they are

deceased. Shortly thereafter, on July 6, 2012, Appellants filed a claim to preserve mineral interests pursuant to R.C. 5301.56(C), (H).

{¶5} On July 31, 2012, the Blackstones filed an answer to the counterclaim. Two heirs of Tharcella Larrick Smith also filed an answer to the cross-claim and were involved in the trial court proceedings, however, they are not parties to this appeal. The remaining parties failed to respond. Accordingly, on September 17, 2012, Appellants filed a motion for partial default judgment of the cross-claim against the parties who failed to respond. On November 19, 2012, the trial court granted the motion for default judgment against the following: Nick Kuhn, Flora Kuhn, Leonna Wheatley, Tharcella Larrick Smith, Luella Yontz, Mary Curran, Gilbert Yontz, Opal M. Yontz, Mahala Breaden, Allie Pryor, Howard Pryor, Meredith Edwards, Jack Edwards, Barbara Edwards, Elwood Edwards, and Miles Edwards.

{¶6} Relevant to this appeal, as the case proceeded the trial court set the following deadlines: February 28, 2013 for discovery and March 29, 2013 for filing dispositive motions. On March 25, 2013, the Blackstones filed a motion to amend their complaint to add a claim regarding the MTA. On April 8, 2013, the trial court extended the discovery deadline to April 30, 2013 and the dispositive motion filing deadline to May 31, 2013 in order to allow the parties to proceed with a deposition. On April 8, 2013, the court granted the Blackstones' motion for leave to file an amended complaint, which was then filed on April 11, 2013.

{¶7} The parties filed competing motions for summary judgment. On January 22, 2014, the trial court found that Appellants' interests were abandoned

pursuant to both the 1989 DMA and the MTA, and granted the Blackstones' motion for summary judgment. This timely appeal followed.

Summary Judgment

{¶8} An appellate court conducts a *de novo* review of a trial court's decision to grant summary judgment, using the same standards as the trial court set forth in Civ.R. 56(C). *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Before summary judgment can be granted, the trial court must determine that: (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most favorably in favor of the party against whom the motion for summary judgment is made, the conclusion is adverse to that party. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). Whether a fact is "material" depends on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc.*, 104 Ohio App.3d 598, 603, 662 N.E.2d 1088 (1995).

{¶9} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." (Emphasis deleted.) *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 662 N.E.2d 264 (1996). If the moving party carries its burden, the nonmoving party has a reciprocal burden of setting forth specific facts showing that there is a genuine issue for trial. Id. at 293. In other words, when presented with a properly

supported motion for summary judgment, the nonmoving party must produce some evidence to suggest that a reasonable factfinder could rule in that party's favor. *Brewer v. Cleveland Bd. of Edn.*, 122 Ohio App.3d 378, 386, 701 N.E.2d 1023 (8th Dist.1997).

{¶10} The evidentiary materials to support a motion for summary judgment are listed in Civ.R. 56(C) and include the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact that have been filed in the case. In resolving the motion, the court views the evidence in a light most favorable to the nonmoving party. *Temple*, 50 Ohio St.2d at 327.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED BY NOT DETERMINING WHETHER APPELLANTS' INTEREST WAS A "PERPETUAL NON PARTICIPATING ROYALTY" OR A FEE INTEREST IN THE MINERALS.

{¶11} Appellants contend that a royalty interest is more akin to personal property, or a contractual right, rather than an interest in the minerals themselves. As such, Appellants argue that royalty interests are not subject to either the DMA or the MTA. In response, the Blackstones contend that the broad scope of the MTA encompasses all interests, including royalty interests.

{¶12} We have recently held that "[t]he Marketable Title Act does not differentiate between different types of interests. It applies to all interests."

(Emphasis deleted.) *Warner v. Palmer*, 7th Dist. No. 14 BE 0038, 2017-Ohio-1080, ¶ 29, citing *Pollock v. Mooney*, 7th Dist. No. 13 MO 9, 2014-Ohio-4435, ¶ 21; *Covert v. Koontz*, 7th Dist. No. 13 MO 8, 2015-Ohio-228. In *Pollock,* we held that a royalty interest is subject to the MTA. *Id.* at ¶ 17. In another recent case, we held that a royalty interest is subject to abandonment pursuant to the DMA. *DeVitis v. Draper,* 7th Dist. No. 13 MO 0017, 2017-Ohio-1136, ¶ 19.

{¶13} In accordance with *Warner, Pollock,* and *DeVitis*, Appellants' first assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

> THE TRIAL COURT ERRED IN APPLYING THE 1989 VERSION OF THE DORMANT MINERAL ACT CAUSING AUTOMATIC ABANDONMENT OF APPELLANTS' MINERAL INTEREST WHEN (1) AT THE TIME OF FILING THE LAWSUIT THE CURRENT VERSION OF OHIO REVISED CODE §5301.56 WAS IN EFFECT PREVENTING APPLICATION OF THE FORMER STATUTE, AND/OR (2) THE TAKING OF APPELLANTS' MINERAL INTEREST VIA AN AUTOMATIC ABANDONMENT WITHOUT NOTICE CONSTITUTES AN UNCONSTITUTIONAL TAKING OF PROPERTY.

{¶14} We note that the briefing schedule in this appeal was completed prior to the Ohio Supreme Court's recent DMA opinions. No supplemental briefing has been filed by either party.

{¶15} Appellants argue that the 2006 version of the DMA applies in this matter as Appellees' complaint was filed after its effective date. As such, Appellants contend that the trial court erroneously applied the 1989 DMA and found that surface and mineral interests had automatically reunited.

{¶16} In response, the Blackstones argue that the 1989 DMA automatically reunited the mineral interests and surface rights by operation of law in the absence of a savings event within the preceding twenty years. The Blackstones based their argument on their belief that the 2006 DMA applies prospectively rather than retroactively. However, at oral argument, the Blackstones conceded that *Corban* has resolved this issue.

> [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*, *supra*, ¶ 31.

{¶17} The *Corban* Court further held that the 1989 DMA was not self-executing and did not serve to automatically transfer ownership rights of dormant minerals by operation of law, thus any attempt to declare mineral interests

abandoned after June 30, 2006 must comply with the notice requirements of the 2006 DMA. *Id.*, citing *Corban* at ¶ 28. Because the Blackstones filed their complaint on June 4, 2012, the 2006 DMA controls. As such, the trial court improperly relied on the 1989 version of the Act.

{¶18} Abandonment is precluded if the mineral interest holder files an affidavit to preserve his or her interests within sixty days of receiving the surface owner's notice of intent to declare those interests abandoned. *Dodd v. Croskey,* 143 Ohio St.3d 293, 2015-Ohio-2362, 37 N.E.3d 147, ¶ 37. Appellants filed an affidavit to preserve their interests within sixty days of receiving the Blackstones' notice and Appellants have preserved their interests pursuant to the 2006 DMA.

{¶19} Accordingly, Appellants' second assignment of error has merit and is sustained.

ASSIGNMENT OF ERROR NO. 3

THE TRIAL COURT ERRED IN ALLOWING APPELLEES TO AMEND THEIR COMPLAINT IMMEDIATELY PRIOR TO THE MOTION DEADLINE TO PERMIT A CLAIM UNDER THE MARKETABLE TITLE ACT.

{¶20} Pursuant to Civ.R. 15(A):

A party may amend its pleading once as a matter of course within twenty-eight days after serving it or, if the pleading is one to which a responsive pleading is required within twenty-eight days after service of a responsive pleading or twenty-eight days after service of a motion

> under Civ.R. 12(B), (E), or (F), whichever is earlier. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court shall freely give leave when justice so requires. Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within fourteen days after service of the amended pleading, whichever is later.

{¶21} Civ.R. 15(A) allows for liberal amendment, but a motion should not be granted if the record supports a finding of bad faith, undue delay, or undue prejudice to the opposing party. *Turner v. Cent. Local School Dist.*, 85 Ohio St.3d 95, 99, 706 N.E.2d 1261 (1999). A trial court's ruling on a motion to amend a complaint is reviewed for an abuse of discretion. *Porter v. Probst,* 7th Dist. No. 13 BE 36, 2014-Ohio-3789, 18 N.E.3d 824, ¶ 13, citing *Turner,* 85 Ohio St.3d at 99.

{¶22} Appellants contend that the trial court abused its discretion by allowing the Blackstones to add a claim pursuant to the MTA nine months after the original complaint was filed. Appellants argue that the Blackstones' motion for leave to file an amended complaint was untimely because it was filed after the initial discovery deadline had passed and mere days before the dispositive motion filing deadline. Appellants also argue that they suffered prejudice because their interests were extinguished on the MTA claim that was added to the complaint.

{¶23} In response, the Blackstones argue that the question of whether the DMA and MTA could serve as alternative claims had been unanswered at the time

the original complaint was filed. The Blackstones assert that they filed the motion for leave to amend the complaint following two trial court decisions which determined that the DMA and MTA could serve as alternative claims. They urge that they filed the motion as soon as possible after learning that Appellants would not consent to the amendment. The Blackstones also clarify the case schedule by explaining that the discovery and dispositive motion deadlines had been extended to allow the parties to conduct previously scheduled depositions.

{¶24} While there is no reason to suggest that a claim pursuant to the MTA was unavailable to the Blackstones at the time the complaint was filed, the record is devoid of any evidence demonstrating bad faith, undue delay, or undue prejudice. Appellants contend that because the discovery and dispositive motion deadlines had already passed, this alone provides evidence of prejudice. The Blackstones filed a motion for leave on March 25, 2013. While the original discovery deadline had passed and the dispositive motion deadline was mere days away, the trial court extended these deadlines in order to allow the parties to proceed with an earlier-scheduled deposition. The court extended the discovery deadline to April 30, 2013 and the dispositive motion deadline to May 31, 2013. The court later extended the dispositive motion deadline to November 13, 2013. Hence, the Blackstones' motion to amend had no affect on the case schedule.

{¶25} Appellants also argue that prejudice is evident from the fact that their interests were extinguished once the MTA was applied. However, the mere fact that

the Blackstones succeeded on this claim has no bearing on whether the leave to file an amended complaint should be granted.

{¶26} As the parties had previously scheduled a disposition that required the discovery and dispositive motions deadlines to be extended prior to the filing of the motion for leave, Appellants were not prejudiced in terms of scheduling in this matter. The record is devoid of any additional evidence demonstrating prejudice by the request to file an amended complaint.

{¶27} Accordingly, Appellants' third assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 4

THE TRIAL COURT ALSO ERRED IN EXTINGUISHING APPELLANTS' MINERAL INTEREST UNDER THE MARKETABLE TITLE ACT.

{¶28} Appellants argue that the trial court erroneously extinguished their rights pursuant to the MTA for three reasons. First, Appellants contend that the Blackstone deed contained a specific reference to the Kuhn reservation, as it stated the name of the person reserving the interest and the nature of the interest. Second, Appellants argue that actual notice may bar application of the MTA. Appellants argue that the Blackstones had actual knowledge of the Kuhn reservation, having previously negotiated with the Kuhn heirs in an attempt to purchase their royalty interest. Third, Appellants argue that they had filed a preservation claim.

{¶29} In response, the Blackstones argue that reference to an interest contained in a deed must be specific enough to allow a title examiner to locate the reservation deed without using the indexes. The Blackstones contend that it is impossible to find the deed containing the reservation without using the indexes, because the reference did not include the volume or page number. They also argue that there is no legal authority to suggest that actual or constructive knowledge prevents extinguishment under the MTA and that extinguishment is based on record title. Finally, the Blackstones argue that the claim of preservation was filed almost three years after Appellants' interests were already extinguished.

{¶30} The purpose of the MTA is "to extinguish interests and claims in land that existed prior to the root of title with 'the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title.' " *Corban,* at ¶ 17. Pursuant to R.C. 5301.50, "record 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." "A person who has an unbroken chain of title of record to any interest in land for forty years or more has a marketable record title to such interest." *Warner, supra,* at ¶ 30.

{¶31} R.C. 5301.47(A) defines marketable record title as "a title of record, as indicated in Section 5301.48 of the Revised Code, which operates to extinguish such interests and claims, existing prior to the effective date of the root of title, as are

stated in Section 5301.50 of the Revised Code." "Root of title" is defined as "that conveyance or other title transaction in the chain of title of a person, purporting to create the interest claimed by such person, upon which he relies as a basis for the marketability of his title, and which was the most recent to be recorded as of a date forty years prior to the time when marketability is being determined." R.C. 5301.47(E).

{¶32} Record marketable title is subject to several interests and exceptions found within R.C. 5301.49 and R.C. 5301.53. The crux of this case centers on R.C. 5301.49(A), which provides that:

> Such record marketable title shall be subject to:
>
> (A) All interests and defects which are inherent in the muniments of which such chain of record title is formed; provided that a general reference in such muniments, or any of them, to easements, use restrictions, or other interests created prior to the root of title shall not be sufficient to preserve them, unless specific identification be made therein of a recorded title transaction which creates such easement, use restriction, or other interest; and provided that possibilities of reverter, and rights of entry or powers of termination for breach of condition subsequent, which interests are inherent in the muniments of which such chain of record title is formed and which have existed for forty years or more, shall be preserved and kept effective only in the manner provided in section 5301.51 of the Revised Code.

{¶33} The reference at issue, here, stated: "Excepting the one-half interest in oil and gas royalty previously excepted by Nick Kuhn, their heirs and assigns in the above described sixty acres." (7/30/69 Deed.) Appellants argue that the reference is sufficiently specific, because it names the person who reserved the interest and the nature of the interest. In response, the Blackstones argue that the reference fails to specify the volume and page number of the reserving deed, making this a general reference pursuant to *Duvall v. Hibbs*, 5th Dist. No. CA-709, 1983 WL 6483 (June 8, 1983).

{¶34} In *Duvall*, the pertinent language stated that the conveyance was "subject to a deed made to R.S. Hibbs for one-half of said royalty making the amount of royalty for all oil pumped from the wells on said lands after March 1, 1908,..." *Id.* at *1. In determining whether this reference was specific or general, the Fifth District cited an earlier decision of this Court, *Landefeld v. Keyes,* 7th Dist. No. 548, 1982 WL 6146 (June 17, 1982). The Fifth District started with the premise that in *Landefeld* we found the following language amounted to a specific reference: "excepting the coal and oil and gas rights as reserved by G.E. Ketterer and wife in deed to Geo. J. Egger, dated March 26, 1919, in Deed Book No. 81, pages 194-95, Monroe County, Ohio." *Duvall* at *2. However, while we did hold that this reference was "specific," we were not called on to reach the issue of whether this reference complied with R.C. 5301.49(A), because it pertained to a section of land that was not involved in the matter before us in *Landefeld. Id.* at *2. Nonetheless, the Fifth District utilized the *Landefeld* decision to determine that R.C. 5301.49(A) "requires sufficient reference

so that a title examiner may locate the prior conveyance by going directly to the identified conveyance record in the recorder's office without checking conveyance indexes." *Duvall* at *2. The Fifth District is the only appellate district that follows this strict rule.

{¶35} The Fourth District addressed whether a reference to a reservation was sufficiently specific pursuant to R.C. 5301.49(A) in *Patton v. Poston*, 4th Dist. No. 1141, 1983 WL 3171 (April 25, 1983). In *Patton*, the reference stated: "Excepting from all of the foregoing described real estate, all minerals and mining rights heretofore granted by the former owners of said real estate." (Emphasis deleted.) *Id.* at *4. The Fourth District held this reference was general, because it failed to include four essential pieces of information: the type of mineral rights created, the nature of the encumbrance (an estate profit, lease or easement), to whom the original interest was granted, and the instrument that created the interest. *Id.* at *5.

{¶36} More recently, the Eighth District reviewed the issue in *Pinkney v. Southwick Investments L.L.C.*, 8th Dist. Nos. 85074, 85075, 2005-Ohio-4167. In *Pinkney*, the deed stated that the title was "free from all incumbrances [sic] whatsoever except taxes and assessments, general and specific, respread assessments, conditions, reservations and limitations of record, building and use restrictions of record, and zoning or other ordinances of the City of Shaker Heights, if any there be * * *." *Id.* at ¶ 48. The Court held that the language failed to create a specific reference, as it did not identify the recorded title transaction that created the interest, nor refer to the nature of the encumbrance created. *Id.* at ¶ 50.

{¶37} In the present matter, the parties cite to *Toth v. Berks Title Ins. Co.*, 6 Ohio St.3d 338, 453 N.E.2d 639 (1983). While the *Toth* Court found that the reference at issue in the case was specific, unfortunately, the actual language was not cited within its Opinion. Contrary to the Blackstones' assertion, the Supreme Court did not hold that a reference must include the volume and page number in order to be specific. The words "volume" and "page number" are found nowhere in *Toth*.

{¶38} We are persuaded by the analysis of the Fourth and Eighth Districts and adopt the *Patton* and *Pinkney* factors. We expressly reject the *Duvall* requirement. As such, when determining whether a reference is specific or general, we look to whether it included: (1) the type of mineral right created, (2) the nature of the encumbrance (an estate, profit, lease, or easement), (3) the original owner of the interest, and (4) whether it referenced the instrument creating the interest.

{¶39} This record demonstrates that in the matter before us, each of these factors were met. The reservation specified that the encumbrance created a royalty interest. The nature of the encumbrance is an oil and gas lease. Further, the reservation specified that the encumbrance was originally reserved by Nick Kuhn. While the reference did not provide the volume and page number of the reserving deed, it is readily apparent that the reserving deed was the Kuhn deed, which was in the Blackstones' chain of title. As such, the Kuhn reservation was specific pursuant to the requirements of R.C. 5301.49(A). Based on the above, the trial court erred when it decided that Appellants' interests were extinguished pursuant to the MTA and

this decision is hereby reversed. Appellants' fourth assignment of error has merit and is sustained. Our decision renders Appellants' remaining arguments moot.

Conclusion

{¶40} The trial court in this matter correctly determined that a royalty interest in minerals is subject to both the MTA and DMA. The record fails to show that the trial court abused its discretion in allowing the Blackstones to amend their complaint to include MTA claims. However, the trial court erroneously applied the 1989 version of the DMA instead of the 2006 version of the statute. The trial court also erred when it extinguished Appellants' interests pursuant to the MTA, because the reference to the reserving deed in this matter was sufficiently specific. Based on the above, summary judgment was improperly granted to Appellees and we hereby reverse the matter and enter judgment in favor of Appellants.

Donofrio, J., concurs.

Robb, P.J., concurs.

APPROVED:

CHERYL L. WAITE, JUDGE

STATE OF OHIO)
)
MONROE COUNTY)

FILED
JUN 29 2017
SEVENTH DISTRICT COURT OF APPEALS
MONROE COUNTY OHIO
BETH ANN ROSE
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO

SEVENTH DISTRICT

DAVID M. BLACKSTONE, et al.)
)
PLAINTIFFS-APPELLEES)
)
VS.)
)
SUSAN E. MOORE, et al.)
)
DEFENDANTS-APPELLANTS)

CASE NO. 14 MO 0001

JUDGMENT ENTRY

For the reasons stated in the Opinion rendered herein, Appellants' first and third assignments of error are overruled and their second and fourth assignments are sustained. It is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Monroe County, Ohio, is reversed. Judgment is hereby entered in favor of Appellants. Costs to be taxed against Appellees.

JUDGES.

STATE OF OHIO, MONROE COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

DAVID M. BLACKSTONE, et al.	)	CASE NO. 14 MO 0001
	)	
PLAINTIFFS-APPELLEES	)	
	)	
VS.	)	OPINION AND
	)	JUDGMENT ENTRY
SUSAN E. MOORE, et al.	)	
	)	
DEFENDANTS-APPELLANTS	)	

CHARACTER OF PROCEEDINGS: Appellees' Motion to Certify a Conflict.

JUDGMENT: Motion Granted.

APPEARANCES:

For David & Nicolyn Blackstone:

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Atty. Kristopher O. Justice
Theisen Brock, L.P.A.
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For Susan Moore, Carolyn Kohler, Rebecca Englehart and Charles Yontz:

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For J.K. Larrick and Ila Carpenter:

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

Dated: September 18, 2017

PER CURIAM.

{¶1} On June 29, 2017, we released our Opinion in *Blackstone v. Moore,* 7th Dist. No. 14 MO 0001, 2017-Ohio-5704, -- N.E.3d --. On July 10, 2017, Appellees David M. and Nicolyn Blackstone ("the Blackstones") filed a motion to certify a conflict to the Ohio Supreme Court, pursuant to App.R. 25(A). As our Opinion conflicts with the decision in *Duvall v. Hibbs,* 5th Dist. No. CA-709, 1983 WL 6483 (June 8, 1983), we grant Appellees' motion and certify a conflict to the Ohio Supreme Court.

{¶2} Motions to certify a conflict are governed by Article IV, Section 3(B)(4) of the Ohio Constitution. It provides:

> Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the Supreme Court for review and final determination.

{¶3} Under Ohio law, "there must be an actual conflict between appellate judicial districts on a rule of law before certification of a case to the Supreme Court for review and final determination is proper." *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 613 N.E.2d 1032, (1993), paragraph one of the syllabus. We have adopted the following requirements from the Supreme Court:

> [A]t least three conditions must be met before and during the certification of a case to this court pursuant to Section 3(B)(4), Article IV

> of the Ohio Constitution. First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict must be "upon the same question." Second, the alleged conflict must be on a rule of law—not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals. (Emphasis deleted.)

Id. at 596.

{¶4} Appellees allege that our Opinion in their case conflicts with *Duvall, supra.* In *Duvall,* the Fifth District was presented with the issue of whether a reference to a reservation of rights in a deed was specific or general pursuant to R.C. 5301.49(A), the same issue before us in the instant case. The *Duvall* Court created a bright-line rule that looks to whether the reserving deed can be located without checking the indexes. *Id.* at *2. In addition to *Duvall,* we reviewed two other cases addressing the same issue, *Patton v. Poston,* 4th Dist. No. 1141, 1983 WL 3171 (Apr. 25, 1983) and *Pinkney v. Southwick Investments, L.L.C.,* 8th Dist. Nos. 85074, 85075, 2005-Ohio-4167. In *Patton* and *Pinkney,* the respective courts used four factors to determine whether such reference was specific or general.

{¶5} We chose to follow the logic of *Patton* and *Pinkney* and declined to follow the stricter bright-line rule of *Duvall.* In rejecting *Duvall,* we noted that it relied on an earlier case from our District, *Landefeld v. Keyes,* 7th Dist. No. 548, 1982 WL

6146 (June 17, 1982). The *Duvall* Court determined that the reference to a reservation of rights at issue was "a little more definite than that in Landefeld, but not as specific as that which the court in Landefeld found would have been sufficient to satisfy the statute." *Id.* at *2. However, in *Landefeld* we did not reach the issue of whether a reference complied with R.C. 5301.49(A). *Landefeld* confined itself to a much narrower determination:

> Defendants contend that the specific reference to the recorded title transaction, which created the oil and gas interest in the 83 acre parcel of land, in P.X. 2 and P.X. 3, complies with the above cited provision of R.C. 5301.49 for subject parcel of real estate. We agree with the decision of the trial court that inasmuch as such specific reference concerned a different tract of land than subject parcel of land, it does not affect the claim of title for subject parcel of real estate pursuant to R.C. 5301.49.

Id. at *2.

{¶6} Nonetheless, the *Duvall* Court utilized *Landefeld* to decide that R.C. 5301.49(A) "requires sufficient reference so that a title examiner may locate the prior conveyance by going directly to the identified conveyance record in the recorder's office without checking conveyance indexes." *Duvall* at *2. We noted that the Fifth District is the only district that follows this strict rule, and that this rule holds drafters to a much higher standard than does the plain language of the statute.

{¶7} Because *Duvall* required more than is required by R.C. 5301.49(A), we instead elected to follow *Patton* and *Pinkney*, and looked to four factors in determining whether a reference to reservation of rights is specific or general. These factors examine whether the reference included: (1) the type of mineral right created, (2) the nature of the encumbrance (an estate, profit, lease, or easement), (3) the original owner of the interest, and (4) whether it referenced the instrument creating the interest. We held that these factors were statutorily sufficient to put parties on notice of a reservation of rights.

{¶8} As we chose to follow the *Patton* and *Pinkney* holdings and rejected the *Duvall* holding, the Blackstones correctly assert that our decision conflicts with the holding of *Duvall*. Accordingly, the Blackstones' motion to certify a conflict is granted.

JUDGE CHERYL L. WAITE

JUDGE GENE DONOFRIO

JUDGE CAROL ANN ROBB

STATE OF OHIO, MONROE COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

DAVID M. BLACKSTONE, et al. PLAINTIFFS-APPELLEES VS. SUSAN E. MOORE, et al. DEFENDANTS-APPELLANTS	CASE NO. 14 MO 0001 OPINION AND JUDGMENT ENTRY
CHARACTER OF PROCEEDINGS:	Appellees' Application for Reconsideration
JUDGMENT:	Application Denied.
APPEARANCES: For David & Nicolyn Blackstone:	Atty. Daniel P. Corcoran Atty. Kristopher O. Justice Theisen Brock, L.P.A. 424 Second Street Marietta, Ohio 45750
For Susan Moore, Carolyn Kohler, Rebecca Englehart and Charles Yontz:	Atty. Mark W. Stubbins Stubbins, Watson & Bryan Co., LPA 59 North Fourth Street P.O. Box 0488 Zanesville, Ohio 43702-0488
For J.K. Larrick and Ila Carpenter:	Atty. Stephanie Mitchell Tribbie, Scott, Plummer & Padden 139 West Eighth Street P.O. Box 640 Cambridge, Ohio 43725
JUDGES: Hon. Cheryl L. Waite Hon. Gene Donofrio Hon. Carol Ann Robb	
	Dated: October 5, 2017

PER CURIAM.

{¶1} Appellees David M. and Nicolyn Blackstone ("the Blackstones") seek reconsideration of our decision in *Blackstone v. Moore,* 7th Dist. No. 14 MO 0001, 2017-Ohio-5704, -- N.E.3d --. The Blackstones argue that the interests of Susan Moore, Rebecca Englehart, Carolyn Kohler, and Charles Franklin Yontz ("Appellants") have been extinguished by the Marketable Title Act ("MTA"), because the reference that reserved their interest in subsequent deeds was not sufficiently specific pursuant to R.C. 5301.49(A). For the following reasons, the Blackstones' request for reconsideration is denied.

{¶2} In the underlying appeal, this Court was charged with determining several issues related to both the Dormant Mineral Act ("DMA") and MTA. Relevant to this motion, Appellants successfully argued on appeal that the Blackstone deed contained a specific reservation of mineral rights. Consequently, we found that their interests were not extinguished by the MTA.

{¶3} On April 3, 2015, Nick and Flora Kuhn reserved a royalty interest to certain minerals through the following language: "Except Nick and Flora Kuhn, their heirs and assigns reserve one half interest in oil and gas royalty in the above described Sixty (60) acres." Blackstone at ¶ 2. This deed was recorded on April 10, 1915. On July 30, 1969, the property was conveyed to David Blackstone. In 1978 or 1979, Blackstone entered into negotiation with the Kuhn heirs to purchase the royalty interest. The negotiations failed. On January 8, 2001, Blackstone's deed was

transferred into a joint and survivorship deed with his wife, Nicolyn Blackstone. *Id.* at ¶ 3.

{¶4} On May 9, 2012, the Blackstones recorded an affidavit of intent to declare the mineral interests abandoned. *Id.* at ¶ 4. On June 4, 2012, they filed a complaint against Appellants (who are Kuhn heirs) and several other persons who are not parties to this appeal. On July 6, 2012, Appellants filed a claim to preserve their interests. Both parties filed respective motions for summary judgment based on the DMA and the MTA. The trial court found that Appellants had abandoned their interests pursuant to both the 1989 DMA and MTA, and granted the Blackstones' motion for summary judgment.

{¶5} On appeal, we reversed the trial court's decision. We determined that Appellants had preserved their interests pursuant to the 2006 DMA and the MTA. In their motion for reconsideration, the Blackstones solely contest our holding as it applies to the MTA.

> The test generally applied upon the filing of a motion for reconsideration in the court of appeals is whether the motion calls to the attention of the court an obvious error in its decision, or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been.

Columbus v. Hodge, 37 Ohio App.3d 68, 523 N.E.2d 515 (10th Dist.1987), paragraph one of the syllabus.

{¶6} "Reconsideration motions are rarely considered when the movant simply disagrees with the logic used and conclusions reached by an appellate court." *State v. Himes*, 7th Dist. No. 08 MA 146, 2010-Ohio-332, ¶ 4, citing *Victory White Metal Co. v. Motel Syst.*, 7th Dist. No. 04 MA 245, 2005-Ohio-3828; *Hampton v. Ahmed*, 7th Dist. No. 02 BE 66, 2005-Ohio-1766.

{¶7} The Blackstones first argue that our holding contradicts the purpose of the MTA, which is to simplify the title search process. The Blackstones provide a lengthy discussion of how the title process works in Monroe County, although they admit that the process varies by county. The Blackstones argue that our decision will cause the title process to become more cumbersome, not less, and so they contend that we did not fully consider the impact of our decision. However, as the Blackstones concede, this argument was not raised in the parties' respective briefs, thus is not appropriate in their motion to reconsider. The Blackstones additionally state that this Court has misinterpreted the stated purpose of the MTA and the DMA. As these were intended to simplify the process of determining mineral rights, they again contend that our decision does not result in such simplification.

{¶8} The Blackstones argue that the Kuhn deed is outside the chain of title. The Blackstones assert that the Kuhns' interest predates the root of their title deed, and would not be easily found within the Blackstones' chain of title. Without a volume and page number of the Kuhn deed, the Blackstones believe that the Kuhn deed would be almost impossible to find.

{¶9} It is clear from this record that the Kuhn reservation was recited in every deed within the Blackstones' chain of title. It is also clear that the Blackstones knew

of the Kuhns' interest in 1978/1979, because David Blackstone entered into negotiations with Appellants in a failed attempt to purchase their royalty interest. The Blackstones also admitted that they were able to locate and obtain a copy of the Kuhn deed before they filed their complaint in this matter. As such, it is disingenuous for the Blackstones to now argue that the language in their deed notifying them of Appellants' mineral interests was insufficiently specific. Regardless, R.C. 5301.49(A) does not require reference to such reservations to include the volume and page number of the reserving deed. If the legislature had intended to create such a stringent requirement, it would have done so. For example, the legislature has found it necessary to specifically require a deed to include the volume and page number to comply with several sections of R.C. 5301.56, the 2006 DMA. Similar language is absent from R.C. 5301.49(A).

{¶10} The Blackstones contend that this Court committed an obvious error when we relied on *Toth v. Berks Title Ins. Co.,* 6 Ohio St.3d 338, 453 N.E.2d 639 (1983) in our Opinion. They point out that the appellate court in *Toth* had the language of the reference to mineral rights before the court when issuing their decision, and that this language included the reference to a volume and page number of a plat book. *Toth v. Berks Title Ins. Co.*, 9th Dist. No. 10488, 1982 WL 2693 (Aug. 4, 1982). In fact, the Blackstones were able to locate a copy of that deed and attached it to their appellate brief. While in its opinion the Ninth District does recite the language of the reference, the court did not hold that a subsequent deed must always include the volume and page number of the reserving deed in order for a reference in that subsequent deed to be considered specific. In fact, the appellate

court held that the reference in the *Toth* deed was not sufficiently specific because it referred to a plat book, not a deed. Importantly, neither of these references was considered by the Ohio Supreme Court when it undertook review of the matter. The Supreme Court never once referred to volume and page number within its opinion, either of a deed recording or a plat book, and so it appears that recitation of the volume and page number contained within the *Toth* deed and discussed by the trial court and the Ninth District Court had absolutely no impact on the decision of the Supreme Court. The Court clearly did not rule that a reference to a reservation of mineral rights in a later deed must include the volume and page number of the original deed in order to comply with statute.

{¶11} The Blackstones also take issue with our discussion of *Landefeld v. Keyes,* 7th Dist. No. 548, 1982 WL 6146 (June 17, 1982); *Patton v. Poston*, 4th Dist. No. 1141, 1983 WL 3171 (Apr. 25, 1983); and *Pinkney v. Southwick Investments, L.L.C.,* 8th Dist. Nos. 85074, 85075, 2005-Ohio-4167. The Blackstones contend that these cases were not raised by the parties, thus it was inappropriate for us to consider these cases. However, an appellate court is expected to conduct its own independent research and is not limited to consideration of only those cases cited by the parties. Contrary to the Blackstones' argument, the fact that *Landefeld, Patton,* and *Pinkney* were not addressed by the parties does not provide independent grounds for reconsideration. The standard, instead, is whether the court fully considered an issue brought to us on appeal.

{¶12} In addition, the Blackstones argue that our holding conflicts with *Landefeld, Patton,* and *Pinkney*. *Landefeld* is a Seventh District case. With respect

to *Landefeld*, this case was improperly cited in *Duvall v. Hibbs*, 5th Dist. No. CA-709, 1983 WL 6483 (June 8, 1983) for the principle that in order for a deed reference to be sufficiently specific pursuant to statute, a party must be able to find the reserving deed without using the indexes. *Duvall* erred in its reliance on *Landefeld* as this issue was never addressed by us in *Landefeld*. As noted in our Opinion, here, while the *Landefeld* panel called the reference "specific," the Court actually was "not called on to reach the issue of whether this reference complied with R.C. 5301.49(A)[.]" *Blackstone* at ¶ 34.

{¶13} In contrast, the Fourth District in *Patton* was charged with determining whether a reference was specific or general pursuant to R.C. 5301.49(A). In *Patton*, the court did not utilize the *Duvall* bright-line rule. Instead, the *Patton* court relied on several factors in interpreting the statute, including: (1) the type of mineral right created, (2) the nature of the encumbrance, (3) the original owner of the interest, and (4) a reference to the instrument creating the interest. *Id.* at *5. We relied on these *Patton* factors in this case in order to determine that the reference to reservation of mineral rights in the Blackstones' deed was sufficiently specific per statute. The *Pinkney* court also utilized these factors.

{¶14} While in *Patton* and *Pinkney* the references were found to be too general to pass statutory constraints, these references lacked the detail found in the instant case. Relevant to the Blackstones current contention, neither the *Patton* nor *Pinkney* courts based their holdings on the lack of a date or volume and page number of the original deed. Rather, these courts found that the references in the subsequent deeds to the original did not satisfy the four factors. In the instant matter,

Appellants' reference does satisfy all four factors. While the Blackstones also take issue with our finding that the encumbrance in this matter involved a lease, and their interest regards royalties, the nature of this underlying encumbrance is a lease. We note that a royalty interest and a lease are intertwined, and that one has no value without the other.

{¶15} In order to prevail on a motion for reconsideration, the Blackstones are required to demonstrate an obvious error in our decision or raise an issue that was either not fully considered or not considered at all. The Blackstones raise neither. Mere disagreement with this Court's logic and conclusions and discontent that the Court considered relevant cases not raised by the parties does not support a motion for reconsideration. Accordingly, the Blackstones' application for reconsideration is denied.

JUDGE CHERYL L. WAITE

JUDGE GENE DONOFRIO

JUDGE CAROL ANN ROBB

IN THE SUPREME COURT OF OHIO

David M. Blackstone, *et al.*,	:	On Appeal from the Monroe
	:	County Court of Appeals,
Appellants,	:	Seventh Appellate District
	:	
v.	:	
	:	Court of Appeals
Susan E. Moore, *et al.*,	:	Case No. 14 MO 0001
	:	
Appellees.	:	

NOTICE OF APPEAL OF APPELLANTS, DAVID M. BLACKSTONE AND NICOLYN D. BLACKSTONE

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NOTICE OF APPEAL OF APPELLANTS, DAVID M. BLACKSTONE AND NICOLYN D. BLACKSTONE

Appellants hereby give notice of appeal to the Supreme Court of Ohio from the decision of the Monroe County Court of Appeals, Seventh Appellate District, in Case No. 14 MO 0001, as set forth in the Opinion entered on June 29, 2017 and in the Opinion and Judgment Entry denying Appellants' Motion for Reconsideration entered on October 6, 2017. Appellants' Motion for Reconsideration was filed on July 10, 2017.

This case is one of public or great general interest. It also relates to the case in which a conflict has been certified to this Court by the Seventh District, which was filed on September 27, 2017 in Supreme Court Case No. 2017-1362.

Respectfully submitted,

/s/ Daniel P. Corcoran
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CERTIFICATE OF SERVICE

The undersigned hereby certifies a copy of the foregoing **Notice of Appeal** was served upon the following parties by sending a copy of same by ordinary U.S. mail, postage pre-paid, on this 20th day of November, 2017:

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(424387)

ORC Ann. 5301.47

Current with Legislation passed by the 132nd General Assembly and filed with the Secretary of State through file 51 (HB 45) with the exception of file 46 (HB 145) and file 49 (SB 144).

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§ 5301.47 Definitions.

As used in *sections 5301.47* to *5301.56*, inclusive, of the Revised Code:

(A) "Marketable record title" means a title of record, as indicated in *section 5301.48 of the Revised Code*, which operates to extinguish such interests and claims, existing prior to the effective date of the root of title, as are stated in *section 5301.50 of the Revised Code*.

(B) "Records" includes probate and other official public records, as well as records in the office of the recorder of the county in which all or part of the land is situate.

(C) "Recording," when applied to the official public records of the probate or other court, includes filing.

(D) "Person dealing with land" includes a purchaser of any estate or interest therein, a mortgagee, a levying or attaching creditor, a land contract vendee, or any other person seeking to acquire an estate or interest therein, or impose a lien thereon.

(E) "Root of title" means that conveyance or other title transaction in the chain of title of a person, purporting to create the interest claimed by such person, upon which he relies as a basis for the marketability of his title, and which was the most recent to be recorded as of a date forty years prior to the time when marketability is being determined. The effective date of the "root of title" is the date on which it is recorded.

(F) "Title transaction" means any transaction affecting title to any interest in land, including title by will or descent, title by tax deed, or by trustee's, assignee's, guardian's, executor's, administrator's, or sheriff's deed, or decree of any court, as well as warranty deed, quit claim deed, or mortgage.

History

129 v 1040. Eff 9-29-61.

End of Document

ORC Ann. 5301.48

Current with Legislation passed by the 132nd General Assembly and filed with the Secretary of State through file 51 (HB 45) with the exception of file 46 (HB 145) and file 49 (SB 144).

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§ 5301.48 Unbroken chain of recorded title.

Any person having the legal capacity to own land in this state, who has an unbroken chain of title of record to any interest in land for forty years or more, has a marketable record title to such interest as defined in section 5301.47 of the Revised Code, subject to the matters stated in section 5301.49 of the Revised Code.

A person has such an unbroken chain of title when the official public records disclose a conveyance or other title transaction, of record not less than forty years at the time the marketability is to be determined, which said conveyance or other title transaction purports to create such interest, either in:

(A) The person claiming such interest; or

(B) Some other person from whom, by one or more conveyances or other title transactions of record, such purported interest has become vested in the person claiming such interest; with nothing appearing of record, in either case, purporting to divest such claimant of such purported interest.

History

129 v 1040. Eff 9-29-61.

End of Document

ORC Ann. 5301.49

Current with Legislation passed by the 132nd General Assembly and filed with the Secretary of State through file 51 (HB 45) with the exception of file 46 (HB 145) and file 49 (SB 144).

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§ 5301.49 Record marketable title; exceptions.

Such record marketable title shall be subject to:

(A) All interests and defects which are inherent in the muniments of which such chain of record title is formed; provided that a general reference in such muniments, or any of them, to easements, use restrictions, or other interests created prior to the root of title shall not be sufficient to preserve them, unless specific identification be made therein of a recorded title transaction which creates such easement, use restriction, or other interest; and provided that possibilities of reverter, and rights of entry or powers of termination for breach of condition subsequent, which interests are inherent in the muniments of which such chain of record title is formed and which have existed for forty years or more, shall be preserved and kept effective only in the manner provided in *section 5301.51 of the Revised Code*;

(B) All interests preserved by the filing of proper notice or by possession by the same owner continuously for a period of forty years or more, in accordance with *section 5301.51 of the Revised Code*;

(C) The rights of any person arising from a period of adverse possession or user, which was in whole or in part subsequent to the effective date of the root of title;

(D) Any interest arising out of a title transaction which has been recorded subsequent to the effective date of the root of title from which the unbroken chain of title or record is started; provided that such recording shall not revive or give validity to any interest which has been extinguished prior to the time of the recording by the operation of *section 5301.50 of the Revised Code*;

(E) The exceptions stated in *section 5301.53 of the Revised Code*.

History

129 v 1040 (Eff 9-29-61); 130 v 1246. Eff 1-23-63.

End of Document

ORC Ann. 5301.50

Current with Legislation passed by the 132nd General Assembly and filed with the Secretary of State through file 51 (HB 45) with the exception of file 46 (HB 145) and file 49 (SB 144).

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§ 5301.50 Prior interests.

Subject to the matters stated in *section 5301.49 of the Revised Code*, such record 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.

History

129 v 1040. Eff 9-29-61.

End of Document

ORC Ann. 5301.51

Current with Legislation passed by the 132nd General Assembly and filed with the Secretary of State through file 51 (HB 45) with the exception of file 46 (HB 145) and file 49 (SB 144).

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§ 5301.51 Preservation of interests.

(A) Any person claiming an interest in land may preserve and keep effective the interest by filing for record during the forty-year period immediately following the effective date of the root of title of the person whose record title would otherwise be marketable, a notice in compliance with *section 5301.52 of the Revised Code*. No disability or lack of knowledge of any kind on the part of anyone suspends the running of the forty-year period. The notice may be filed for record by the claimant or by any other person acting on behalf of any claimant who is:

(1) Under a disability;

(2) Unable to assert a claim on his own behalf; or

(3) One of a class, but whose identity cannot be established or is uncertain at the time of filing the notice of claim for record.

(B) If the same record owner of any possessory interest in land has been in possession of the land continuously for a period of forty years or more, during which period no title transaction with respect to such interest appears of record in his chain of title, and no notice has been filed by him on his behalf as provided in division (A) of this section, and such possession continues to the time when marketability is being determined, the period of possession is equivalent to the filing of the notice immediately preceding the termination of the forty-year period described in division (A) of this section.

History

129 v 1040 (Eff 9-29-61); 142 v H 502. Eff 5-31-88.

End of Document

ORC Ann. 5301.52

Current with Legislation passed by the 132nd General Assembly and filed with the Secretary of State through file 51 (HB 45) with the exception of file 46 (HB 145) and file 49 (SB 144).

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§ 5301.52 Contents and filing of notice; false statements.

(A) To be effective and entitled to recording, the notice referred to in *section 5301.51 of the Revised Code* shall satisfy all of the following:

(1) Be in the form of an affidavit;

(2) State the nature of the claim to be preserved and the names and addresses of the persons for whose benefit the notice is being filed;

(3) Contain an accurate and full description of all land affected by the notice, which description shall be set forth in particular terms and not by general inclusions, except that if the claim is founded upon a recorded instrument, the description in the notice may be the same as that contained in such recorded instrument;

(4) State the name of each record owner of the land affected by the notice, at the time of its recording, together with the recording information of the instrument by which each record owner acquired title to the land;

(5) Be made by any person who has knowledge of the relevant facts or is competent to testify concerning them in court.

(B) The notice shall be filed for record in the office of the county recorder of the county or counties where the land described in it is situated. The county recorder of each county shall accept all such notices presented that describe land situated within the county, and shall enter and record them in the official records of that county, and shall index each notice in the direct index under the names of the claimants appearing in that notice and in the reverse index under the names of the record owners appearing in that notice. If the county recorder maintains indexes under *section 317.20 of the Revised Code*, the notices also shall be indexed under the description of the real estate involved. The county recorder shall charge the same fees for the recording of such notices as are charged for recording deeds.

(C) A notice prepared, executed, and recorded in conformity with the requirements of this section, or a certified copy of it, shall be accepted as evidence of the facts stated insofar as they affect title to the land affected by that notice.

(D) Any person who knowingly makes any false statement in a notice executed under this section is guilty of perjury under *section 2921.11 of the Revised Code*.

History

129 v 1040 (Eff 9-26-61); 142 v H 502. Eff 5-31-88; *2013 HB 72*, § 1, eff. Jan. 30, 2014.

End of Document

ORC Ann. 5301.53

Current with Legislation passed by the 132nd General Assembly and filed with the Secretary of State through file 51 (HB 45) with the exception of file 46 (HB 145) and file 49 (SB 144).

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§ 5301.53 Certain rights not barred.

The provisions of *sections 5301.47* to *5301.56 of the Revised Code*, shall not be applied to bar or extinguish any of the following:

(A) Any lessor or his successor as reversioner of his right to possession on the expiration of any lease, or any lessee or his successor of his rights in and to any lease, except as may be permitted under *section 5301.56 of the Revised Code*;

(B) Any easement or interest in the nature of an easement created or held for any railroad or public utility purpose;

(C) Any easement or interest in the nature of an easement, the existence of which is clearly observable by physical evidence of its use;

(D) Any easement or interest in the nature of an easement, or any rights granted, excepted, or reserved by the instrument creating such easement or interest, including any rights for future use, if the existence of such easement or interest is evidenced by the location beneath, upon, or above any part of the land described in such instrument of any pipe, valve, road, wire, cable, conduit, duct, sewer, track, pole, tower, or other physical facility and whether or not the existence of such facility is observable;

(E) Any right, title, estate, or interest in coal, and any mining or other rights pertinent to or exercisable in connection with any right, title, estate, or interest in coal;

(F) Any mortgage recorded in conformity with *section 1701.66 of the Revised Code*;

(G) Any right, title, or interest of the United States, of this state, or of any political subdivision, body politic, or agency of the United States or this state.

History

129 v 1040 (Eff 9-26-61); 135 v S 267 (Eff 12-17-73); 135 v H 1231 (Eff 9-30-74); 142 v S 223. Eff 3-22-89.

End of Document

ORC Ann. 5301.54

Current with Legislation passed by the 132nd General Assembly and filed with the Secretary of State through file 51 (HB 45) with the exception of file 46 (HB 145) and file 49 (SB 144).

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§ 5301.54 Effect of changes in law.

Nothing contained in sections 5301.47 to 5301.56, inclusive, of the Revised Code, shall be construed to extend the period for the bringing of an action or for the doing of any other required act under any statutes of limitations, nor, except as provided in sections 5301.47 to 5301.56, inclusive, of the Revised Code, to affect the operation of any statutes governing the effect of the recording or the failure to record any instrument affecting land.

History

129 v 1040. Eff 9-29-61.

End of Document

ORC Ann. 5301.55

Current with Legislation passed by the 132nd General Assembly and filed with the Secretary of State through file 51 (HB 45) with the exception of file 46 (HB 145) and file 49 (SB 144).

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§ 5301.55 Liberal construction.

Sections 5301.47 to 5301.56, inclusive, of the Revised Code, shall be liberally construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title as described in *section 5301.48 of the Revised Code*, subject only to such limitations as appear in *section 5301.49 of the Revised Code*.

History

129 v 1040. Eff 9-29-61.

End of Document

ORC Ann. 5301.56

Current with Legislation passed by the 132nd General Assembly and filed with the Secretary of State through file 51 (HB 45) with the exception of file 46 (HB 145) and file 49 (SB 144).

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§ 5301.56 Abandonment of mineral interest and vesting in owner of surface of lands.

(A) As used in this section:

(1) "Holder" means the record holder of a mineral interest, and any person who derives the person's rights from, or has a common source with, the record holder and whose claim does not indicate, expressly or by clear implication, that it is adverse to the interest of the record holder.

(2) "Drilling or mining permit" means a permit issued under Chapter 1509., 1513., or 1514. of the Revised Code to the holder to drill an oil or gas well or to mine other minerals.

(3) "Mineral interest" means 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.

(4) "Mineral" means gas, oil, coal, coalbed methane gas, other gaseous, liquid, and solid hydrocarbons, sand, gravel, clay, shale, gypsum, halite, limestone, dolomite, sandstone, other stone, metalliferous or nonmetalliferous ore, or another material or substance of commercial value that is excavated in a solid state from natural deposits on or in the earth.

(5) "Owner of the surface of the lands subject to the interest" includes the owner's successors and assignees.

(B) Any 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 the requirements established in division (E) of this section are satisfied and none of the following applies:

(1) The mineral interest is in coal, or in mining or other rights pertinent to or exercisable in connection with an interest in coal, as described in division (E) of *section 5301.53 of the Revised Code*. However, if a mineral interest includes both coal and other minerals that are not coal, the mineral interests that are not in coal may be deemed abandoned and vest in the owner of the surface of the lands subject to the interest.

(2) The mineral interest is held by the United States, this state, or any political subdivision, body politic, or agency of the United States or this state, as described in division (G) of *section 5301.53 of the Revised Code*.

(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

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, provided that an affidavit that states the name of the permit holder, the permit number, the type of permit, and a legal description of the lands affected by the permit has been filed or recorded, in accordance with *section 5301.252 of the Revised Code*, in the office of the county recorder of the county in which the lands are located.

(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.

(C)

(1) A claim to preserve a mineral interest from being deemed abandoned under division (B) of this section may be filed for record by its holder. Subject to division (C)(3) of this section, the claim shall be recorded in accordance with division (H) of this section and *sections 317.18* to *317.20* and *5301.52 of the Revised Code*, and shall consist of a notice that does all of the following:

(a) States the nature of the mineral interest claimed and any recording information upon which the claim is based;

(b) Otherwise complies with *section 5301.52 of the Revised Code*;

(c) States that the holder does not intend to abandon, but instead to preserve, the holder's rights in the mineral interest.

(2) A claim that complies with division (C)(1) of this section or, if applicable, divisions (C)(1) and (3) of this section preserves the rights of all holders of a mineral interest in the same lands.

(3) Any holder of an interest for use in underground gas storage operations may preserve the holder's interest, and those of any lessor of the interest, by a single claim, that defines the boundaries of the storage field or pool and its formations, without describing each separate interest claimed. The claim is prima-facie evidence of the use of each separate interest in underground gas storage operations.

(D)

(1) A mineral interest may be preserved indefinitely from being deemed abandoned under division (B) of this section by the occurrence of any of the circumstances described in division (B)(3) of this section, including, but not limited to, successive filings of claims to preserve mineral interests under division (C) of this section.

(2) The filing of a claim to preserve a mineral interest under division (C) of this section does not affect the right of a lessor of an oil or gas lease to obtain its forfeiture under *section 5301.332 of the Revised Code*.

(E) 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 of the lands subject to the interest shall do both of the following:

(1) 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. The notice shall contain all of the information specified in division (F) of this section.

(2) At least thirty, but not later than sixty days after the date on which the notice required under division (E)(1) of this section is served or published, as applicable, file in the office of the county recorder of each county in which the surface of the land that is subject to the interest is located an affidavit of abandonment that contains all of the information specified in division (G) of this section.

(F) The notice required under division (E)(1) of this section shall contain all of the following:

(1) The name of each holder and the holder's successors and assignees, as applicable;

(2) A description of the surface of the land that is subject to the mineral interest. The description shall include the volume and page number of the recorded deed or other recorded instrument under which the owner of the surface of the lands claims title or otherwise satisfies the requirements established in division (A)(3) of *section 5301.52 of the Revised Code*.

(3) A description of the mineral interest to be abandoned. The description shall include the volume and page number of the recorded instrument on which the mineral interest is based.

(4) A statement attesting that nothing specified in division (B)(3) of this section has occurred within the twenty years immediately preceding the date on which notice is served or published under division (E) of this section;

(5) A statement of the intent of the owner of the surface of the lands subject to the mineral interest to file in the office of the county recorder an affidavit of abandonment at least thirty, but not later than sixty days after the date on which notice is served or published, as applicable.

(G) An affidavit of abandonment shall contain all of the following:

(1) A statement that the person filing the affidavit is the owner of the surface of the lands subject to the interest;

(2) The volume and page number of the recorded instrument on which the mineral interest is based;

(3) A statement that the mineral interest has been abandoned pursuant to division (B) of this section;

(4) A recitation of the facts constituting the abandonment;

(5) A statement that notice was served on each holder or each holder's successors or assignees or published in accordance with division (E) of this section.

(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.

The holder or the holder's successors or assignees shall notify the person who served or published the notice under division (E) of this section of the filing under this division.

(2) If a holder or a holder's successors or assignees who claim that the mineral interest that is the subject of a notice under division (E) of this section has not been abandoned fails to file a claim to preserve the mineral interest, files such a claim more than sixty days after the date on which the notice was served or published under division (E) of this section, fails to file an affidavit that identifies an event describe