

IN THE SUPREME COURT OF OHIO

LRC REALTY, INC.,	:	Supreme Court Case No. 18-_____
Appellee-Appellant,	:	
-vs-	:	On Appeal from the Geauga County Court of
B.E.B. PROPERTIES, <i>et al.</i> ,	:	Appeals, Eleventh Appellate District
Appellants-Appellees,	:	
NEW PAR d.b.a.	:	Court of Appeals Case No. 2016-G-0076
Verizon Wireless, et al.,	:	
Appellee-Appellee.	:	
-vs-	:	
BRUCE BIRD, <i>et al.</i> ,	:	
Appellants-Appellees,	:	

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MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT 112 PARKER  
COURT, LLC

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### APPENDIX:

Judgment Entry and Opinion of Geauga County Court of Appeals, Eleventh Appellate District.

I. Explanation of Why this Case is a Case of Public or Great General Interest.

This case presents critical issues for the property rights of every citizen of the State of Ohio. For the first time in Ohio jurisprudence, the court below held that a reservation of an interest in real property may be implied rather than express. It was undisputed that the prior conveyances did not contain an express reservation of the right to receive the rental payments at issue in this case. Yet, the Appellate Court found that “the ‘subject to’ language contained within the deed \* \* \* clearly indicates that the parties’ intention was to reserve the right to receive rent for the benefit of B.E.B. Properties.” (Appellate Decision, p. 16, ¶ 42) Whether a reservation of a property right may be implied from the “parties’ intention” was not briefed in the court below. A decision of this magnitude should not be lightly passed upon without being briefed by the parties because of the potential consequences it may have past and future real estate transactions.

The dissenting opinion astutely noted that under the majority’s rationale, “the construction of virtually every warranty deed or property transfer in the State of Ohio is vulnerable to judicial reinterpretation.” (*Id.* at ¶57.) How will title insurance companies insure the status of title if they have to determine the “parties’ intent” in order to determine what property rights have been conveyed and which have been reserved by implication? What will the uncertainty mean for the consumers’ costs of real estate transactions in Ohio? What effects will this have on commercial

development if a prospective purchaser has to examine prior owners' intentions to know what rights they can acquire? How much litigation will we see the next time mineral rights are in high demand and prior owners or lessors claim that they intended to reserve mineral rights in the land?

The remedy Appellants sought was reformation of the original deed. (Appellants' Merit Brief at 12.) Appellants sought reformation because they argued "the recorded documents **do not expressly reflect the intent** of the foregoing transactions." (*Id.* at 9. (Emphasis added.)) Yet, the majority, after properly determining that reformation was unavailable, stated, "[t]he "subject to" language contained within the deed \* \* \* **clearly indicates that the parties' intention** was to reserve the right to receive rent for the benefit of B.E.B. Properties." (Appellate Decision at ¶41. (Emphasis added.)) That statement is the exact opposite of what the original Appellants, one of whom was a member B.E.B. Properties, argued.

The dissenting Justice rightfully pointed out, "[t]hat this boilerplate ["subject to"] language should amount to an express reservation of the right to receive rent was certainly not clear to the lower court judge or the litigants in the present case, is not clear to this judge, and, as far as this judge has been able to determine, has not been clear to any court that has considered the significance of language in a warranty deed that the premises are "subject to \* \* \* specific encumbrances." (*Id.* at ¶55.) The

majority's decision represents an extraordinary attempt to bend the law to reach a chosen result.

By addressing the proposition of law in this matter, this Court has the opportunity to protect the sanctity of an individual's property rights, restore the full bundle of sticks to Ohio property owners, reaffirm that the express language of a real estate instrument evidence the intent of the parties, and protect the due process rights of the litigants. Furthermore, if the majority's decision is allowed to stand it will create a conflict not only within the Eleventh Appellate District but with appellate districts across Ohio. This Court should eliminate these conflicts and reaffirm settled law by accepting the following propositions of law:

**Proposition of Law No. I:** Absent an express reservation, the right to receive rents runs with the land.

**Proposition of Law No. II:** Appellate courts should not decide cases based on issues that were not raised by any party without first providing the parties an opportunity to brief those issues.

If the Eleventh District Court of Appeals' split decision is allowed to stand it calls into question every previously-thought settled real property transfer, including mineral interest transfers, across the State of Ohio. The dissenting Justice recognized this when she wrote that under the majority's rationale, "the construction of virtually every warranty deed or property transfer in the State of Ohio is vulnerable to judicial reinterpretation."

This Court has the opportunity to reaffirm over a century's worth of Ohio property law and provide the necessary guidance on how real property instruments should be interpreted. Without the Court's final word on this issue, to plug the hole in the dam created by the appellate court's decision, the dam will break and courts across Ohio will be vulnerable to a flood of litigation over previously settled property transfers. Additionally, future transfers will have to be scrutinized ever more than before or be open to judicial reinterpretation. This additional scrutiny will raise the costs for both buyers and sellers of any Ohio real property.

## II. Statement of the Case and the Facts.

This case began as two cases which, while separate, were based in the same facts and issues so they were consolidated at the lower level.

The facts of this case are not in dispute. In 1994, B.E.B Properties owned real property at 112 Parker Court in Chardon, Ohio. B.E.B. Properties was an Ohio general partnership of which Appellee Bruce Bird was a general partner. In March of 1994, B.E.B. Properties executed a Lease Agreement ("Lease") with Northern Ohio Cellular Telephone Company, a predecessor in interest to Appellee New Par. The Lease Agreement authorized Northern Ohio Cellular Telephone Company to construct and operate a wireless transmission and receiving tower on a portion of the Parker Court property. In exchange for using the land, the Lease entitled the Landlord to annual rental payments which increased over time. A wireless transmission and receiving

tower was constructed on a portion of the premises at 112 Parker Court where it remains to this day and is operated by New Par.

In March of 1995, B.E.B. Properties sold the Parker Court property to Baker and Cyvas. The deed conveying the property from B.E.B. Properties to Keith Baker and Joseph Cyvas contained no provision reserving the rental payments due under the cell tower lease to B.E.B. Properties.

On June 22, 1995, B.E.B. Properties executed an Assignment of Partnership whereby two of the three general partners of B.E.B. assigned their partnership interests to Appellees Bruce and Sheila Bird. In January 1997, Northern Ohio Cellular Telephone Co. assigned the Lease Agreement to its affiliate, Appellee New Par. In June 1999, Baker and Cyvas transferred legal title to the Parker Court Property to Magnum Machine Co. No reservation of rental payments was included in that deed.

In October 2003, the Magnum Machine Co. transferred title to the Parker Court property to Appellant 112 Parker Court, LLC. Again, the deed transferring the property contained no reservation of any rental payments associated with the property. In January of 2013, 112 Parker Court, LLC, transferred title to the Parker Court property to LRC Realty, without an express reservation of the rent associated with the cell tower.

At the trial court, motions for summary judgment in part or in whole were filed by all parties. The trial court denied the Appellants' motion and granted the motions



of Appellees 112 Parker Court and LRC Realty. Appellees filed an appeal on June 6, 2016.

The appellate court, in a split decision, not only reversed the decision of the trial court but remanded with instructions to enter judgment in favor of the original Appellants. The majority based its decision on arguments not brought before it by any party, including the original Appellants, and did not give the parties the opportunity to brief the issue before issuing its decision. As a result, not only is the split decision an improper interpretation of law, it is contrary to the Ohio Revised Code, precedent in a myriad of appellate districts including its own, and was issued in violation of the parties' due process rights.

This timely appeal follows, as the Eleventh District Court of Appeals erred in its finding that a reservation can be created via boilerplate "subject to" language, despite no one raising that argument or being afforded the opportunity to brief it.

### III. Argument in Support of the Propositions of Law

Proposition of Law No. 1: Absent an express reservation, the right to receive rents runs with the land.

Under Ohio law, the right to rents and profits of real estate follows legal title. Ohio Revised Code §5302.04; *Commercial Bank & Sav. Co. v. Woodville Sav. Bank Co.*, 126 Ohio St. 587, 591, 186 N.E. 444 (Ohio 1933). Ohio Revised Code §5302.04 states, "[i]n a conveyance of real estate or any interest therein, all rights, easements, privileges, and

appurtenances belonging to the granted estate shall be included in the conveyance, unless the contrary is stated in the deed, and it is unnecessary to enumerate or mention them either generally or specifically.”

Therefore, absent express reservations within the deed, the owner of property is entitled to the rents and profits that property produces. In this case, it was undisputed that neither the original transfer nor any subsequent transfer included a reservation of the right to the rents. Appellate Decision, Dissenting Opinion ¶52.

However, the majority stated, “[t]he fact that the language in the deed does not expressly state B.E.B. Properties “reserved the right to receive rent” is not dispositive.” Appellate Decision ¶41. The majority, after determining they could not give the original Appellants the remedy they sought, chose to craft an express reservation where none existed before. The majority seized upon the following language within the deed:

Said premises being subject to the same restriction as recorded in Volume 537, Page 523, Geauga County Records of Deeds which are hereby incorporated and made a part of this deed as if fully written herein.

Further subject to an Option to Lease and Lease Agreement dated March 14, 1994 and recorded April 21, 1994 at Volume 979, Page 1, of the Geauga County Records;

Further subject to a Non-Exclusive Easement filed March 3, 1995 referred to in Volume 1009, Page 56 of Geauga County Records;

Further subject to a Memorandum of Lease filed March 3, 1995, referred to in Volume 1009, Page 50 of Geauga County Records.

And B.E.B. Properties, an Ohio Partnership, the said Grantor, does for its self and its successors and assigns, covenant with the said Grantees, Keith R. Baker and Joseph K. Cyvas, their heirs and assigns, \* \* \* that it will warrant and defend said premises, with the appurtenances thereunto belonging, to the said Grantees, their heirs and assigns, against all lawful claims and demands whatsoever, *such premises further to be subject to the specific encumbrances on the premises as set forth above.* Id. ¶39. (Emphasis in original).

The majority next quoted the Four Corners Doctrine; “The first rule of deed construction in Ohio is that when the parties’ intentions are clear from the four corners of the deed, we will give effect to that intention.” *Koprivec v. Rails-to-Trails of Wayne Cty.*, Slip Opinion No. 2018-Ohio-465, 1 J29, citing *Hinman v. Barnes*, 146 Ohio St. 497, 508 (1946). Appellate Decision ¶41. Finally reaching the conclusion that the “subject to” language above “clearly indicates that the parties’ intention was to reserve the right to receive rent for the benefit of B.E.B. Properties.” Id.

It is inconceivable, based on the facts and procedural posture of the case up through the appeal, as well as the very law the majority quotes, how the majority could decide it was clear that the intention was to reserve the right to rental payments. Even the original Appellants stated “the recorded documents do not expressly reflect the intention of the parties.” (Appellants’ Merit Brief at 9.) At best, the quoted language put Baker and Cyvas on notice that the land was being sold subject to a lease, which they would have to honor, but not that the rental payments of that lease were being reserved. The dissenting Justice also found the majority’s holding untenable and stated,

That this boilerplate language should amount to an express reservation of the right to receive rent was certainly not clear to the lower court judge or the litigants in the present case, is not clear to this judge, and, as far as this judge has been able to determine, has not been clear to any court that has considered the significance of language in a warranty deed that the premises are "subject to \* \* \* specific encumbrances." Appellate Decision, Dissenting Opinion ¶55.

The majority's decision was not based in fact or law. The majority's decision is, in fact, contrary to Ohio Revised Code ¶5302.04 as shown above. There is a litany of cases interpreting this code section, including in the Eleventh Appellate District, which contradicts the majority's holding. *Ashtabula Cty. Technical and Career Ctr. v. Thompson*, 85 N.E.3d 165, 2017-Ohio-618, ¶26 (App. 11<sup>th</sup> Dist. 2017). ("Because there is no express reservation of oil and gas rights in the Trust, those rights transfer with the property upon conveyance to the grantee. *See generally* R.C. 5302.04"); *Whitt v. Whitt*, 2003-Ohio-3046, ¶11 (App. 2<sup>nd</sup>. Dist. 2003). (Pursuant to R.C. 5302.04, "Appellant did not state in the deed that her dower rights are retained. As a result, the quitclaim deed passed to the grantee whatever interests the grantors had in the real estate which was held by the grantors."); *Pease Co. v. Huntington Natl. Bank*, 495 N.E.2d 45, 23 Ohio App. 3d 227, 229 (App. 10<sup>th</sup> Dist. 1985). (In an opinion authored by former Chief Justice Moyer, when he was a 10<sup>th</sup> Dist. Appellate Judge, citing R.C. ¶5302.04, "The use of limited warranty deeds and limited warranty covenants, as defined under R.C. 5302.07 and 5302.08, and the [appellants'] warranty deed do not limit the transfer of all interests held by the transferor to the transferee."); *Schreck v. Schreck*, 2001-Ohio-4245, (decided November

15, 2001 8<sup>th</sup> App. Dist.). ("Pursuant to [R.C. §§ 5302.04 and 5302.11], any reservation of rights must be listed within the quit-claim deed."); *James O. Henry v. James F. Murfin*, 95-LW-2457, (decided May 31, 1995, 9<sup>th</sup> App. Dist.). ("[R.C. 5302.04] presumes that words of limitation will be used if a grantor intends to limit the rights in the interest conveyed. Thus, if the grantors intended to retain a right of control over the use of the easement property "for driveway and yard purposes," it was incumbent upon them to expressly reserve the right in the deed. \* \* \* In the absence of a clear expression of intent or other evidence of a contrary intent, it is presumed that the grantors conveyed the entire interest by their grant.").

It is clear by both statute and common law that a reservation of rents must be expressly made in the deed or the right to those rents is transferred. The majority's decision is contrary to both the Ohio Revised Code and the common law. Appellant respectfully requests this Court accept jurisdiction and correct the erroneous decision of the majority in the court below.

**Proposition of Law No. II:** Appellate courts should not decide cases based on issues that were not raised by any party without first providing the parties an opportunity to brief those issues.

The lower court majority took a set of facts completely settled among the parties, that there was no express reservation in the deed, and *sua sponte* and without notice or the opportunity to brief it, decided the case by finding some perceived evidence of intent to reserve rental payments. Further, the majority decided the case, in its entirety,

by remanding for judgment in favor of the original Appellants on an issue no party disputed or briefed. This represents an abuse of discretion by the majority and a complete disregard for the due process rights of the parties.

The Ohio Supreme Court has previously spoken on this issue and required that appellate courts afford parties the opportunity to brief issues that are raised *sua sponte* by the court. *State of Ohio v. 1981 Dodge Ram et al.*, 522 N.E.2d 524, 36 Ohio St.3d 168, 171 (1988). In *Dodge*, the Court reviewed an appellate court decision which was decided on an issue that was not raised or briefed by any party to the case. *Id.* at 168. The Court held that it was an abuse of discretion to raise a new issue and decide the case on that issue without affording the parties the opportunity to brief it. *Id.* at 171. The Court relied on another Ohio Supreme Court case *Miller Chevrolet, Inc. v. Willoughby Hills*. *Id.* at 170. The Court noted that *Willoughby* stated in a footnote “that out of fairness to the parties, a court of appeals which contemplates a decision upon an issue not briefed before it should (as was done in that case) give the parties notice of its intention and an opportunity to brief the issue.” *Id.* at 170. (Citing *Miller Chevrolet, Inc. v. Willoughby Hills*, (1974), 38 Ohio St.2d 298, 301 fn. 3, 67 O.O.2d 358, 313 N.E.2d 400.)

In this case, no opportunity to brief the new issue was given, a decision was simply rendered. The majority not only misconstrued the law, they violated the parties’ due process rights in the process by failing to allow the parties the opportunity to

address the issue they ultimately decided the case upon, and created a conflict of law within their own appellate district.

Accordingly, it is necessary that this Court accept jurisdiction of this appeal and both preserve the due process rights of the parties and correct the improper split decision of the court below. Otherwise, previously settled property transfers, of all types, will suddenly be subject to judicial reinterpretation which could flood courtrooms across the state.

#### V. Conclusion

For the reasons discussed above, this case involves matters of public and great general interest. The Appellants, respectfully request this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Memorandum in Support of Jurisdiction*, was served upon the following parties via electronic transmission pursuant to Ohio R. Civ. P. 5(B)2(f) this 5th day of September 2018.

/s/ Robert Dove

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