IN THE SUPREME COURT OF OHIO

JEFFREY H. SHARP, et al. Plaintiffs-Appellants, Cross-Appellees v. **DAVID R. MILLER**, et al. Defendants-Appellees, Cross-Appellants	Case No. 2019-0036 On Appeal from the Jefferson County Court of Appeals, Seventh Appellate District Court of Appeals Case No. 17 JE 0022

COMBINED JURISDICTIONAL MEMORANDUM OF DEFENDANTS-APPELLEES/CROSS-APPELLANTS, ERIC PETROLEUM CORPORATION AND BRUCE E. BROCKER, TRUSTEE OF THE BROCKER ROYALTY TRUST NO. ONE U/A/D 10/15/2010 IN OPPOSITION TO APPELLANTS' PROPOSITIONS OF LAW AND IN SUPPORT OF APPELLEES/CROSS-APPELLANTS' PROPOSITION OF LAW

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I. EXPLANATION OF WHY APPELLANTS' PROPOSITIONS OF LAW ARE NOT A MATTER OF PUBLIC OR GREAT GENERAL INTEREST

While Appellants have framed their two propositions of law in such a way as to make them intriguing to any mineral lawyer, neither arises to the level of a matter of public or great general interest because the relevant facts of the case as reviewed by the Seventh District Court of Appeals do not support application of either proposition to the instant appeal. In other words, neither the issue of whether an oil and gas lease signed by the Millers is a title transaction inuring to the benefit of the Appellants, nor the issue of the sufficiency of the Millers' records search, is pertinent in this appeal because the Appellants actually obtained timely notice from a third party, East Ohio Mineral Recovery ("EOMR"), of the Sharps' need to take some action to preserve their purported mineral interest, but they waited two months past the deadline in which to file their preservation affidavits.

One of the first questions from the Seventh District at oral argument was whether any principle of tolling would mitigate a mineral owner's need to preserve their interest within sixty (60) days of the surface owner's publication of intent to declare it abandoned? Appellants' counsel responded truthfully that he was not aware of any. Appellants had a copy of the deed containing the mineral reservation on August 27, 2014 and knew that they had to take action by early September, but still missed the September 8, 2014 deadline for filing. In other words, the Seventh District saw the case for what it was—appellants who were tardy in protecting their purported rights.

Appellants argue they needed "to take caution and perform their due diligence" before filing a preservation affidavit "that could subject them to liability for slander of title." Appellants' Juris. Memo., p. 2. However, after first noting that "Appellants admit that EOMR informed them on August 10, 2014 that they were required to file in the matter by sometime in

September," the Seventh District concluded that "it is clear from the record that they had sufficient information on which to at least timely file a claim of preservation," and "[a]ppellants have provided no reasonable excuse as to why they waited until November of 2014 to file a claim of preservation." *Sharp v. Miller*, 7th Dist. Jefferson No. 17 JE 0022, 2018-Ohio-4740, ¶ 24-25.

Appellants' real issue, not addressed by their propositions of law, is with the 60-day time limit in which a purported severed mineral owner has to file its claim after notice. Whether that period is too short, or if some principle of tolling should enable a mineral owner receiving notice from a third party to research the bona fides of its claim before filing, are both policy issues for the legislature. Because Appellants had notice and filed late, neither proposition of law saves them. Proposition of Law No. 1, arguing that a surface owner's lease operates as a savings event, is moot because the Millers filed an Affidavit of Notice of Failure to File pursuant to R.C. 5301.56(H)(2)[1] based upon the Appellants' failure to timely file their preservation claim. That moots any R.C. 5301.56(B)(3) review.

Proposition of Law No. 2 is similarly moot due to Appellants' failure to timely file a preservation claim. Even if it were not, the adjudicated facts would not support Appellants' second proposition of law. The Seventh District concluded that "an internet search would not likely have been helpful in this case, because the only names available to Appellees were Smith and Poole. ***There is no evidence that a simple internet search would have revealed the actual***

[1] R.C. 5301.56(H)(2) provides in relevant part that upon the surface owner's filing of the Notice of Failure to File "the mineral interest … vest[s] in the owner of the surface of the lands formerly subject to the interest, and the record of the mineral interest … cease[s] to be notice to the public of the existence of the mineral interest or of any rights under it." The reservation "shall not be received as evidence in any court in this state on behalf of the former holder or the former holder's successors or assignees against the owner of the surface of the lands formerly subject to the interest." *Id.*

Smith/Poole heirs." (Emphasis added.) *Id.* at ¶ 21. In other words, Appellants failed to present any summary judgment evidence in the trial court that an internet search would have provided the Millers with the names and addresses of potential mineral holders who could not be located by a public records search in the Jefferson County Courthouse. As one former Justice has suggested, "one should not attempt to make law when the record will not support it." Neff, *A Jurist's Views On . . . . What Constitutes A Matter of Public or Great General Interest*, 38 Clev.B.J. 47 (1967), quoting the Hon. Louis J. Schneider.

II. ARGUMENT IN OPPOSITION TO EACH OF APPELLANTS' PROPOSITIONS OF LAW

A. *Proposition of Law No.1: The owner of a surface estate that leases a severed mineral interest that it does not own causes a title transaction and a savings event under R.C. 5301.56(B)(3)(a) of the 2006 Dormant Mineral Act, thereby preventing the severed mineral interest from being deemed abandoned and reunited with the surface estate.*

Appellants attack the Seventh District's decision on the grounds that it "creates confusion in the property records." Appellants' Juris. Memo. , p. 1. Their solution would cause a transaction indexed under third parties A and B to be dispositive as to the interests of D, a purported heir of C, neither of whom are referenced on the face of such document. The existence of D and C would be found, if at all, only through an exhaustive nationwide search outside the courthouse. This, of course, would fly in the face of the Ohio Marketable Title Act's (hereinafter, "OMTA") "legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title." R.C. 5301.55. This Court found this rationale to expressly apply to the 1989 version of the Ohio Dormant Mineral Act (hereinafter "ODMA"). *Corban v. Chesapeake Exploration, L.L.C.*, 149 Ohio St.3d 512, 2016-Ohio-5796, 76 N.E.3d 1089, ¶ 27.

Appellants posit a paradox: Appellees supposedly have no interest in the minerals under the property, but can, without acquiring further rights, make those minerals "the subject of a title transaction" under R.C. 5301.56(B)(3)(a). Using the rules of common usage, the Seventh District defined "subject" as a "topic of interest, primary theme or basis for action." *Dodd v. Croskey*, 7th Dist. Harrison No. 12 HA 6, 2013-Ohio-4257, ¶ 48, citing Webster's II New Riverside University Dictionary 1153 (1984). It goes without saying that Appellants' purported ownership of minerals can not logically be the basis for Appellees Miller leasing their own oil and gas to Appellee Eric Petroleum.

This distinction is made within the text of R.C. 5301.56(B) itself, which states that "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." (**Emphasis added.**) R.C. 5301.56(B)(3)(b) creates a savings event where "[t]here has been actual production or withdrawal of minerals **by the holder.**" (**Emphasis added.**) Likewise R.C. 5301.56(B)(3)(c) & (d) expressly only apply to actions taken by the holder. R.C. 5301.56(B)(3)(e) & (f) are not expressly limited to the holder, but it goes without saying that no surface owner or unrelated third party would be filing claims to preserve or creating separate tax ID numbers for long-forgotten mineral reservations. The savings events in R.C. 5301.56(B)(3)(b-f) all relate to actions taken by or on behalf of the holder. Obviously R.C. 5301.56(B)(3)(a) was also intended to only apply to the holder and those claiming through the holder's independent mineral chain of title. Otherwise, we have the absurd situation where the 2009 Lease from Appellees Miller to Appellee Eric Petroleum preserves Appellants' title, but the wells Appellee Chesapeake drilled in pooled units containing portions of that same lease do not! See, e.g., R.C. 5301.56(B)(3)(b).

Appellants refer to ¶39 of *Chesapeake Exploration, L.L.C. v. Buell*, stating that a title transaction "is not limited to the transactions enumerated in the statute or to transactions that transfer an ownership interest" to suggest that the Seventh District inappropriately restricted title transactions to those that convey an ownership interest. *Chesapeake Exploration, L.L.C. v. Buell*, 144 Ohio St.3d 490, 2015-Ohio-4551, 45 N.E.3d 185, ¶ 39, Appellants' Juris. Memo., p.7. *Buell* uses an easement as an example of a title transaction that does not convey ownership. *Id* at ¶37. The Court defines an easement as "[a]n interest in land **owned by another person**, consisting in **the right to use or control** the land, or an area above or below it, for a specific limited purpose (such as to cross it for access to a public road)." (**Emphasis added.**) *Chesapeake Exploration, L.L.C. v. Buell*, at ¶ 38, quoting *Black's Law Dictionary* at 622. Thus, while Buell does not require that a fee estate be conveyed for a title transaction to occur, it does not, as Appellants would have it, recognize a title transaction without ownership of any subordinate interest or valid right in the property to be preserved. Appellees Miller did not lease Appellants' minerals to Appellee Eric Petroleum, but their own.

Heifner v. Bradford makes clear that the alleged devolution of severed minerals to Appellants and the surface conveyances of Appellees form two distinct chains of title. *Heifner v. Bradford*, 4 Ohio St.3d 49, 50, 52, 446 N.E.2d 440 (1983). See also Justice Kennedy's concurrence in *Corban v. Chesapeake Exploration, L.L.C.*, 149 Ohio St.3d 512, 2016-Ohio-5796, 76 N.E.3d 1089, ¶ 83. "[A] 'marketable title,' as defined in R.C. 5301.47(A) and 5301.48, is subject to an interest arising out of a 'title transaction' under R.C. 5301.49(D) which may be part of an independent chain of title." *Id*. at 52-53. Note that the Court says "subject to" not "preserved by." Anything filed in Appellees' chain would act to preserve **Appellees' interest**, as in *Heifner*, not that claimed by Appellants. To hold otherwise would create an unworkable dual

preservation of interests which would prevent any severed interest from being terminated absent a lengthy dual abandonment.

Because Appellants' Proposition of Law No.1 so beggars logic, its disposal cannot be a matter of great general or public interest. As such, Appellee Eric Petroleum humbly requests this Court reject it.

B. ***Proposition of Law No.2: A search for mineral holders that is limited to the county courthouse is unreasonable as a matter of law pursuant to R.C. 5301.56(E) of the 2006 Dormant Mineral Act.***

Appellants' Proposition of Law No. 2 is moot. Since Appellants Sharp received notice with sufficient time to preserve their interests under the ODMA, any shortcomings in the search or notice made by Appellees Miller are harmless. See *Dodd v. Croskey*, 7th Dist. Harrison No. 12 HA 6, 2013-Ohio-4257, ¶¶ 59-60, followed by *Paul v. Hannon*, 7th Dist. Carroll No. 15 CA 0908, 2017-Ohio-1261, ¶¶ 35-36. "[A] preservation claim filed by one mineral interest holder is deemed to be a preservation for all of the mineral interest holders." *Warner v. Palmer*, 7th Dist. Belmont No. 14 BE 0038, 2017-Ohio-1080, ¶ 21, citing *Dodd v. Croskey*, 143 Ohio St.3d 293 at ¶ 28, and R.C. 5301.56(C)(2). Appellants could easily have preserved their claim before September 9, 2014 and foregone over 4 years of litigation on ODMA minutiae.

Even were this issue not moot, the facts still support Appellees. On summary judgment, Appellees presented two affidavits. *Sharp v. Miller*, 7th Dist. Jefferson No. 17 JE 0022, 2018-Ohio-4740, at ¶18. The first detailed efforts made by Appellees Miller which failed to find any servable holders. *Id.* The second showed the extensive efforts undertaken by Appellee Eric Petroleum to successfully turn up the original holders' lineal descendants.[2] *Id*. at ¶19. Appellants

[2] While Appellants insist that they are all heirs of the original mineral holders, Poole and Smith, such a relationship was never established. Summary judgment evidence merely established that they are lineal descendants.

did not offer any evidence contra, but instead relied, and still rely, on Eric Petroleum's trial-preparation search to show that holders could have been found. Appellants' Juris. Memo., p. 8.

As trier of fact, Judge Bruzzese found that "there was no public record indicating who Mr. Piergallini should be looking for and he had no reason to connect the surnames of Sharp, Dean or Barnes with Poole or Miller." Summary Jdmt. Order, 8-3-2017, pp. 5-6, attached hereto as Appendix Exhibit 2. Based on that, "[n]o reasonable mind could conclude that certified mail notice was possible with the information Piergallini [counsel for Appellees Miller] had. No one claims otherwise." *Id*. at p. 9.

The Seventh District conducted a *de novo* review. *Sharp* at 11, citing *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). They similarly decided that "[b]ased on the facts and circumstance of this case, Appellees' public record search constituted reasonable due diligence." *Id.* at ¶ 21. Rejecting the imposition of a bright line rule, the Seventh District found that "reasonable actions in one case may not be reasonable in another case." *Id*. at ¶ 17.

Two competent courts have independently found the facts of this case to support the reasonableness of Appellees' search. In order to overturn the Seventh District's decision, this Court would have to offer a bright line rule as to what kind of efforts must be undertaken before service by publication becomes available under the ODMA. That rule would significantly expand the scope of search required beyond the intent of the legislature and the understanding of every reasonable reader of R.C. 5301.56.

As stated above, the entire OMTA, of which the ODMA is a part, has "the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title." R.C. 5301.55. Although admittedly not used to restrict the search required

in R.C. 5301.56, the term "records" is defined for the purposes of R.C. 5301.47 – R.C. 5301.56 to include "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**." (**Emphasis added.**) R.C. 5301.47(B).

It is impossible to conceive of R.C.5301.56(E)(1)'s requirement that the surface owner "serve notice…to each holder…at the last known address of each" without some sort of geographical limitation. A holder will almost always know his current address; his neighbors will usually know it. The logical locus for where the holder's address must be known is thus not at the location of such holder, but at the location of the property held. To hold otherwise would expand the title search out from the courthouse to infinity, and make the record chain of title a flimsy reed to stand on.

To preserve the utility of the ODMA, Appellee Eric Petroleum requests this Court reject consideration of Appellants' Proposition of Law No.2.

III. EXPLANATION OF WHY APPELLEES/CROSS-APPELLANTS' PROPOSITION OF LAW IS A MATTER OF PUBLIC OR GREAT GENERAL INTEREST

Justice DeGenaro highlighted the importance of the applicability of the Ohio Marketable Title Act to oil and gas in a recent concurring opinion, observing that "[q]uieting title to severed mineral interests, especially oil-and-gas interests, is a significant matter that impacts the overall economy of this state—especially southeast Ohio. Thus, I write separately to highlight this issue and to stress the narrow scope of our holding today." *Blackstone v. Moore*, Slip Opinion No. 2018-Ohio-4959, ¶ 24. Justice DeGenaro questioned "the continued applicability of the Marketable Title Act in light of the more specific Dormant Mineral Act." However, it was

conceded that since that issue was not argued by the parties in *Blackstone,* "it remains an open issue that is ripe for this court's future review." *Id.* at ¶ 23.

As noted by Justice DeGenaro, the issue of title to oil and gas interests impacts the economy of this state. Large Utica Shale producers have desired certainty as to the state of title. For this reason, some would prefer that the OMTA not apply so that every mineral exception and reservation would remain valid until a surface owner successfully completes the 2006 ODMA abandonment process. But most of the appellate cases decided to date indicate that application of the 2006 ODMA only serves to preserve severed mineral interests, not abandon them. The rare exception is where, as here, the purported severed mineral owner fails to file its claim in time.

The surface owner, in essence, does the mineral holder's work for him by bringing the issue to light in spite of the fact that it has long been recognized that the onus to preserve is supposed to rest on the severed mineral owner: "What right has any one to complain, when a reasonable time has been given him, if he has not been vigilant in asserting his rights?" *Texaco, Inc. v. Short*, 454 U.S. 516, 526, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982), citing *Hawkins v. Barney's Lessee*, 5 Pet. 457, 466. In the instant case seventy (70) years passed without any efforts by Poole, Smith or their descendants to preserve their interests, in spite of the mandate to do so at least every forty years under the OMTA.

To be clear, Eric Petroleum Corporation and the Brocker Royalty Trust (hereinafter collectively, "Eric Petroleum" or "Cross-Appellants") do not espouse the easy route preferred by some of its industry partners because Eric Petroleum does not believe that a fair reading of R.C. 5301.47 through 5301.56 demands such an outcome, or makes sense. Cross-Appellants respectfully disagree with the viewpoint seemingly posed by Justice DeGenaro's query during

the *Blackstone* oral argument when she asked counsel if continued application of the OMTA didn't "conflict with what the DMA says? It basically enables a severed mineral interest owner to revive an expired interest." Oral Argument, July 17, 2018, at 25.07. Such a view suggests that a surface owner would have had to file a quiet title action sometime prior to 2006 in order to establish the extinguishment of the oil and gas interest, much the same as was required for a deemed abandonment and vesting under the 1989 ODMA. None of the case law applying the OMTA's extinguishment provision has ever required such formal action. The extinguishment of the interest is automatic, rendering it null and void.

As revealed in the ensuing statement of facts and argument in support of Cross-Appellant's proposition of law, the oil and gas exception and reservation at issue in this case was extinguished by operation of law under the OMTA in 1985, four years prior to the adoption of the ODMA. Adoption of the *Blackstone* concurrence's interpretation of the OMTA, of which the ODMA is now a part, would once again require title examiners to conduct a search back to at least the 1859 discovery of oil in Titusville, Pennsylvania by Colonel Drake, and perhaps even back to the patent. It would also cause investments that had previously been made on the basis of a correct application of the extinguishment provisions of the OMTA to be brought into question, a result that is unnecessary where there is no express language from the legislature to that effect.

IV. STATEMENT OF THE CASE AND FACTS

On March 24, 2017 Eric Petroleum filed a motion for leave to amend its answer to include two additional defenses, including an extinguishment defense under the Ohio Marketable Title Act, R.C. 5301.47, *et seq*. A hearing was held before the Hon. Michelle G. Miller on April 3, 2017 in which Eric Petroleum appeared in open court through counsel. Judge Miller granted

the motion to amend *Instanter,* signed from the bench the Order that is appended hereto as Exhibit 1, and authorized Eric Petroleum to add as its Nineteenth Defense the following:

> 146. Plaintiffs' claims to ownership of the oil and gas underlying the Miller property, based upon the language of exception and reservation of mineral rights in the deed acknowledged March 4, 1944 and recorded on July 13, 1944 in Deed Volume 195, Page 312 of the Jefferson County Records, have been extinguished by operation of the Ohio Marketable Title Act, R.C. 5301.47, *et seq*.
>
> 147. The Satisfaction and Discharge dated March 1, 1945, and recorded on April 17, 1945, on the margin of the recorded Mortgage Deed from Henry McCloskey and Lucy McCloskey to I.W. Poole and R.S. Smith dated March 4, 1944, and recorded on July 14, 1944 in Mortgage Volume 158, Page 435 of the Jefferson County Records, a copy of which is attached hereto, identified as Exhibit 6, and incorporated by reference herein, constitutes an "other title transaction" pursuant to R.C. 5301.47(E) and serves as the root of title for David Miller.

This Amended Answer bears a filing date of April 4, 2017, as the Clerk overlooked it when filing the Order on April 3, 2017.

Eric Petroleum argued both in its summary judgment briefing and on April 24, 2017, at oral argument in the trial court, that the 1944 Poole/Smith exception and reservation of oil and gas had been extinguished by operation of the OMTA. This argument was presented in the alternative to the defense of abandonment under the ODMA, but the trial court never addressed the applicability of the OMTA. See, Order Summary Jdmt., Aug. 3, 2017, appended hereto as Exhibit 2, and Final Order, Oct. 25, 2017, appended hereto as Exhibit 3. At oral argument below, although the court asked no questions regarding the OMTA, counsel noted that Eric Petroleum wished to preserve this defense should any aspect of its ODMA defense be lacking. The Court of Appeals properly noted in its Opinion and Judgment Entry that one of Eric Petroleum's cross-assignments of error was that "(3) the trial court improperly failed to rule on

EPC/Brocker's MTA defense." No party disputed that Eric Petroleum had properly raised an OMTA defense.

The Seventh District concluded that Eric Petroleum had waived its OMTA argument based upon the erroneous belief that the OMTA had not been mentioned in Eric Petroleum's amended answer. See *Sharp v. Miller*, 2018-Ohio-4740, ¶ 37. Eric Petroleum did not move for reconsideration because the Court of Appeals affirmed the trial court on the independent basis that the 2006 ODMA abandonment procedures had been properly prosecuted by the Millers, and also acknowledged that certain trial court *dicta* did not affect the validity of Eric Petroleum's lease with the Millers. *Id*. at ¶ 35. Because Eric Petroleum considered this an acceptable outcome unless appealed by Appellants, it concluded that it made more sense to wait and see if Appellants filed a notice of appeal to this Court. See, e.g., *State ex rel. Natl. Elec. Contrs. Assn. v. Ohio Bur. of Emp. Servs.*, 88 Ohio St.3d 577, 579, 2000-Ohio-431, 728 N.E.2d 395, suggesting that either reconsideration or an appeal may be an appropriate course of conduct ("should have moved for reconsideration of or appealed our judgment.")

Now that Appellants contest the Seventh District's determination that the Millers successfully completed the 2006 ODMA abandonment process, Eric Petroleum again finds the need to preserve its OMTA defense in the unlikely event of a remand. Should this court decline to accept discretionary jurisdiction over Appellants' two propositions of law, the court is certainly welcome to accept Appellee/Cross-Appellants' sole proposition of law, but there would be no need to do so. Facts relevant to this claim are contained in the following timeline:[3]

[3] A number of timeline events reflect title transactions between the McCloskeys (the Millers' predecessors) and either coal or oil and gas companies. Their existence lends credence to Eric Petroleum's contention that the 1944 language of exception and reservation was really a way of Poole and Smith warning the McCloskeys that the mineable coal was largely gone. The McCloskeys acted as if the minerals were their own, a scenario that even the trial court thought

1908-07-29	W.E. and Helen Smith deed all coal, save a surface vein, under 76 acres to Youghiogheny & Ohio Coal Co. Sharp Dep. Exh. 12
1934-05-08	I.W. Poole and R.S. Smith acquired title to the 153 acres subject to a reservation of coal only (save the No.8 vein) from W.E. Smith. Pl. Am. Compl. ¶24; Exh.1.
1934-05-08	Mortgage to W.E. Smith references prior reservation and intent to strip coal on the east side of county road. Protiva Aff. Exh. A.
1942	Amsterdam Mine abandoned 76 acres of the Lower Freeport No.6A underlying the Property. Protiva Aff. Exh. J
1944-03-04	I.W. Poole and R.S. Smith convey the premises to Henry and Lucy McCloskey "Excepting and reserving all mineral rights".
1944-07-13	Poole & Smith to McCloskey deed recorded. Pl. Am. Compl. Exh.2.
1944-07-14	Mortgage from McCloskey to Poole & Smith recorded. **EPC Am. Answer Exh.6**., Protiva Aff. Exh. C.
1945-03-01	Mortgage satisfied. *Id.*
1945-04-17	Mortgage release recorded. *Id.*
1954-03-21	I.W. Poole dies. Silker Aff. Exh. D.
1961-09-29	Ohio Marketable Title Act (OMTA) enacted (Oil and Gas exempted)
1961-05-11	McCloskeys lease the No.8 vein to Andrew Pelegreen Jr. Protiva Aff. Exh. D
1969-03-14	Release from Administration of I.W. Poole's Amsterdam lot. Silker Aff. Exh. D.
1969-07-14	McCloskey to E.K. Petroleum Company oil & gas lease. Protiva Aff.. Exh. G
1973-12-17	OMTA no longer exempts oil and gas. Owners given a grace period to preserve their rights. EPC MSJ p.29

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plausible. Summary Jdmt. Order, 8-3-2017, at 3, Appx. Ex. 2. All the more reason that the OMTA should be available to extinguish the previously reserved interest.

1976-12-31	Grace period from the 1973 OMTA amendment expires. EPC MSJ p.30
1979	McCloskey oil & gas lease to Columbia Gas Trans. Corp. Pl. Am. Compl. Exh.3.
1984-05-16	Henry & Lucy McCloske**y** deed to David & Ruth Miller. The Poole & Smith to McCloske**y** deed is referenced, but no reservations are made therein.
1985-04-17	OMTA extinguishes Poole & Smith's reservation. EPC MSJ p.22.
1989-03-22	Ohio Dormant Mineral Act (ODMA) enacted. Owners have a grace period to preserve rights. Former R.C. 5301.56(B)(2), S.B. 223, 142 Ohio Laws, Part I, 987.
1992	ODMA grace period expires. *Id.*
1993-12-13	Ruth Stafford dies. Protiva Aff. Exh. H.
1994-06-01	Tax on Ruth Stafford's Estate paid in Carroll County. *Id.*
2004-05-20	Oil and gas lease from David and Ruth Miller to Mason Dixon Energy Inc.
2004-07-26	Miller/Mason lease recorded.
2004-08-30	Mason Dixon Energy assigns the lease to Burlington Resources Oil & Gas Company LP ("BROG"). Jefferson OR Vol.672 Pg.409.
2007-10-11	Oil and gas lease assigned from BROG to Eric Petroleum. OR Vol.821 Pg.357.
2009-06-30	New oil and gas lease from Millers to Eric Petroleum. Pl. Am. Compl. ¶64; Exh.6.
2009-07-08	Miller/EPC lease recorded. Silker Aff. ¶3.
2010-10-22	EPC assigns deep rights to Ohio Buckeye Energy, LLC, predecessor by merger to Chesapeake, eff. 07-15-2010 at 7:00 am CST. EPC Answer Exh.2.
2013-01-02	McCoy 17-11-4 3H well completed. Brocker Aff. ¶12, Exh. F & G.
2013-01-17	McCoy Unit Declaration of Pooled Unit ("DPU") recorded. Brocker Aff. ¶13, Exh.H.
2013-01-28	Booth 23-11-4 6H well completed. Brocker Aff. ¶7, Exh. B & C.
2013-03-04	Booth South DPU recorded, including part of the 153 Miller acres. Brocker Aff.

¶8, Exh. D.

2014-07-09	Millers published their ODMA Notice of Abandonment
2014-07-30	Sharps told by East Ohio Minerals Recovery LLC. (which reunites lost heirs with mineral interests for a fee) that they have an interest in a deed reservation. Pl. 12-29-2016 Supp. Resp. to EPC Req. for Prod. Exh. 17.
2014-08-27	Sharps get a copy of the Poole/Smith to McCloskey deed with several days to file an Affidavit of Preservation. Pl. 2-1-2017 Resp. Exh.4 to EPC's Req. for Prod.
2014-08-29	Sharps' abstractor prints out Auditor's record showing David Miller owns the Property. Pl. 8-1-2016 Resp. to EPC Req. Exh.4
2014-09-02	Millers file their Affidavit of Forfeiture with the Jefferson County, Ohio Recorder.
2014-09-02	Sharp's title searcher visits the Recorder's office but does not discover the Affidavit because it had been filed but not yet recorded.
2014-09-08	Time to file a Notice of Preservation expires (60 days R.C. 5301.56(H)(1)).
2014-11-06	Sharps learn of Miller's Affidavit.
2014-11-12	Sharps file Affidavit of Preservation.
2015-03-17	Sharps file this instant case. Pl. Compl. p.1
2015-10-08	Millers file Notice of Failure to File a Mineral Interest. Protiva Aff. Exh. I
2016-06-22	Case stayed pending Supreme Court decision on 1989 ODMA and 2006 ODMA.
2016-10-17	Stay lifted
2017-04-24	Motions for Summary Judgment argued to Honorable Judge Michelle G. Miller.
2017-06-02	Judge Miller recused herself because of an apparent conflict of interest between her and Attorney Piergallini.
2017-06-02	Case assigned to Judge Joseph J. Bruzzese, Jr.
2017-07-10	Transcript of oral argument filed.

Relevant to Eric Petroleum's Proposition of Law, but not discernible from Appellants' Statement of the Case and Facts, are three facts. First, Eric Petroleum was aware at the time of entering into the 2009 lease with the Millers of the 1944 reservation from a title search performed by Mason Dixon on or about June 4, 2004, a copy of which was provided as Exhibit 33 in response to Appellants' discovery requests. It believed, and continues to believe, that this reservation has been extinguished by the OMTA. Second, Eric Petroleum made Chesapeake Exploration, LLC's predecessor aware of the 1944 reservation and its belief that the interest had been extinguished by operation of the OMTA at the time of its 2010 assignment of the deep rights in the Miller lease (Prod. Doc. Exhibit 16). Third, according to the Millers response to Appellants' discovery requests, they instituted the ODMA process when Chesapeake presented them with a title search performed on or about May 4, 2014. Miller Verified Resp., 1-25-2016.

Since the Booth 23-11-4 6H well had already been drilled, the inference was that production royalties would be placed in suspense until the Millers completed the process. In fact, royalties were suspended at least during the duration of the trial court proceedings. Despite wrongly finding the OMTA waived, the Seventh District acknowledged where these facts lead, "[a]s interests extinguished by the MTA are automatically null and void, EPC/Brocker contended that the surface and mineral interests reunited in 1985, 24 years before the oil and gas lease was signed. Thus, the Millers did own the mineral interests at the time they entered the lease with EPC." *Sharp v. Miller*, 2018-Ohio-4740, ¶ 36.

V. ARGUMENT IN SUPPORT OF APPELLEES/CROSS-APPELLANTS' PROPOSITION OF LAW

Proposition of Law No. 1: Either a claim or an affirmative defense of extinguishment of a severed oil and gas interest under the Ohio Marketable Title Act may be pled in the alternative by a surface owner and/or its lessee in a case involving the proper application of the 2006 version of the Ohio Dormant Mineral Act. Notice of intent to

declare the interest abandoned does not preclude a claim or affirmative defense of extinguishment from being pled in the alternative.

If a surface owner is confronted with a demand by its partial lessee to initiate and successfully conclude the ODMA abandonment process in order to receive royalties from an already producing well, as has occurred in this case, that surface owner/lessor, or another partial lessee, should be permitted to plead the OMTA extinguishment provisions in the alternative as either a claim, for example, in either a declaratory judgment or quiet title action, or as an affirmative defense, as here, where the purported severed mineral interest holder is the plaintiff. Appellants' argument contra in both the trial court and before the Seventh District, like Justice DeGenaro's concurring opinion in *Blackstone,* was that the specific controls over the general, and, therefore, the OMTA can no longer be used as a tool for reuniting severed mineral interests with the surface. However, such a position ignores the rule of construction contained in R.C. 1.51 which reads in its entirety as follows:

> If a general provision conflicts with a special or local provision, **they shall be construed, if possible, so that effect is given to both**. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

(**Emphasis added**.) The first sentence of the statute clearly mandates that an effort be made to reconcile the general and specific provisions in order to give effect to both, if possible, before the specific provision is found to control.

Here there is no difficulty in giving effect to both the OMTA and ODMA. The OMTA extinguishes and renders an interest null and void after forty years if not preserved. If a surface owner wants to attempt to reunite the severed interest with the surface in a shorter period of time, he can take advantage of a "deemed abandonment," roll the dice, serve notice after twenty years' omission of a savings event, and hope that no one shows up at the county recorder's office with a

preservation affidavit. If the latter occurs, the surface owner or his successors must either wait another forty years for extinguishment or play the ODMA game again in twenty.

"Nothing in either version of the ODMA suggests that it should not be construed in *pari materia* with the OMTA." *Eisenbarth v. Reusser*, 2014-Ohio-3792, 18 N.E.3d 477, ¶ 85 (7th Dist.), DeGenaro, P.J., concurring in judgment only. The OMTA does provide that a record marketable title is subject to "[a]ny interest **arising out of** a title transaction which has been recorded subsequent to the effective date of the root of title." (Emphasis added.) R.C. 5301.49(D). One might argue that an affidavit pursuant to R.C. 5301.56(H)(1) would qualify, but even if it did, R.C. 5301.49(D) concludes with the advisory 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." "'Extinguish' means '[t]o bring an end to; to put an end to.' Black's Law Dictionary 703 (10th Ed.2014). This court has used the term 'extinguish' when referring to an interest in real property that is lost by automatic operation." *Corban v. Chesapeake Exploration, L.L.C.*, 149 Ohio St.3d 512, 2016-Ohio-5796, 76 N.E.3d 1089, ¶ 76, Kennedy, J., concurring in judgment only.

Accordingly, a claim to preserve, or an affidavit of a purported severed mineral interest owner pointing to an alleged savings event in the previous twenty years, filed in response to an ODMA notice of abandonment will not serve to revive a mineral interest extinguished under the OMTA if such extinguishment is timely used as either sword or shield in the pleadings between the surface owner/lessee and the purported severed mineral owner. When this proposition of law is applied to the facts in this case, it is clear that the 1944 mineral reservation was extinguished no later than 1985 in the manner argued by Eric Petroleum at both the trial and appellate levels.

A. The 1945 Satisfaction of the McCloskey to Poole & Smith Mortgage Deed is the Millers' Root of Title; the 1944 Mineral Reservation is Extinguished by R.C. 5301.47, et seq.

On July 14, 1944, the day after the Poole & Smith to McCloskey deed was recorded, the McCloskeys recorded a Mortgage Deed back to Poole & Smith. Eric Petroleum's Amended Answer, Exh. 6. The Mortgage "give[s], grant[s], bargain[s], sell[s] and convey[s]" the very same 153 acres included in the deed, subject to the condition that if the McCloskeys paid Poole and Smith $700 one year from the date of the mortgage with 5% interest, the deed would be void, "otherwise to remain in full force and virtue in law." A little over a year later, the County Recorder entered a satisfaction on the face of the instrument, noting that the release was recorded from the original instrument executed by R. S. Smith and I. W. Poole on March 1, 1945. There is no mention in the Mortgage of any exception or reservation of mineral rights, so the McCloskeys, in effect, mortgaged the entire fee.

1. A Mortgage Discharge Can Serve as Root of Title

Every deed that is made for the purpose of providing collateral security for the payment of money is a mortgage. *Perkins v. Dibble*, 10 Ohio 433, 438 (1841). "A mortgage is in reality a conditional fee, which is as large an estate as a fee simple, though it may not be so durable." (Citation omitted.) *Bradford v. Hale*, 67 Ohio St. 316, 324 (1902). "[T]he mortgagor, upon payment being made according to the condition, or upon tender of such payment, may re-enter [and] is reinvested with the full legal title." *Perkins* at 439. See also, *Ramsey v. Jones*, 41 Ohio St. 685, 687 (1885), as cited in *Eastern Savings Bank v. Bucci*, 7th Dist. Mahoning No. 08 MA 28, 2008-Ohio-6363, ¶ 37: "a recorded release of a mortgage and accompanying failure to record a substitute mortgage ***clothed the debtor with absolute ownership and provided binding notice to subsequent purchasers*** and mortgagees that the debtor paid off the mortgage for

purposes of determining lien priority." (Emphasis added.)

A mortgage is one of the title transactions listed in R.C. 5301.47(F). A discharge of a mortgage is an interest in land. *Gatts v E.T.G.T., GMBH*, 14 Ohio App. 3d 243, 470 N.E.2d 425 (11th Dist.1983), paragraph two of Syllabus. A Release of Mortgage, as we have in this case, is very similar to a Release of an Oil and Gas Lease. The Seventh District has determined that the recorded release of an oil and gas lease constitutes a title transaction. *Davis v. Consolidation Coal Co*., 7th Dist. Harrison No. 13 HA 0009, 2017-Ohio-5703, 2017 Ohio App. LEXIS 2738, ¶ 25. The release of the McCloskey mortgage provides notice of both the satisfaction of the mortgage and the reversion of rights to the mortgagor/fee simple owner, just as the release of the oil and gas lease in *Davis* provided notice of the expiration of the lease and reversion to the lessor. *Id.*

2. The McCloskey/Poole & Smith Mortgage Discharge is Millers' Root of Title

"'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." R.C. 5301.47(A). "Root of title," in turn, 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.

(Emphasis added.) R.C. 5301.47(E). Eric Petroleum argued at summary judgment that the OMTA extinguished the 1944 mineral reservation because the discharge of the McCloskey to Poole & Smith Mortgage Deed was the Millers' root of title. The marginal release of the

Mortgage Deed was recorded on April 17, 1945. It had the same effect as "a record of the release of the mortgage." R.C. 5301.36(A), former G.C. 8548. It is an "other title transaction" serving as David Miller's root of title, because it is the most recent to be recorded as of a date forty years prior to the commencement of this litigation on March 17, 2015, which provides him with marketable record title.

3. The OMTA Extinguished Appellants' Mineral Reservation

Moving forward forty years from April 17, 1945 to April 17, 1985, there is nothing of record pertaining to the purportedly excepted and reserved mineral rights in the muniments of title in a subsequent title transaction, nor any preservation notice recorded by the holder. *Corban*, 149 Ohio St. 3d 512, 517 at ¶ 18. Since this interest also did not arise out of a title transaction recorded subsequent to the effective date of the root of title, any purported exception and reservation of the oil and gas rights underlying the Miller property was extinguished and rendered null and void by operation of law as of April 17, 1985. *Id.* "Ohio's version of the Marketable Title Act, found in R.C. 5301.47 - 5301.56, acts as a 40-year statute of limitations for bringing claims against a title of record." *Collins v. Moran*, 7th Dist. Mahoning No. 02 CA 218, 2004-Ohio-1381, ¶ 20. Appellants' claims are, accordingly, foreclosed on the alternative basis that they were extinguished no later than 1985. Because this extinguishment occurred well before the time that the Millers executed any oil and gas lease, it was error for both the trial and appellate court to fail to consider Eric Petroleum's OMTA defense.

VI. CONCLUSION

Appellants' two propositions of law are not merely misguided, but dangerous to the workability of the ODMA. After significant amounts of judicial time spent in the courts of this State hammering the ODMA into a somewhat usable shape, this framework should not be

disturbed absent the utmost necessity. Appellants have not presented this necessity. As such, Appellee Eric Petroleum requests that this Court deny review of Appellants' two propositions of law.

However, in the event that this Court should entertain either one of Appellants' propositions of law, then Eric Petroleum requests that this Court also grant discretionary jurisdiction over the sole proposition of law presented by Appellees/Cross-Appellants in their cross-appeal, and determine that a claim of extinguishment of a severed mineral interest under the OMTA may be raised as either claim or defense as an alternative to a claim or defense of abandonment under the ODMA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Combined Memorandum of Appellees/Cross-Appellants Opposing Jurisdiction as to Appellants' Propositions of Law and in Support of the sole Proposition of Law of Appellees, Eric Petroleum Corporation and Brocker Royalty Trust, was served upon counsel of record for Plaintiffs-Appellants and Defendants-Appellees in accordance with S.Ct.Prac.R. 3.11(C) via electronic mail this 8th day of February, 2019, to the following:

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Respectfully submitted,

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Thomas A. Hill, Bar I.D. # 8560

APPENDIX

Exhibit 1—Trial Court Order Granting Eric Petroleum, et al., Leave to Amend Answer *Instanter*, per Miller, J., Apr. 3, 2017

Exhibit 2—Trial Court Summary Judgment Order, per Bruzzese, J., Aug. 3, 2017

Exhibit 3—Trial Court Final Order, per Bruzzese, J., Oct. 25, 2017

EXHIBIT 1

IN THE COURT OF COMMON PLEAS
JEFFERSON COUNTY, OHIO

JEFFREY H. SHARP, et al.	)	Case No. 15-CV-108
	)	
Plaintiffs	)	Judge Michelle G. Miller
	)	
v.	)	**ORDER GRANTING LEAVE TO FILE AMENDED ANSWER *INSTANTER***
	)	
DAVID R. MILLER, et al.	)	
	)	
Defendants	)	

This cause came to be heard upon the motion of Defendants, Eric Petroleum Corporation and the Brocker Royalty Trust No. One u/a/d 10-15-2010, pursuant to Civ. R. 15(A), for an ORDER granting leave to file their First Amended Answer in the above-captioned matter.

Having considered that motion, this Court finds it to be well taken. It is hereby ordered and adjudged that Defendants shall be permitted to file their First Amended Answer, *instanter*

IT IS SO ORDERED.

4-3-17
Date

JUDGE MICHELLE G. MILLER

EXHIBIT 2

IN THE COMMON PLEAS COURT OF JEFFERSON COUNTY, OHIO

JEFFREY H. SHARP, et.al.) **ORDER SUMMARY JUDGMENT**

Plaintiffs,)

-vs-

DAVID R. MILLER, et.al. Case No: 15-CV-108

)

Defendant

) **JUDGE JOSEPH J. BRUZZESE, JR.**

* * * * * * * *

FACTS

This is an action over ownership of oil and gas rights beneath 153 acres more or less in Jefferson County, Ohio. Plaintiffs claim to be presumptive heirs[1], lineal descendants of I.W. Poole and R.S. Smith who originally reserved the minerals under the 153 acres in 1944.

David R. Miller and Ruth A. Miller are the current surface owners seeking to reunite the oil and gas rights with surface rights.

Eric Petroleum is the lessee of an oil and gas lease on the 153 acres wherein the Millers are lessor.

Chesapeake, through an assignment from Eric Petroleum, is now the lessee of the Miller lease with respect to deep oil and gas leaving Eric in control of the shallow oil and gas.

The facts of this case are not disputed but the meanings of those facts are very disputed.

[1] Lineal descendants and heirs if no will redirected from lineal heirs

TIME LINE

1934-05-08	I.W. Poole and R.S. Miller acquired title to the 153 acres subject to a reservation of coal only.
1944-03-04	I.W. Poole and R.S. Smith convey the premises to Henry and Lucy McCloskey "Excepting and reserving all mineral rights".
1984-05-16	Henry and Lucy McClosky deed to David and Ruth Miller. No reservations are included in the deed but it does make reference to the Poole, Smith/McClosky deed.
2004-05-20	Oil and gas lease from David and Ruth Miller to Mason Energy Inc.
2004-07-26	Miller/Mason lease recorded.
2007-10-11	Oil and gas lease assigned from Mason Energy, Inc., to Eric Petroleum.
2007-07-08	New oil and gas lease from Millers to Eric Petroleum.
2014-07-09	Millers published their Ohio Dormant Minerals Act (ODMA) Notice of Abandonment.
2014-08-10	Sharps discover that they have an interest in a deed reservation. They are informed by East Ohio Minerals Recovery LLC.which is in the business of reuniting lost heirs with mineral interests for a fee.
2014-08-29	Sharps obtain a copy of the Poole/Smith to Miller deed of 1984-05-16 with several days to file an Affidavit of Preservation.
2014-09-02	Millers file their Affidavit of Forfeiture for recording with the Jefferson County, Ohio Recorder.

2014-09-02	Sharps' title searcher visits the Recorder's office but does not discover the Affidavit because it had been filed but not yet recorded
2014-09-07	Time to file a Notice of Preservation expires.
2014-11-06	Sharps learn of Miller's Affidavit.
2014-11-12	Sharps file Affidavit of Preservation.
2014-03-17	Sharps file this instant case.
2016-06-22	Case stayed pending Supreme Court decision on 1989 ODMA and 2006 ODMA.
2017-04-24	Motions for Summary Judgment argued before the Honorable Judge Michelle G. Miller.
2017-06-02	Judge Michelle G. Miller recused herself because of an apparent conflict of interest developed between her and Attorney Piergallini.
2017-06-02	Case assigned to Judge Joseph J. Bruzzese, Jr.
2017-07-10	Transcript of oral argument filed.

NATURE OF THE RESERVATION (WHAT WAS RESERVED?)

Defendants claim that the reservation in the 1944-03-04 deed to McCloskey simply advised the McCloskeys that the minerals were gone and was not really meant as a reservation at all. While there seem to be some circumstances in support of that argument, that argument is rejected. There is nothing ambiguous about "excepting and reserving all minerals." Therefore there is no need to resort to extrinsic evidence in an effort to interpret that phrase. It means what it says.

ABANDONMENT

Defendants claim that I.W. Poole and R.S. Miller and/or their heirs voluntarily abandoned their mineral interests. That seems to be the case with I.W. Poole but there is no evidence of abandonment with respect to R.S. Miller.

Abandonment has two elements. First there must be non-use of the interest. Second there must be an intent to abandon. Both can be proven by circumstantial evidence.

The first element of non-use is satisfied for both I.W. Poole and R.S. Miller. The second element of intent to abandon is satisfied with respect to I.W. Poole but not R.S. Miller.

I.W. Poole died in 1954 apparently leaving his surviving spouse Ruth Poole as his sole heir. In 1969 Ruth Poole filed a Jefferson County Release of Administration (case #58573) in I.W. Poole's estate for the sole purpose of conveying a small lot of real estate but making no mention of the oil and gas reservation. This can be deemed an abandonment by her of that reserved mineral interest.

Not only does it appear that Ruth Poole voluntarily abandoned the interest but it would also have made sense at that time for her to do so. I.W. Poole and R.S. Miller were coal people and not much thought was given to oil and gas at the time. The mineable coal had long since been removed or reserved by others with the remaining value being little if anything at all. At the time of the release of administration that interest, with what was known at the time, would have been thought to have zero value. It makes sense then that Ruth Poole would have abandoned that apparently worthless

interest rather than incurring the cost and aggravation of a Certificate of Transfer and the recording thereof for an interest that seemed to have zero value. The Court finds that the reservation interest of I.W. Poole was voluntarily abandoned by Ruth Poole in 1969.

The Court makes no such finding with respect to R. S. Miller as there appears to be no affirmative evidence of abandonment. The Court will not presume abandonment from a silent record.

2006 OHIO DORMANT MINERAL ACT

The 2006 Ohio Dormant Mineral Act R.C. 5301.56 provides for the abandonment of outstanding mineral interests to the surface owner if none of the enumerated savings events has occurred. The act also provides a specific procedure that the surface owner must follow. It begins with notice to the owners of the outstanding interest.

The Millers' attorney Lawrence I. Piergallini, Esq. performed a title search and made an effort to find the heirs and/or descendants of I.W. Poole and R.S. Miller. He checked the Jefferson County Courthouse records in the Recorder's Office, Probate and Clerk of Courts. Piergallini found no records that would indicate the whereabouts of I.W. Poole or R.S. Miller or any of their heirs or lineal descendants. There was a suggestion of Carrollton, Ohio and Amsterdam, Ohio but no street address and no names of heirs or descendants. In actual fact Piergallini apparently missed the Release of Administration filed by Ruth Poole. Other abstractors in this case also missed that Release of Administration. However, having found it would have been no help, as for reasons unknown it lists no next of kin. One of those would have been the mother of the Sharps but Piergallini could not have known that. At this point there was no public record

indicating who Mr. Piergallini should be looking for and he had no reason to connect the surnames of Sharp, Dean or Barnes with Poole or Miller.

Because Attorney Piergallini was unable to find heirs or linear descendants he gave notice by publication on 2014-07-09. With no Affidavits of Preservation having been filed within sixty (60) days Attorney Piergallini then filed the Millers' Affidavit of Forfeiture on 14-09-02. On the face of things the 2006 ODMA seems to have been satisfied vesting title to the dormant oil and gas interests in David and Ruth Miller.

SAVINGS EVENTS

Under the terms of the 2006 ODMA 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" (R.C. 5301.56(B)(3)(a) of the oil and gas interest within the past twenty (20) years would have been a savings event causing title to the oil and gas to remain with the heirs of I.W. Poole and R.S. Miller despite the forfeiture provisions of ODMA. The Sharps claim that the oil and gas leases of the Millers to Mason Energy Inc. and to Eric Petroleum and the later assignments of those leases by Mason Energy Inc. and Eric Petroleum were just such savings events. The Court disagrees.

First of all, none of those transactions actually affected title to the oil and gas because the Millers did not have title at that time and could not have affected title. They are not "Title Transactions." They are nullities.

The Sharps are of the opinion that any lease, valid or not, within the chain of title or out, counts as a savings event. The fact that those leases had no effect on title is, in the Court's view, sufficient to dispel that theory. Further, Plaintiffs' theory runs afoul of the purpose of the ODMA.

The purpose of the ODMA is to encourage the development of oil and gas in the State of Ohio by making readily available the names and addresses of those who have the interest and power to develop or consent to develop. The void leases by non-owners do not serve that goal as the actual owners of the oil and gas rights remain unnamed, unlocated and unknown and the oil and gas remained dormant and incapable of production despite the void leases.

This is important to the purpose of the ODMA. While the focus on ODMA cases has always been on the loss[2], of the oil and gas rights owned by the unknown holders, there is another equally compelling component. Oil and gas that is dormant because of the absence or unknown identity of the true owner holds up not only the oil and gas on that premises but also prevents development of the oil and gas on adjoining premises. This is true even where the adjoining land owners are well known and available.

OAC 1501:9-1-4(C) (4)(c) prohibits drilling or developing within 500 feet[3] of property not leased, owned or controlled by the developer. That means that dormant minerals prevent development not only of its own acreage but also for 500 feet in all directions from the borders of that acreage. For example: 1 acre equals 43,560 sq. ft. That is 208.71 feet per side if that acre was a perfect square. If that single acre was incapable of development because of unknown heirs, the dimensions of the unavailable property (including the 500 foot buffer on each side) would be 1,208.71 feet by 1,208.71 feet. or 1,460,979.86 square feet for a total of 33.5 available acres of which 32.5 acres would belong to someone else who is not lost and unavailable. For that reason the loss of the heirs' mineral rights is only one of two important policy considerations. This is an

[2] Some see as a forfeiture.
[3] For wells 4,000 feet deep or deeper.

important reason why the ODMA should not be stretched out of shape for the benefit of unknown or absentee owners who should have taken care of themselves but instead take the property of innocent neighbors out of production.

It is important then that the ODMA serve its function of identifying and locating oil and gas owners so that their innocent neighbors can develop their ground. Treating a void transaction that is outside the owner's chain of title and which transfers nothing defeats the purpose of the ODMA. For these reasons the leases between David and Ruth Miller and Mason Energy and Eric Petroleum are not savings events.

FALSE AFFIDAVIT

Plaintiffs claim that Millers' Affidavit of Abandonment was false because it claimed that no savings event had occurred. As can be seen above, the Millers were correct and no savings event had occurred.

FAILURE TO SEND CERTIFIED MAIL
(NECESSITY OF ACTUALLY PLACING CERTIFIED MAIL IN OUTGOING MAIL)

Plaintiffs claim that the Publication notice of 14-07-09 was ineffective because the Millers did not first send Certified Mail notice.

R.C. 5301.56(E)(1) provides the Notice requirement and reads as follows:

> "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, (emphasis added) 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."

Note that R.C. 5301.56(E)(a) does not require a failed attempt at Certified Mail. It requires only a determination that "Service of Notice cannot be completed to any

holder". While a Return Receipt marked "Undeliverable" would be pretty good evidence of that determination it is not the only evidence. The notion of mailing Certified Mail to dead mineral interest owners with no street addresses is also pretty good evidence that "Service of Notice cannot be completed to any holder". Nowhere does R.C. 5301.56 require Certified Mail to be actually sent out into space on the blind. It is not a matter of excusing the requirement of a vain act. That vain act is not required in the first place.

No reasonable mind could conclude that certified mail notice was possible with the information Piergallini had. No one claims otherwise.

ADEQUACY OF THE SEARCH FOR HEIRS

Defendant's counsel Lawrence I. Piergallini searched all Jefferson County public records for heirs and found nothing. Even the belated filing of the I.W. Poole Release of Administration missed by Piergallini provided no useful information and no names of heirs. The question now becomes whether that effort represents a "reasonable" search or it should have gone farther. Obviously the heirs could have been found had enough time and money been spent in the search. East Ohio Minerals Recovery, LLC found the Sharps and Eric Petroleum found others after 80 hours of research. The question becomes where does "reasonable" end and "extraordinary" begin. No amount of search for heirs no matter how expensive or extraordinary is exhaustive. One can always expand the search from the county to adjoining counties to the state to the country or the world as a whole. If one private investigator can't find the heirs, then three more could be hired. No matter how much is done there is always something else that could have been done, someone else who could have been called, another door that could have been knocked on. Despite the infinite possibilities a "reasonable" search must end somewhere.

In balancing the rights of the heirs and the interest of the State in producing its oil and gas and the interests of adjoining property owners whose property is tied up because owners of adjoining interests cannot be found, the Court finds that Piergallini's search was reasonable under the circumstances. The ODMA itself gives some insight into the area that must be searched. For example, all filings that can be savings events must occur in the "County in which the lands are located." Publication notice for unknown heirs is limited to "a newspaper of general circulation in each County in which the land that is subject to the interest is located". Here, after Piergallini searched all public records he did not even have the name of an heir for whom to search. Under these circumstances the Court finds that Piergallini's search was reasonable and adequate justifying a determination that "Service of Notice cannot be completed" and authorizing Notice of Publication.

In the interest of clarity and certainty the Court finds as a matter of law that a search limited to the public records of the County in which the interest is located is sufficient to justify service by publication under R.C. 5301.56(E)(1) where both of the following apply:

1. That search has not turned up the name or address of any specific heir.

2. That no specific heir is actually known to the searcher from some other source.

ORDER

The Court finds and orders as follows:

1. The interest of I.W. Poole and his heirs was abandoned in 1969 when

Ruth Poole filed a Release of Administration in order to transfer other real estate but did not address the mineral interests.

2. The mineral interests of both I.W. Poole and R.S. Smith are deemed abandoned and vested in surface owners David R. Miller and Ruth A. Miller pursuant to R.C. 5301.56(B).

3. Plaintiffs' complaint is dismissed with prejudice.

4. Title to the minerals underlying the 153 acres is quieted in David R. Miller and Ruth A. Miller.

5. Counsel for Defendant Millers shall prepare a Final Order consistent herewith and suitable for recording.

6. Costs to be paid by Plaintiffs.

JUDGE JOSEPH J. BRUZZESE, JR

Copies:

All Attorneys of Record

EXHIBIT 3

IN THE COMMON PLEAS COURT OF JEFFERSON COUNTY, OHIO

Jeffrey H. Sharp, et al.,	FILED COMMON PLEAS COURT	Case No. 15 CV 108
Plaintiff	2017 OCT 25 P 2:03	FINAL ORDER
v.	JOHN A CORRIGAN CLERK OF COURTS	
David R. Miller, et al.	JEFFERSON COUNTY, OH	JUDGE JOSEPH J. BRUZZESE, JR.
Defendant		

****

Pursuant to the decision of this Court issued August 3, 2017:

1. The interest of I.W. Poole and his heirs was abandoned in 1969 when Ruth Poole filed a Release of Administration in order to transfer other real estate but did not address the mineral interests.

2. The mineral interests of both I.W. Poole and R.S. Smith are deemed abandoned and vested in surface owners David R. Miller and Ruth A. Miller pursuant to R.C. 5301.56(B).

3. Title to the minerals underlying the 153 acres is quieted in David R. Miller and Ruth A. Miller. The description of said 153 acres is more specifically described as follows:

Tract 1: Situated in Springfield Township, Jefferson County, Ohio; being the West half of the Northwest Quarter of Section 16, Township 11, Range 4, containing 80 acres, more or less.

Tract 2: Being the South half of the Southeast Quarter of Section 23, Township 11, Range 4. Beginning for boundary at the Southeast corner of said Southeast Quarter of said Section 23; thence North 01° 30' East 1342.44 feet to the North side of a white oak 14 inches in diameter; thence South 88° 00' West 264 feet; thence North 14° 00' West 36.96 feet; where a point bears North 02° East; 1.33 feet; thence South 88° West 33 feet; thence South 14° East 36.96 feet to a division line enclosing springs and water privileges; thence South 88° West 561 feet; thence North 14° West 36.96 feet; thence South 88° West 66.0 feet; thence South 14° East 33.0 feet to a division line enclosing Spring No. 2 and water privileges; thence South 88° West by said division line 1544.4 feet to a line now or formerly owned by one Warner; (Deed Vol. B-2 page 130); thence by said Warner's line South 01° 30' West 1349.7 feet; thence North 88° East 2459.16 feet to the place of beginning. Containing 76 acres more or less.

COMMON PLEAS COURT JEFFERSON CO. OHIO

The State of Ohio
County of Jefferson SS
I, John A. Corrigan, Clerk of Courts
do hereby certify that the annexed writ is
a true copy of the original
John A. Corrigan, Clerk of Courts
By Alicia Thud Deputy

Excepting and reserving, however, the following conveyances:

1.94 acres conveyed to Apex Coal Company in Deed Vol. 117, page 339.
0.25 acres conveyed to J.N. Croskey in Deed Vol. 97, Page 438.

Auditor's Parcel No. 34-00519-000

Judge Joseph J. Bruzzese, Jr.

To the Recorder: Please index as I.W. Poole, Ruth Poole, R.S. Smith, Louella M. Smith (wife of R.S. Smith), Jeffrey S. Sharp, Bradley W. Sharp, June Smith, Lelah Cline Smith, Gregory C. Smith, J. Kent Smith, Vernon W. Smith, Jeffrey S. Smith, Sharon Barnes, Joyce Dean and Scott W. Johnson to David R. Miller and Ruth A. Miller.

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