The Supreme Court of Ohio

LRC REALTY, INC., -vs- B.E.B. PROPERTIES, *et al.*, New Par d.b.a. Verizon Wireless, et al., -vs- BRUCE BIRD, *et al.,*	: : : : : : : : : : : : : : : :	Supreme Court Case No. 2018-1262 On Appeal from the Geauga County Court of Appeals, Eleventh Appellate District Court of Appeals Case No. 2016-G-0076

AMICUS CURIAE BRIEF OF OHIO ASSOCIATION OF INDEPENDENT TITLE AGENTS, IN SUPPORT OF REVERSAL

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I. AMICUS CURIAE AND ITS INTEREST IN THIS APPEAL

The Ohio Association of Independent Title Agents (OAITA) is a non-profit organization representing independent title insurance agents and interested real estate settlement services industry stakeholders from across Ohio who share a common philosophy about the value of professional standards in real estate transactions. This organization is an affiliate of the National Association of Independent Land Title Agents (NAILTA), a national professional organization representing independent title insurance agents and settlement providers across the United States.

OAITA files its amicus curiae brief to support both propositions of law accepted by this Court for review and supports reversal. If the judgment and opinion of the Eleventh District Court of Appeals stands it will adversely affect all examinations of recorded instruments of leases and deeds of conveyance by attorneys, title agents and title abstractors throughout Ohio in performing title examinations for the issuance of title insurance.

In simplest terms, title insurance is a contract of indemnity designed to protect purchasers or mortgage lenders from unforeseen loss due to title defects such as: liens, encumbrances upon, defects in, or the unmarketability of, the title to real property for which the policy is issued. These contracts of indemnity have evolved into two types of recognized title insurance policies: (I) those policies issued to protect buyers of real estate (Owner's Policy of Title Insurance); and (ii) those policies issued to lenders to protect the mortgage's title, which secures the loan (Loan Policy of Title Insurance).

The fundamental difference between land title insurance versus other types of casualty insurance (i.e., homeowners, automobile and commercial general liability insurance) has always been the commitment of the title insurance industry to seek "risk prevention" over "risk assumption." The

casualty insurance approach of "risk assumption" assures financial indemnity through a pooling of risks for losses arising out of an unforeseen future event such as death or accident. The title insurance approach of "risk prevention" has as its goal the elimination of risks and the prevention of losses caused by defects in title arising out of events that occurred.

In Ohio no contract of title insurance can be written unless it is based upon a "reasonable examination of the title." R. C. 3953.07. To comply with the statutory mandate of "reasonable examination of the title" and to achieve risk prevention goal of the title industry, an attorney, title insurance agent or title abstractor, on behalf of its principle, the underwriter of title insurance, will determine or have determined in its extensive search and examination of the public records whether any person other than the seller has any right, lien, claim or encumbrance. Once all the acceptable rights and claims are established based on a complete search and examination of the title, a policy of title insurance will be issued.

The process to examine the title beings with a "search" and compilation of the all instruments filed in the official records of the County which is the situs of the real property whose title is being examined for this issuance of title insurance. Once the instruments relating to the title to the real property have been determined, a "chain of title" is created, then an attorney or title agent will evaluate each document to determine how they affect the title under examination.

> The very heart of the title insurance industry is the search. It can be simply described as the finding and listing of the various instruments that affect title to real property. These instruments of title, taken together with such documents as may suggest possible liens, encumbrances or defects on a specifically described parcel of real estate, constitute the title search. Although different terms may be used in some parts of the country, terms such as "abstracting", "title abstracting", or "title searching", are, in the main, a distinction without differences. The terms "examine" or "examiner", however, do have a different connotation. An "examiner' is one familiar with real estate law and practice in his area, who evaluates the documents and

> information assembled the searcher, in order to determine under what conditions, if any, the "searched" property will be insurable. The term, therefore, suggest experience and expertise. It can, however, in many areas also include the work and the function of the searcher. The term searcher, however, never includes the functions of the examiner.

The Ohio Land Title Association, *Principles of Ohio Real Estate Titles*, (1984), pg. 33.

From the perspective of OAITA, the decision of the appeals court relating to two documents in the chain of title of LRC Realty, Inc. and examined by the appeals court, if upheld, will affect all future title examinations and issuing title insurance to purchasers of real property and mortgage lenders who rely on title insurance for their mortgages. These documents are:

Listed Document #2 Option to Lease & Lease Agreement between B.E.B. Properties and Northern Ohio Cellular Telephone Company (recorded April 21, 1994) ("Lease Agreement"); and

Listed Document #6 Warranty Deed from B.E.B. Properties to Keith R. Baker and Joseph E. Cyvas (recorded April 4, 1995).

LRC Realty, Inc. v. B.E.B Props., 11th Dist. No. 2016-G-0076, 2018-Ohio-2887, ¶11.

II. STATEMENT OF FACTS

The facts relating to amicus curiae's support for reversal are found in the **recorded** documents stipulated to by the parties and listed by the court of appeals. *Id*.

A. CHAIN OF DEEDS GRANTING FEE SIMPLE

The deeds of conveyances from when B.E.B. Properties acquired title to when LRC Realty, Inc. acquired title to the real estate are listed by the appeals court in chronological order.

Listed Document #1 On July 23, 1980 a Warranty Deed from Geauga Properties, Lt. to B.E.B Properties, an Ohio General Partnership;

Listed Document #6 On April 4, 1995 a Warranty Deed from B.E.B. Properties to Keith R. Baker and Joseph E. Cyvas;

Listed Document #10 — On June 7, 1999 a Warranty Deed from Keith R. Baker and Joseph E. Cyvas to Magnum Machine Co.;

Listed Document #11 — On October 31, 2003 a Warranty Deed from Magnum Machine Co. to Parker Court, LLC; and

Listed Document #13. — On January 24, 2013 a Warranty Deed from Parker Court to LRC Realty, Inc.

B. RECORD CHAIN OF TITLE TO LEASE:

The stipulated recorded documents encumbering the real estate and relating to B.E.B. Properties lease to Northern Ohio Cellular Telephone Company are listed by the appeals court in chronological order.

Listed Document #2 — On April 21, 1994 a Option to Lease & Lease Agreement between B.E.B. Properties and Norther Ohio Cellular Telephone Company;

Listed Document #4 — On March 3, 1995 a Non-exclusive Easement Agreement between B.E.B. Properties and Northern;

Listed Document #5 — On March 3, 1995 a Memorandum of Lease between B.E.B. Properties and Northern; and

Listed Document #9 — On January 19, 1999 an Assignment of Lease and Easement Documents from Northern to New Par d.b.a Verizon Wireless.

C. Extraneous Recorded Document

Listed Document #8 — On June 22, 1995 a Memorandum of Assignment was filed with the Geauga County Recorder's Office assigning David J. Eardley and Robert Bosler's "right, title and interest in and to a certain partnership known as B.E.B. Properties" to Bruce Bird and Sheila Bird.

III. PROPOSITION OF LAW I

Appellant, 112 Parker Court, LLC, Proposition of Law No. 1: absent an express reservation, the right to receive rents runs with the land.

Appellant, LRC Realty, Inc., Proposition of Law No. 1: A covenant to pay rent pursuant to a lease runs with the land and in the absence of a reservation of rent by the grantor prior to a conveyance of the land, the right to rent which accrues thereafter follows the legal title and right to possession of the grantee.

The appeals court majority opinion alters long standing real property law of conveyances of the reversionary interest to leasehold estates in its examination of the Option to Lease & Lease Agreement between B.E.B. Properties and Norther Ohio Cellular Telephone Company. The appeals court majority held that the obligation to pay rent is a contract and is not a reversionary interest in the fee simple upon termination of the leasehold and does not follow title.

> The trial court indicates "the lease describes 'landlord' as the property owner and requires rent to be paid to the landlord." The lease does describe the Landlord as the property owner (therefore the Landlord had authority to enter into the lease), but it also provides that B.E.B. Properties is "hereinafter referred to as 'Landlord[.]'" Thus, while the "landlord" was also the "property owner" at the time the lease was executed, that designation does not define the "property owner" as a party to the lease. The lease is a contract between B.E.B. Properties and Northern-not between Northern and whomever the property owner happens to be at a given time.
> Therefore, the trial court is incorrect in concluding that Baker and Cyvas (an then Magnum Machine Co.) became the "landlords" by virtue of becoming the "property owners."

LRC Realty, Inc. v. B.E.B Props., supra at ¶31.

This holding is contrary to Ohio landlord tenant common law. When an owner of real property grants a leasehold to real property, the owner becomes the owner of the "estate of reversion in fee " after termination of the term of the leasehold. "The right to sue for and recover rents follows the fee simple estate, and the action therefore must be in the name of the owner of the fee at the time the rent accrues." *Smith v. Harrison*, 43 Ohio St. 180, 184, 185 (1884). "Rent out of a land

demised" (leased) is a reservation created out of the grant of the leasehold by the owner of the real property. 13 Ohio Jurisprudence, Deeds §131, citing *Manley v. Carl*, 20 O. C. C. 161, 11 O. C. C. 1.

The statement of Ohio common real property law that "rent arises by privity of estate rather than contract" found in *Loveless v. Erie R.* 2 Ohio App. 404, 25 Ohio Cir. Dec. 87, 19 Ohio C. A. 277, 19 Ohio C.C. (n.s.) 277, 35 Ohio C.C. 87 (11th Dist. 1914) is a correct statement of English common law.

> (4) Rent accruing to the lessor of real estate under the terms of his lease is said to be incident to the lessor's reversion. It is not a debt within the classification of choses in action, whether evidenced by promissory notes of the lessee or not. The right to future rents is not personal property, and upon the death of the lessor, or owner of the reversion, passes to the heirs at law with the reversion. *Combs V. Combs*, 131 Tenn. 66, 173 S.W.441. Rent is said to be "one of the ten principal incorporeal hereditaments known to the ancient English law." 50 Corpus Juris, p.756, citing 2 Blackstone Comm., 21.
> (5) It is however, universally recognized that rent is severable from the reversion, and the owner of the reversion may effect this severance by granting or transferring the rent to another. * * *.

Schmid v. Baum's Home of Flowers, Inc., 162 Tenn. 439, 447, 37 S.W.2d 105, 9 Smith (Tenn.) 439, (1931).

The appeals court dissenting opinion correctly holds that the right to receive rent runs with the land and follows legal title, however it may be severed from the reversion owner of the fee simple.

> "A "covenant to pay rent * * * runs with the land and vests in the assignee of the reversion the right to receive the rents accruing during his ownership of the fee." *Smith v. Harrison*, 42 Ohio St. 180, 185 (1884); *Commercial Bank & Sav. Co. v. Woodville Say, Bank Co.* 126 Ohio St. 587, 186 N. E. 444, 38 Ohio L. Rep. 479 (1933), *paragraph one of the syllabus* ("[t]he right to rents and profits of real estate follows the legal title"). The right to receive rent, however, may be preserved in the

> grantor by a "reservation of rent" in the transferring instrument. *Liberal S. & L. Co. v. Frankel Realty Co*, 137 Ohio St. 489, 501, 30 N.E. 2d 1012 (1940).

LRC Realty, Inc. v. B.E.B Props., supra at ¶51.

Under Ohio common law when B.E.B. Properties made its demise/lease to Norther Ohio Cellular Telephone Company, it became the "owner of the reversion" with "the right to receive rents." In a title examination, once the examiner located the demise/lease from B.E.B. Properties, the examiner would first look to see if the "owner of the reversion" severed the right to rent from the reversion "by granting or transferring the rent to another." Here, no such prior grant or transfer of the right to rent, exists in the chain of title before the Warranty Deed from B.E.B. Properties to Keith R. Baker and Joseph E. Cyvas. (See: stipulated documents #1, #2, #4, #5, and #6 listed in chronological order at *LRC Realty, Inc. v. B.E.B Props.* supra at ¶11).

Since there is no express grant or transfer of B.E.B. Properties right to receive rent to a third person recorded in the chain of title to real estate when titled in B.E.B. Properties and immediately before a conveyance by B.E.B. Properties, a title examiner can assume B.E.B. Properties has good right to grant the reversion of fee simple interest and the right to receive rent. Under R. C. 5301.25(A) a title examiner can also assume that any **unrecorded** grant or transfer of the right to receive rent during B.E.B. Properties' conveyance of fee simple title were fraudulent in so far as they relate to a subsequent purchaser for value of B.E.B. Properties' real estate.

The Memorandum of Assignment under which Appellees, Bruce and Sheila Bird, were assigned all outstanding partnership rights to B.E.B. Properties was recorded on July 12, 1995. (Listed document #8, *LRC Realty, Inc. v. B.E.B Props.* supra at ¶11). Since the Memorandum of Assignment was recorded after delivery and recording of the B.E.B. Properties Warranty Deed to

Keith R. Baker and Joseph E. Cyvas, the Memorandum of Assignment cannot be in Keith R. Baker's and Joseph E. Cyvas's chain of title.

Under 5301.25(A), "constructive notice of the recorded encumbrance rises only when the instrument is recorded in the chain of title." *Huntington Nat'l Bank v. R. Kids Count Learning Ctr., LLC,* 10th Dist. No. 16AP-688 2017–Ohio-7837, ¶30. Since the Memorandum of Assignment was recorded out of Baker and Cyvas's chain of title, it cannot thereafter affect the subsequent conveyances which followed the B.E.B. Warranty Deed to Keith R. Baker and Joseph E. Cyvas. This would include Appellant, 112 Parker Court, LLC's and Appellant, LRC Realty, Inc.'s later conveyances and their respective chains of title.

Upon the determination by the examiner that no prior recorded grants transferring the right to rent exists in B.E.B Properties' chain of title, then the only examination necessary would be whether B.E.B. Properties reserved the right to rent within the four corners of B.E.B. Properties Warranty Deed to Keith R. Baker and Joseph E. Cyvas.

Critical to attorneys, title agents and title abstractors in making a reasonable examination of any instrument in a chain of title to real estate is the application of R. C. 5302.02 and R. C. 5302.04 "to all deeds or other instruments relating to real estate in Ohio."

> The rules and definitions contained in sections 5302.03, 5302.04, 5302.06, 5302.08, 5302.10, 5302.13, 5302.17, 5302.18, 5302.19, 5302.20, and 5302.21 of the Revised Code apply to all deeds or other instruments relating to real estate, whether the statutory forms or other forms are used, where the instruments are executed on or after October 1, 1965. * * *.

R. C. 5302.02.

R. C. 5302.04 sets forth what is included in a deed of conveyance of real estate or any interest therein.

> In 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.
> (Emphasis added).

R. C. 5302.04.

The appeals court's own examination of the Warranty Deed from B.E.B. Properties to Keith R. Baker and Joseph E. Cyvas determined there was no express language that B.E.B. Properties "reserved the right to receive rent" payable out of the lease to Northern. *LRC Realty, Inc. v. B.E.B Props.* supra at ¶41. Likewise, any reasonable examination of title by an attorney, title agent or title abstractor would have determined the conveyance of the right of the reversion of the fee simple by B.E.B. Properties transferred the right to receive rents to Keith R. Baker and Joseph E. Cyvas, their heirs and assigns.

IV. PROPOSITION OF LAW II

> **Appellant, LRC Realty, Inc., Proposition of Law No. 2: When a warranty deed states that a conveyance of real estate is "subject to" a recorded lease agreement and easement, neither of which instrument reserves tot he grantor the right to receive future rents as they become due under the lease agreement, the right to all future rents is conveyed to the grantee since the right to rents follows the legal title and right to possession of the encumbered real estate.**

Contrary to R. C. 5302.04, to create a severance of rent from the fee simple reversion fee simple owner, B.E.B. Properties, when no express language of reservation of rents exists in the B.E.B. Properties Warranty Deed to Robert R. Baker and Joseph E. Cyvas, the appeals court majority turned to creating a reservation out of the use of terms "subject to" in the Warranty Deed from B.E.B. Properties to Robert R. Baker and Joseph E. Cyvas. The warranty deed provides in part:

> 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

LRC Realty, Inc. v. B.E.B Props. supra at ¶39.

From these clauses the appeals court majority states: "It is the use of the terms "subject to" in the warranty deed that "* * * clearly indicates that the parties' intention was to reserve the right to receive rent for the benefit of B.E.B. Properties." *Id.*, at ¶41.

However, "using the clause "subject to" hardly qualifies as an intent to convey or grant." *Yoppolo v. Allen* (*In re Allen*) Case No. 08-3339, 415 B. R. 310.(N.D. Ohio 2009). If "subject to" does not qualify as an intent to convey or grant, it is difficult to find in the grantor and grantee of a deed of a conveyance the use of such clause the intent to create a reservation to satisfy the requirement of R. C. 5302.04.

The use of "subject to" in the context of real property law and the examination of deeds of conveyance is expressed in a 2013 Tuscarawas County Court of Common Pleas decision interpreting the use of "subject to" in a deed of conveyance.

> FINDS that the words "subject to" are generally interpreted to "mean 'limited by,' or "subservient or subordinate to' and connote a limitation on a grantor's warranty rather than a reservation of rights." *Stracha v. Peterson*, 377 N. W. 2d 580, 582, (N. D.,1985).

Wendt v. Dickerson, Tuskarawas C. P. Case No. 2012 CV 02 0135, 2013 Ohio Misc. LEXIS 173 (February 21, 2013).

Two cases out of Missouri rejected the claim that a "reservation of rents" was made by the grantor when the words "subject to" were inserted in a warranty deed. In 1856, the Supreme Court of Missouri decided *Biddle v. Hussman*, 23 Mo. 597 which held the words "subject to" were insufficient to create a reservation of rents.

> The effect, therefore, of Biddle's conveyance to the city was to transfer to the latter a proportionable part of the rent, unless the particular clause in the deed to which we have been referred had the effect of severing the rent from the reversion and reserving it to the grantor. The words of the clause are: "It being understood that some of the said first parties have made leases for portions of the wharf property hereby conveyed, the terms of which have not expired, this conveyance to the city is made by the said first parties, **subject to** said leases now in existence." **These are not apt words of exception, reserving from the operation of the grant something that otherwise would have passed, and they do not import in their ordinary signification that the grantor thereby holds back and excepts from his grant something that the grantee would otherwise have taken under it. They refer to the condition of the grantor in reference to the land he is disposing of, and then declare that the grantee takes it subject to existing leases. That was all that the party could lawfully transfer, and, no matter what was the form of the deed, it could be effectual only to that extent.** If no notice had been taken of the lease, the deed might have been considered *in form* a conveyance of the fee in possession, although it would have been *in effect* only a conveyance of the reversion; and the purpose of this clause, we think, was to make the *deed in form* what it was *in effect;* in a word, the declaration, that the property is subject to an existing lease, and that the grantee takes it with that burden upon it, expresses only -- what otherwise would not have been *apparent* -- that the transaction is a transfer of the grantor's reversionary interest in the property only, and not of an estate in possession.
> (Bold emphasis added.)
> (Italic emphasis sic.

Id., at 599.

In a later 1930 case, the Court of Appeals of Missouri followed *Biddle v. Hussman* and held that a recital in a warranty deed "that the deed was made subject to" a lease "did not work a severance of the rent." *Equitable Life Ins. Co. v. Bowman*, 225 Mo. App. 855, 858, 32 S.W.2d 126, 128.

The appeals court majority's use of "subject to" to create a reservation of rents in the Warranty Deed from B.E.B. Properties to Keith R. Barker and Joseph E. Cyvas belies "the question being not what the parties meant to say, but the meaning of what they did say, as courts can not put words into an instrument which the parties themselves failed to do." *Am. Energy Corp. V. Datkuliak*, 7th Dist, No. 07 MO 3, 2007-Ohio-7199, ¶ 50; *citing*, *Larvill v. Farrelly* (1918), 8 Ohio App 355, 360, 30 Ohio Cir. Dec. 196, 28 C.A. 305, 28 Ohio C.C. (n.s.) 305.

V. CONCLUSION

Amicus curiae, OAITA, supports the reversal of the decision of the 11th District court of Appeals.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Brief of Amicus Curiae OAITA*, was served upon the following counsels via electronic transmission this 11th day of February, 2019.

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