IN THE SUPREME COURT OF OHIO

GARY McCLELLAN, et al., Plaintiffs/Appellees, v. MARIAN McGARY aka MARION McGARY, et al., Defendants/Appellants.	: : : : : : :	On Appeal from the Monroe County Court of Appeals, Seventh Appellate District Court of Appeals Case No. 19 MO 0018

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS MARIAN McGARY AKA MARION McGARY, LARRY McGARY, RICHARD CLEGG, DONNA L. CRAIG, TERRY L. CRAIG, KAREN McKELVEY, KENNETH McKELVEY, ROBERT D. CLEGG, CONNIE WALTZ, MARGARET H. CLEGG, MARCIA L. CLEGG, CINDY GORDON, PAUL E. GORDON AKA PAUL E. GORDON, JR., JEFF CLEGG, ROGER K. RUFENER, AND JANET LEE DEAL

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This case presents a critical issue regarding whether the general provisions of the Marketable Title Act continue to apply to minerals after the adoption of the Dormant Mineral Act, such that mineral interests would be subject to automatic abandonment under the Marketable Title Act, even though the mineral interests would not be subject to abandonment under the Dormant Mineral Act.

In this case, the court of appeals determined that Appellants' mineral interest had been automatically abandoned under the Marketable Title Act. The court of appeals' entire analysis of this issue consists of one sentence: "For the reasons stated in *West v. Bode, supra,* we find that both the MTA and the DMA apply to mineral interests." The Seventh District's decision in *West v. Bode,* 2019-Ohio-4092, __ N.E.3d __ (7th Dist.) determined that this Court in *Blackstone v. Moore,* 155 Ohio St.3d 448, 2018-Ohio-4959, 122 N.E.2d 132, held that the general provisions of the Marketable Title Act continue to apply to minerals, even though the Dormant Mineral Act was inserted into the Marketable Title Act to specifically govern the abandonment of minerals. In doing so, the court of appeals ignored the fact that the continued application of the Marketable Title Act following the adoption of the Dormant Mineral Act was not one of the issues this Court indicated it would decide in *Blackstone,* and the matter was not raised, argued, briefed or explicitly addressed by the majority. Instead, the court of appeals pointed to the fact that a single justice filed a concurring opinion pointing out what this Court was not deciding in *Blackstone*—which the court of appeals somehow interpreted as meaning that those justices who didn't explicitly join in the concurring opinion had adopted the contrary view and were sub silencio overturning all precedent to the contrary.

The decision of the court of appeals interprets *Blackstone* in a manner inconsistent with

this Court's decision in *Corban v. Chesapeake Exploration, L.L.C.*, 149 Ohio St.3d 512, 2016-Ohio-5796, 76 N.E.3d 1089. In *Corban,* this Court held that the intent of the revisions to the Dormant Mineral Act in 2006 were to require both that mineral interest holders be given notice prior to abandonment (along with the opportunity to preserve their interest) and that any transfer of mineral rights pursuant to the statutory abandonment process be recorded in the title records rather than occurring automatically by operation of law. Thus, the court of appeals relied upon what this Court had allegedly implicitly decided in *Blackstone* to ignore what the Court had explicitly held in *Corban* just two years prior. This requires urgent correction by the Court.

The decision of the court of appeals affects a large number of mineral interest holders who will lose their mineral rights despite doing everything necessary to preserve those rights pursuant to the Dormant Mineral Act of 2006. The public interest in the orderly administration of justice is profoundly affected by the holding that an issue not raised, briefed or argued was nevertheless decided—and decided in a manner inconsistent with this Court's recent precedent. Likewise, the public interest would be served in clarifying that a concurrence which points out what the Court is not deciding in a given case is not a dissent, such that the lower courts should assume that the majority disagreed with the concurring opinion, unless the majority explicitly adopts the concurrence as its own.

On January 21, 2020, this court accepted the appeal filed in *Wayne L. West, et al. v. C.J. Bode, et al.,* Supreme Court Case No. 2019-1494. This Court has since accepted at least one appeal filed in a case presenting the same issue, but stayed the briefing schedule and held the cause for the decision in *West v. Bode. See Allen B. Miller, et al. v. Elbert Mellott, et al.*, Supreme Court Case No. 2019-1515. Appellants would request that the Court also accept their appeal and, if the Court deems fit, stay the briefing schedule and hold the cause for the decision *West v. Bode.*

STATEMENT OF THE CASE AND FACTS

This case arises from the Appellees' attempt to claim the minerals underlying their surface estate, despite the fact that Appellants successfully acted to preserve their mineral rights under the Dormant Mineral Act.

In 1901, Margaret Williams transferred the subject 74.94 acre property to Robert F. McCaslin and Irene McCaslin, excepting ½ of the 1/8 of the oil produced from the premises during her life. On March 21, 1921, the McCaslins transferred the property to John Keidaisch, excepting ¼ of the oil royalty and ½ of the gas royalty. They also excepted the ½ of the oil royalty previously excepted by Margaret Williams, and the deed provided that (upon Williams' death) Williams' ½ of the oil royalty would be split ¼ to the McCaslins and ¼ to Keidaisch. When Keidasich died, his heirs conveyed the property and repeated the McCaslin reservation word for word in a deed recorded on August 1, 1942.

Appellants are the heirs of the McCaslins. On February 14, 2006, the Appellees recorded an Affidavit Pursuant to ORC § 5301.252, in which they contended that the McCaslins' mineral interest had been automatically abandoned and vested in the surface owners pursuant to the Dormant Mineral Act of 1989—a contention at odds with this Court's decision in *Corban* that the 1989 act was not self-executing. On January 17, 2017, in an effort to work an abandonment under the Dormant Mineral Act of 2006, Appellees filed an Affidavit of Abandonment Pursuant to R.C. § 5301.56 with regard to the McCaslins' mineral interest. On February 1, 2017, fifty-eight days after they were provided with notice of intent to abandon, the Appellants recorded an Ohio Revised Code § 5301.56(C) and § 5301.52 Affidavit and Claim of Preservation of Mineral Interest, thereby avoiding abandonment under the Dormant Mineral Act of 2006.

On December 13, 2017, Appellees filed suit seeking: (1) a declaration that Appellants'

mineral interest had been extinguished under the Marketable Title Act; (2) a declaration that Appellants' interest had been deemed automatically abandoned under the Dormant Mineral Act of 1989; (3) a declaration that this Court's decision in *Corban* violated Appellees' constitutional rights; and (4) an order quieting title to the mineral interests associated with the property in Appellees. Appellants filed a counterclaim seeking a declaration that their interest had not been abandoned under the Marketable Title Act, a declaration that the provisions of the Dormant Mineral Act control over the provisions of the Marketable Title Act with regard to the abandonment of mineral interests, damages for slander of title, and an order quieting title as to the McCaslin heirs' interest in the oil and gas associated with the property.

The trial court granted Appellees summary judgment based upon the Marketable Title Act on August 12, 2019. The Seventh District Court of Appeals affirmed on March 23, 2020, based solely on its decision in *West*.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. I: The specific provisions of the Ohio Dormant Mineral Act, R.C. § 5301.56, control over the general provisions of the Marketable Title Act, R.C. § 5301.47, et seq., with regard to the abandonment of mineral interests in the State of Ohio.

A. The Dormant Mineral Act is a provision of the Marketable Title Act specifically dealing with marketable record title to minerals.

The Marketable Title Act was enacted in 1961 to extinguish interests and claims in land that existed prior to the root of title; the Marketable Title Act, as originally enacted, specifically excluded mineral interests from the scope of the Act. *Corban,* 149 Ohio St.3d 512, 2016-Ohio-5796, 76 N.E.3d 1089, at ¶ 17. In 1973, R.C. § 5301.53 and former R.C. § 5301.56 were amended to allow for application of the Marketable Title Act as to disused mineral interests as well. *Id.* at ¶ 18. "Thus, the Marketable Title Act extinguished oil and gas rights by operation of law after 40

years from the effective date of the root of title unless a saving event preserving the interest appeared in the record chain of title—i.e., the interest was specifically identified in the muniments of title in a subsequent title transaction, the holder recorded a notice claiming the interest, or the interest '[arose] out of a title transaction which has been recorded subsequent to the effective date of the root of title.'" *Id.* quoting R.C. § 5301.49.

The Marketable Title Act was amended again in 1989, when the Dormant Mineral Act was enacted via another change to R.C. § 5301.56. *Id.* at ¶ 19. This change allowed for the termination of dormant mineral interests in the absence of certain occurrences within the preceding 20 years. *Id.* In 2006, the Marketable Title Act was again amended via a change to the Dormant Mineral Act, this time to require "advance notice to the mineral rights holder, allowing it an opportunity to preserve its mineral rights from being deemed abandoned and merged with the surface estate." *Id.* at ¶ 29. If the mineral owner fails to respond to the notice, the surface owner may then record a notice that the mineral interest has been abandoned. *Id.* "*This statute* [the Dormant Mineral Act] therefore operates to establish the surface owner's *marketable record title* in the mineral estate." (Emphasis added.) *Id.* at ¶ 30. "Thus, as of June 30, 2006, *any surface holder seeking to claim dormant mineral rights* and merge them with the surface estate *is required to follow the statutory notice and recording procedures* enacted in 2006 by H.B. 288." (Emphasis added.) *Id*. at ¶ 31.

B. The Dormant Mineral Act Prevails over the General Provisions of the Marketable Title Act Pursuant to R.C. § 1.51.

"[W]hen there is a conflict between a general provision and a more specific provision in a statute, the specific provision controls." *MacDonald v. Cleveland Income Tax Bd. of Rev.*, 151 Ohio St.3d 114, 2017-Ohio-7798, 86 N.E.3d 314, ¶ 27. "The canon rests on the rationale that """[t]he particular provision is established upon a nearer and more exact view of the subject than the general, of which it may be regarded as a correction."""" *Id.* quoting Scalia & Gardner, *Reading*

Law at 183, quoting Jeremy Bentham, *A Complete Code of Law*s, in 3 *The Works of Jeremy Bentham*, 210 (John Bowring Ed. 1843). "A special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms." *State ex rel. Kearns v. Rindsfoo*s, 161 Ohio St. 60, 66, 118 N.E.2d 138 (1954) (statute dealing with election of banking corporation directors operated to exclusion of statute dealing with election of directors for corporations generally). Thus, the more recent and more specific enactment controls. *See Watkins v. Dept. of Youth Servs.*, 143 Ohio St.3d 477, 2015-Ohio-1776, 39 N.E.3d 477, ¶ 19.

Revised Code § 1.51 provides: "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." This Court has cited to R.C. § 1.51 for the proposition that: "Well-established principles of statutory construction require that specific statutory provisions prevail over conflicting general statutes." *State v. Volpe*, 38 Ohio St.3d 191, 193, 527 N.E.2d 818 (1988). Thus, "the legislature has mandated that the general provisions of the Revised Code be subservient to specific provisions." *State, ex rel. Morgan Cty. Dept. of Human Servs. v. Roddy*, 63 Ohio App.3d 575, 579, 579 N.E.2d 538 (5th Dist. 1991). Further, the fact that the legislature enacted a specific statute to reach certain conduct indicates that it did not intend the general statute to reach the same conduct. *Volpe* at 194.

In *Schindler Elevator,* this Court faced an issue similar to this when considering how the Ohio Department of Taxation must provide notice of certain tax assessments on corporations. *See Schindler Elevator Corp. v. Tracy*, 84 Ohio St.3d 496, 497, 705 N.E.2d 672 (1999). Revised Code § 5703.37 sets forth general service requirements for the Department of Taxation. *Id.* at 499.

Revised Code § 5739.13, however, sets forth specific service requirements for notices of sales tax assessments. *Id.* The Department of Taxation issued a sales and use tax assessment; the appellant filed a petition for reassessment; the commissioner then dismissed that petition because it was not timely filed under R.C. § 5739.13. *Id.* at 496-97. The taxpayer appealed, arguing that the timeliness should be determined based upon the general provisions in R.C. § 5703.37. *Id.* This Court stated: "'Where there is no manifest legislative intent that a general provision of the Revised Code prevail over a special provision, the special provision takes precedence.'" *Id.* at 499 quoting *State v. Frost,* 57 Ohio St.2d 121, 387 N.E.2d, 235 (1979), paragraph one of the syllabus. Therefore, the Court applied R.C. § 1.51 in holding that "the special, later-enacted statute sets forth the [applicable] service requirements." *Id.*

The legislature enacted the Dormant Mineral Act to allow surface owners to reunite severed mineral interests with the surface, where the mineral interest owner had allowed the minerals to lie dormant for at least 20 years. In order to successfully employ the Dormant Mineral Act, the surface owner must first provide notice of the proposed abandonment to the mineral owner, allowing the mineral owner to avoid the abandonment by filing a preservation notice in response to the notice. In contrast, the more general Marketable Title Act—which applies to a broader spectrum of property interests—does not require that any notice be provided to the interest holder. Rather, the lack of any recorded filing noting the severed mineral interest in the forty-year period following the recording of the surface owner's root of title is alone sufficient to extinguish the severed mineral interest. Applying *Schindler Elevator*, the special, later enacted statute that specifically deals with the abandonment of mineral interests sets forth the applicable service requirements to work an abandonment of mineral interests.

The Marketable Title Act extinguishes property interests as a matter of law, without

anything being recorded in the record chain of title. *See Spellman Outdoor Advert. Servs., LLC v. Ohio Turnpike & Infrastructure Comm.*, 11th Dist. Portage No. 2015-P-0081, 2016-Ohio-7152, ¶ 38 (noting that extinguishment under the Marketable Title Act occurs automatically and without notice). However, this Court has emphasized that one purpose of the Dormant Mineral Act is to ensure that any abandonment of mineral interests will be noted of record. *Corban,* 149 Ohio St.3d 512, 2016-Ohio-5796, 76 N.E.3d 1089, at ¶ 31. Thus, allowing an unrecorded abandonment of minerals under the Marketable Title Act is fundamentally irreconcilable with the legislative scheme adopted under the Dormant Mineral Act, which requires that any abandonment of minerals appear of record.

C. The Seventh District has misconstrued this Court's decision in *Blackstone v. Moore* as deciding the issue of whether the general provisions of the Marketable Title Act continue to apply despite the enactment of the Dormant Mineral Act.

In *Blackstone,* this Court determined that a reference which specifies the type of interest created and indicates to whom the interest was granted is sufficiently specific to preserve the interest under the Marketable Title Act. *Blackstone,* 155 Ohio St.3d 448, 2018-Ohio-4959, 122 N.E.3d 132, at ¶ 18. Although the case raised a general issue with regard to the application of the Marketable Title Act, the landowners were seeking to abandon and oil and gas royalty interest. *Id.* at ¶¶ 1-2. During oral argument, Justice DeGenaro questioned whether the Marketable Title Act would even apply to such a mineral interest, given the adoption of the Dormant Mineral Act in 1989. *See* Supreme Court of Ohio Oral Argument in *Blackstone v. Moore,* available at http://www.ohiochannel.org/video/case-no-2017-1639-blackstone-v-moore (accessed May 31, 2019). Ultimately, however, the continued applicability of the Marketable Title Act to mineral interests was not a critical factor in the case, given that this Court held that the oil and gas royalty had not been abandoned. *Blackstone* at ¶ 18.

In her concurrence, Justice DeGenaro described the Dormant Mineral Act as "a more specific statute" than the Marketable Title Act, enacted to control the termination of mineral interests. *Id.* at ¶ 19 (DeGenaro, J., concurring). "The fact that the legislature amended the more general Marketable Title Act to include the Dormant Mineral Act, which provides a distinct process specifically for the termination of mineral interests, strongly suggests that the Dormant Mineral Act should be the controlling law and the exclusive remedy for this discrete class of real-property interests." *Id.* at ¶ 22. While this issue was not squarely before the Supreme Court, Justice DeGenaro left little doubt that the issue was ripe for this Court's review and that it should hold the specific provisions of the Dormant Mineral Act control over the general provisions of the Marketable Title Act. *Id.* at ¶¶ 19-24

Because the issue of whether the Marketable Title Act continues to apply to mineral interests following the adoption of the Dormant Mineral Act was not raised, argued, or briefed in *Blackstone*, counsel at the time stated "if the Court were to want to go down that road to look at the relationship between those two different statutes it really ought to permit some argument and briefing on it." *See* Supreme Court of Ohio Oral Argument in *Blackstone*. Justice DeGenaro later acknowledged that the continued applicability of the Marketable Title Act in light of the Dormant Mineral Act was not raised as a proposition of law in *Blackstone*. *Blackstone* 155 Ohio St.3d 448, 2018-Ohio-4959, 122 N.E.3d 132, at ¶ 23 (DeGenaro, J., concurring). Her concurrence was intended to emphasize that the narrow scope of the Court's holding, i.e., that the Court was not deciding the continued applicability of the Marketable Title Act to minerals following the enactment of the Dormant Mineral Act. *Id.* at ¶¶ 19, 24.

The Seventh District Court had previously held that the Dormant Mineral Act controls over the Marketable Title Act in determining whether minerals have been abandoned because "the

specific statute controls over the general statute." *See Tribett v. Shepherd*, 2014-Ohio-4320, 20 N.E.3d 365, ¶ 36 (7th Dist.), *rev'd on other grounds* 150 Ohio St.3d 346, 2016-Ohio-5821, 81 N.E.3d 346. "[T]he DMA is more specific, it was enacted later, and the legislative intent is clearly to reattach mineral interests back to the surface under a twenty-year look back." *See Swartz v. Householder*, 2014-Ohio-2359, 12 N.E.3d 1243, ¶ 20 (7th Dist.), *rev'd on other grounds* 150 Ohio St.3d 341, 2016-Ohio-5817, 81 N.E.3d 1221. While *Tribett* and *Swartz* may have been reversed as to whether the Dormant Mineral Act of 1989 was self-executing, the conclusion that the specific provisions of the Dormant Mineral Act control over the general provisions of the Marketable Title Act is entirely consistent with *Corban*'s statement that surface owners wishing to reunite the minerals with the surface must comply with the notice and recording provisions of the Dormant Mineral Act of 2006. *Corban,* 149 Ohio St.3d 512, 2016-Ohio-5796, 76 N.E.3d 1089, at ¶ 27. ("It becomes apparent from analyzing the sequential legislation on this topic that the legislature did not intend title to dormant mineral interests to pass automatically and outside the record chain of title.")

Despite Justice DeGenaro writing to emphasize the narrowness of the Court's holding, however, the Seventh District has explicitly stated that it views *Blackstone* as rejecting the argument that the Dormant Mineral Act is the exclusive option for abandoning minerals. *West,* 2019-Ohio-4092, __ N.E.3d __, ¶¶ 42-43. Incredibly, the Seventh District seems to have adopted this position, in part, because the majority opinion in *Blackstone* did not "acknowledg[e] the statement in the concurrence" that the Court was not deciding an issue that had not been raised, argued, or briefed. *Id.* at ¶ 42. Thus, the Seventh District has treated *Blackstone* as overruling its prior precedent and definitively deciding an issue the Court did not address—as one justice explicitly noted for the benefit of the lower courts.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest bearing upon whether mineral interests can be abandoned without complying with the notice and recording provisions of the Dormant Mineral Act. The Appellants request that this Court accept jurisdiction in this case and, if the Court deems fit, stay the briefing schedule and hold the cause for the decision in *West v. Bode*.

Respectfully submitted,
Andrew P. Lycans, Counsel of Record

/s/ Andrew P. Lycans
Andrew P. Lycans
COUNSEL FOR APPELLANTS

CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of the foregoing *Memorandum in Support of Jurisdiction* was served upon the following by electronic mail this 5th day of May, 2020:

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COUNSEL FOR APPELLEES GARY McCLELLAN AND JERRY McCLELLAN

/s/ Andrew P. Lycans
Andrew P. Lycans

Appendix

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MONROE COUNTY

GARY MCCLELLAN ET AL.,

Plaintiffs-Appellees,

v.

MARIAN MCGARY AKA MARION MCGARY ET AL.,

Defendants-Appellants.

OPINION AND JUDGMENT ENTRY
Case No. 19 MO 0018

Civil Appeal from the
Court of Common Pleas of Monroe County, Ohio
Case No. 2017-411

BEFORE:
David A. D'Apolito, Gene Donofrio, Carol Ann Robb, Judges.

JUDGMENT:
Affirmed.

Atty. Jason Yoss, and *Atty. Ryan Regel,* Yoss Law Office, 122 North Main Street, Woodsfield, Ohio 43793, for Plaintiffs-Appellees and

Atty. Andrew Lycans, Critchfield, Critchfield & Johnston, 225 North Market Street, P. O. Box 599, Wooster, Ohio 44691, for Defendants- Appellants.

Dated: March 23, 2020

D'APOLITO, J.

{¶1} Defendants-Appellants, Marian McGary aka Marion McGary, Larry McGary, Richard Clegg, Donna L. Craig, Terry L. Craig, Karen McKelvey, Kenneth McKelvey, Robert D. Clegg, Connie Waltz, Margaret H. Clegg, Marcia L. Clegg, Cindy Gordon, Paul E. Gordon aka Paul E. Gordon, Jr., Jeff Clegg, Roger K. Rufener, and Janet Lee Deal ("Appellants" or "McCaslin heirs"), the purported mineral interest owners, appeal the decision of the Monroe County Court of Common Pleas granting the motion for summary judgment filed by Plaintiffs-Appellees, Gary and Jerry McClellan ("Appellees"), the surface owners, and denying Appellants' cross motion for summary judgment, in this action for declaratory judgment and to quiet title, filed pursuant to the Marketable Title Act ("MTA") and the Dormant Mineral Act ("DMA"). The trial court found that a mineral interest exception in a 1921 warranty deed was extinguished by operation of the MTA.

{¶2} In their first assignment of error, Appellants assert that the trial court erred in concluding that a warranty deed recorded in 1974 was Appellees' root of title, because it contains a specific reference to an oil and gas exception in a 1947 deed. In support of their assertion, Appellants cite our decisions in four cases, *Miller v. Mellott*, 7th Dist. Monroe No. 18 MO 0004, 2019-Ohio-504, 30 N.E.3d 1021, decision clarified on reconsideration *Miller v. Mellot*, 7th Dist. Monroe No. 18 MO 0004, 2019-Ohio-4084, reconsideration denied *Miller v. Mellot*, 7th Dist. Monroe No. 18 MO 0004, 2020-Ohio-237, appeal allowed, *Miller v. Mellott*, 2020-Ohio-313, and *Hickman v. Consolidated Coal Co.*, 7th Dist. Columbiana No. 17 CO 0012, 2019-Ohio-492, which cited with favor *Christman v. Wells*, 7th Dist. Monroe No. 539, 1981 WL 4773, (Aug. 28, 1981) and *Holdren v. Mann*, 7th Dist. Monroe No. 592, 1985 WL 10385, *2 (Feb. 13, 1985). *Christman* and *Holdren* stood for the proposition that a root of title must contain a fee simple title free of any oil and gas exception and reservation.

{¶3} However, after briefing was complete in the above-captioned appeal, we granted motions for reconsideration in *Miller* and *Hickman*, and recognized that *Christman* and *Holdren* were no longer good law based upon the Ohio Supreme Court's decision in *Blackstone v. Moore*, 155 Ohio St.3d 448, 2018-Ohio-4959, 122 N.E.3d 132. See *Miller*

v. Mellott, 7th Dist. Monroe No. 18 MO 0004, 2019-Ohio-4084 and *Hickman v. Consolidation Coal Co.*, 7th Dist. Columbiana No. 17 CO 0012, 2019-Ohio-4077. In *Blackstone,* the root of title contained a specific reference to the particular mineral interest at issue in that case. Based on intervening case law from this District, we find that the trial court did not err in concluding that the 1974 deed is Appellees' root of title.

{¶4} In their second assignment of error, Appellants contend that the specific provisions of the Dormant Mineral Act, R.C. 5301.56, prevail over the general provisions of the MTA. For the reasons previously set forth in *West v. Bode*, 7th Dist. Monroe No. 18 MO 0017, 2019-Ohio-4092, appeal allowed, 157 Ohio St.3d 1535, 2020-Ohio-122 (2020), we find that Appellants' second assignment of error is meritless. Therefore, the judgment entry of the trial court extinguishing the mineral interest in this case pursuant to the MTA is affirmed.

STANDARD OF REVIEW

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

{¶6} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." (Emphasis deleted.) *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 662 N.E.2d 264

(1996). If the moving party carries its burden, the nonmoving party has a reciprocal burden of setting forth specific facts showing that there is a genuine issue for trial. *Id.* at 293. In other words, when presented with a properly supported motion for summary judgment, the nonmoving party must produce some evidence to suggest that a reasonable factfinder could rule in that party's favor. *Doe v. Skaggs*, 7th Dist. Belmont No. 18 BE 0005, 2018-Ohio-5402, ¶ 11.

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

FACTS AND PROCEDURAL HISTORY

{¶8} Appellees are the undisputed owners of the surface rights to approximately 74.94 acres in Monroe County, Ohio ("Property"), which they acquired by warranty deed on November 18, 2005. On December 13, 2017, Appellees filed this declaratory judgment action against Appellants and Eileen E. Beaver nka Eileen E. Cartwright, Beverly Beaver, Sandra K. Hopton nka Sandra K. Bottenfield, Bonnie L. Hopton nka Bonnie L. Carter, Richard J. Ashcroft, Dale A. Aschcroft, David L. Ashcroft, Edward J. Ashcroft, Robert J. Kiedaisch aka Robert J. Furedy, and Marlene Kiedaisch ("Kiedaisch heirs"), all purported mineral interest owners in the Property.

{¶9} Appellees sought a declaration that any mineral interest in the Property held by the McCaslin and Kiedaisch heirs had been extinguished pursuant to the MTA; a declaration that the Kiedaisch interest was predicated upon a repetition of the language creating the McCaslin interest, which did not constitute a new exception; a declaration that the mineral interests had been deemed abandoned pursuant to the 1989 DMA; a declaration that the Ohio Supreme Court's decision in *Corban v. Chesapeake Exploration, L.L.C.*, 149 Ohio St. 3d 512, 518 (2016) violated Appellees' constitutional rights; and an order quieting title to the mineral interests associated with the Property.

{¶10} Appellants filed an Answer and Counterclaim, seeking a declaration that the McCaslin interest had not been abandoned under MTA, and a declaration that the

mineral-specific provisions of the DMA prevail over the general property interest provisions of the MTA. They further sought damages for slander of title and an order quieting title as to the McCaslin mineral interest.

{¶11} Appellees and the Kiedaisch heirs filed a Notice of Settlement on May 14, 2019. Appellants and Appellees filed cross-motions for summary judgment. The following relevant facts are a part of the record on appeal.

{¶12} On April 20, 1901, a handwritten warranty deed was recorded in which Margaret T. Williams transferred the Property to Robert F. McCaslin and Irene McCaslin ("Williams deed"). The deed included the following exception: "The grantor in this deed excepts 1/2 of the 1/8 of the oil produced from the above described premises during her natural lifetime * * * ."

{¶13} On March 21, 1921, a warranty deed was recorded transferring the Property from the McCaslins to John Keidaisch ("McCaslin deed"). The deed included the following exceptions and provision ("McCaslin exception"):

> Exception: Excepting herefrom the One half 1/2 of the royalty of Oil underlying above described premises unto Margaret T. Williams for and during her natural life as set forth in a deed made by Margaret T. Williams to Robert F. McCaslin and recorded in Volume 58, page 612-613 in the Record of Deeds of said County.
>
> Exception: Said grantor hereby reserves unto himself, assigns and heirs the one half of the one half or 1/4 of the royalty of oil and 1/2 of the gas underlying said premises in fee.
>
> Provision: It is provided and understood that upon the death of Margaret T. Williams, the above one half royalty held by her, shall be equally divided between said grantor and grantee herein or their heirs or assigns, to wit, 1/4 to grantor and 1/4 to grantee or their respective heirs or assigns.

{¶14} On August 1, 1942, an affidavit of transfer was recorded noting the transfer of John Kiedaisch's interest in the Property to his heirs based upon intestate succession. That same day, a warranty deed was recorded, which transferred the Property from the

recipients under the certificate of transfer to H.J. Walters. The deed contained a repetition of the McCaslin exception, that is, a verbatim recitation of the exception without any reference to the McCaslin deed, only the Williams deed.

{¶15} On November 3, 1947, a warranty deed was recorded at Monroe County Deed Record Volume 120, Page 607, which transfered the Property from H.J. Walters and his wife Sylvia to Donoto and Lola Finalli. The deed included the following exception ("Walters exception"):

> The grantors herein except all the oil and gas rights together with all leasing rights for oil and gas rights together with all leasing rights for oil and gas and the right at any time to go on said premises for drilling purposes. The grantees herein are to receive all rentals and the grantors are not to lease said premises for less than fifty cents ($.50) an acre.

{¶16} On November 15, 1960, a warranty deed was recorded transferring the Property from Lola Finalli to Donoto Finalli. The deed excepted "oil and gas rights and leasing rights for oil and gas heretofore reserved (See Vol. 120, Page 607 of the Deed Records of Monroe County, Ohio.)"

{¶17} On March 3, 1972, a certificate of transfer was recorded noting the transfer of Donato [sic] Finalli's interest in the Property to his heirs based upon intestate succession; and excepted "all oil and gas rights and leasing rights for oil and gas heretofore reserved. (See reservations Volume 120 at Page 607 of the Deed Records of Monroe County, Ohio.)"

{¶18} On August 16, 1973, a warranty deed was recorded transferring the Property from the Finalli heirs to Arthur and Verla Lude. The deed excepted "all oil and gas rights and leasing rights for oil and gas heretofore reserved. (See reservations Volume 120 at Page 607 of the Deed Records of Monroe County, Ohio.)"

{¶19} On January 31, 1974, a joint and survivorship deed was recorded transferring the Property from the Ludes to Elden and Inez McClellan. The deed excepted "all oil and gas rights and leasing rights for oil and gas heretofore reserved. (See reservations Volume 120 at Page 607 of the Deed Records of Monroe County, Ohio.)" The trial court identified the 1974 deed as Appellees' root of title deed.

{¶20} On November 18, 2005, Inez McClellan recorded an affidavit stating that Elden McClellan died on October 4, 1976. On November 18, 2005, a warranty deed was recorded transferring the Property from Inez McClellan to Appellees, but reserving a life estate in Inez McClellan. A termination of life estate was subsequently recorded noting that Inez McClellan died on November 28, 2015.

{¶21} On February 14, 2006, Appellees recorded an Affidavit pursuant to R.C. 5301.252, captioned "Affidavits on facts relating to title," in which they asserted that the McCaslin interest had been abandoned, and vested in them as the surface owners pursuant to the 1989 DMA. On December 8, 2012, Appellees, Inez McClellan, and Cindy McClellan entered into an oil and gas lease with Eclipse Resources I, LP.

{¶22} On January 17, 2017, Appellees and Cindy McClellan recorded an Affidavit of Abandonment pursuant to R.C. 5301.56. The Affidavit of Abandonment indicated that notice was provided to the McCaslin heirs during a period beginning on December 5, 2016 and ending on December 15, 2016. On February 1, 2017, Appellants recorded an Affidavit and Claim of Preservation of Mineral Interest, pursuant to R.C. 5301.56(C) and 5301.52. The Affidavit was filed within 60 days after the first of the McCaslin heirs was served with notice. In the fall of 2017, the McCaslin Heirs signed oil and gas leases with Eclipse Resources I, LP.

{¶23} On January 12, 2017, Appellees and Cindy McClellan recorded an Affidavit of Abandonment pursuant to R.C. 5301.56 with regard to the Walters exception. The Affidavit indicated that notice was provided to the Walters heirs by publication on December 8, 2016. On February 7, 2017, the McClellans recorded a Notice of Failure to File pursuant to O.R.C. 5301.56 with regard to the Walters exception. On March 16, 2017, the Walters heirs recorded an Affidavit and Notice of Claim Preservation of Mineral Interest.

{¶24} The trial court granted Appellees' motion for summary judgment and denied Appellants' cross-motion on August 12, 2019. The trial court found that the 1974 deed, which contained a reference to the Walters exception, was the root of title. The trial court further concluded that the muniments of the chain of title contained no specific reference to the McCaslin exception, and that no other provision of the MTA applied to prohibit extinguishment of the McCaslin exception. The judgment entry reads, in pertinent part,

"Judgment in favor of the Plaintiffs shall further be noted by the recording of said Judgment Entry on the McCaslin Deed * * * , and the Root of Title Deed * * * ."

{¶25} Despite the fact that the trial court opined that the Walters exception was deemed abandoned as a result of Appellants' filing of the Notice of Failure to File pursuant to the DMA, the trial court did not enter an order quieting title. The judgment entry reads, in pertinent part, "[t]he Court further finds that there is no just reason for delay, and that this 'Judgment Entry Incorporating Findings of Fact and Conclusions of Law' is a final appealable order, as defined under Civil Rule 54." This timely appeal followed.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED IN HOLDING THAT APPELLEES' ROOT OF TITLE IS A DEED WHICH EXCEPTED ALL OIL AND GAS FROM THE CONVEYANCE.

{¶26} The MTA was enacted to "simplify[ ] and facilitat[e] land title transactions by allowing persons to rely on a record chain of title." R.C. 5301.55. Thus, the Act provides that a person "who has an unbroken chain of title of record to any interest in land for forty years or more, has a marketable record title to such interest." R.C. 5301.48. The marketable record title "operates to extinguish such interests and claims, existing prior to the effective date of the root of title." R.C. 5301.47(A).

{¶27} The MTA facilitates title transactions, as the record marketable title "shall be taken by any person dealing with the land free and clear of all interests, claims, or charges whatsoever, the existence of which depends upon any act, transaction, event, or omission that occurred prior to the effective date of the root of title." R.C. 5301.50. A "root of title" is "that conveyance or other title transaction in the chain of title of a person, purporting to create the interest claimed by the person, upon which he relies as a basis for the marketability of his title, and which was the most recent to be recorded as of a date forty years prior to the time when marketability is being determined." R.C. 5301.47(E).

{¶28} We recently observed in *Senterra Ltd. v. Winland*, 7th Dist. Belmont No. 18 BE 0051, 2019-Ohio-4387, ¶ 52, modified on reconsideration *Senterra Ltd. v. Winland*, 7th Dist. Belmont No. 18 BE 0051, 2019-Ohio-5458, that a "root of title" has two elements

– one temporal and the other substantive, and both elements must exist to be a root of title:

> The temporal element for a "root of title" is a title transaction that is at least 40 years preceding the date when marketability is being determined. Once that title transaction is found, it must be determined whether that title transaction meets the second element. This substantive element requires the title transaction to purport "to create the interest claimed by such person, upon which he relies as a basis for the marketability of his title." R.C. 5301.47(E). A "root of title" cannot be the initial severance deed of the interest the person is seeking to have extinguished. This is because record marketable title extinguishes interests and claims existing prior to the effective date of the root of title, not when the interest and claims were created in the "root of title." R.C. 5301.47(A).

Id. at ¶ 53.

{¶29} The Ohio Supreme Court has recognized that the desire to facilitate title transactions is balanced against the need to protect interests that predate the root of title in the MTA. To that end, the MTA provides that the marketable record title is subject to interests inherent in the record chain of title, "provided that a general reference * * * to * * * interests created prior to the root of title shall not be sufficient to preserve them, unless specific identification be made therein of a recorded title transaction which creates such * * * interest." R.C. 5301.49(A).

{¶30} Appellants contend that the trial court predicated its conclusion that their mineral interest was extinguished by operation of the MTA on the wrong deed, citing two of our 2019 decisions, *Miller* and *Soucik*, *supra,* which relied on two earlier decisions from the 1980s, *Christman* and *Holdren, supra.* In *Christman*, *supra,* the purported root of title was a 1926 deed, which read, in pertinent part, "[e]xcepting and reserving the one-half oil and gas royalty being 1/16th of the oil produced and 1/2 of the money received from the sale of gas." *Christman, supra,* at *1. The panel found that the 1926 deed contained a repetition of the reservation of royalties from the 1925 severance deed.

{¶31} The panel held that "'[t]he interest claimed' by the [surface holders] is an interest free of [the] reservation of royalties, a fee simple." *Id.* As a consequence, the panel concluded that the 1926 deed was not the root of title "because such instrument contains, within it, a repetition of the original exception of all the oil and gas." The panel reasoned that the 1926 deed could not be the root of title "because it does not contain a fee simple title free of any such oil and gas exception and reservation." *Id.*

{¶32} After disqualifying the 1926 deed, the panel continued back through the deed history and identified a 1923 deed, which transferred a fee simple, as the surface owner's root of title. Because the 1925 severance deed was a title transaction in Christmans' chain, based on the 1923 root, the panel concluded that the MTA did not extinguish the prior mineral interest.

{¶33} Likewise, in *Holdren, supra,* the panel recognized that the purported root of title contained a repetition of an oil and gas exception from the prior severance deed. Because the purported root did not convey "a fee simple, free of any such oil and gas exception," the panel continued back through the deed history and identified an 1881 deed, which transferred a fee simple, as the surface holders' root of title. As a result, the severance deed was a title transaction in Holdrens' chain, based on the 1881 root, the panel, with one judge dissenting, concluded that the MTA did not extinguish the prior interest. In his dissent, Judge O'Neill advocated a specific-analysis test, and concluded that the repetition was not specific enough to prevent extinguishment by operation of the MTA. *Id.* at *3-4.

{¶34} However, in 2018, the Supreme Court of Ohio issued its decision in *Blackstone, supra,* in which the Court concluded that a specific reference to a prior mineral interest in the root of title deed was sufficient to preserve the interest. The root of title deed in *Blackstone* read, in pertinent part, "[e]xcepting the one-half interest in oil and gas royalty previously excepted by Nick Kuhn, their [sic] heirs and assigns." The Ohio Supreme Court concluded that the reference was sufficiently specific to preserve the Kuhn interest.

{¶35} As a consequence, we have repeatedly recognized that *Christman* and *Holdren* are no longer good law following the Ohio Supreme Court's decision in *Blackstone*. See *Miller*, *supra*, *Hickman*, *supra, Senterra, supra*. Further, in *Senterra,* we

observed that "the 'root of title' can contain a repetition of a reservation; the deed must merely account for the interest the person is claiming to have record marketable title to and not be the severance deed." *Id.*

{¶36} Based on intervening case law from this District, we find that the trial court correctly identified the 1974 deed as Appellees' root of title. Although the deed contains a prior deed reference, it accounts for the interest in which Appellees claimed record marketable title (the minerals) and is not the severance deed.

{¶37} Next, Appellants argue that the mineral interest owner should not have any impact on the identification of the root of title. They argue that the 1974 deed would not be the root of title for the Walters heirs. To the contrary, if the 1974 deed fulfilled the temporal element, it would also fulfill the substantive element, that it purports to create the interest claimed by Appellees, upon which they rely as a basis for the marketability of their title. However, the 1974 root of title would not extinguish the Walters' mineral interest, because it contains a specific reference to that interest. Consequently, Appellants' second argument has no merit.

{¶38} For the foregoing reasons, we find that the trial court did not err in concluding that the McCaslin exception was extinguished by operation of the MTA. We further find that Appellants' first assignment of error is meritless.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED IN HOLDING THAT THE SPECIFIC PROVISIONS OF THE MARKETABLE TITLE ACT GOVERNING ABANDONMENT OF MINERAL INTERESTS (KNOWN AS THE DORMANT MINERAL ACT) DO NOT CONTROL OVER THE PROVISIONS OF THE MARKETABLE TITLE ACT GOVERNING ABANDONMENT OR PROPERTY INTERESTS IN GENERAL.

{¶39} For the reasons stated in *West v. Bode*, *supra*, we find that both the MTA and the DMA apply to mineral interests.

CONCLUSION

{¶40} In summary, we find that the trial court did not err in applying the MTA to the mineral interest at issue in this case or in finding that the 1974 deed was the root of title. For the foregoing reasons, the judgment entry of the trial court is affirmed.

Donofrio, J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Monroe County, Ohio, is affirmed. Costs to be taxed against the Appellants.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

JUDGE DAVID A. D'APOLITO

JUDGE GENE DONOFRIO

JUDGE CAROL ANN ROBB

NOTICE TO COUNSEL

This document constitutes a final judgment entry.