IN THE SUPREME COURT OF OHIO
Case No. 2021-0148

PATRICIA CAROL SMITH, *et al.*,

Appellees,

vs.

COLLECTORS TRIANGLE, LTD., *et al.*,

Appellants.

On Appeal from the Harrison County Court of Appeals, Seventh Appellate District

Court of Appeals Case No. 19 HA 0010

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT ASCENT RESOURCES - UTICA, LLC

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EXPLANATION OF WHY THIS CASE INVOLVES A QUESTION OF PUBLIC OR GREAT GENERAL INTEREST

This case raises two issues of great importance to Ohio's oil, gas, and mineral industry, as well as to real property transfers in general. First, can a transfer of rights to future royalties from oil, gas, or mineral rights be transferred orally, outside the written chain of title? Second, can a written real estate conveyance reserve rights in favor of a non-party to the conveyance? The answers to both questions should be "no." But the Seventh District held otherwise in this case. Its precedent injects uncertainty, instability, and unpredictability into the law of real estate conveyancing – a body of law that aims for certainty, stability, and predictability.

The first issue in this case worthy of the Court's consideration is whether rights to future oil, gas, or mineral royalties can be transferred by oral agreement. If they can be, then such transfers will be outside the written chain of title. And then third parties to those verbal transfers will have no record notice of those verbal transfers, and often no notice of any kind – actual, constructive, or otherwise. This means that a subsequent purchaser or lessor of the land at issue cannot know with any certainty whether that land is subject to an oral transfer of valuable rights. It also means that someone who claims to possess these valuable rights via an oral agreement will not know with any certainty whether those rights will be enforceable. After all, purported oral agreements are subject to dispute, and their validity will often depend on credibility determinations by judges and juries.

The answer to this question turns primarily on whether the right to receive future oil, gas, or mineral royalties is real or personal property. An interest in real property can be transferred only by written conveyance; the statute of frauds requires as much. *See* R.C. 1335.04 ("No lease, estate, or interest, either of freehold or term of years, or any uncertain interest of, in, or out of lands, tenements, or hereditaments, shall be assigned or granted except by deed, or note in

writing, signed by the party assigning or granting it, or his agent thereunto lawfully authorized, by writing, or by act and operation of law."). Personal property, on the other hand, can be transferred by oral agreement in many instances.

This Court's precedents draw a critical distinction missed by the Seventh District here. This Court's early cases recognize a difference between oil, gas, and minerals *in place* – which are real property – and oil, gas, and minerals *when produced* – which become personal property at the point of production. "It is well established that in Ohio oil and gas in place are the same as any part of the realty, and capable of separate reservation or conveyance." *Pure Oil Co. v. Kindall*, 116 Ohio St. 188, 201, 156 N.E. 119 (1927).

> Petroleum oil is a mineral, and while in the earth it is part of the realty * * * until it reaches a well, and is raised to the surface, and then for the first time it becomes the subject of distinct ownership, separate from the realty, and becomes personal property—the property of the person into whose well it came.

Kelly v. Ohio Oil Co., 57 Ohio St. 317, 328, 49 N.E. 399 (1897). The Court has recently reaffirmed this distinction and confirmed that minerals in place are real property. *Chesapeake Exploration, L.L.C. v. Buell*, 144 Ohio St.3d 490, 2015-Ohio-4551, ¶ 21, 45 N.E.3d 185.

Consistent with this distinction, this Court long ago held that, while a verbal agreement to transfer mineral royalties is enforceable between the parties, it is *not* binding on a subsequent purchaser of the property unless it is expressly carved out of the conveyance. *See Newburg Petroleum Co. v. Weare*, 44 Ohio St. 604, 613 9 N.E. 845, syllabus (1887) (an agreement to transfer oil and gas royalties to a third party is personal to the promisor, and "does not run with the land so as to bind grantees" unless the instrument conveying the property generating the royalties bound grantees to the prior agreement conveying royalties by its express terms).

This Court's precedents therefore hold that minerals in place are real property. These precedents at least suggest, if not hold, that the rights to those minerals can be conveyed only by

a written, recorded conveyance – as with any other real property interest. The logical implication is that the right to future royalties, based on the future mining and production of those in-place minerals, must also be a real property right requiring a written, recorded conveyance to be transferred.

The Seventh District nonetheless held, based on its recent precedent, that the rights to royalties from oil, gas, or minerals are personal property. *Smith v. Collectors Triangle, Ltd.*, 7th Dist. No. 19 HA 0010, 2020-Ohio-4823; *see also Pollock v. Mooney*, 7th Dist. No. 13 MO 9, 2014-Ohio-4435, ¶ 16. The Seventh District acknowledged conflict in the case law on this point, citing the "tendency of many jurisdictions . . . to treat unaccrued royalty interests (oil and gas still in the ground) as realty and to treat royalty (oil and gas severed from the ground) as personal property." *Pollock*, 2014-Ohio-4435, at ¶ 16. Notwithstanding that tendency, the court of appeals adopted a rule distinguishing between minerals in place (which this Court's precedents establish are real property) and the future royalties arising from those minerals in place (which the Seventh District holds are personal property).

The basis for this distinction is unclear, and it cannot be squared with this Court's precedents. In any event, having held that royalties – existing or future – are personal property, the Seventh District took that rule to its logical conclusion: The right to future royalties from minerals in place can be transferred orally, outside the chain of title and without any notice to subsequent purchasers.

The second issue meriting this Court's attention is whether the Stranger-to-Title Rule (or the "Stranger Rule" for short) applies in Ohio and, if so, whether it can be defeated by a purported prior, verbal transfer. The Stranger Rule holds that a reservation or exception in a deed in favor of a third party who is neither a grantor nor grantee (*i.e.*, a non-party or "stranger"

to the deed) is ineffective as a matter of law to transfer any interest to the third party. *See, e.g.*, *Estate of Thomson v. Wade*, 509 N.E.2d 309, 310 (N.Y. 1987). The Stranger Rule is based on the premise – foundational to real estate conveyancing – that parties intending to convey property must do so through a written conveyance using words of grant. The Stranger Rule therefore ensures, as do other rules of real estate conveyancing, that transfers of real property interests are unambiguously described in the written chain of title, and not subject to guesswork.

This Court has never addressed the Stranger Rule and whether it reflects the law of Ohio. That, in and of itself, is a good reason to accept jurisdiction in this case, given the important role played by the rule. Some lower courts in Ohio have adopted and applied it. *See, e.g.*, *Porterfield v. Bruner Land Co., Inc.*, 7th Dist. No. 16 HA 0019, 2017-Ohio-9045, ¶ 26, 103 N.E.3d 152 (2017); *Lighthorse v. Clinefelter*, 36 Ohio App.3d 204, 521 N.E.2d 1146 (9th Dist. 1987). And it is the traditional and apparently the majority rule in sister states. *See, e.g., Shirley v. Shirley*, 525 S.E.2d 274 (Va. 2000); *Estate of Thomson*, 509 N.E.2d at 310; *Collins v. Stalnaker*, 131 W.Va. 543, 551–52, 48 S.E.2d 430, 434–35 (1948). This point of uncertainty deserves to be settled. It is of obvious importance for anyone involved in real property transactions to know whether deed reservations or exceptions in favor of a third party are effective or ineffective. It is also of obvious importance to a third party purportedly benefited by such a reservation or exception.

The Seventh District here assumed that Ohio recognizes the Stranger Rule, but then held that the rule did not apply when the stranger had a "preexisting" interest. This makes some sense if the preexisting interest is one found in the chain of title; a prospective purchaser or title examiner could locate and assess the nature and scope of that interest through title examination. Here, however, it was not. The "preexisting" interest on which the Seventh District relied was nothing more than an alleged verbal agreement between some of the grantors and third parties –

an "interest" that was not written, not recorded, therefore not in the chain of title, and of which the world had no record notice. To be sure, the deed in question referenced this supposed interest as an exception to the grant, but when that supposed interest is nowhere in the chain of title, it should not be valid. After all, what's the point of a written chain of title if title to real property can be affected by verbal agreements that are unknown and unknowable to purchasers, real estate agents, title examiners, and the like? A prospective purchaser or title examiner has no real way to understand or assess the nature of the purported interest when it is based on a purported verbal agreement. How would one even go about it? Interviewing all the parties to the purported verbal agreement? What if their understandings varied?

The law of conveyancing, including the statute of frauds, exists to eliminate such quandaries. The Seventh District's precedent instead creates them. The Stranger Rule enforces the foundational premise of conveyancing law that transfers of real property interests must be in writing, recorded, and accomplished using recognized words of grant. *See Lighthorse*, 36 Ohio App.3d at 206 ("It is generally held that a conveyance must contain operative words which indicate the intention to effect a grant."). By permitting verbal exceptions to the Stranger Rule, the Seventh District defeated the entire purpose of the rule. And this opens up the proverbial can of worms: If someone can set forth a valid claim for ownership of the right to receive future oil and gas royalties (the most valuable "stick" in the fee mineral "bundle") based on nothing more than a purported verbal agreement, then the chain of recorded title interests becomes little more than a piece of the puzzle – with the rest of the pieces open to debate.

Both of these unsettled propositions of law deserve this Court's consideration, as they are important to Ohio law and Ohio's economy. Legal rules that affect ownership of mineral rights are increasingly important in Ohio. Oil and gas production in Ohio is primarily the result of real

property owners leasing oil and gas rights to drilling and production companies in exchange for royalties. Thus, "[t]he oil and gas lease is central to the oil and gas industry." *Chesapeake Exploration, L.L.C. v. Buell*, 144 Ohio St.3d 490, 2015-Ohio-4551, ¶ 16, 45 N.E.3d 185. Even by the mid-1960s, an estimated three-fourths of Ohio's land was subject to an oil and gas lease. *Id*. at ¶ 17. The recent boom in production in the Marcellus and Utica Shale regions of eastern Ohio have only increased the importance of oil and gas leases. *Id*. The boom "has heightened interest in who owns that land and, more specifically, who holds the mineral rights and the rights to make the potentially lucrative leases." *Dodd v. Croskery*, 143 Ohio St.3d 293, 2015-Ohio-2362, ¶ 5, 37 N.E.3d 147.

As a result, the legal rules surrounding the creation, interpretation, and enforcement of oil and gas leases – and the associated royalties – are of critical importance given the prominence of the oil and gas industry in Ohio. In addition, as this Court has noted, "severed mineral interests are transferred and divided" with frequency, making it "difficult, or even impossible, to find the owners of such severed mineral rights." *Id.* at ¶ 7. In that instance, this Court was speaking about difficulties in the *written* chain of title. The problem is exacerbated many-fold when, as here, allegations of verbal transfers are permitted to cloud chains of title.

Ascent respectfully requests that the Court accept both of Ascent's propositions of law.

STATEMENT OF THE CASE AND FACTS

This case arises from alleged oral agreements purporting to convey to third parties the right to receive royalties due under an oil and gas lease. This is a much-simplified account limited to those facts relevant to the propositions of law.

Ross Harris owned a 63.7-acre parcel in Harrison County. He leased the oil and gas rights for the parcel but retained the right to receive the royalties from oil and gas production on

the property. When Mr. Harris died intestate in 1988, his two daughters – Catherine Finney and Mildred Worrell – each inherited an undivided one-half interest in the property (subject to the lease), including the royalties.

In 1992, Mrs. Worrell and her husband, Adrian Worrell, deeded their interest in the parcel to their three children in equal shares, reserving for themselves only a life estate in a one-acre area in which their home was located. This deed specifically transferred to the Worrell children all rents, issues, and profits associated with the parcel. At this point, the chain of title showed that the property, including the royalty rights, was owned ½ by Ms. Finney and ⅙ by each of the three Worrell children, subject to the life estate in a small part of the parcel.

A family dispute led Ms. Finney and Patricia Smith, one of the Worrell children, to file a partition action in late 1997. The defendants were the other individuals with record interests in the property: Mildred and Adrian Worrell and the other two Worrell children. The partition complaint sought the reservation of the one-acre life estate for Mildred and Adrian Worrell and the division of the rest of the property interests among Ms. Finney and the three Worrell children – all of which was consistent with the state of record title for the property. The partition complaint said nothing about any purported verbal agreements among any of the parties.

The court of common pleas ultimately determined that the parcel could not be fairly divided, and it ordered a sale of the property. So far, so good. Things went awry with the preparation and execution of the Sheriff's Deed that was supposed to effectuate the court's ruling in the partition action. The Sheriff's Deed purported to reserve the oil and gas royalties for Mildred and Adrian Worrell:

> FURTHER EXCEPTING AND RESERVING unto Adrian Worrell and Mildred I. Worrell the right to receive all royalties payable under a certain oil and gas lease and any extension or modification thereof, said lease being recorded in Lease Volume 69, Page 79, Records of Harrison County, Ohio.

This purported reservation would have been a mystery to anyone looking at the chain of title or the history of the partition action. First, the history of written conveyances showed that Mrs. Finney owned the rights to half of the royalties; that half could not be "reserved" for the Worrells. Second, the chain of title showed that the Worrells had previously conveyed by deed the right to their half of the royalties to their three children. So, while that half of the royalty rights might have been granted back to the Worrells through a proper written conveyance, it – like the other half – could not be "reserved" for the Worrells when the Worrells did not own it. Third, the Worrells defaulted in the partition action, yet the Sheriff's Deed purported to "reserve" for them one of the most valuable sticks in the bundle of property rights for the parcel. Fourth, this purported reservation was not requested by the partition complaint or ordered by the court of common pleas in its ruling. Thus, this purported reservation contradicted both the chain of title and the proceedings in the partition action.

Collectors Triangle, Ltd. purchased the parcel via the Sheriff's Deed. It concluded from an examination of record title that it had acquired the rights to the royalties, in part because the purported reservation was ineffective – Mildred and Adrian Worrell had previously granted away their rights to the royalties, which could not be subsequently "reserved" for them.

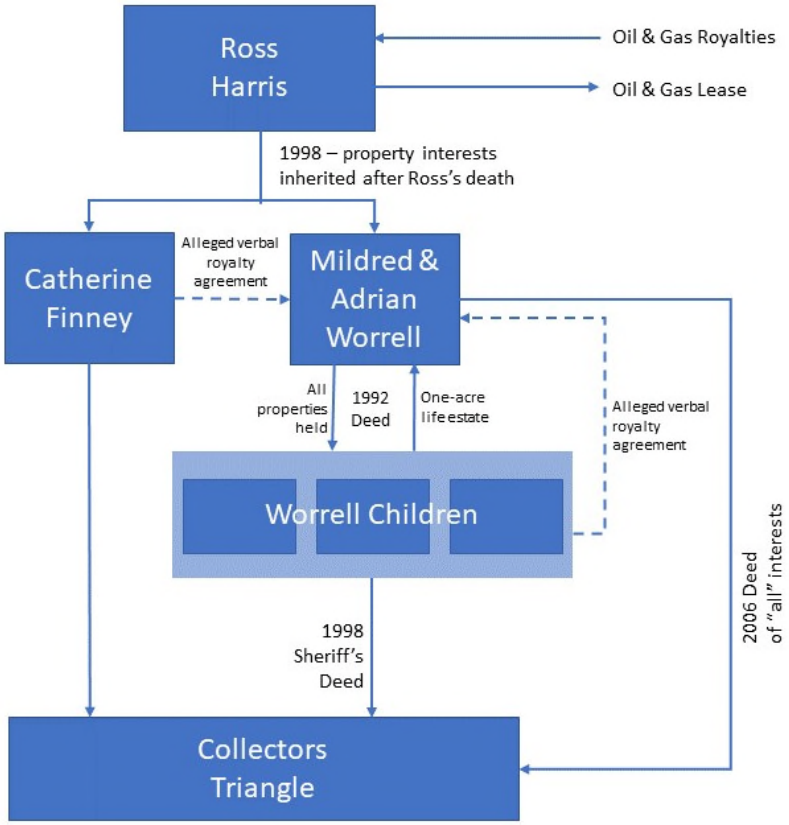
Mildred Worrell died intestate in 2005, and therefore Adrian Worrell inherited whatever rights she possessed in the 63.7-acre parcel. In 2006, though, Adrian Worrell deeded "all" of his interests – whatever they were – to Collectors Triangle. At this point, the chain of title established that Collectors Triangle had acquired whatever interests were held by Ms. Finney and the Worrell children via the Sheriff's Deed, and then whatever interests had been or were being held by the Worrells via the 2006 deed. In other words, at this point, the *written* record of

conveyances showed that neither the Worrells nor their children nor any heirs or successors nor Ms. Finney nor any of her heirs or successors had *any* remaining rights in the property.

Ascent Resources – Utica, LLC obtained the rights to drill on the parcel, and once it began to do so it paid royalties to Collectors Triangle. This action followed. The plaintiffs alleged that the purported reservation of royalty rights for Mildred and Adrian Worrell in the Sheriff's Deed was effective and that the reservation was effective for *all*, not just the Worrells' original half, of the royalties. How could this be, given that the undisputed chain of title contradicted all of this? According to the plaintiffs: *two oral agreements*. The plaintiffs alleged that Catherine Finney had *verbally* agreed that Mildred and Adrian Worrell could have Ms. Finney's half of the royalties. So, according to the plaintiffs, the Worrells at some point obtained the right to 100% of the royalties. But there's still the problem that the Worrells granted their royalty rights, whatever they were, to their three children. The plaintiffs' answer? *Another purported verbal agreement*. According to the plaintiffs, the Worrell children verbally transferred the royalty rights back to their parents after their parents had deeded those royalty rights to their children. Thus, the plaintiffs' theory is that Mildred and Adrian Worrell formally deeded the royalty rights to their children, and then the children transferred those same rights back to Mildred and Adrian Worrell – but didn't bother with a deed or any other form of memorialization. Curiously, the original complaint did not allege any verbal transfers; those allegations – seemingly indispensable to the plaintiffs' theory of the case – did not surface until an amended complaint.

The graphic below reflects the undisputed and alleged transfers of property rights, with conveyances by recorded deed represented by solid lines and the alleged verbal transfers represented by dotted lines. (To avoid complexity, the graphic combines spouses Mildred and

Adrian Worrell and treats their interests as coextensive at all times. The resulting omission of some details is inconsequential to the issues raised in this memorandum.)



The trial court dismissed the complaint. It accepted arguments by Ascent and Collectors Triangle that the rights to future royalties could not be conveyed by alleged verbal agreements and that the Sheriff's Deed could not reserve for Mildred and Adrian Worrell rights that they had granted away by previous deed.

The Seventh District reversed. It held that the right to receive royalties was *personal* property, not real property, and therefore could be transferred by verbal agreement. The statute of frauds, according to the court of appeals, does not apply to transfers of oil, gas, or mineral royalties. It further held that the Stranger Rule did not render ineffective the Sheriff's Deed's purported reservation of royalty rights in favor of Mildred and Adrian Worrell. The Stranger

Rule, the Seventh District held, does not apply when the purported reservation or exception to a grant of property rights involves a *preexisting* interest. Here, of course, the "preexisting interest" is the alleged *verbal* grant of royalty rights back to Mildred and Adrian Worrell – an interest that appeared nowhere in the record title for the parcel. The Seventh District did not comment on an apparent tension between these two holdings – the first holding was that a transfer or "reapportionment" of royalty rights involves personal property, but the second holding regarding the Stranger Rule presupposes that royalty rights are real property because the Stranger Rule is a rule about deed construction and conveyancing. Finally, the Seventh District held that the 2006 deed from Adrian Worrell to Collectors Triangle did not transfer the verbally transferred royalty rights. The Seventh District concluded that the transfer of "all" of Adrian Worrell's interest in the property meant only those property interests that were specifically enumerated in the deed.

ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: The right to receive future oil and gas royalties is an interest in real property that cannot be conveyed orally.

It is settled law in Ohio that minerals in place are considered real property. *Chesapeake Exploration, L.L.C. v. Buell*, 144 Ohio St.3d 490, 2015-Ohio-4551, ¶ 21, 45 N.E.3d 185; *Pure Oil Co. v. Kindall*, 116 Ohio St. 188, 201, 156 N.E. 119 (1927); *Kelly v. Ohio Oil Co.*, 57 Ohio St. 317, 49 N.E. 399 (1897). This follows from several foundational premises. A covenant to pay rent runs with the land. *LRC Realty, Inc. v. B.E.B. Properties*, 160 Ohio St.3d 218, 2020-Ohio-3196, 155 N.E.3d 852, ¶ 13 (citing R.C. 5302.04). Thus, "the right to receive rents *and profits* … ordinarily follow[s] the legal title" unless "the grantor included a specific provision reserving the right to receive rental payments *in the deed conveying the subject property*." *Id.* (emphasis added); *see also Newburg Petroleum Co. v. Weare*, 44 Ohio St. 604, syllabus, 9 N.E. 845 (1887) (an agreement to transfer oil and gas royalties generated by a property to a third party

is personal to the promisor, and "does not run with the land so as to bind grantees" unless expressly referenced in the deed to the grantees).

The right to receive royalty payments under a lease is "one stick in the bundle" of rights associated with ownership of the mineral estate. *Eisenbarth v. Reusser*, 7th Dist. No. 13 MO 10, 2014-Ohio-3792, ¶ 60, 18 N.E.3d 477, *aff'd*, 150 Ohio St.3d 342, 2016-Ohio-5819, 81 N.E.3d 1222. When a property owner seeks to reserve or convey an interest in future royalties, the effect is to reserve or convey "at least a portion of the oil in place." *Vandenbark v. Busiek*, 126 F.2d 893, 897 (7th Cir. 1942). Not surprisingly, "'[a] reservation of all possible benefit of the oil is tantamount to a reservation of the corpus thereof.'" *Id.* at 896 (quoting *Toothman v. Courtney*, 62 W.Va. 167, 58 S.E. 915, 918 (1907)).

Put another way, a grant or reservation of the right to receive all future royalties from oil and gas currently in place is the grant or reservation of a real property interest, not a personal property interest. This conclusion follows not only from the foundational premises just described, but also from this Court's decisions in *Chesapeake Exploration*, *Pure Oil*, and *Kelly*. Recent Seventh District authority, however, holds that the right to future royalties from minerals in place are personal property that can be transferred by oral agreement. *See Pollock v. Mooney*, 7th Dist. No. 13 MO 9, 2014-Ohio-4435, ¶ 16; *Smith v. Collectors Triangle, Ltd.*, 7th Dist. No. 19 HA 0010, 2020-Ohio-4823. These lines of authority cannot be squared – there is no plausible distinction between the minerals in place and the rights to profit in the future from those minerals in place. If the former is real property, then the latter must be, too. And that means that the right to future mineral royalties can be transferred only by a written, recorded conveyance.

But in the Seventh District – which, by reason of geography, sets critical precedent for oil and gas issues – the right to receive future oil and gas royalties is a personal property interest and

therefore not subject to the statute of frauds. In this case, the court of appeals relied in part on this Court's decision in *Nonamaker v. Amos,* 73 Ohio St. 163, 170 76 N.E. 949 (1905). In *Nonamaker*, 73 Ohio St. 163, 170, the parties to a mineral lease verbally agreed to modify the royalty percentage in the lease, and the lessee sued the lessor to enforce the lower, verbally agreed royalty rate. This Court held that the parties could modify the lease in this instance by verbal agreement. The court of appeals glossed over two critical distinctions in *Nonamaker* and, as a result, misread that case. First, the royalty rate in *Nonamaker* involved oil and gas when brought to the surface, which this Court's precedents do treat as a personal property interest. *Nonamaker v. Amos*, 73 Ohio St. at 170, 76 N.E. 949, 951 (1905). It did not involve an alleged transfer of all future rights to royalties from minerals in place, as is the case here. Second, *Nonamaker* was a dispute between the *parties* to a lease and therefore did not involve the enforceability of a verbal agreement against third parties. In short, *Nonamaker* does not answer the question presented here —whether a *real* property interest allegedly conveyed by verbal agreement is enforceable against anyone other than the parties to that alleged agreement.

Proposition of Law No. 2: A purported reservation or exception in a written conveyance of real property rights in favor of a non-party to the conveyance is ineffective as a matter of law.

As adopted in other jurisdictions, the Stranger Rule holds that a reservation or exception in a deed in favor of a third party who is neither a grantor nor grantee (*i.e.*, a non-party or "stranger" to the deed) is ineffective as a matter of law to transfer any interest to the third party. The rationale for the rule is straightforward: Because the function of a reservation is to limit some right in the land conveyed in favor of the grantor (and thus serve as a limitation on the general rule that a deed conveys to the grantee the whole title to the property), a reservation can be made by a grantor only in favor of herself. *See In re Allen*, 415 B.R. 310, 317 (Bankr. N.D.

Ohio 2009). A deed reservation cannot *convey* an interest in real property; a real property interest can be granted only by recognized words of conveyance to someone who is a party to the written conveyance.

The Seventh District assumed that the Stranger Rule applies in Ohio but held that it did not apply when the deed reservation reflected a "preexisting" interest. But the single Ohio precedent on which the Seventh District relied does not support this conclusion. In *The Akron Cold Spring Co. v. Ely,* 18 Ohio App. 74 (9th Dist. 1923), the deed conveyed property "subject to * * * all right of the Akron Spring Company to the spring of water on said land, together with not exceeding 60/100 of an acre of land." The *Akron Cold Spring* court acknowledged that this could not be a valid conveyance to the Akron Spring Company, which was not a party to the deed; the court interpreted it, however, as an exception to the conveyance in favor of the grantor, which the grantor then later conveyed by valid, recorded deed to the Akron Spring Company. And, in any event, the Stranger Rule discussion was *dicta* because the *Akron Cold Spring* court held that the Akron Cold Spring Company had adversely possessed the rights in question anyway. Thus, the *Akron Cold Spring* decision provides no support for the Seventh District's holding in this case.

To be sure, the Stranger Rule may not be applicable when a deed references a preexisting, valid, recorded interest in the property at issue. But that is not because there is a preexisting-interest exception to the rule. It is because the earlier grantee of some interest in the property is not a *stranger* to title at all – he is the holder of a recorded interest in the chain of title. So, when a later deed references that preexisting, recorded interest, the later deed is not conveying any interest to a stranger; it is acknowledging and references an already existing,

recorded interest. The Stranger Rule comes into play where – as here – the deed's reservation references some purported interest missing from the chain of title.

Under the Seventh District's reasoning, it is easy to foresee mischief and difficult to know where it might stop. A grantor could add reservations or exceptions to a deed in favor of third parties that appear nowhere in the chain of title. The grantee or a title examiner could reasonably ignore them as ineffective because they are not in the chain of title. But in the Seventh District, at least, they might in fact be effective if the grantor or a third party claims a "preexisting" verbal agreement corresponding to the reservation. And, at that point, the written chain of title becomes merely a starting point for ascertaining interests in real property – rather than the starting and ending point it is supposed to be.

CONCLUSION

Ascent respectfully requests that this Court grant jurisdiction and reverse the judgment of the Harrison County Court of Appeals.

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Jurisdiction of Appellant Ascent Resources – Utica, LLC has been served by e-mail on this 12th day of February, 2021 to:

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/s/ Matthew C. Blickensderfer

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IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
HARRISON COUNTY

PATRICIA CAROL SMITH, et al.,

Plaintiffs-Appellants,

v.

COLLECTORS TRIANGLE, LTD., et al.,

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 19 HA 0010

Civil Appeal from the
Court of Common Pleas of Harrison County, Ohio
Case No. CVH-2019-0039

BEFORE:
Cheryl L. Waite, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Reversed and Remanded.

Atty. Sara E. Fanning, Roetzel & Andress, LPA, 41 South High Street, Huntington Center, 21st Floor, Columbus, Ohio 43215 and *Atty. Richard S. Mitchell*, Roetzel & Andress, LPA, 1375 East Ninth Street, One Cleveland Center, 10th Floor, Cleveland, Ohio 44114 and *Atty. David J. Wigham* and *Atty. Emily K. Anglewicz*, Roetzel & Andress, LPA, 222 South Main Street, Suite 400, Akron, Ohio 44308, for Plaintiffs-Appellants

Atty. Andrew P. Lycans and *Atty. Eric T. Michener*, Critchfield, Critchfield & Johnston, LTD, 225 North Market Street, P. O. Box 599, Wooster, Ohio 44691, for Defendants-Appellees Collectors Triangle, Ltd.

Atty. Nathan D. Vaughn and *Atty. Giuseppe Ionno*, Kimble Company, 3596 S.R. 39 NW, Dover, Ohio 44622, for Defendants-Appellees ESK ORI, LLC, GDK ORI, LLC, GWK ORI, LLC, JEM ORI, LLC, KBK ORI, LLC, and RHDK Oil & Gas, LLC.

Atty. Kevin Colosimo, *Atty. Christopher Rogers*, and *Atty. Daniel P. Craig*, Frost Brown Todd, LLC, Union Trust Building, 501 Grant street, Suite 800, Pittsburgh, Pennsylvania 15219, for Defendant-Appellee Ascent Resources-Utica, LLC.

Dated: September 28, 2020

WAITE, P.J.

{¶1} Appellants Patricia Carol Smith, Catherine Finney, Agnes Worrell, and Doug Worrell appeal an August 27, 2019 Harrison County Court of Common Pleas judgment entry which granted a Civ.R. 12(B)(6) motion to dismiss the complaint filed by Appellees Ascent Resources Utica LLC, "Collectors Triangle" aka "Collector's Triangle," ESK ORI LLC, GDK ORI LLC, GWK ORI LLC, KBK ORI LLC, JEM ORI LLC, RHDK ORI LLC. Appellants argue that the court's decision is erroneous for three reasons. First, Appellants contend that Appellees' arguments as to the 1998 Sheriff's Deed amount to an improper collateral attack on the trial court's partition order. Second, the Stranger Rule to a deed does not apply where the so-called stranger owns an interest before the conveying deed is executed. Third, the 2006 General Warranty Deed conveyed only a portion of what Appellants obtained through the 1998 Sheriff's Deed to Collector's Triangle. For the reasons provided, Appellants' arguments have merit and the judgment of the trial court is reversed and the matter is remanded for further proceedings consistent with this Opinion.

Factual and Procedural History

{¶2} The instant action involves property that was initially owned by Ross Harris. The property includes two tracts of land: 103.75 acres and 63.7 acres. It appears that this appeal involves only the 63.7 acre tract. On February 2, 1984, Harris entered into an oil and gas lease with Floyd Kimble. Kimble drilled a well referred to as the "Harris Well" which began producing in 1987. In addition to the royalties associated with the well, Kimble agreed to provide the Harris house with free gas.

{¶3} On January 21, 1988, Harris died intestate and his estate was divided equally between his two children, Catherine Finney and Mildred I. Worrell. According to Appellants, the parties orally agreed that Mildred and her husband, Adrian, would receive the oil and gas royalties from the 63.7 acre tract. It is unclear whether there was any agreement as to the remaining 103.75 acre tract.

{¶4} On November 24, 1992, Mildred and Adrian conveyed their one-half interest in the property to their three children (Robert, Ross, and Patricia) in equal shares, retaining a life estate in a one-acre residence located on the 63.7 acre property. After these conveyances, Catherine owned a one-half interest in the property, Robert Worrell owned a one-sixth interest, Ross Worrell owned a one-sixth interest, and Patricia Smith owned a one-sixth interest.

{¶5} Sometime in 1997 a dispute arose between Catherine and the Worrell children regarding who was responsible for the farming and maintenance of the property. The dispute led to a partition complaint filed on November 26, 1997.

1997 Partition Action

{¶6} The partition complaint sought a division of the property among Catherine and the Worrell children. The complaint also sought reservation of a life estate in favor of Mildred and Adrian for a one-acre section of the property where their existing house was situated. However, on February 6, 1998, a motion for default judgment was filed against Mildred and Adrian, as they had not filed an answer. The trial court granted this motion and entered default judgment against Mildred and Adrian.

{¶7} The court ultimately determined that the property could not be fairly divided and ordered a sale of the property. On May 14, 1998, a Sheriff's Deed pertaining to the 63.7 acre tract was executed. Despite the fact that default had been entered against Mildred and Adrian, the deed provided, in relevant part:

> EXCEPTING AND RESERVING UNTO Adrian Worrell and Mildred I. Worrell a life estate in the residence situate on the above described premises, being the tract consisting of 63 acres, 2 rods, and 37 perches, an unsurveyed one (1) acre square surrounding the said residence, and ingress to and egress from the said residence for and during the natural lifetimes of Adrian Worrell and Mildred I. Worrell.
>
> FURTHER EXCEPTING AND RESERVING unto Adrian Worrell and Mildred I. Worrell the right to receive all royalties payable under a certain oil and gas lease and any extension or modification thereof, said lease being recorded in Lease Volume 69, Page 79, Records of Harrison County, Ohio.

> FURTHER EXCEPTING AND RESERVING unto Adrian Worrell and Mildred I. Worrell the right to receive such gas as produced by the existing well free of charge for use at their residence.

(6/13/19 Motion to Dismiss, Exh. A.)

{¶8} The 63.7 acre property was sold to Appellee Collector's Triangle in accordance with the Sheriff's Deed, and the deed was recorded by Appellee.

2006 General Warranty Deed

{¶9} On March 4, 2005, Mildred died. Shortly thereafter, Adrian moved into an assisted living facility. Collector's Triangle approached Patricia Worrell and inquired whether the family would consider terminating Adrian's life estate in the one-acre property. On March 24, 2006, the life estate was terminated through a general warranty deed. In relevant part, the deed stated:

> **KNOW ALL MEN BY THESE PRESENTS, Adrian Worrell**, an unmarried person, (the "Grantor"), for valuable consideration paid, grants, with general warranty covenants, to Collector's Triangle, Ltd., an Ohio limited liability company, whose tax mailing address is P.O. Box 473, Sugarcreek, Ohio 44681 (the "Grantee"), all of his interest in the real property described on Exhibit A (the "Property"), being an estate for life in the residence located on the Property as set forth in a certain Sheriff's Deed in Partition recorded in Official Record Volume 52, Page 163.
>
> * * *

The Property is conveyed subject to, and there are excepted from the general warranty covenants, the following:

1. All easements, leases, covenants, conditions and restrictions of record

* * *

GRANTOR ALSO CONVEYS TO GRANTEE, ITS SUCCESSORS AND ASSIGNS, ALL OF GRANTOR'S RIGHT TO RECEIVE ROYALTIES AND FREE GAS IN CONNECTION WITH A CERTAIN OIL AND GAS WELL LOCATED ON THE PROPERTY AND DRILLED PURSUANT TO THE LEASE RECORDED IN LEASE VOLUME 69, PAGE 79, IN THE RECORDER'S OFFICE, HARRISON COUNTY, OHIO.

{¶10} Sometime thereafter, Ascent began horizontal drilling, which resulted in new production. Ascent paid royalties resulting from the new drilling to Collector's Triangle, and not to Appellants, which led to the instant action.

2019 Complaint

{¶11} On May 13, 2019, Appellants filed a complaint against Doug Worrell, Agnes Worrell, Collector's Triangle, ESK ORI LLC, GDK ORI LLC, KBK ORI LLC, JEM ORI LLC, RHDK Oil and Gas LLC, and Ascent Resources - Utica LLC. The complaint sought the following: a declaratory judgment that Appellants own the royalty interests at issue and are entitled to receive those royalties; quiet title; breach of contract (solely against Ascent); and conversion and accounting (solely against Ascent.) On June 3, 2010, an answer was filed on behalf of all defendants except Collector's Triangle.

{¶12} On June 13, 2019, Ascent filed a Civ.R. 12(B)(6) motion to dismiss the complaint in its entirety. In this motion Ascent argued that any claim that the Sheriff's Deed vested certain rights in Mildred and Adrian is barred by *res judicata.* Ascent also argued that Mildred and Adrian were strangers to the Sheriff's Deed, thus the deed could not reserve any interests in their favor. Finally, Ascent argued that Adrian conveyed all of his interests in the property through the 2006 General Warranty Deed. Collector's Triangle filed a motion to join the motion to dismiss.

{¶13} On June 26, 2019, Appellants filed an amended complaint. The amended complaint contained additional facts surrounding the oral agreement as to a division of royalties between Mildred and Patricia, but did not add any new legal claims.

{¶14} On August 27, 2019, the trial court granted Ascent's Civ.R. 12(B)(6) motion to dismiss. The court determined that even if the 1998 Sheriff's Deed properly reserved property and royalty interests in favor of Mildred and Adrian, any claim to those interests was extinguished by the 2006 General Warranty Deed. This timely appeal followed.

Civ.R. 12(B)(6)

{¶15} This action was dismissed pursuant to Civ.R. 12(B)(6). "A Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted tests only the legal sufficiency of the complaint." *Youngstown Edn. Assn. v. Kimble*, 2016-Ohio-1481, 63 N.E.3d 649, ¶ 11 (7th Dist.), citing *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 605 N.E.2d 378 (1992).

{¶16} When reviewing a Civ.R. 12(B)(6) motion, "the court must accept the factual allegations contained in the complaint as true and draw all reasonable inferences from these facts in favor of the plaintiff." *Kimble, supra*, at ¶ 11, citing *Mitchell v. Lawson Milk*

Co., 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). In order to grant a Civ.R. 12(B)(6) motion, "it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus. However, "[i]f there is a set of facts consistent with the complaint that would allow for recovery, the court must not grant the motion to dismiss." *Kimble, supra*, at ¶ 11, citing *York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 144, 573 N.E.2d 1063 (1991).

{¶17} A Civ.R. 12(B)(6) claim is reviewed *de novo*. *Ford v. Baska*, 2017-Ohio-4424, 93 N.E.3d 195, ¶ 6 (7th Dist.), citing *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5.

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED BY DISMISSING APPELLANTS' FIRST AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

{¶18} Appellants contend that Appellees' arguments regarding the Sheriff's Deed are improper as they attempt to attack the earlier partition order. As the Sherriff's Deed was accepted by the trial court at the time, they argue that it inherently became part of the court's order. Because Appellees not only had notice of the existence and contents of the Sherriff's Deed but possessed and recorded the deed without ever attempting to attack its provisions, any argument pertaining to the validity of the Sheriff's Deed constitutes an improper collateral attack on the trial court's order.

{¶19} In response, Appellees contend that the Sherriff's Deed was not part of the trial court's order in the partition action. Even so, Appellees argue that they could not appeal the order because they were not a party to the partition action. Appellees also argue that it is Appellants who are barred by *res judicata* from seeking to relitigate the issue of Mildred and Adrian's interests in the property.

{¶20} Again, this matter was dismissed as a result of a Civ.R. 12(B)(6) motion. There are certain defenses that cannot be raised in a motion to dismiss. Relevant to this matter, the Ohio Supreme Court has held that "the defense of *res judicata* may not be raised by motion to dismiss under Civ.R. 12(B)." *State ex rel. Freeman v. Morris*, 62 Ohio St.3d 107, 109, 579 N.E.2d 702, 703 (1991). Thus, Appellees' reliance on *res judicata* within their Civ.R. 12(B)(6) motion is misplaced. However, as to Appellants' argument regarding collateral estoppel, these arguments may properly be raised in defense of a Civ.R. 12(B)(6) motion. See *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550.

{¶21} This matter is governed by Civ.R. 12(B)(6). We are limited to a review of the complaint and the amended complaint. All facts asserted within the complaint and amended complaint must be accepted as true. With that understanding, resolution of this matter involves the analysis of three issues: whether the 1998 Sheriff's Deed properly reserved oil and gas interests in favor of Mildred and Adrian, whether Appellee Collector's Triangle waived their ability to contest the rights granted in the 1998 Sheriff's Deed, and whether the 2006 General Warranty Deed conveyed all of the rights obtained through the 1998 Sheriff's Deed.

{¶22} Beginning with the 1998 Sheriff's Deed, a question remains as to what rights were conferred. Appellants allege within their amended complaint that Mildred and Patricia had orally agreed at some point before the partition action was filed that Mildred and Adrian were to receive the oil and gas royalties stemming from the 63.7 acre tract. Although the record before us is limited, it does appear that Mildred and Adrian received these oil and gas royalties during the relevant time period.

{¶23} Appellee Collector's Triangle does not dispute that it was Appellants who received the royalties from the time the Sheriff's Deed was executed until the dispute over payment of royalties following the execution of the General Warranty Deed terminating Adrian's life estate. This dispute appears to have begun in 2008. Thus, in addition to having actual knowledge of this reservation through the recorded deed, Collector's Triangle knew that Appellants had been receiving any and all royalties. Collector's Triangle made no effort whatsoever to dispute the provision nor did it seek to obtain any portion of the royalties.

{¶24} Appellees contend that if an oral agreement existed vesting all royalty payments to Mildred and Adrian, it would be barred by the statute of frauds. The Ohio Supreme Court addressed this issue in *Nonamaker v. Amos,* 73 Ohio St. 163, 76 N.E. 949 (1905). The *Nonamaker* Court reviewed whether an oral agreement regarding royalty interests raises a statute of frauds issue. The Court held that an agreement to increase or decrease a royalty division stemming from an oil lease is not within the statute of frauds because "when the parties entered into the parol contract, * * * they were not contracting for an interest in or concerning real estate, but for a division of personal property in proportions different from those named in the written lease." *Id.* at 171.

{¶25} Taking all of the allegations in the complaint as true, the limited evidence suggests that the oral agreement at issue was not a contract dealing with a new interest in the royalties, but modified the existing proportions already reserved. The exact parameters of the agreement are unknown, particularly whether the agreement pertained only to the tract at issue or the property as a whole. However, it is clear that Catherine and Mildred jointly inherited all royalty interests from Ross Harris. Thus, the oral agreement did not create a new interest in favor of Mildred, it merely changed the royalty proportions as between Mildred and Patricia. This oral agreement does not fall within the prohibition of the statute of frauds.

{¶26} Appellees argue that Mildred and Adrian were strangers to the 1998 Sheriff's Deed, meaning they were not a grantor or grantee in the deed and so, the deed could not reserve interests in their favor.

{¶27} The Stranger Rule was first announced in *The Akron Cold Spring Co. v. Ely,* 18 Ohio App. 74 (9th Dist.1923). The *Ely* court stated "a reservation in a deed is ineffectual to create title in a stranger to the conveyance; a reservation is something issuing from or coming out of the thing granted, and must be to the grantor or party executing the conveyance and not to a stranger." *Id.* at 80. However, *Ely* acknowledged an exception existed where an interest was conveyed to a party before the deed was executed. *Id.* at 78-79. In other words, if the grantor conveys an interest to a third party and then executes a deed concerning the property to the grantee, the third party is not a stranger to the deed because the conveyed interest predates the deed.

{¶28} Appellees contend that this case is analogous to *In re Allen*, 415 B.R. 310 (Bankr. N.D. Ohio 2009). *In re Allen* involved a conveyance of land to a trust where

grantor reserved a life estate in favor of a third party before grantor filed for bankruptcy. *Id.* at 313. The *Allen* court determined that the third party was a stranger to the deed because there was no evidence that his rights existed before the deed containing the reservation. *Id.* at 317. Contrary to Appellees' arguments, however, this case actually supports Appellants' position, as the court acknowledged that pre-existing rights were not subject to the Stranger Rule. Unlike *Allen,* in the instant matter reveals evidence that Mildred and Adrian had pre-existing rights in the disputed royalty interests.

{¶29} Because we must accept as true the existence of the oral agreement, we must also deal with the question of whether Appellee waived its rights to attack the 1998 Sheriff's Deed. This record establishes that Collector's Triangle was indirectly a party to the partition action. While Collector's Triangle is not a third-party beneficiary, it was clearly the party who benefitted from the partition and sale. Importantly, Collector's Triangle signed the deed and recorded it on June 1, 1998.

{¶30} In *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio- 5024, 875 N.E.2d 550, the Ohio Supreme Court held that a prior judgment may only be collaterally attacked if the trial court lacked jurisdiction in the original action or if the judgment was the result of fraud. The *Ohio Pyro* Court noted that the ability to collaterally attack a judgment is limited and disfavored, because judgments are meant to be final. *Id.* at ¶ 22, citing *Coe v. Erb,* 59 Ohio St. 259, 267-268, 52 N.E. 640 (1898).

{¶31} The Court held that "[a]lthough res judicata principles apply only to parties and those in privity with them, the collateral-attack doctrine applies to both parties and nonparties, contrary to Ohio Pyro's position that the collateral-attack doctrine cannot

apply to a nonparty." *Id.* at ¶ 35, citing *Moor v. Parsons*, 98 Ohio St. 233, 243, 120 N.E. 305 (1918); *Plater v. Jefferson*, 136 N.E.2d 111 (8th Dist.1956).

{¶32} In *Jefferson,* an exception to this principle was announced. Strangers to the court order who, "if the judgment were given full credit and effect, would be prejudiced in regard to some pre-existing right, * * * are permitted to impeach the judgment. Being neither parties to the action, nor entitled to manage the cause nor appeal from the judgment, they are by law allowed to impeach it whenever it is attempted to be enforced against them so as to effect rights or interests acquired prior to its rendition." *Id.* at 113.

{¶33} Appellees were not parties to the partition action in the instant case. Regardless, they are prohibited from attacking the original court order unless they can demonstrate that that they have pre-existing rights that would be prejudiced by enforcement of that order. Collector's Triangle arguably may be prejudiced by the inability to receive royalties. However, to the extent they argue entitlement to that right, it did not pre-exist the court's partition order in this case. Thus, they cannot collaterally attack the partition order.

{¶34} Additionally, Appellees did not argue at any point during this action that the trial court lacked jurisdiction or that the judgment was procured through fraud. Instead, they contend the Sheriff's Deed does not form part of the trial court's judgment, and even if it is part and parcel of the judgment, it was erroneous, because the sheriff lacked the authority to grant Mildred and Adrian any rights to the royalty interests. Due to the limited nature of the record before us, we are unable to fully determine whether the Sheriff's Deed forms part of the trial court's order in the partition. On May 7, 1998, the trial court entered an order confirming the sale and proceeds which stated, in relevant part, "[t]he

court having examined the return of the sheriff and the sales having been made to James C. Lottes and Eddie Yoder as to Sale 1 and [Collector's Triangle] as to Sale 2. The sales are hereby confirmed and approved in all respects by this court." (5/7/98 J.E.). The court then ordered the Sheriff to execute and deliver the deeds. This property concerns "sale 2."

{¶35} From the court's language, it appears that all aspects of the sale known by the court were approved at confirmation. However, it is unclear whether the royalty reservation to Mildred and Adrian was known and approved by the trial court at the time it accepted the sale and ordered the Sheriff's Deed. The Sheriff's Deed was executed one week later on May 14, 1998. Accepting the allegations of the complaint as true, it should have been known by the trial court when it approved "all aspects of the sale." If so, then the royalty reservation is part of the trial court's order, which cannot be collaterally attacked.

{¶36} Instead of analyzing critical issues surrounding the execution and recording of the 1998 Sheriff's Deed, the trial court focused its analysis on the 2006 General Warranty Deed, finding that it conveyed all royalties to Collector's Triangle. However, a review of the 2006 General Warranty Deed reveals that Adrian conveyed less than what was reserved to him in the 1998 Sheriff's Deed.

{¶37} In relevant part, the 1998 Sheriff's Deed specifically stated:

> FURTHER EXCEPTING AND RESERVING unto Adrian Worrell and Mildred I. Worrell the right to receive *all royalties payable under a certain oil and gas lease and any extension or modification thereof*, said lease being

recorded in Lease Volume 69, Page 79, Records of Harrison County, Ohio. (Emphasis added.)

(6/26/19 Amended Complaint, Exh. 1.) This language clearly reserved all royalty interests in the lease, as well as future modifications and extensions of the lease.

{¶38} In comparison, the 2006 General Warranty Deed stated, in relevant part,

GRANTOR ALSO CONVEYS TO GRANTEE, ITS SUCCESSORS AND ASSIGNS, ALL OF GRANTOR'S RIGHT TO RECEIVE *ROYALTIES AND FREE GAS IN CONNECTION WITH A CERTAIN OIL AND GAS WELL LOCATED ON THE PROPERTY AND DRILLED PURSUANT TO THE LEASE* RECORDED IN LEASE VOLUME 69, PAGE 79, IN THE RECORDER'S OFFICE, HARRISON COUNTY, OHIO. (Emphasis added)

{¶39} The language used in the 2006 General Warranty Deed specifically limited the conveyance to those royalties in connection with the Harris Well. In contrast, the 1998 Sheriff's Deed used broad language reserving royalties from any well drilled pursuant to the lease. Thus, the plain and unambiguous language of the 2006 General Warranty Deed conveyed only the oil and gas that is produced by the Harris Well, and not the subsequent drilling that is at issue in this action.

{¶40} Although Appellees encourage this Court to construe the 2006 conveyance broadly, the language is clear and unambiguous. The express language of the 1998 Sheriff's Deed clearly reserved all royalty rights deriving from the lease and any extension or modification, whereas the 2006 General Warranty Deed conveyed only the oil and gas in connection with the Harris Well, without extension or modification.

{¶41} This matter was dismissed on the pleadings, based on the determination that Appellants have failed to raise any set of facts on which to base a valid claim. However, our review of the filings reveals that Appellants have raised allegations, which must be accepted as true, that could establish a viable claim for relief. The 2006 General Warranty Deed does not appear to convey all rights obtained through the 1998 Sheriff's Deed. There remains a question as to whether the Sheriff's Deed may now be attacked. Hence, Appellants have presented a claim upon which relief can be granted,

{¶42} As such, Appellants' sole assignment of error has merit and is sustained.

Conclusion

{¶43} Appellants argue that the court's decision to grant Appellees' Civ.R. 12(B)(6) motion is erroneous as their mother and father obtained a reservation of all royalty rights in the 1998 Sheriff's Deed and conveyed only a portion of those interests in a 2006 General Warranty Deed. For the reasons provided, Appellants' arguments have merit and are sustained. The judgment of the trial court is reversed and the matter is remanded for further proceedings consistent with this Opinion.

Donofrio, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is sustained and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Harrison County, Ohio, is reversed. We hereby remand this matter to the trial court for further proceedings according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellees.

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 CHERYL L. WAITE

JUDGE GENE DONOFRIO

JUDGE DAVID A. D'APOLITO

NOTICE TO COUNSEL

This document constitutes a final judgment entry.

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
HARRISON COUNTY

PATRICIA CAROL SMITH et al.,

Plaintiffs-Appellants,

v.

COLLECTORS TRIANGLE, LTD. et al.,

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 19 HA 0010

Appellants' Application for Partial Reconsideration

BEFORE:
Cheryl L. Waite, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Denied.

Atty. Sara E. Fanning, Roetzel & Andress, LPA, 41 South High Street, Huntington Center, 21st Floor, Columbus, Ohio 43215 and *Atty. David J. Wigham* and *Atty. Emily K. Anglewicz*, Roetzel & Andress, LPA, 222 South Main Street, Suite 400, Akron, Ohio 44308, for Plaintiffs-Appellants

Atty. Andrew P. Lycans and *Atty. Eric T. Michener*, Critchfield, Critchfield & Johnston, LTD, 225 North Market Street, P. O. Box 599, Wooster, Ohio 44691, for Defendants-Appellees Collectors Triangle, Ltd.

Atty. Nathan D. Vaughn and *Atty. Giuseppe Ionno*, Kimble Company, 3596 S.R. 39 NW, Dover, Ohio 44622, for Defendants-Appellees ESK ORI, LLC, GDK ORI, LLC, GWK ORI, LLC, JEM ORI, LLC, KBK ORI, LLC, and RHDK Oil & Gas, LLC.

Atty. Kevin Colosimo, *Atty. Christopher Rogers*, and *Atty. Daniel P. Craig*, Frost Brown Todd, LLC, Union Trust Building, 501 Grant street, Suite 800, Pittsburgh, Pennsylvania 15219, for Defendant-Appellee Ascent Resources-Utica, LLC.

Dated: December 31, 2020

PER CURIAM.

{¶1} Appellants Patricia Carol Smith, Catherine Finney, Agnes Worrell, and Doug Worrell have filed a motion for partial reconsideration of our decision in *Smith v. Collectors Triangle, Ltd.*, 7th Dist. Harrison No. 19 HA 0010, 2020-Ohio-4823. Appellants argue that in paragraph three of our Opinion we erroneously describe the acreage involved in the appeal. For the reasons provided, Appellants' motion for partial reconsideration is denied.

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

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

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

{¶3} Here, Appellants seek partial reconsideration of our Opinion pertaining to land acreage descriptions. The initial filing in this matter involved two parcels of property. Appellants contend that, contrary to our Opinion, their appeal concerned both the 63.7 and the 103.75 acre tracts of land.

{¶4} This matter came to us on a motion to dismiss in the trial court and therefore, has a limited factual record. In our underlying Opinion we noted that it was unclear whether the oral agreement at issue in the matter applied to the 103.75 acre tract due to this limited record and the fact that the larger tract of land was not part of the appeal.

{¶5} The limited evidence within the record shows that the original property, which included both tracts of land, was sold during partition proceedings. The 63.7 acre tract was eventually sold to Collector's Triangle by means of a 1998 Sheriff's Deed. The 103.75 acre tract of land was sold in a separate sheriff's deed. There is no evidence within the record to suggest that the grantee of the deed to the larger tract is associated with Collector's Triangle. The grantee was not named as a party in the instant complaint. As such, neither the trial court nor this Court has the ability to declare that the 103.75 tract of land is bound to the oral agreement alleged in this matter.

{¶6} Importantly, while the amended complaint alleged that the oral agreement and the oil and gas lease applies to both tracts of land, this is immaterial and irrelevant to

the matter at hand. The issues presented to the trial court and on appeal to this Court were limited to whether the 1998 Sheriff's Deed can be collaterally attacked to challenge what rights were retained by Mildred and Adrian Worrell, and the extent to which those rights were then conveyed to Collector's Triangle through the 2006 General Warranty Deed. Appellants concede that neither the 1998 Sheriff's Deed nor the 2006 General Warranty Deed apply to the 103.75 acre tract they now reference.

{¶7} Appellants attempt to compare this case to *Neuhart v. TransAtlantic Energy Corp.*, 7th Dist. Noble No. 17 NO 0449, 2018-Ohio-5115, appeal not allowed, 155 Ohio St.3d 1421, 2019-Ohio-1421, 120 N.E.3d 867, ¶ 10 (2019). However, the issue in that case is completely inapposite. In *Neuhart,* the parties created confusion as to the property descriptions by labeling them and interchangeably using the labels during the trial court proceedings. Furthering this confusion, the "Neuhart Well" was apparently located on the Waldie property, not the Neuhart property. We remanded the matter to allow the parties to clarify and appropriately label the properties involved.

{¶8} Here, there is no such confusion. This case involves 63.7 acres that passed to Collector's Triangle by means of the 1998 Sheriff's Deed. The 103.75 property was sold to a party not involved in these proceedings through a separate and distinct sheriff's deed. While the alleged oral agreement may apply to the 103.75 acre tract, that is irrelevant to these proceedings. If Appellants wish to litigate whether the oral agreement they allege applies to the larger parcel, they must file an action naming the appropriate parties and raise an issue that relates to that property.

{¶9} For these reasons, Appellants' motion for partial reconsideration is denied.

JUDGE CHERYL L. WAITE

JUDGE GENE DONOFRIO

JUDGE DAVID A. D'APOLITO

NOTICE TO COUNSEL

This document constitutes a final judgment entry.

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
HARRISON COUNTY

PATRICIA CAROL SMITH et al.,

Plaintiffs-Appellants,

v.

COLLECTORS TRIANGLE, LTD. et al.,

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 19 HA 0010

Appellees' Application for Reconsideration and
Application for En Banc Consideration

BEFORE:
Cheryl L. Waite, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Denied.

Atty. Sara E. Fanning, Roetzel & Andress, LPA, 41 South High Street, Huntington Center, 21st Floor, Columbus, Ohio 43215 and *Atty. Richard S. Mitchell*, Roetzel & Andress, LPA, 1375 East Ninth Street, One Cleveland Center, 10th Floor, Cleveland, Ohio 44114 and *Atty. David J. Wigham* and *Atty. Emily K. Anglewicz*, Roetzel & Andress, LPA, 222 South Main Street, Suite 400, Akron, Ohio 44308, for Plaintiffs-Appellants

Atty. Andrew P. Lycans and *Atty. Eric T. Michener*, Critchfield, Critchfield & Johnston, LTD, 225 North Market Street, P. O. Box 599, Wooster, Ohio 44691, for Defendants-Appellees Collectors Triangle, Ltd.

Atty. Nathan D. Vaughn and *Atty. Giuseppe Ionno*, Kimble Company, 3596 S.R. 39 NW, Dover, Ohio 44622, for Defendants-Appellees ESK ORI, LLC, GDK ORI, LLC, GWK ORI, LLC, JEM ORI, LLC, KBK ORI, LLC, and RHDK Oil & Gas, LLC.

Atty. Kevin Colosimo, *Atty. Christopher Rogers*, and *Atty. Daniel P. Craig*, Frost Brown Todd, LLC, Union Trust Building, 501 Grant street, Suite 800, Pittsburgh, Pennsylvania 15219, for Defendant-Appellee Ascent Resources-Utica, LLC.

Dated: December 31, 2020

PER CURIAM.

{¶1} Appellees Collectors Triangle, Ltd., Ascent Resources Utica LLC, ESK ORI LLC, GDK ORI LLC, GWK ORI LLC, KBK ORI LLC, JEM ORI LLC, RHDK ORI LLC. (collectively referred to as "Appellees") seek reconsideration of our Opinion in *Smith v. Collectors Triangle, Ltd.*, 7th Dist. Harrison No. 19 HA 0010, 2020-Ohio-4823. Appellees also seek en banc review of our determination that the 2006 General Warranty Deed did not convey all of the rights in the oil and gas royalty interests of Appellants Patricia Carol Smith, Catherine Finney, Agnes Worrell, and Doug Worrell's (collectively referred to as "Appellants"). Appellees contend that this holding conflicts with a case from this Court that was subsequently released, *Richards v. Hilligas,* 7th Dist. Harrison No. 19 HA 0008, 2020-Ohio-4717. For the reasons provided, Appellees' motion for reconsideration and en banc consideration is denied.

{¶2} The standard for reviewing an application for reconsideration pursuant to App.R. 26(A) is whether the application "calls to the attention of the court an obvious error in its decision or raises an issue for consideration that was either not considered at all or

was not fully considered by the court when it should have been." *Columbus v. Hodge*, 37 Ohio App.3d 68, 523 N.E.2d 515 (10th Dist.1987), paragraph one of the syllabus.

> An application for reconsideration is not designed for use in instances where a party simply disagrees with the conclusions reached and the logic used by an appellate court. App.R. 26 provides a mechanism by which a party may prevent miscarriages of justice that could arise when an appellate court makes an obvious error or renders an unsupportable decision under the law.

State v. Owens, 112 Ohio App.3d 334, 336, 678 N.E.2d 956 (11th Dist.1996).

{¶3} Pursuant to App.R. 26(A)(2)(a),

> Upon a determination that two or more decisions of the court on which they sit are in conflict, a majority of the en banc court may order that an appeal or other proceeding be considered en banc. The en banc court shall consist of all fulltime judges of the appellate district who have not recused themselves or otherwise been disqualified from the case. Consideration en banc is not favored and will not be ordered unless necessary to secure or maintain uniformity of decisions within the district on an issue that is dispositive in the case in which the application is filed.

{¶4} This case presents a complicated factual and procedural history, detailed within our Opinion as follows:

The instant action involves property that was initially owned by Ross Harris. The property includes two tracts of land: 103.75 acres and 63.7 acres. It appears that this appeal involves only the 63.7 acre tract. On February 2, 1984, Harris entered into an oil and gas lease with Floyd Kimble. Kimble drilled a well referred to as the "Harris Well" which began producing in 1987. In addition to the royalties associated with the well, Kimble agreed to provide the Harris house with free gas.

On January 21, 1988, Harris died intestate and his estate was divided equally between his two children, Catherine Finney and Mildred I. Worrell. According to Appellants, the parties orally agreed that Mildred and her husband, Adrian, would receive the oil and gas royalties from the 63.7 acre tract. It is unclear whether there was any agreement as to the remaining 103.75 acre tract.

On November 24, 1992, Mildred and Adrian conveyed their one-half interest in the property to their three children (Robert, Ross, and Patricia) in equal shares, retaining a life estate in a one-acre residence located on the 63.7 acre property. After these conveyances, Catherine owned a one-half interest in the property, Robert Worrell owned a one-sixth interest, Ross Worrell owned a one-sixth interest, and Patricia Smith owned a one-sixth interest.

Sometime in 1997 a dispute arose between Catherine and the Worrell children regarding who was responsible for the farming and maintenance of

the property. The dispute led to a partition complaint filed on November 26, 1997.

1997 Partition Action

The partition complaint sought a division of the property among Catherine and the Worrell children. The complaint also sought reservation of a life estate in favor of Mildred and Adrian for a one-acre section of the property where their existing house was situated. However, on February 6, 1998, a motion for default judgment was filed against Mildred and Adrian, as they had not filed an answer. The trial court granted this motion and entered default judgment against Mildred and Adrian.

The court ultimately determined that the property could not be fairly divided and ordered a sale of the property. On May 14, 1998, a Sheriff's Deed pertaining to the 63.7 acre tract was executed. Despite the fact that default had been entered against Mildred and Adrian, the deed provided, in relevant part:

EXCEPTING AND RESERVING UNTO Adrian Worrell and Mildred I. Worrell a life estate in the residence situate on the above described premises, being the tract consisting of 63 acres, 2 rods, and 37 perches, an unsurveyed one (1) acre square surrounding the said residence, and ingress to and egress from the said residence for and during the natural lifetimes of Adrian Worrell and Mildred I. Worrell.

FURTHER EXCEPTING AND RESERVING unto Adrian Worrell and Mildred I. Worrell the right to receive all royalties payable under a certain oil and gas lease and any extension or modification thereof, said lease being recorded in Lease Volume 69, Page 79, Records of Harrison County, Ohio.

FURTHER EXCEPTING AND RESERVING unto Adrian Worrell and Mildred I. Worrell the right to receive such gas as produced by the existing well free of charge for use at their residence.

(6/13/19 Motion to Dismiss, Exh. A.)

The 63.7 acre property was sold to Appellee Collector's Triangle in accordance with the Sheriff's Deed, and the deed was recorded by Appellee.

2006 General Warranty Deed

On March 4, 2005, Mildred died. Shortly thereafter, Adrian moved into an assisted living facility. Collector's Triangle approached Patricia Worrell and inquired whether the family would consider terminating Adrian's life estate in the one-acre property. On March 24, 2006, the life estate was terminated through a general warranty deed. In relevant part, the deed stated:

KNOW ALL MEN BY THESE PRESENTS, Adrian Worrell, an unmarried person, (the "Grantor"), for valuable consideration paid, grants, with general warranty covenants, to Collector's Triangle, Ltd., an Ohio limited liability

company, whose tax mailing address is P.O. Box 473, Sugarcreek, Ohio 44681 (the "Grantee"), all of his interest in the real property described on Exhibit A (the "Property"), being an estate for life in the residence located on the Property as set forth in a certain Sheriff's Deed in Partition recorded in Official Record Volume 52, Page 163.

* * *

The Property is conveyed subject to, and there are excepted from the general warranty covenants, the following:

1. All easements, leases, covenants, conditions and restrictions of record

* * *

GRANTOR ALSO CONVEYS TO GRANTEE, ITS SUCCESSORS AND ASSIGNS, ALL OF GRANTOR'S RIGHT TO RECEIVE ROYALTIES AND FREE GAS IN CONNECTION WITH A CERTAIN OIL AND GAS WELL LOCATED ON THE PROPERTY AND DRILLED PURSUANT TO THE LEASE RECORDED IN LEASE VOLUME 69, PAGE 79, IN THE RECORDER'S OFFICE, HARRISON COUNTY, OHIO.

Sometime thereafter, Ascent began horizontal drilling, which resulted in new production. Ascent paid royalties resulting from the new drilling to Collector's Triangle, and not to Appellants, which led to the instant action.

2019 Complaint

On May 13, 2019, Appellants filed a complaint against Doug Worrell, Agnes Worrell, Collector's Triangle, ESK ORI LLC, GDK ORI LLC, KBK ORI LLC, JEM ORI LLC, RHDK Oil and Gas LLC, and Ascent Resources - Utica LLC. The complaint sought the following: a declaratory judgment that Appellants own the royalty interests at issue and are entitled to receive those royalties; quiet title; breach of contract (solely against Ascent); and conversion and accounting (solely against Ascent.) On June 3, 2010, an answer was filed on behalf of all defendants except Collector's Triangle.

On June 13, 2019, Ascent filed a Civ.R. 12(B)(6) motion to dismiss the complaint in its entirety. In this motion Ascent argued that any claim that the Sheriff's Deed vested certain rights in Mildred and Adrian is barred by *res judicata.* Ascent also argued that Mildred and Adrian were strangers to the Sheriff's Deed, thus the deed could not reserve any interests in their favor. Finally, Ascent argued that Adrian conveyed all of his interests in the property through the 2006 General Warranty Deed. Collector's Triangle filed a motion to join the motion to dismiss.

On June 26, 2019, Appellants filed an amended complaint. The amended complaint contained additional facts surrounding the oral agreement as to a division of royalties between Mildred and Patricia, but did not add any new legal claims.

On August 27, 2019, the trial court granted Ascent's Civ.R. 12(B)(6) motion to dismiss. The court determined that even if the 1998 Sheriff's Deed

> properly reserved property and royalty interests in favor of Mildred and Adrian, any claim to those interests was extinguished by the 2006 General Warranty Deed. This timely appeal followed.

Smith, supra, ¶ 2-14

{¶5} Appellees now argue that we failed to consider there were two alleged oral agreements in this case. According to Appellees, our Opinion addressed only the alleged oral agreement between Patricia Smith and Mildred Worrell, where the parties agreed that Mildred and her husband, Adrian, would receive the oil and gas royalties associated with the property. Appellees contend the record discloses a second oral agreement, between Mildred and Adrian and their children. Appellees explain that Mildred and Adrian conveyed their interests in the property to their children through a 1992 General Warranty Deed. At the time of the conveyance, there was an apparent agreement that Mildred and Adrian would continue to receive the royalty interests even after signing all of their interests in the property to their children. It is this alleged second oral agreement that Appellees believe violates the statute of frauds.

{¶6} This matter came to us following a motion to dismiss granted in the trial court, and so, is factually limited. Appellees are correct that it was not clear from the limited record before us there may have been a second oral agreement. Appellants argue that this second agreement was merely a continuation of the first oral agreement. However, Appellees correctly point out that the first agreement was between Patricia and Mildred, but the second agreement was between Mildred and Adrian and their children. Thus, it constitutes a second, separate promise. Even accepting Appellees' contention as true, it does not affect our underlying decision.

{¶7} We remanded the matter to allow the trial court to determine whether the 1998 Sheriff's Deed may be collaterally attacked. The alleged agreement is only pertinent to the remand. It was unclear from the record provided to this Court whether the trial court handling the partition proceedings was alerted to the fact that the deed reserved the royalty interests in favor of Mildred and Adrian. If so, then the 1998 Sheriff's Deed is part of the court's order and cannot be collaterally attacked by this second oral agreement or in any other fashion.

{¶8} However, if the trial court finds that the 1998 Sheriff's Deed was not a part of the trial court's order in the partition proceedings, then Appellees would be able to argue that the second oral agreement violates the statute of frauds, and attack the reservations contained within that deed.

{¶9} Appellees additionally argue that our Opinion conflicts with a subsequently released case, *Richards, supra.* In *Richards,* we determined that the deed conveying the surface rights to a property did not sufficiently reserve or except the corresponding royalty interests. In accordance with established caselaw, we held that the royalty interests automatically transferred with the surface rights. *Id.* at ¶ 32, citing *Porterfield v. Bruner Land Co., Inc.*, 7th Dist. Harrison No. 16 HA 0019, 2017-Ohio-9045.

{¶10} In *Poterfield*, on which *Richards*, *supra*, relies, a limited warranty deed conveyed 160.987 acres of land. *Id.* at ¶ 2. The issue on appeal was whether the language of the deed sufficiently reserved coal, oil, and gas rights. We determined the language reserving these rights in favor of the "former grantors" was insufficient, as those rights had not previously been reserved or excepted in any deed by the former grantor. Due to this, the coal, oil, and gas rights transferred with the surface rights. *Id.* at ¶ 27.

{¶11} *Richards* and the instant case are clearly distinguishable. In *Richards* there was a clear intent to transfer the surface, but the deed lacked a specific exception or reservation language regarding the oil and gas rights. Thus, the royalty interests followed the surface rights just as in *Porterfield.*

{¶12} Importantly, this matter does not involve a transfer of surface rights. The sole mention of a surface right conveyed in the 2006 General Warranty Deed involved merely a life estate in a one acre portion of the total 63.7 acres tract, so there were no surface rights granted for the royalty interests to follow. The intent of the 2006 General Warranty Deed was to convey the one-acre life estate and the royalty interests pertaining to the Harris Well to Collector's Triangle. Because the instant case is factually distinguishable and does not invoke any facts or the specific holding of *Richards,* the cases are not in conflict and Appellees' motion for en banc consideration pursuant to App.R. 26(A)(2) is denied.

{¶13} Appellees also argue that our Opinion would operate to create a violation of R.C. 5302.04. R.C. 5302.04 states: "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."

{¶14} In our Opinion, we held that that the language used in the 2006 General Warranty Deed sufficiently reserved all oil and gas rights beyond the Harris Well royalties. That language stated:

> GRANTOR ALSO CONVEYS TO GRANTEE, ITS SUCCESSORS AND ASSIGNS, ALL OF GRANTOR'S RIGHT TO RECEIVE ROYALTIES AND

FREE GAS IN CONNECTION WITH A CERTAIN OIL AND GAS WELL LOCATED ON THE PROPERTY AND DRILLED PURSUANT TO THE LEASE RECORDED IN LEASE VOLUME 69, PAGE 79, IN THE RECORDER'S OFFICE, HARRISON COUNTY, OHIO.

Smith, supra, at ¶ 9.

{¶15} The language "in connection with a *certain oil and gas well located on the property*" is sufficient. (Emphasis added.) It clearly limits the conveyance to one certain well; the Harris Well. Contrary to Appellees' claim, this is not an instance where general language was used. The language clearly states that the rights being conveyed are connected to "a certain oil and gas well located on the property," and this language sufficiently refers to the Harris Well.

{¶16} The deed does not require extrinsic evidence to show what has not been conveyed. In *Porterfield,* we held that when a deed incorporates a prior instrument by reference, that instrument becomes part of the contract. *Id.* at ¶ 39, citing *Volovetz v. Tremco Barrier Sols, Inc.,* 2016-Ohio-7707, 74 N.E.3d 743, ¶ 26 (10th Dist.). The instruments must then be read together. *Id.*

{¶17} Here, the 2006 General Warranty Deed incorporated the original oil and gas lease by reference. Consequently, the 2006 General Warranty Deed and the oil and gas lease must be read together. By its language the lease clearly is not limited to just one certain well. It allows the entire property to be drilled and allows for oil and gas to be removed from the entire property.

{¶18} R.C. 5302.04 provides that all rights will be conveyed unless the contrary is stated in the deed. Here, the deed expressly limits the conveyance to the Harris Well.

We must give effect to the words used in the deed and the parties only referred to the rights associated with the Harris Well. If the Harris Well had not been sufficiently referenced, Appellees would be correct and it would have been unnecessary to specifically or generally enumerate each right involved within the conveyance.

{¶19} We remanded this matter for the trial court to determine whether the 1998 Sheriff's Deed can be collaterally attacked. In the event that the trial court determines that the deed was not part of the earlier judgment entry, Appellees retain the right to attack that deed, and hence, the conveyance made through the 2006 General Warranty Deed. Appellees' motion for reconsideration pursuant to App.R. 26(A)(1) is also denied.

{¶20} For the reasons provided, Appellees' motion for reconsideration and en banc consideration is denied.

JUDGE CHERYL L. WAITE

JUDGE GENE DONOFRIO

JUDGE DAVID A. D'APOLITO

NOTICE TO COUNSEL

This document constitutes a final judgment entry.