IN THE SUPREME COURT OF OHIO

PATRICIA CAROL SMITH, *et al.*,	)	**CASE NO. 2021-0148**
	)	
Appellees,	)	On Appeal from the Harrison County
	)	Court of Appeals, Seventh Appellate
v.	)	District, Case No. 19 HA 0010
	)	
COLLECTORS TRIANGLE, LTD, *et al.*,	)	
	)	
Appellants.	)	

MEMORANDUM IN RESPONSE OF APPELLEES PATRICIA CAROL SMITH, CAROLYN J. LURNDAHL, DOUG WORRELL, AND AGNES WORRELL

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EXPLANATION OF WHY THIS CASE DOES NOT INVOLVE AN ISSUE OF PUBLIC OR GREAT GENERAL INTEREST

"According to Section 2, Article IV of the Ohio Constitution, this court sits to settle the law, not to settle cases." *Baughman v. State Farm Mut. Auto. Ins. Co*., 88 Ohio St.3d 480, 492, 727 N.E.2d 1265 (2000) (Cook, J., concurring). As such, this Court's role in jurisdictional appeals is to decide issues "which present[] a question or questions of public or great general interest as distinguished from questions of interest primarily to the parties." *Williamson v. Rubich*, 171 Ohio St. 253, 254, 168 N.E.2d 876 (1960). Because this case presents unique facts and procedural circumstances—the pertinent details of which Appellants Collectors Triangle, Ltd., *et al.* (the "Collectors Triangle Appellants")[1] and Ascent Resources – Utica, LLC ("Ascent," collectively "Appellants") largely gloss over in their memoranda in support of jurisdiction—any resolution by this Court would have extremely limited utility for those not parties to this lawsuit.[2]

Indeed, the Seventh District's unanimous decision in this case was based upon the application of this Court's established precedent on the collateral attack doctrine. (*See* Seventh District Opinion, 2020-Ohio-4823, ¶ 29-35). Given that Appellants effectively fail to challenge the Seventh District's collateral attack determination, which was dispositive of the appeal below,

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[1] Appellants ESK ORI, LLC, GDK ORI, LLC, GWK ORI, LLC, JEM ORI, LLC, KBK ORI, LLC, and RHDK Oil & Gas, LLC filed a joint memorandum in support of jurisdiction with Collectors Triangle. All of these entities are owned by the Kimble family, and RHDK Oil & Gas, LLC ("RHDK") is the successor to the Lease in this case that was originally granted to Floyd Kimble. Appellant Ascent subsequently filed a separate notice of appeal and memorandum in support of jurisdiction. Pursuant to S.Ct.Prac.R. 7.03(D), Appellees now file "one memorandum in response" to both memoranda in support of jurisdiction.

[2] The Collectors Triangle Appellants' second proposition of law merely argues that: "A sheriff's deed issued pursuant to a judicial proceeding that conflicts with the court's docket does not constitute a judgment of the court for purposes of the collateral attack doctrine." This narrow proposition of law misconstrues the holding of the court of appeals (it did not hold that the sheriff's deed "constitutes" a judgment) and fails to otherwise challenge the Seventh District's substantive application of established collateral attack principles.

any ruling by this Court pertaining to the Stranger Rule or whether an oil-and-gas lease royalty interest constitutes personal property will, on its own, have no practical impact on the outcome of this appeal.

Importantly, this appeal arises from a ruling on a Rule 12(B)(6) motion to dismiss, which requires that a reviewing court "presume that all factual allegations in the amended complaint are true and make all reasonable inferences in appellees' [plaintiffs'] favor. *Schmitz v. Natl. Collegiate Athletic Assn.*, 155 Ohio St.3d 389, 2018-Ohio-4391, 122 N.E.3d 80, ¶ 3 (emphasis added). Under this procedural lens, the court of appeals properly held that, at this stage of the litigation, Appellants are barred from challenging the sheriff's deed at issue in this case because doing so would amount to an improper collateral attack on a final judgment, namely the order of the partition court that created the sheriff's deed. (*See* Seventh District Opinion, 2020-Ohio-4823, ¶ 33, 35) ("Thus, they cannot collaterally attack the partition order." * * * "Accepting the allegations of the complaint as true, * * * the royalty reservation is part of the trial court's order, which cannot be collaterally attacked.") Because Appellants' arguments concerning the Stranger Rule and the nature of an oil-and-gas lease royalty interest, were made *in furtherance of* their collateral attack, a ruling one way or the other by this Court on these issues, standing alone, would not change the outcome of this appeal. The remaining propositions of law raised by the Collectors Triangle Appellants either misconstrue the Seventh District's decision, are not ripe for review, and/or merely seek error correction where the court of appeals properly applied established law. For all of these reasons, this Court should decline jurisdiction over this meritless appeal.

This case involves a pre-existing, family agreement regarding the allocation of royalties payable for the *ongoing production of oil and gas* pursuant to a specific lease. Due to family disagreements regarding the care and upkeep of the property covered by the lease, a partition action

was filed. The partition court ordered the property sold and the resulting sheriff's deed reflected that Mildred and Adrien Worrell would continue to receive royalties from the lease, along with a life estate in a portion of the property and free household gas. Appellant Collectors Triangle, Ltd. ("Collectors Triangle") purchased the property at sheriff's sale in 1998 with full knowledge and acceptance of the life estate and reservation of lease royalties. (*See* Seventh Dist. Opinion, 2020-Ohio-4823, ¶ 23.)

Collectors Triangle failed to appeal the partition court's final order, and for eight years thereafter, Mildred and/or Adrian Worrell *continued* to receive lease royalty payments, again, unchallenged by Collectors Triangle. (*Id*.) In 2006, following Mildred's death, and at Collectors Triangle's request, Adrian sold his life estate to Collectors Triangle, along with his interest in the royalties from the production of one specific shallow well that had been drilled on the property. The oil and gas lease was eventually assigned to Ascent (among others), the property was unitized, and lucrative horizontal wells were drilled and began producing. Despite the fact that the reservation of lease royalties was a matter of record, Ascent began paying royalties to Collectors Triangle, instead of to Appellees Patricia Carol Smith, Carolyn J. Lurndahl, Doug Worrell, and Agnes Worrell ("Appellees" or the "Worrells"), the heirs of Mildred and Adrian Worrell. Accordingly, Appellees filed the present lawsuit.

Both the Collectors Triangle Appellants and Ascent raise propositions of law relating to the nature of an oil and gas royalty interest—seeking a broad ruling by this Court that a royalty constitutes a real property interest, not a personal property interest. As discussed, however, although the Seventh District addressed this in its Opinion, the Court's ultimate decision to reverse

did not hinge on this issue.[3] Moreover, these propositions of law are overbroad in that they would encompass royalty interests *in the land* (i.e., non-participating royalty interests), while the particular interest in this case merely involves a reservation of royalties payable from the *ongoing production of oil and gas* pursuant to *a specific lease*. In this regard, this Court's prior precedent supports the Seventh District's ruling that the lease royalty in this case is personal property and that therefore the Worrell family's pre-existing oral agreement regarding the allocation of royalties does not fall under the statute of frauds. *See, e.g., Nonamaker v. Amos*, 73 Ohio St. 163, 171, 76 N.E. 949 (1905); *Pure Oil Co. v. Kindall*, 116 Ohio St. 188, 201, 156 N.E. 119 (1927).

Moreover, the Collectors Triangle Appellants' concern that the Seventh District's decision would serve to permit oral conveyances of oil and gas rights "such that purchasers of real property will be unable to determine whether the right to royalties generated by the property are included" is simply unfounded. This case involves a royalty reservation that was *of record*, having been included in the court-ordered sheriff's deed in the partition action. It is undisputed that Collectors Triangle knew about it yet "made no effort whatsoever to dispute the provision nor did it seek to obtain any portion of the royalties." (Seventh Dist. Opinion, 2020-Ohio-4823, ¶ 23.) Kimble, Ascent's predecessor, certainly knew about the lease royalty reservation too—it continued to pay Adrian and Mildred Worrell lease royalties for *years* after Collectors Triangle purchased the

[3] The issue of the nature of a royalty interest arose in a very limited context below—to rebut Appellants' arguments that the Stranger Rule invalidates the royalty reservation in the sheriff's deed. The Worrells argued that the Stranger Rule (in addition to constituting an impermissible collateral attack) cannot apply because there was a pre-existing oral agreement regarding the allocation of lease royalties and because it was the intent of all parties to the partition action that Mildred and Adrian retain the lease royalty interest. Appellants argued that this oral agreement over royalties concerned an interest in real property and was barred by the statute of frauds. The Worrells countered that the royalty in this case constitutes personal property and is therefore out of the purview of the statute of frauds under these circumstances.

property. (Am. Compl. ¶¶ 33.) For all of these reasons, this Court should decline to review the propositions of law relating to the nature of a royalty interest.

Ascent's second proposition of law concerns the Stranger Rule. Although the court of appeals did address the Stranger Rule argument—concluding that the Stranger Rule did not apply due to the Worrell family's pre-existing agreement about the allocation of lease royalties—the Stranger Rule analysis ultimately had no impact upon the outcome of the appeal due to the Seventh District's decision to apply the collateral attack doctrine. Further, this barrier notwithstanding, the fact that this matter involves a sheriff's deed arising from a partition action, and the parties to the partition action intended for the Worrell family to retain the lease royalty, are factual wrinkles that make this case an inappropriate vehicle for review of the Stranger Rule. This Court should decline to review the Stranger Rule in the context of this appeal.

The second proposition of law raised by the Collectors Triangle Appellants, in addition to being exceptionally fact-specific and therefore not an issue of public or great general interest, also misconstrues the court of appeals' holding. The Seventh District did not hold that a sheriff's deed issued pursuant to a court proceeding "constitutes" a judgment for the purpose of the collateral attack doctrine. Rather, the Court held that "[a]ccepting the allegations of the complaint as true, * * * the royalty reservation is part of the trial court's [partition] order, which cannot be collaterally attacked.") (Seventh Dist. Opinion, 2020-Ohio-4823, ¶ 35.) This holding is amply supported by Ohio law and the cases relied upon by the Collectors Triangle Appellants are inapposite.

The Collectors Triangle Appellants' third proposition of law also misconstrues the holding of the court of appeals; moreover, it is not ripe for this Court's review. No judicial officer has been deposed, nor did the Seventh District order as much. Entertaining this seriously premature proposition of law at this time will inevitably result in an improper advisory opinion. *Armco, Inc.*

v. Pub. Util. Comm., 69 Ohio St.2d 401, 406, 433 N.E.2d 923 (1982) ("it is well-settled that this court does not indulge itself in advisory opinions").

Finally, the Collectors Triangle Appellants' fourth proposition of law involves the application of settled law to interpret the specific language contained in a specific deed. This Court should decline to accept this proposition of law because it merely seeks error correction where the court of appeals did not err. *See Anderson v. WBNS-TV, Inc.*, 158 Ohio St.3d 307, 2019-Ohio-5196, 141 N.E.3d 192 (DeWine, J., concurring in judgment only) (where a "case simply involve[s] the application of settled standards and thus call[s] for (at most) error correction[,]" jurisdiction should be declined).

For all of these reasons, this Court should decline jurisdiction over this meritless appeal.

STATEMENT OF THE CASE

This case involves an intra-family agreement regarding the allocation of royalties payable from the ongoing production of oil and gas pursuant to a specific lease. In 1984, the property at issue herein was owned in fee simple by Ross Harris and included two tracts of land, one consisting of 103.75 acres, and the other 63.7 acres (the "Property"). On February 2, 1984, Harris entered into an oil and gas lease (the "Lease") with Floyd Kimble, encumbering the Property (and other lands). Kimble drilled a shallow well known as the "Harris Well," which began producing in 1987. In addition to paying leasehold royalties, Kimble agreed to provide free gas to the residence on the Property. (Seventh Dist. Opinion, 2020-Ohio-4823, ¶ 2.) On January 21, 1988, Ross Harris died intestate and his estate was divided equally between his two children, Catherine Finney and Mildred I. Worrell. The family orally agreed that Mildred and her husband, Adrian, would receive the oil and gas royalties under the Lease. (*Id.* at ¶ 3.)

On November 24, 1992, Mildred and Adrian conveyed their one-half interest in the property to their three children in equal shares, retaining a life estate in a one-acre residence located on the 63.7-acre parcel. (*Id*. at ¶ 4.) Pursuant to the existing oral argument regarding the allocation of royalties, Mildred and Adrian continued to receive the royalties directly from Kimble from the ongoing production of oil and gas under the Lease. (Am. Compl. ¶¶ 18-22.)

In 1997, the partition action was filed. All the parties to the partition action intended for the Worrells to maintain their rights and interests to the life estate in the house, free gas, and oil and gas royalties under the Lease after the Property was partitioned or sold. (*Id*. at ¶ 24.) This intent was conveyed through counsel to the partition court. (*Id*.) Following a hearing, the partition court ordered the Property sold and the resulting sheriff's deed, in fact, reflected that Mildred and Adrien Worrell would continue to receive royalties from the Lease, along with a life estate in a portion of the property, and the right to receive gas produced by the existing well free of charge for use at their residence (the "Sheriff's Deed"). (*See* Seventh Dist. Opinion, 2020-Ohio-4823, ¶ 7.) The operative language in the Sheriff's Deed provides:

> 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.

(*Id*.)

In 2005, Mildred died, and soon thereafter, Adrian moved into an assisted-living facility. In 2006, after being approached by Collectors Triangle, Patricia Worrell, attorney-in-fact for Adrian, conveyed to Collectors Triangle Adrian's life estate interest in the 63.7-Acre Parcel and the right to receive free gas in a general warranty deed drafted by Collectors Triangle (the "2006 Deed"). The 2006 Deed also conveyed the royalties stemming from the Harris Well only. (*Id*. at ¶ 9.) The 2006 Deed specifically provides:

> Grantor grants, with general warranty covenants, to Collectors Triangle, . . . all of his interest in the . . . [63.7-acre Parcel], being an estate for life in the residence located on the Property
>
> ***
>
> 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 . . .

(*Id*.)

The clear and unambiguous language of the 2006 Deed shows that it only transferred the royalties from production of the Harris Well. Importantly, as the court of appeals expressly found: "Collector's [sic] Triangle does not dispute that it was Appellants [the Worrells] who received the royalties from the time the Sheriff's Deed was executed [in 1998] until the dispute over payment of royalties [began][,] following the execution of the General Warranty Deed terminating Adrian's life estate." (Seventh Dist. Opinion, 2020-Ohio-4823, ¶ 23) (emphasis added). Further, "Collector's Triangle [sic] knew that Appellants [the Worrells] 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." (*Id*.) Indeed, Kimble continued to pay royalties to the Worrells during this time. (Am. Compl. ¶ 33.)

By subsequent assignments in the chain of title, the working interest and various overriding royalty interests in the Lease are now owned by Appellants Ascent and Kimble-controlled entities,

RHDK, ESK ORI, LLC, GDK ORI, LLC, GWK ORI, LLC, JEM ORI, LLC, KBK ORI, LLC. In 2015, Ascent drilled several horizontal, Utica wells pursuant to the Lease, which began producing in 2016. (*See id*. at ¶ 10.) Ascent ignored the reservation of royalties to the Worrells in the Sheriff's Deed, Kimble's own royalty records, and the clear and unambiguous language of the 2006 Deed and began paying royalties from the production of the Utica wells to Collectors Triangle. (*See id*.) As a result of Ascent's failure to pay Appellants royalties the Worrells filed suit; their First Amended Complaint sought, *inter alia*, a declaration that they own the lease royalty interest at issue, along with breach of contract, and accounting/conversion claims against Ascent, and an estoppel/estoppel by deed claim against Collectors Triangle.

The trial court granted Appellants' Civ.R. 12(B)(6) motion to dismiss on the sole (erroneous) basis that the 2006 Deed conveyed *all* of Adrian's lease royalty interest to Collectors Triangle, not merely just the royalties in the Harris Well. (Trial Court Opinion, p. 2.) The trial court did not address the Stranger Rule or statute of frauds arguments. (*Id*.) On appeal to the Seventh District, the Worrells' primary argument was that Appellants' contentions about the sheriff's deed (which notably ***include*** their arguments regarding the Stranger Rule and the statute of frauds) are improper attempts to collaterally attack the earlier partition order. (*See* Seventh Dist. Opinion, 2020-Ohio-4823, at ¶ 18) (outlining the Worrells' arguments). The court of appeals agreed, concluding that "[a]ccepting the allegations of the complaint as true, * * * the royalty reservation is part of the trial court's order, which cannot be collaterally attacked.") (*Id*. at ¶ 35.) The court of appeals also concluded that the 2006 Deed clearly and unambiguously conveyed to Collectors Triangle royalties in the Harris Well, only. (*Id*. at ¶ 39-40.) The Seventh District denied Appellants' application for reconsideration and *en banc* consideration, along with the Worrells' application for partial reconsideration on December 31, 2020. The Collectors Triangle Appellants

filed a notice of appeal and memorandum in support of jurisdiction on February 1, 2021, raising four propositions of law. On February 12, 2021, Ascent filed a second notice of appeal and memorandum in support of jurisdiction, raising two propositions of law.

ARGUMENT

I. RESPONSE TO PROPOSITION OF LAW NO. 1 OF THE COLLECTORS TRIANGLE APPELLANTS AND PROPOSITION OF LAW NO. 1 OF ASCENT: Royalties payable for the ongoing production of oil and gas pursuant to a specific lease are personal property pursuant to this Court's established precedent.

The first proposition of law of Ascent and the first proposition of law of the Collectors Triangle Appellants both raise arguments about the nature of a royalty interest. They ask this Court to hold that oil and gas royalty interests constitute real property such that agreements regarding royalties fall under the statute of frauds and the Stranger Rule.

However, Appellants' propositions of law are overbroad in that they would encompass royalty interests *in the land* (i.e., non-participating royalty interests), while the particular interest in this case merely involves reservation of royalties from the *ongoing production of oil and gas* pursuant to *a specific lease*. This Court's prior precedent supports the Seventh District's ruling that the royalty in this case is personal property, and therefore, the Worrell family's pre-existing oral agreement regarding the allocation of lease royalties does not fall under the statute of frauds. *See Nonamaker v. Amos*, 73 Ohio St. 163, 171, 76 N.E. 949 (1905) (holding that an agreement to increase or decrease the royalty payable under 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." *See also Pure Oil Co. v. Kindall*, 116 Ohio St. 188, 201, 156 N.E. 119 (1927) ("[r]oyalty is personal property, and is not realty.")

In support of their argument that a royalty constitutes a real property interest, Appellants cite a federal case, *Vandenbark v. Busiek*, 126 F.2d 893 (7th Cir. 1942) for the proposition that when a lessor 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." *Id*. at 897. *Vandenbark*, however, directly conflicts with this Court's binding precedent in *Pure Oil Co.*, which held that a conveyance reserving royalties forever under an oil lease on land "does not operate as a reservation and exception of the corpus of such oil and gas in place[.]" *Pure Oil Co.,* 116 Ohio St. 188, at syllabus (emphasis added). Other cases relied on by Appellants are inapposite. *LRC Realty, Inc. v. B.E.B. Properties*, 160 Ohio St.3d 218, 2020-Ohio-3196, 155 N.E.3d 852, does not involve an oil and gas royalty interest. And *Newberg Petroleum Co. v. Weare*, 44 Ohio St. 604, 611-612, 9 N.E. 845 (1887) is also readily distinguishable. Unlike the party in *Newberg Petroleum Co*., the Worrells did "bind [their] assigns in express terms" to their agreement by the reservation of lease royalties in the Sheriff's Deed. *See id*. at 613. For all of these reasons, the first propositions of law raised separately by Ascent and the Collectors Triangle Appellants are meritless.

II. RESPONSE TO PROPOSITION OF LAW NO. 2 OF ASCENT: Where a family agreement regarding the allocation of royalties for production from a specific oil and gas lease pre-dates the sheriff's deed in a partition action that reserved the lease royalties, and all parties to the partition action intended for the royalties to be reserved, the Stranger Rule does not apply.

Ascent's second proposition of law asserts that the reservation in the Sheriff's Deed is invalid based upon the Stranger Rule, an old common-law rule which generally directs that "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." *Akron Cold Spring Co. v. Ely*, 18 Ohio App. 74, 80 (9th Dist.1923). As the Court in *Akron Cold Spring Co*., acknowledged, however, there are

exceptions to the Stranger Rule where (1) the so-called stranger had pre-existing rights to the interest at issue before the deed was executed, or (2) where the parties intended for the interest to be conveyed to the so-called stranger. *See id*. at 77-79.[4]

The Stranger Rule cannot apply here because there *was* a pre-existing agreement that Mildred and Adrian would receive the royalties payable from the ongoing production of oil and gas pursuant to the Lease. Further, it was the intent of all of the parties to the partition action[5] that the Worrells would continue to maintain their rights and interests to the life estate in the house, free gas, and oil and gas royalties under the Lease after the Property was partitioned or sold. (Amended Compl. ¶ 24). For these reasons, the Stranger Rule does not impact the Worrells' reserved lease royalty in this case. Ascent's second proposition of law is meritless.

III. RESPONSE TO PROPOSITION OF LAW NO. 2 OF THE COLLECTORS TRIANGLE APPELLANTS: **Where a sheriff's deed is issued pursuant to a final court order, under a Civ.R. 12(B)(6) review, it must be accepted that the deed is incorporated into the court order and therefore insulated from collateral attack.**

The Collectors Triangle Appellants' second proposition of law misconstrues the holding of the court of appeals. The Seventh District did not hold that a sheriff's deed issued pursuant to

[4] Many modern courts have abrogated the Stranger Rule altogether, in favor of a rule that looks solely at the parties' intent. *See, e.g., Malloy v. Boettcher*, 334 N.W.2d 8, 10 (N.D. 1983); *Garza v. Grayson,* 255 Or. 413, 467 P.2d 960 (1970); *Simpson v. Kistler Inv. Co*., 713 P.2d 751, 752 (Wyo.1986); *Townsend v. Cable*, 378 S.W.2d 806, 808 (Ky.1964); *Willard v. First Church of Christ, Scientist*, 7 Cal.3d 473, 474, 498 P.2d 987 (1972).

[5] Notably, in a statutory partition action, the parties to the action are the grantors to the resulting sheriff's deed. Under R.C. 5307.13, once the court has examined and approved the sale proceedings, "the sheriff shall execute and deliver a deed to the purchaser on receiving payment * * * to the satisfaction of the court." Although the deed is made by the sheriff, it is generally regarded as an act of the parties to the partition themselves. *Williams v. Haller*, 27 Ohio Dec. 343, 364, 13 Ohio N.P(N.S.) 329 ("The partition was had upon the petition of the plaintiff, and the sheriff's deed in partition must stand upon the same footing here as if it had been a voluntary conveyance of the title by the plaintiff himself.") (citations omitted).

a court proceeding "constitutes" a judgment for the purpose of the collateral attack doctrine. Rather, the Court held that "[a]ccepting the allegations of the complaint as true, * * * the royalty reservation is part of the trial court's [partition] order, which cannot be collaterally attacked.") (Seventh Dist. Opinion, 2020-Ohio-4823, ¶ 35.)

Ohio courts have held that partition actions, and the deeds executed pursuant to the courts' order for partition, are not subject to collateral attack on the grounds of an irregularity or mistake of law. *See Dabney v. Manning,* 3 Ohio 321, 325 (1828) ("The proceedings and judgments of the courts, in a petition for partition, must, like judicial proceedings in all other cases, bind both parties and privies, while they remain unreversed, however erroneously they may have been conducted."); *Glover's Lessee v. Ruffin,* 6 Ohio 255, 270 (1834) (Any errors in a partition action "do not vitiate the final decision, and that if such exist, they can not be noticed collaterally."). *See also Bohart v. Atkinson*, 14 Ohio 228, 239 (1846) (A partition is a judicial proceeding which "cannot be collaterally impeached unless tainted with fraud.").

In attempting to rely on *Ludlow's Heirs' Lessee v. Park*, 1829 WL 1 (1829), the Collectors Triangle Appellants misconstrue its holding. *Ludlow's Heirs' Lessee* is not on point; moreover, the case contains dicta that actually <u>supports</u> the Worrells' position, as the Court stated that "[t]he judgment and order are emphatically the foundation of such titles, and the deed is the best evidence of what judgment or order the sheriff or administration acted under in making the sale." *Id.* at *14. For these reasons, the Collectors Triangle Appellants' second proposition of law is meritless.

IV. <u>RESPONSE TO PROPOSITION OF LAW NO. 3 OF THE COLLECTORS TRIANGLE APPELLANTS</u>: When the court of appeals reverses the trial court's grant of a motion to dismiss, on remand the parties have the opportunity to conduct discovery to factually support their respective legal positions.

In their third proposition of law, the Collectors Triangle Appellants again misstate the holding of the court of appeals. The court of appeals did not order that a judicial officer would be

subject to deposition on remand. Rather, the Seventh District properly applied Civ.R. 12(B)(6) and merely noted that on remand the parties would have the opportunity to conduct discovery pertaining to Appellees' collateral attack argument. (*See* Seventh Dist. Recon. Opinion, 2020-Ohio-6965, ¶¶ 7, 19.) It is axiomatic that on appeal from the trial court's denial of a motion to dismiss under Rule 12(B)(6), the court of appeals has two options: (1) affirm the trial court; (2) reverse and remand the matter for further proceedings. Here, the Seventh District properly decided to reverse and remand for further proceedings, which necessarily involves the commencement of discovery relating to the Worrells' claims and Appellants' defenses.

Moreover, this proposition of law addresses an issue that is not yet ripe for review, as no deposition of a judicial officer has occurred. Any ruling on the propriety of such a deposition would be purely advisory. It is "well-settled that this court does not indulge itself in advisory opinions." *Armco, Inc.*., 69 Ohio St.2d at 406. For these reasons, the third proposition of law of the Collectors Triangle Appellants is meritless.

V. RESPONSE TO PROPOSITION OF LAW NO. 4 OF THE COLLECTORS TRIANGLE APPELLANTS: All parts of a deed must be construed together, and courts must apply the clear, unambiguous language as written.

Finally, in their fourth proposition of law, the Collectors Triangle Appellants assert that the Court of Appeals erred by concluding that the 2006 Deed conveyed only the right to receive royalties from production of the Harris Well. However, the court of appeals properly applied established law in interpreting the clear, unambiguous language in the 2006 Deed. "It is a well-settled principle, applicable to the construction of deeds and other instruments, that all their parts are to be construed together, and the meaning ascertained from a consideration of each and every part * * *" of the deed. *Dodd v. Bartholomew*, 44 Ohio St. 171, 175, 5 N.E. 866 (1886) (emphasis added). And if the language of a deed is "clear and unambiguous" courts must give the words

their "plain and ordinary meaning" and "cannot in effect create a new contract by finding an intent not expressed in the clear language employed by the parties." *Alexander v. Buckeye Pipe Line*, 53 Ohio St.2d 241, 246, 374 N.E.2d 146 (1978).

Here, in drafting the 2006 Deed, the operative language of which is quoted at page 8 of this Memorandum, Collectors Triangle specifically qualified the interest conveyed as "being an estate for life in the residence located on the Property" and the "right to receive royalties and free gas in connection with a certain oil and gas well." The Collectors Triangle Appellants' fourth and final proposition of law is meritless.

CONCLUSION

For all of these reasons, this Court should decline to accept jurisdiction over this meritless appeal.

Respectfully submitted,
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CERTIFICATE OF SERVICE

A copy of the foregoing *Memorandum in Response of Appellees* was filed electronically and served on this 15th day of March, 2021 via electronic mail pursuant to Civ.R. 5(B)(2)(f), and S.Ct.Prac.R 3.11(C)(1) to:

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