IN THE SUPREME COURT OF OHIO

| | |
|---|---|
| **PEPPERTREE FARMS, L.L.C., et al.,**<br><br>Plaintiffs-Appellees,<br><br>vs.<br><br>**JOY ANN THONEN, et al.,**<br><br>Defendants-Appellants. | Case No. 2020-0814<br><br>On Appeal from the Stark County Court of Appeals,<br>Fifth Appellate District,<br>Case No. 2019CA00161 |

# MERIT BRIEF OF APPELLEES, PEPPERTREE FARMS, L.L.C., JAY MOORE, AND AMY MOORE

David J. Wigham
Roetzel & Andress, LPA
222 South Main Street
Akron, OH 44308
dwigham@ralaw.com

Sara E. Fanning
Roetzel & Andress, LPA
41 South High Street
Huntington Center, 21st Floor
Columbus, OH 43215
sfanning@ralaw.com
*Attorneys for Defendants-Appellants, Cheryl Bilby, et al.*

COUNSEL FOR APPELLANTS

Gregory W. Watts (0082127) (Counsel of Record)
Matthew W. Onest, Esq. (0087907)
Wayne A. Boyer (0087983)
KRUGLIAK, WILKINS, GRIFFITHS & DOUGHERTY CO.,
LPA
4775 Munson Street N.W.
P.O. Box 36963
Canton, OH 44735
gwatts@kwgd.com
monest@kwgd.com
wboyer@kwgd.com

COUNSEL FOR APPELLEES

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Statutes**



**Other Authorities**

## PRELIMINARY STATEMENT

"[T]he State has the power to condition the permanent retention of that property right on the performance of reasonable conditions that indicate a present intention to retain the interest." *Texaco, Inc. v. Short*, 454 U.S. 516, 526, 102 S. Ct. 781, 70 L.Ed.2d 738 (1982). This is a key concept in this appeal because Appellants, Cheryl Bilby, Dwight Sowle, Kris Pfalzgraf, Karigan Bea Pfalzgraf, Kansas Lee Pfalzgraf, Shirley M. Pfalzgraf, Stacey L. Lucas, Jeremy Stimpert, Angie Pfalzgraf Stimpert, Jennifer Stimpert Burkhart, Donna Sims, Aaron Lucas, Robbie Lucas, Roger William Erwin, and Brian Matthew Erwin, erroneously cloak the issues in terms of private property being taken away.

Neither the Marketable Title Act ("MTA") nor G.C. § 8510-1 constitutes a taking of private property rights. Indeed, Ohio is well within its constitutional lane when it conditions "the permanent retention of that property right on the performance of reasonable conditions that indicate a present intention to retain the interest." *Id*. In such a case, the loss of a property interest is the result "of the failure of the property owner [Appellants] to perform the statutory condition" and not a result of the other property owner's actions or the government's action. *Id*. at 529. Here, the severed mineral owners could have avoided the present situation by (1) placing heirship language within the original severance instruments and (2) preserving under the MTA.

Each of the actions required by the MTA or G.C. § 8510-1 to avoid an extinguishment or termination of a severed mineral interest furthers a legitimate state

goal. Ohio rightly encourages mineral owners to develop the potential of those interests, serving the fiscal interest in collecting property taxes and facilitating the identification and location of mineral owners, from whom developers may acquire operating rights and from whom the county may collect taxes. The "power to condition the ownership of property on compliance with" the MTA's minimal conditions, each of which is a "slight burden on the owner" provides "clear benefits to" Ohio. *Id.* at 529-30.

Appellants can hardly complain that the extinguishment of their mineral interest is unfair. As this Court held in *Heifner v. Bradford*, the MTA provides a "simple and easy" method by which the owner of an existing old interest may preserve it. *Heifner v. Bradford*, 4 Ohio St.3d 49, 53, 446 N.E.2d 440 (1983). Appellants failed to try to preserve their interest and they have only themselves to blame if that "interest is extinguished." *Id.*, *quoting Miami v. St. Joe Paper Co.*, 364 So.2d 439, 442 (Fla. 1978). The MTA extinguished Appellants' mineral interest because of Appellants' own neglect, not the action of a state or Appellees. As a result, upholding the Fifth District's decision does not threaten Ohio's constitutional protections of private property. *Pinkney v. Southwick Investments, L.L.C.*, 8th Dist. Cuyahoga No. 85074, 2005-Ohio-4167, ¶ 38 ("[T]he MTA provides multiple specific procedural steps which could have preserved the interests upon which it predicates its claims. The failure to comply with such procedural requirements does not render the MTA unconstitutional.").

This case involves questions relating to a single severed mineral interest ("Jones Interest") which previously affected about 84 acres of real property in Adams Township, Monroe County, Ohio ("Real Estate"). Appellants claim that this old, severed interest is still valid. Appellees, Peppertree Farms, L.L.C., Jay Moore, and Amy Moore ("Appellees"), claim this old, severed interest is no longer valid.

The Fifth District determined that the interest is no longer valid for two independent reasons—expired life estate and extinguished by the MTA. *Peppertree Farms, L.L.C. v. Thonen*, 5th Dist. Stark No. 2019CA00161, 2020-Ohio-3043, ¶¶ 36-48. The Fifth District's decision is correct and can be affirmed because:

*First*, Appellants concede that the Fifth District's decision that the MTA applied to the Jones Interest is correct and should be affirmed under this Court's decision in *West v. Bode*, 162 Ohio St.3d 293, 2020-Ohio-5473, 165 N.E.3d 298, *reconsideration denied*, 160 Ohio St.3d 1511, 2020-Ohio-6835, 159 N.E.3d 1168. [Appellants' Br., p. 13]. Thus, Proposition of Law No. I should be answered in the negative.

*Second*, the Fifth District appropriately held that the Jones Interest was a life estate. *Peppertree Farms*, 2020-Ohio-3043, ¶ 42. The reservation "created a new, severed oil and gas interest" and failed to include words of inheritance. *Id*. Under Ohio law at the time of severance, if a mineral severance did not include words of inheritance, the newly created interest was a life estate. Here, the reserving party (H.J. Jones) did not own the Jones Interest separate from his interest in the portion of the real estate conveyed. Thus, he

necessarily created a new interest when he reserved the new oil and gas interest, which contained less than 100% of future lease bonus payments. By not including words of inheritance, Ohio law presumed he intended to create a life estate. That estate has now terminated.

*Third*, Appellants failed to create a genuine issue of fact about whether the Jones Interest arose from the single will at issue. Appellants cannot prove the will is a preserving event under the MTA because: (1) the Jones Interest arose from a 1921 severance deed, not the will and (2) the will had no provision which would convey or otherwise affect the Jones Interest (in fact by its own terms the will refused to affect the interest).

## STATEMENT OF THE FACTS

Peppertree owns about 78 acres of the Real Estate. [Tr. Ct. Dkt 1 (Compl., ¶¶ 2, 101; Exh. 1 to Compl.); Tr. Ct. Dkt 84 (Exh. 1 to Peppertree's MSJ)]. The Moores own about 5.009 acres of the Real Estate. [Tr. Ct. Dkt 86 (Jones Defs' MSJ, p. 2, Exhs. B-14 and B-15 attached to it); Tr. Ct. Dkt 84 (Exh. 2 to Peppertree's MSJ)].

In 1921, H.J. Jones, Appellants' predecessor, reserved the oil and gas rights for a portion of the Real Estate—the Jones Interest. [Tr. Ct. Dkt 1 (Compl. ¶¶ 128-131; Exh. 8 to Compl.); Tr. Ct. Dkt 84 (Exh. 8 to Peppertree's MSJ); Appellants' Supp. to Briefs, p. 1]. When construed in its entirety, the Jones Interest is a reservation of a newly created estate: "All The oil and Gas underlying the above described premises is hereby *reserved* and is

not made a part of this transfer. The Grantor of this deed is to have the privilege of leasing and operating for said oil & gas and Bonus money received from said leasing to be equally divided between Grantor& Grantee[.]" [*Id*.].

Before that reserving deed, the oil and gas rights affected by the reservation did not exist as a separate legal estate, meaning those oil and gas rights were still part of the Real Estate. In the 1921 deed, H.J. Jones created a new, separately recognized estate—a severed oil and gas estate, that was reserved (re-granted) out of the estate conveyed. That reservation necessarily created new rights, meaning rights not in separate existence before the reservation, in the form of oil and gas rights severed from the surface, as well as rights in the surface estate conveyed, as the reserved interest included "the privilege of leasing and operating for said oil and gas" on the land conveyed, which would include surface access rights associated with future production of the severed oil and gas rights. H.J. Jones also reserved back a portion of the bonus payments—H.J. Jones conveyed the leasing bonus payments to the grantee and then reserved back half of those payments.

## ARGUMENT IN OPPOSITION TO PROPOSITIONS OF LAW

### I. ARGUMENT IN OPPOSITION TO PROPOSITION OF LAW NO. I: This Court answered Proposition of Law No. I in the negative in *West v. Bode*.

#### A. LAW AND ARGUMENT

Appellants concede that the Court has already answered Proposition of Law No. II in the negative. [Appellants' Br., p. 13]. The Court recently rejected this proposition:

This appeal concerns the interplay between the Ohio Marketable Title Act,

> R.C. 5301.47 et seq., and the subsequently enacted Ohio Dormant Mineral Act, R.C. 5301.56, which is itself part of the Marketable Title Act. We specifically consider the continued viability of the Marketable Title Act as it relates to interests in oil and gas that have been severed from the interests in surface property. Appellants, John L. Christman, Katherine Haselberger, and Charlotte McCoy, as well as amici curiae Ascent Resources-Utica, L.L.C., and Gulfport Energy Corporation, urge this court to hold that the Dormant Mineral Act supersedes and controls over the original Marketable Title Act due to a conflict between the two acts.
>
> An express purpose of both the Marketable Title Act and the Dormant Mineral Act is to "simplify[] and facilitat[e] land title transactions by allowing persons to rely on a record chain of title." R.C. 5301.55. The acts operate in different ways to individually achieve that purpose. We acknowledge at the outset, however, the concerns expressed by amici Ascent Resources-Utica, L.L.C., and Gulfport Energy Corporation that joint application of the acts to severed oil and gas interests brings about the unintended consequence of complicating determinations of ownership of those interests. But because we discern no irreconcilable conflict between the Dormant Mineral Act and the Marketable Title Act, we must apply them as the General Assembly wrote them—as independent, alternative statutory mechanisms that may be used to reunite severed mineral interests with the surface property subject to those interests.

*West*, 162 Ohio St.3d 293, ¶¶ 1-2. The Court then reaffirmed the *West* decision when it denied the *West* appellants' motion for reconsideration. *West v. Bode*, 160 Ohio St.3d 1511, 2020-Ohio-6835, 159 N.E.3d 1168.

This means the Fifth District correctly held that the MTA applies to the Jones Interest. *Peppertree Farms*, 2020-Ohio-3043, ¶¶ 44-49.

### B. CONCLUSION

Based on the above, the Court should answer Proposition of Law No. I in the negative and affirm the Fifth District's decision holding that the MTA applies to the Jones

Interest.

## II. ARGUMENT IN OPPOSITION TO PROPOSITION OF LAW NO. II: The Jones Interest is an expired life estate because: (1) it was created before Ohio General Code § 8510-1's enactment, (2) it lacked words of inheritance, and (3) it created a brand new mineral estate, meaning it could not have been excepted from the grant because it did not have independent existence at the time of severance.

### A. LAW AND ARGUMENT

Proposition of Law No. II deals with a statute that has been off the books for over 95 years and an exceedingly few severed mineral owners: those who severed mineral rights before March 1925. The number of affected parties is reduced even further because the issue applies only to those who severed mineral rights before March 1925 which failed to include words of inheritance in the severance.

#### i. The Jones Interest was a life estate because (1) it created a brand new severed oil and gas interest, with new fractional ownership of lease bonus royalties, and (2) it did not include words of inheritance.

When real property estates were conveyed or reserved before March 25, 1925, the conveyance or reservation needed to contain words of inheritance, such as "to [Grantor], heirs and assigns forever"; otherwise, it conveyed or reserved merely a life estate. *Roberts v. Jones*, 86 Ohio App. 327, 328–29, 91 N.E.2d 817 (5th Dist.1949); *Ewing v. McClanahan*, 33 Ohio App.3d 46, 46–47, 514 N.E.2d 444 (12th Dist.1986) ("Prior to the enactment in 1925 of G.C. 8510–1 which eliminated the need for words of inheritance or perpetuity in conveyances, deed reservations without such words did not pass to heirs or successors

any interest of the grantor."). *See Gill v. Fletcher*, 74 Ohio St. 295, 78 N.E. 433 (1906); *see also Embleton v. McMechen*, 110 Ohio St. 18, 24–26, 143 N.E. 177 (1924).

On March 25, 1925, G.C. § 8510-1 went into effect and removed the need to place words of inheritance to ensure the creation of a fee simple estate. The statute applied to every grant or conveyance or mortgage of lands.

In *Embleton*, this Court held the requirement to use words of inheritance applied to fee simple estates (not just right of ways or easements). *Embleton*, 110 Ohio St. at 24–26. In *Embleton*, the deed provided that if the grantees failed to perform the conditions in the deed, the grantees would forfeit one-half of the premises back to the grantor shareholders. This Court held that if forfeited, the interest in the premises obtained by the grantors would have been a life estate only with the grantees still having the remainderman interest, because:

> They did not agree to forfeit the estate in controversy to the specified shareholder and to their heirs. The covenant in the agreement ran to the person only, and words of inheritance or perpetuity usually required in the conveyance of fee-simple estates were omitted. Should the grantees violate the terms of their agreement and forfeiture ensue, a new estate would be thereby created, which, in order to make it a fee simple, necessarily required terms of perpetuity.

*Id*. at 179. In *Embleton*, the premises (the physical land) existed both before and after the conveyance or forfeiture and thus did not determine whether words of inheritance were necessary.

This Court explicitly stated that words of inheritance were usually required in the conveyance of fee-simple estates. The "new estate" related to a reservation does not refer to whether the thing being reserved existed in the universe previously, but whether it was conveyed back out of the original grant (a new grant or new right) rather than never conveyed at all. Importantly, *Embleton* (1924) came after both *Sloan v. Lawrence Furnace Co.* (1876) and *Gill v. Fletcher* (1906), and follows Ohio property law before G.C. § 8510-1.

Based on uniform authorities before 1925, Ohio real property law required that a fee simple deed contain words of inheritance or perpetuity. This means the deed had to have a manifestation that the owner's interest was not limited to his or her life but passed to his or her heirs or beneficiaries. In *Ford v. Johnson*, 41 Ohio St. 366 (1884), this Court stated:

> The elementary authorities uniformly hold the word heirs is indispensable to the creation by deed of an estate tail or in fee simple; though it is otherwise in respect to a will. The requirement is technical; but it has always been a rule of property in this state and must, for manifest reasons, be upheld.

*Ford*, 41 Ohio St. at 367. Thus, the word "heirs" or other appropriate words of perpetuity in a mortgage or other deed of conveyance of lands, was essential at common law to pass a fee simple estate, and any the omission of such wording in the deed's granting or habendum clause vests the grantee with a life estate only. *Id*. at 366; *Brown v. First Nat. Bank*, 44 Ohio St. 269, 273, 6 N.E. 648 (1886).

Because this is a property and deed construction rule, the reserving deed at issue must be construed in accordance with this common law rule–it was the rule when the deeds were executed. *Schurch v. Harraman*, 47 Ohio App. 383, 387, 191 N.E. 907 (3rd Dist.1933) (holding in a conveyance of real property that there were no words of inheritance, succession, or perpetuity in the deed, and a title in fee simple was unnecessary to carry out the trust); *Warren v. Brenner*, 89 Ohio App. 188, 191–92, 101 N.E.2d 157 (9th Dist. 1950) ("Estates may be said to fall primarily into 'freehold estates' and 'estates less than freehold.' Freehold estates are divided into (a) estates of inheritance, which pass to the owners' heirs, and (b) estates not of inheritance. . . . In this state prior to the year 1925, the use of the word 'heirs' was necessary to create a fee simple by conveyance inter vivos."); *Wollam v. Van Vleck*, 1892 WL 1022, *5 (Ohio Cir. Ct. Oct. 28, 1892) (holding in a conveyance of real estate, that even if granted to these plaintiffs, by this deed, it is an estate for life only); *Kelly v. Marsh*, 12th Dist. Butler No. 88-06-079, 1989 WL 18869, *3 (holding that deeds are construed as of the "facts and circumstances at the time of execution").

Because the Jones Interest lacked language of inheritance, it was a life estate and has expired and terminated because of the original owner's death. No parties claimed that the original owner is still alive.

Appellees' position that the Jones Interest was a life estate is even stronger given the Court's recent decision in *Chesapeake Expl., L.L.C. v. Buell*, 144 Ohio St.3d 490, 2015-Ohio-4551, 45 N.E.3d 185 (2015). At paragraph 23, the Court stated:

> *The owner who conveys the surface estate may retain an interest in the mineral estate by reservation*. *Pure Oil* at 202, 156 N.E. 119. Although the surface land may be separately owned, we have recognized the "truism" that when the interests have been severed, "neither the owner of the surface interest nor the owner of the mineral interest has full ownership" because "[e]ach has rights that are subject to the rights of the other." *Snyder v. Ohio Dept. of Natural Resources*, 140 Ohio St.3d 322, 2014-Ohio-3942, 18 N.E.3d 416, ¶ 13. "Unless the language of the conveyance by which the minerals are acquired repels such construction, *a severed mineral estate is considered to include those rights to use of the surface as are reasonably necessary for the proper working of the mine and the obtaining of the minerals*." *Quarto Mining Co. v. Litman*, 42 Ohio St.2d 73, 83, 326 N.E.2d 676 (1975). (Emphasis added.)

*Buell*, 144 Ohio St.3d 490, ¶ 23. *See Pure Oil Co. v. Kindall*, 116 Ohio St. 188, 200–04, 156 N.E. 119 (1927) ("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*.") (Emphasis added.) The new mineral interest is a brand new interest, which carries with it new rights, such as the newly created right to reasonable surface access and the newly split lease bonus right.

Before the creation of a severed mineral interest, there is no unique mineral estate because it is treated as united with the surface estate within a common estate. Before severance, a person reviewing title would see the surface and mineral owner as one in the same. There is also not a separate surface access privilege by a mineral owner because the owner of the minerals also owns the surface. That said, when minerals are severed

from the surface estate, there is an actual creation of two new, separate estates (surface estate and mineral estate). Unless the reservation provides otherwise, the new mineral estate owner acquires rights in the surface of the lands granted, including the right to access the surface estate to produce the severed minerals.

In our case, Appellants' predecessor conveyed the property at issue and "reserved" the oil and gas interest now claimed by Appellants. Under *Buell*, this created a new estate separate from the estates in existence before the reserving deed. Before the creation of the Jones Interest, there was no payment intangible carved out of the surface and mineral estate conveyed. Indeed, H.J. Jones created a brand new fractional lease bonus interest within the reserving deed.

Based on the above, the Jones Interest created a new severed oil and gas interest (with a newly created lease bonus fractional interest), meaning there needed to be words of inheritance within it to avoid the life estate limitation. Because no such language exists, it should be treated as a now-terminated life estate.

**ii. There is no conflict between the Fifth and Seventh Districts' rulings on this issue because (1) neither court has certified a conflict and (2) each case is determined on its unique facts and not some conflicting legal principle.**

Appellants' claim that there is a conflict of law between the Fifth and Seventh Districts is both wrong and irrelevant to the issues before the Court.

There is not a conflict of law between the Fifth and Seventh Districts given that neither district has certified a conflict on this issue.

There cannot be a conflict of law between the Fifth District's decision here and the Seventh District's decision in *Headley v. Ackerman*, 7th Dist. Monroe No. 16 MO 0010, 2017-Ohio-8030 because determining whether G.C. § 8510-1 applies to a severed mineral interest turns on a determination of fact, more specifically whether the parties intended to create a reservation or an exception.

When cases from different appellate districts apply the same rule of law but arrive at different conclusions based on the cases' factual distinctions, Appellate Rule 25(A) (certifying a conflict) is inapplicable. *Kinderdine v. Mahoning Cty. Bd. of Dev. Disabilities*, 7th Dist. Mahoning No. 14 MA 0174, 2016-Ohio-7017, ¶ 4 ("Rather, they are factually different. Factual distinctions are not a basis for certification."); *Semenchuk v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 10AP-19, 2010-Ohio-6394, ¶ 4 ("[F]actual distinctions between cases are not a basis upon which to certify a conflict.").

As this Court has held, "[W]hether the language used in a deed creates a reservation or exception from the grant depends upon *the intention of the parties* as evinced by a construction of the whole instrument *in light of the circumstances of each case*." *Gill*, 74 Ohio St. 295, paragraph one of syllabus (emphasis added). Intent and the circumstances of each case are factual issues, not legal ones. *See Wells v. Am. Elec. Power Co.*, 48 Ohio App.3d 95, 97, 548 N.E.2d 995 (4th Dist.1988) (acknowledging that if a deed is subject to two reasonable, yet conflicting interpretations, such as being a reservation or an exception, then the parties' intent is an issue of fact).

Thus, Appellate Rule 25(A) is not applicable to Proposition of Law No. II, meaning no conflict of law exists.

The outcome of this case and *Headley*, 2017-Ohio-8030 depended on the specific facts of each case. As acknowledged in the two cases, the determination of whether the severance language constitutes a reservation (requires words of inheritance) or an exception (does not require words of inheritance) requires *the factual determination of the parties' intent*. *Peppertree Farms*, 2020-Ohio-3043, ¶ 38, *citing Fletcher*, 74 Ohio St. 295; *Headley*, 2017-Ohio-8030, ¶ 46. This determination will turn upon the language of the instruments at issue, as well as "the circumstances of each case." *Id*., ¶ 36. *See Holdren v. Mann*, 7th Dist. Monroe No. 592, 1985 WL 10385, *1 (Feb. 13, 1985), *abrogated on other grounds* (relying on the fact that the trial court determined the parties intended to create an exception, as opposed to a reservation).

To answer Appellants' proposed question, one needs to determine the parties' intent behind the severance document. As detailed above, this analysis will focus on the facts of each case, not a broad-sweeping rule of law. The factual differences among the cases at issue explain the difference in outcome, not a disagreement as to the applicable rule of law. In fact, the Fifth District and the Seventh District agree on the applicable rule of law: a reservation requires words of inheritance, while an exception does not require words of inheritance.

The difference of each case comes down the factual differences in what the parties intended through their choice of severance words. *Headley* is distinguishable because the circumstances of that case show it involved a sheriff's sale when the court did not give the right to sell the one-half mineral interest because it was not subject to the sale. *Headley*, 2017-Ohio-8030, ¶¶ 8, 17. Because the grantors had no right to sell the interest in the first place, it necessarily was excepted from the grant, and therefore the sale. *Id*. Thus, *Headley* was determined upon its unique facts, specifically a court's prior partition judgment that the severed royalty interest would be "excepted" from the sale.

No such facts are presented here. Instead, the reserving party created a brand new severed oil and gas interest. And the Fifth District correctly relied on this lack of a conflict of law when it denied Appellants' motion to certify conflict. [App. Ct. Dkt 20 (Aug. 11, 2020 Judgment Entry denying Appellants' Motion to Certify Conflict)].

**iii. Appellants' cases are distinguishable and do not impact the issues before the Court.**

Appellants have cited no reason to ignore the precedent discussed above.

First, Appellants cite *Bosky Group, L.L.C. v. Columbus & Ohio River RR. Co.*, 5th Dist. Muskingum No. CT2017-0027, 2017-Ohio-8292 at page 15 of their brief. *Bosky Grp.* involved the granting of land in a deed to a railroad company which contained language for an easement for crossing the railroad tracks. *Bosky Grp.*, 2017-Ohio-8292, ¶ 3 ("The said Company to construct two good crossings over said rail road track one between my house and barn near to the point where my road now passes from the National road to

my barn, the other at some point towards the east boundary line of my land convenient for the purpose[.]"). The case is distinguishable as the *Bosky* court held the right to a crossing ran perpetually with the land because it had "been in use for over 100 years" and "without a crossing, the subject property was legally landlocked and incapable of being developed." *Id*. ¶ 22. No such facts exist here because Appellants ignored their interest for about a century and there is no issue of landlocked land.

Additionally, *Sloan v. Lawrence Furnace Co.*, 29 Ohio St. 568 (1876) is distinguishable because the reserving language was contained within the instrument's granting clause and therefore constituted an exception of the minerals from the operation of the grant. *Sloan*, 29 Ohio St. at 569. The language creating the Jones Interest was not contained within the granting clause. Thus, *Sloan* does not control the issues before this Court.

Furthermore, Appellants' reliance on *Gill*, 74 Ohio St. 295, is misplaced, as *Gill* supports Appellees. *Gill* held that "Whether the language used in a deed creates a reservation or exception from the grant depends upon the intention of the parties as evinced by a construction of the whole instrument in the light of the circumstances of each case." *Gill*, 74 Ohio St. 295, paragraph one of syllabus. The grantor in *Gill* explicitly stated the interest to be retained by the grantor was "only excepted" from the grant. *Id*., paragraph two of syllabus. This Court stressed the fact the mineral interest at issue was described as an exception. *Id*. at 303–04 ("This language cannot be overlooked nor thrown out of the instrument. The parties meant something in using it and it can only mean that

the grantor excepted out of the estate granted and retained in himself the fee simple, which he already had, in the one-half of the plaster.").

*Sloan* and *Gill* are also distinguishable because they involved hard minerals, not the unique physical properties of oil and gas. *See Medina Oil Dev. Co. v. Murphy*, 233 S.W. 333, 335 (Tex. Civ. App. – San Antonio 1921, error dismissed) (describing oil and gas as "percolat[ing] restlessly about under the surface of the earth, even as the birds fly from field to field and the beasts roam from forest to forest."). Traditional concepts of land ownership, for example, the *ad coleum* doctrine, didn't apply to oil and gas. The *ad coleum* doctrine was "[t]he common-law rule that a landowner holds everything above and below the land, up to the sky and down to the earth's core, including all minerals. This 'rule governs ownership of 'hard' (immovable) minerals such as coal, but not 'fugacious" (volatile) minerals such as oil and gas." AD COELUM DOCTRINE, Black's Law Dictionary (11th ed. 2019).

Instead, the rule of capture applied to oil and gas. The rule of capture is with respect to property, "[t]he principle that wild animals belong to the person who captures them, regardless of whether they were originally on another person's land." RULE OF CAPTURE, Black's Law Dictionary (11th ed. 2019). And with respect to oil and gas, "[a] fundamental principle of oil-and-gas law holding that there is no liability for drainage of oil and gas from under the lands of another so long as there has been no trespass and all relevant statutes and regulations have been observed." *Id.*

In *Kelly v. Ohio Oil Co.*, 57 Ohio St. 317, 49 N.E. 399 (1897), Ohio followed the well-known rule of capture with respect to oil and gas, acknowledging that ownership of oil and gas – unlike plaster or other hard mineral which are fixed in place – could flow away or into a tract of land at different times, stating:

> Petroleum oil is a mineral, and while in the earth it is part of the realty, and should it move from place to place by percolation or otherwise, it forms part of that tract of land in which it tarries for the time being, and if it moves to the next adjoining tract, it becomes part and parcel of that tract; and it forms part of some tract, 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.

*Kelly*, 57 Ohio St. at 328.

This Court's treatment of oil (or gas) as migratory (flowing to a well) is fundamentally different than its assumption regarding hard minerals in *Gill*, that they are static. *Gill*, 74 Ohio St. at 304 ("It cannot be maintained that the plaster was not in esse at the time of the conveyance. With good reason it was at that time believed to exist, although it had not been 'found'; and hence the reservation or exception. The court found that it exists now and the necessary inference is that it existed then."). *Kelly* and *Gill* were only decided nine years apart and show the clear difference in property law between hard minerals and oil and gas.

Further, *Crum v. Yoder*, 7th Dist. Monroe No. 20 MO 0005, 2020-Ohio-5046 is distinguishable because: (1) it involved a mineral severance *in 1990* and therefore did not need words of inheritance to avoid being a life estate, (2) it acknowledged that intent of

the parties' controls whether a reservation or exception occurs, and (3) involved a severance of the full mineral estate, rather than an interest where parts of the lease bonus rights are carved from the conveyed estate. The *Crum* court cited *Rubel v. Johnson*, 2017-Ohio-9221, 101 N.E.3d 1092 (7th Dist.) for the idea that " '[a] reservation is said to be the mere right or privilege, reserved by the grantor, to use the estate which is not part of the realty itself but issues out of it (such as rent or the right to timber as it is cut); the title to the whole estate passes to the grantee, but it is burdened by the right reserved.'" *Crum*, 2020-Ohio-5046, ¶ 81 (emphasis added). The same thing happened in our case—H.J. Jones conveyed the entire surface and mineral estate, but burdened the mineral estate with the removal of the oil and gas rights and a part of future lease bonus payments As a result, under the reasoning of *Crum*, the Jones Interest was a reservation and thus needed words of inheritance. *Id*. ¶ 82 ("[A] reservation must use words of inheritance to be perpetual (otherwise it expired upon the death of the owner)[.]").

Finally, *Holdren* is distinguishable because (1) there is no analysis on this particular issue, thus we cannot say with any certainty what rule of law was applied there and (2) the Seventh District relied on the trial court's factual determination of the parties' intent behind the language used in the severance instrument. Appellants have not set forth any evidence outside the Jones Interest's language showing that H.J. Jones intended to create an exception, rather than a reservation.

Based on the above, the Jones Interest created a new severed oil and gas interest, with a new lease bonus fractional interest. This means there needed to be words of inheritance within it in order to avoid the life estate limitation. Because no such language exists, it should be treated as a now-terminated life estate. As a result, the Court should answer Proposition of Law No. II in the negative and affirm the Fifth District's decision.

**iv. Rules of deed construction require an interpretation in favor of Appellees and against Appellants.**

If there is any doubt on whether the Jones Interest falls under the words of inheritance requirements, the Court should err on the side of finding the interest was a life estate. As this Court has stated:

> It is, of course, the general rule in the construction of deeds, that in case of ambiguity the instrument must be construed most strongly against the grantor and in favor of the grantee. 2 Tiffany on Real Property (2d Ed.) 437:
>
> > 'The courts, in connection with the construction of written conveyances, as of other instruments, have asserted some general rules of construction, to aid in ascertaining the intention of the parties thereto.
> >
> > 'In case of doubt, it is said, the conveyance is to be construed most strongly as against the grantor, or in favor of the grantee on the theory, it seems, that the words used are to be regarded as the words of the grantor rather than of the grantee. Applying this rule, an exception or reservation in a conveyance is construed in favor of the grantee rather than of the grantor.'
>
> Many cases might be cited in support of this rule, but the same is so elementary that citation is unnecessary.

*Pure Oil*, 116 Ohio St. at 202–03. *See Campbell v. Johnson*, 87 Ohio App.3d 543, 547, 622 N.E.2d 717 (2nd Dist.1993); *see also Am. Energy Corp. v. Datkuliak*, 174 Ohio App.3d 398, 882 N.E.2d 463, ¶ 75 (7th Dist. 2007).

If the Court has any doubt on whether the Jones Interest is a reservation of a life estate or an exception of a perpetual interest in oil and gas, the Court should construe the severed interest in favor of Appellees, thereby declaring it to be a life estate. The least restrictive interest to be created by the severed interest is a life estate, because such an estate would burden the Real Estate's surface and mineral estate only during original owner's life. As a result, this means the "smallest" interest able to be retained by the original owner (H.J. Jones) was a life estate. If the Court has any doubt as to the scope of Jones' interest, it should construe it as a life estate. *Detlor v. Holland*, 57 Ohio St. 492, 49 N.E. 690 (1898); *Stocker & Sitler, Inc. v. Metzger*, 19 Ohio App.2d 135, 142, 250 N.E.2d 269 (5th Dist.1969) ("A deed is to be construed most strongly against the grantor."); *Hartman v. Patton*, 4th Dist. Athens No. 1343, 1987 WL 16564, *3.

As a result, the Fifth District correctly held that the Jones Interest is an expired life estate because the reservation lacked words of inheritance.

**B. <u>CONCLUSION</u>**

Based on the above, the Court should answer Proposition of Law No. II in the negative and affirm the Fifth District's decision.

## III. ARGUMENT IN OPPOSITION TO PROPOSITION OF LAW NO. III: The Jones Interest was not preserved by the filing of an instrument which by its own terms could not affect the Jones Interest's title, in this case a will which did not convey or effect the Jones Interest.

### A. LAW AND ARGUMENT

#### i. Appellants cannot reasonably assert that the General Assembly violated their due process rights by making the MTA applicable to severed mineral interests because (1) they waived those arguments and (2) the General Assembly gave them a three-year grace period during which they could preserve their interest.

The Court can easily reject Appellants' due process arguments for two reasons:

*First*, Appellants raised no constitutional challenge to the MTA's application to the Jones Interest in the trial court and in the Fifth District. As a result, they have waived any constitutional challenge here. *State v. Smith*, 162 Ohio St.3d 353, 2020-Ohio-4441, 165 N.E.3d 1123, ¶ 35 ("Smith did not make any due-process argument relating to the use of other-acts evidence in his merit briefs in the court of appeals. We generally decline to consider issues that were not raised in the court of appeals. *Wireman v. Keneco Distribs., Inc.*, 75 Ohio St.3d 103, 108, 661 N.E.2d 744 (1996); *State v. Phillips*, 27 Ohio St.2d 294, 302, 272 N.E.2d 347 (1971)."); *State ex rel. Compton v. Sutula*, 132 Ohio St.3d 35, 2012-Ohio-1653, 968 N.E.2d 476, ¶ 4 ("Moreover, Compton waived his claim that Judge Sutula could not rely on a nunc pro tunc order to rectify any error in his sentencing entry because he failed to raise the claim in the court of appeals. *See State ex rel. DeGroot v. Tilsley*, 128 Ohio St.3d 311, 2011-Ohio-231, 943 N.E.2d 1018, ¶ 9.").

*Second*, the MTA gave all owners of pre-root severed mineral interests (including

Appellants and their predecessors) three years to preserve their pre-root interests. As this Court acknowledged just a few months ago:

> As originally enacted in 1961, the Marketable Title Act did not apply to mineral interests. Former R.C. 5301.53(E), 129 Ohio Laws at 1046. The General Assembly amended the act in 1973, however, " 'to enable property owners to clear their titles of disused mineral interests.' " Corban at ¶ 18, quoting Am.S.B. No. 267, 135 Ohio Laws, Part I, 942-943. *That amendment included a grace period, through the end of 1976, that afforded mineral-interest holders more than three years in which to preserve their interests and avoid extinguishment of those interests by the Marketable Title Act.* Former R.C. 5301.56, Am.S.B. No. 267, 135 Ohio Laws, Part I, at 943.

*West*, 162 Ohio St.3d 293, ¶ 17. Appellants shoot right past this when making their spurious due process claim.

The three-year grace period proves a death knell for Appellants' due process argument—Appellants' future inaction (from 1973 through 1976) caused the Jones Interest's extinguishment and not state action. Thus, no due process violation. *Texaco*, 454 U.S. at 517 ("The 2-year grace period provided by the statute forecloses any argument that the statute is invalid because mineral owners may not have had an opportunity to become familiar with its terms. Property owners are charged with knowledge of relevant statutory provisions affecting the control or disposition of their property.").

**ii. The MTA relies exclusively upon the record chain of title and does not cause interests to pass outside that record chain of title.**

Appellants' claim that severed mineral interests pass outside the record chain of title under the MTA, a claim repeated throughout their brief, creates a strawman to justify their ignoring of how the MTA's extinguishment mechanism works. Appellants'

strawman is the claim that severed mineral interests pass outside record chain of title. In actuality, those interests, like all interests extinguished by the MTA, are explicitly terminated because of and based on the record chain of title.

> As this Court acknowledged in *Corban v. Chesapeake Expl., L.L.C.*, the MTA:
>
> *[E]xtinguished oil and gas rights by operation of law after 40 years from the effective date of the root of title unless a saving event preserving the interest appeared in the record chain of title*—i.e., the interest was specifically identified in the muniments of title in a subsequent title transaction, the holder recorded a notice claiming the interest, or the interest "[arose] out of a title transaction which has been recorded subsequent to the effective date of the root of title." R.C. 5301.48 and 5301.49. (Emphasis added.).

*Corban v. Chesapeake Expl., L.L.C.*, 149 Ohio St.3d 512, 2016-Ohio-5796, 76 N.E.3d 1089, ¶ 18. Thus, the MTA relies explicitly upon what is contained within the record chain of title when determining whether the pre-root interests are extinguished. One would identify the root of title and then examine the record chain of title in the 40 years later to determine whether the pre-root interest has been extinguished. If no preserving event exists, then the current property owner may rely on the record chain of title, meaning those interests not within the record chain are no longer valid. There is no passing of title outside the record chain of title, but there is extinguishment based on the record chain. Again, this is the purpose and reason for the MTA, to extinguish properly recorded and filed interests based on the dates on which documents creating or preserving interest were filed. The strength or legitimacy of the interest is irrelevant.

Appellants' arguments are about the MTA generally and not just as applied to severed mineral interests. The MTA extinguishes all pre-root interests in the same manner and as such, does not have some sort of unique animus towards severed mineral interests. The MTA essentially requires the examination of the entire chain of title from the root of title deed forward in time, no matter if the pre-root interest is a mineral interest. The pre-root interest is extinguished if it is not preserved during the relevant forty-year period, much like an accrued cause of action that is not asserted during the applicable statute of limitations period. This is a universal application and does not work differently with severed mineral interests.

The separate chain of title for a severed mineral interest in *Heifner* did not remove the MTA's applicability; instead, the separate chain of title acknowledged that one must examine the full chain of title for the forty-year-period:

> Appellants' root of title is the 1916 deed from Elvira Sprague and her husband to Fred H. Waters which reserved to the grantors the oil and gas rights in the land. Appellees' root of title is the 1936 conveyance from Fred H. Waters and his wife to Charles B. Waters, Emma M. Waters, Sarah K. Waters, and William H. Waters which failed to mention the reservation of oil and gas rights. Consequently, unless subject to R.C. 5301.49, appellees hold a marketable record title to the oil and gas rights, as well as title to the surface land, by virtue of having an "unbroken chain" of record title for over forty years which extinguishes prior claims and interests, including that of appellants. R.C. 5301.47(A) and 5301.48.
>
> The Act defines a "title transaction" to include the passage of "title by will or descent." Thus, the 1957 conveyance of the oil and gas rights which passed under the terms of Elvira Sprague's will must be considered a "title transaction" under R.C. 5301.49(D).

> Appellees argue that we should construe R.C. 5301.49(D) to require that a title transaction under that section arise from the same chain of title as that under which there is claimed to be a marketable record title. For the reasons to follow, we feel the proper construction should be otherwise.
>
> ***
>
> Hence, we are satisfied that R.C. 5301.49(D) ought to be construed in the manner that Simes and Taylor, as drafters of Section 2(d) of the Model Act, intended.4 *Accordingly, a "marketable title," as defined in R.C. 5301.47(A) and 5301.48, is subject to an interest arising out of a "title transaction" under R.C. 5301.49(D) which may be part of an independent chain of title. Further, the effect of R.C. 5301.49(D) is identical to that obtained by the filing of a preservation notice. R.C. 5301.51 provides for the preservation of interests by the filing of a notice of claim during the forty-year period.* As a result, the recording of a "title transaction" under R.C. 5301.47(F) and 5301.49(D) is equivalent to the filing of a notice of claim during the forty-year period as specified in R.C. 5301.51 and 5301.52.6

*Heifner*, 4 Ohio St.3d at 51–53 (emphasis added).

**iii. Appellants erroneous rely on the definition of "title transaction" and ignore the Revised Code section governing the title transaction preserving event under the MTA (R.C. 5301.49(D)).**

The Ward Will could not preserve the Jones Interest from MTA-extinguishment because the Appellants' interest in the Jones Interest did not "arise out of "the will. Appellants know this to be case. As such, they spend their time arguing why the definition of "title transaction" may be important, while ignoring the fact that the MTA requires that the pre-root arise "out of" the particular "title transaction" to be preserved. Ultimately, Appellants conflate the title transaction savings event under the Dormant Mineral Act (R.C. 5301.56) with the title transaction exception under the MTA (R.C. 5301.49(D)).

A "title transaction" under the MTA is defined as: "any transaction affecting title to any interest in land, including title by will or descent, title by tax deed, or by trustee's, assignee's, guardian's, executor's, administrator's, or sheriff's deed, or decree of any court, as well as warranty deed, quit claim deed, or mortgage." R.C. 5301.47.

But the definition of "title transaction" does not determine whether a pre-root interest was preserved. Instead, under R.C. 5301.49(D), an interest is preserved by a title transaction only if the pre-root interest arises out of that title transaction:

> Such record marketable title shall be subject to:
>
> ***
>
> Any interest *arising out of a title transaction which has been recorded subsequent to the effective date of the root of title* from which the unbroken chain of title or record is started; provided that such recording shall not revive or give validity to any interest which has been extinguished prior to the time of the recording by the operation of section 5301.50 of the Revised Code… (Emphasis added.).

Based on the statute's plain language, the pre-root interest is preserved under R.C. 5301.49(D) if both of these are true: (1) it arises out of the particular title transaction and (2) the title transaction was recorded after the root deed.

The parties agree that the Appellants' interest in the Jones Interest did not arise out of the Ward Will. Merriam Webster's defines "arising" as "to begin to occur or to exist" or "to originate from a source." https://www.merriam-webster.com/dictionary/arising (Last visited April 26, 2021). None of the Appellants' interest arose out of the will which does not convey the Jones Interest, states any real

estate was transferred prior to death, and contains no residuary clause. The necessity of the title transaction purporting to create the interest is paramount and addressed at page 33 of Simes and Talyor, Model Title Standards (1960), Standard 4.11 (QUITCLAIM DEED OR TESTAMENTARY RESIDUARY CLAUSE IN FORTY-YEAR CHAIN). The Model Title Standards acknowledge that a residuary clause in a will can be a link in a chain of title. *Id*. In the comments, they note the important of what interest the instrument purports to create:

> In some instances a particular title transaction may have to be construed before it can be determined what interest it "purports to create." Thus, in a jurisdiction where there is no decree of distribution in the settlement of a decedent's estate, and the significant muniment of title in a testate estate is a will which describes no real estate but. merely devises to a named person "all the residue of" the testator's estate, it is necessary to determine what is in the residue before deciding what interests in land the will "purports to create."

*Id.* The Ward Will does not purport to create any interest in the Jones Interest. In fact, it declares the opposite – that any real estate was conveyed prior to death. As a result, R.C. 5301.49(D)'s "arising out of a title transaction" does not apply to these facts.

Knowing that the Ward Will did not create or even affect the Jones Interest, Appellants then conflate the Dormant Mineral Act's title transaction event with the MTA's event. Under the Dormant Mineral Act, a severed mineral interest is preserved if it "has *been the subject of a title transaction* that has been filed or recorded in the office of the county recorder of the county in which the lands are located." R.C. 5301.56(B)(3)(a) (emphasis added). Thus, the interest need not originate from the title transaction. Instead,

the much lower threshold of being "the subject of a title transaction" is all that is needed. *Buell*, 144 Ohio St.3d 490, ¶ 58 ("We find that by these or substantially similar terms, the mineral interest *has been the subject of a title transaction because the oil and gas lease affects title* to the surface and mineral interests in land in a number of ways.") (Emphasis added.).

That differs from the MTA, which requires the interest to arise from the title transaction recorded after the root deed. Affecting title to the mineral estate is not enough under the MTA. Indeed, if the General Assembly had intended to have the same standard in the Dormant Mineral Act as in the MTA, it would have had both statutes say the same thing. It deliberately chose to have different standards. As a result, all title transactions from which pre-root severed interests arise will preserve under both the MTA and Dormant Mineral Act—the creating document affects title to the minerals. But not all title transactions which may affect title to the minerals will qualify under the MTA because the pre-root severed interest may not arise from them. In either event, since the Ward Will does not contain a residuary clause, it did not even affect title to the Jones Interest, let alone give rise to any of the Appellants' claim to an interest in the Jones Interest.

Appellants cite *Oglebee v. Miller*, 111 Ohio St. 426, 145 N.E. 846 (1924), which states that when a testator fails to dispose of certain property in his will such property will "descend in accordance with the law of descent and distribution, *irrespective of the actual intention or expectation of testator*" and outside the scope purview of the will. *Oglebee* at 434. But this misses the point: Appellants argued below that the Ward Will itself was the

preserving document, and the will has no applicability to the question of who owns the Jones Interest. Appellants do not cite any recorded or filed document which was recorded or filed from Appellees' root of title and the 40 years following the root which purportedly conveyed, transferred, or otherwise affected title to the Jones Interest. As a result, the Ward Will did not preserve the Jones Interest.

*Hartline v. Atkinson*, 7th Dist. Monroe No. 20 MO 0006, 2020-Ohio-5606, is distinguish because there was no sign that the will in *Hartline* lacked a residue clause. *Hartline*, 2020-Ohio-5606, ¶¶ 16-31, *reconsideration denied*, 7th Dist. Monroe No. 20 MO 00062021-Ohio-575, ¶¶ 16-31. Indeed, the following statement from the Seventh District suggests the will did contain a residue clause: "Thus, the fact that the Webb Interest was not specifically listed in any of the wills did not prevent it from transferring title and constituting a title transaction under the MTA." *Id*. ¶ 29. If the will did not have a residue clause or a specific bequeathing of the pre-root interest, then the will would be prevented from transferring title because it would not pass the interest in any way. *See* April 5, 2021 Memorandum in Support of Jurisdiction of Appellants in Ohio Supreme Court Case No. 2021-0412, pp. 4-5 (saying that both wills in Hartline had provisions "devising all" of the testators' "property"); *see also* Model Title Standard, *supra*.

Under Ohio law, every conveyance of real property must contain a legal description that can be used to locate the land. *Scarberry v. Lawless*, 4th Dist. Lawrence No. 09CA18, 2010-Ohio-3395, ¶ 27, *citing Griffin v. Griffin*, 12th Dist. Butler Nos. CA2003-

03-076 and CA2003-04-081, 2004-Ohio-698. This description must be written and must afford reasonable certainty as to the land's identity and location. *Id*. ¶ 27, *citing* 35 Ohio Jurisprudence 3d (2002) 264 deeds, § 42 (footnotes omitted)). When a person cannot locate the land cannot be located from the description, or when the description is so unclear that it cannot be known what land was intended to be conveyed, the deed is void. *Id*. For the same reason, an interest in land does not arise out of a will if it does not specifically devise the interest or describe the property subject to the interest.

Section 2113.61(A) of the Revised Code states that when real property passes by intestate succession or under a will, the administrator or executor must apply for a certificate of transfer as to the real property. Within five days following the filing of the application, the probate court must issue a certificate of transfer for record in each county where the real property is situated. Under R.C. 2113.61(C)(5), the certificate of transfer must recite "[a] description of each parcel of real property being transferred." Even if real estate passes by intestacy without a formal estate, an affidavit of real estate inherited under R.C. 317.22(B) is required setting forth "the part or portion of such real estate inherited" by each heir at law and next of kin. Thus, a filed or recorded will should specifically devise the pre-root interest or describe the property affected by the interest to meet R.C. 5301.49(D)'s criteria.

This was the case in *Heifner*, in which the will actually *devised* the reserved oil and gas rights, and actual transfer documents, such as a recorded certificate of transfer or an

affidavit of real estate inherited, were recorded to preserve a pre-root interest under R.C. 5301.49(D). *Heifner*, 4 Ohio St.3d at 49-51.

Indeed, Appellants' statement that the Ward Will "informs us that the Jones Interest passed to Ward's heirs at law under Ohio's law of descent and distribution" is nonsensical and contrary to the actual four corners of the will. The will tells us only that the will passed only that property specifically identified within the will. It does not say that unlisted property passes by intestacy any more so than it tells us that the property passed by a previous deed or a trust. It does not even say (as claimed by Appellants) that Earl Ward died "seized" of the Jones Interest. In fact, it says the opposite, that any interest in real estate that he owned was conveyed prior to death. Simply put—the will is limited on its face and must be given its limited construction. *Oliver v. Bank One, Dayton, N.A.*, 60 Ohio St.3d 32, 36, 573 N.E.2d 55 (1991) (HOLMES, Justice, concurring) ("In all reviews of wills and trusts, however, courts attempt to look for the testator's intent within the four corners of the will itself without applying extraneous evidence of such intent.").

Rather than follow the R.C. 5301.49(D)'s text, Appellants ask the Court to apply a standard which finds no support within the Revised Code — that R.C. 5301.49(D) covers any transaction, or no transaction at all, which "influenced" the pre-root interest "in some way." This is an amorphous standard that litigants will be unable to grasp with any firmness. Instead, that standard will lead to more lawsuits.

When Peppertree and the Moores first acquired the Real Estate, the relevant

conveyance instrument never mentioned the Jones Interest. [Tr. Ct. Dkt 84 (Exh. 2 to Peppertree's MSJ)]. Because the Jones Interest was not subject to any exception under the MTA, nor subject to a preserving event during the relevant review period (from the root of title until Peppertree and the Moores acquired the Real Estate), the MTA irrevocably extinguished it in 1997.

Based on the above, the Fifth District's decision that the MTA extinguished the Jones Interest was proper and should be affirmed.

### B. CONCLUSION

Based on the above, the Fifth District's decision that a will which did not create the interest claimed by Appellants could not and did not (on its own terms) affect the Jones Interest was correct and should be affirmed.

## CONCLUSION

For these reasons, the Court should affirm the Fifth District's decision.

Respectfully submitted,

*s/ Gregory W. Watts*
Gregory W. Watts (0082127) (COUNSEL OF RECORD)
Matthew W. Onest, Esq. (0087907)
Wayne A. Boyer (0087983)
KRUGLIAK, WILKINS, GRIFFITHS & DOUGHERTY CO., LPA
4775 Munson Street N.W./ P.O. Box 36963
Canton, OH 44735
gwatts@kwgd.com; monest@kwgd.com
wboyer@kwgd.com
ATTORNEYS FOR APPELLEES

## PROOF OF SERVICE

The foregoing was filed electronically with the Court and a copy served by electronic mail on this 4th day of May 2021 upon:

David J. Wigham
Roetzel & Andress, LPA
222 South Main Street
Akron, OH 44308
dwigham@ralaw.com

Sara E. Fanning
Roetzel & Andress, LPA
41 South High Street
Huntington Center, 21st Floor
Columbus, OH 43215
sfanning@ralaw.com
*Attorneys for Defendants-Appellants,*
*Cheryl Bilby, et al.*

*s/ Gregory W. Watts*
Gregory W. Watts, Esq.
Krugliak, Wilkins, Griffiths & Dougherty Co., LPA
ATTORNEYS FOR APPELLEES