Supreme Court of Ohio Clerk of Court - Filed August 02, 2023 - Case No. 2023-0411

NO. 23-0411

THE SUPREME COURT OF OHIO

APPEAL FROM THE COURT OF APPEALS
SEVENTH APPELLATE DISTRICT
BELMONT COUNTY, OHIO
CASE NO. BE0047

RICE DRILLING D, LLC, *et al.*,
Defendant-Appellants

v.

TERA, LLC
Plaintiff-Appellee

BRIEF OF AMICI CURIAE OHIO OIL AND GAS ASSOCIATION AND SOUTHEASTERN OHIO OIL AND GAS ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLANTS

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I. INTRODUCTION

Oil and gas development has a long history in Ohio. Commercial production began in Ohio in 1860, only a year after Col. Edwin Drake struck oil in Titusville, Pennsylvania. Since that time, we have drilled nearly 270,000 wells, produced over 23 trillion cubic feet (Tcf) of natural gas and 1.3 billion barrels (Bbl) of oil, and had exploration activities in most counties of the state. Historically, and today, Ohio oil and gas production has been of significant benefit to its citizens, both in terms of reliability of supply and providing a lower cost alternative to production from other regions in the country. If affirmed, the lower courts' decisions on Propositions of Law I and II threaten our vital industry and will have dramatic consequences for production in this state.

On Proposition of Law I, the lower courts erred by finding—as a matter of law—that the "formation commonly known as the Utica Shale" does not include the Point Pleasant interval. **To reach this finding, the lower court decisions overlooked competent and contemporaneous evidence showing that numerous sources, including the parties to the underlying lease, understood that the phrase "Utica Shale" has been commonly understood to include the Point Pleasant interval**. The court of appeals instead retroactively applied a hyper-technical and scientific meaning to that term, one not established at the time of contracting. This retroactive application of a yet-to-be established scientific term erases the parties' use of the phrase "commonly known as," and subverts basic axioms of contract law.

In his June 28, 2023 Opinion and Order in a companion federal case in the U.S. District Court for the Southern District of Ohio, Chief Judge Marbley, analyzing the same language and similar evidence, had this same critique of the court of appeals' decision here: "While Plaintiff and the Ohio Court of Appeals interpreted the words 'commonly known as' simply to reinforce the contract canon of interpretation that courts should rely on the common meaning of words, it applied the 'technical stratigraphic meaning' of Utica Shale, demonstrating that the 'common

meaning' of the term inherently relies on evidence extrinsic to the lease." *Tera II, LLC v. Rice Drilling D, LLC*, No. 2:19-cv-02221, Doc. No. 490 at 30 (S.D. Ohio). Chief Judge Marbley reached the same conclusion as Judge Robb in her dissenting opinion below: that the phrase "commonly known as the Utica Shale" **is ambiguous**. *See id*. at 30 ("'Utica Shale' reasonably could be given multiple definitions by those across the scientists, landowners, and drilling companies that make up the oil and gas industry."); *Dissenting Opinion*, at ¶136. Judge Robb even went a step further and found that "The plain language of the lease clearly granted the lessee rights in the Point Pleasant formation after employing extrinsic evidence on the specialized meaning of certain terminology used in the lease." *Id*.

On Proposition of Law II**,** the lower courts have rewritten Ohio law on presumptions by expanding and misapplying a bad faith presumption found in certain ancient coal conversion cases in direct violation of the modern rules of evidence and this Court's modern precedent. The lower courts each effectively adopted a per se rule that when a party to a lease, or any other written property agreement for that matter, interprets its lease differently from a trier-of-fact, that party runs the risk that it will be presumed—irrespective of intent—that it is a bad faith trespasser *and* that it bears the burden of proof to show it acted in good faith.

In an industry such as Amici's, where producers have countless real property contracts and are on the leading-edge of development and exploration, this now-expanded bad faith presumption will have devastating effects and will thwart Ohio's clear public policy in favor of oil and gas exploration and production.

Moreover, the ripples of the court of appeals' expansion and misapplication of the bad faith presumption reach beyond just our industry. Parties to *any* agreement governing the use of property, such as farming leases, timber contracts, grain contracts, aquifer contracts, easements,

right-of-ways, or licenses, will be presumed bad faith trespassers *and* have the burden of proving good faith where they are found to have exceeded the boundaries of their grant.

II. STATEMENT OF INTEREST OF AMICI CURIAE

Amicus Curiae the Ohio Oil and Gas Association ("OOGA") is a statewide trade association whose members engage in the exploration, development, and production of oil and natural gas in Ohio. OOGA's membership includes small independent producers and major energy companies, as well as Ohio contractors, service and supply companies, manufacturers, utilities, accountants, insurers, engineers, and landowners. Its mission is to protect, promote, foster, and advance the common interest of those engaged in all aspects of the Ohio crude oil and natural gas producing industry. It believes that the local oil and gas industry plays a vital role in continued economic growth and development of this geographic area and nationwide. OOGA monitors Ohio litigation involving oil and gas law and occasionally participates as amicus curiae in select cases that address issues of special importance to their members. OOGA believes this to be one of those cases.

Amicus Curiae the Southeastern Ohio Oil and Gas Association ("SOOGA") is a non-profit organization comprised of local producers and businesses involved in oil and gas operations in southeastern Ohio and northern West Virginia. Since it was established in 1978, SOOGA has addressed issues and concerns unique to the Mid-Ohio River Valley. It firmly believes that the local oil and gas industry is vital to the continued economic growth and development of this geographic area and to the entire country. Like OOGA, SOOGA occasionally participates as amicus curiae in cases involving important legal issues concerning the Ohio oil and gas industry. SOOGA also believes this to be such a case.

If left standing, the court of appeals' 2-1 majority opinion (the "Majority Opinion") will have drastic and unintended impacts not only on the industry segment that explores for and

produces oil and gas in Ohio, but will potentially have further industry-wide ramifications for the gathering, processing and transmission of critical energy infrastructure for end users in Ohio, regionally and beyond. Members are encountering the ripple effects of the court of appeals' decision. Amici have received reports of property owners trying to leverage the court of appeals' decision to demand settlements far in excess of any injury actually suffered—turning contract interpretation disputes concerning leases or rights of ways into bad faith tort claims. Likewise, litigants have sought to expand these rulings to other segments of the energy sector that rely on real property contracts to conduct their business. Such attempts are not surprising given that the Majority Opinion raised the stakes of being on the wrong side of a contract interpretation dispute involving use-rights in property.

III. STATEMENT OF FACTS

Amici Curiae adopt and incorporate the statement of facts of Defendants-Appellants.

IV. ARGUMENTS ON PROPOSITIONS OF LAW

I. PROPOSITION OF LAW NO. 1: OIL AND GAS LEASES ARE NO EXCEPTION TO THIS COURT'S PRECEDENTS REQUIRING THAT COURTS CONSIDER EVIDENCE OF COMMON MEANING.

The court of appeals held as a matter of law that the "formation commonly known as the Utica Shale" did not include the Point Pleasant interval. To do so, the court relied upon the "technical stratigraphic meaning" from today even though that meaning was not established in 2013 and certainly not "commonly known" in 2013. Majority Opinion, at ¶ 50. At the same time, the court of appeals disregarded contemporary evidence from Appellants that showed that the common understanding of the phrase "Utica Shale" in 2013 included the Point Pleasant interval. The question before this Court is whether the court of appeals erred.

The core tenet of contractual interpretation is to ascertain and give effect to the parties' intentions. Where the contract's language is clear and unambiguous, it must be applied as written and cannot be interpreted to, in effect, create a new contract for the parties. And it is presumed that the language chosen and used by the parties was done for a specific purpose, such that contracts should not be interpreted in a way that renders language superfluous or meaningless. *See Wohl v. Swinney*, 118 Ohio St. 3d 277, 280, 888 N.E.2d 1062 (2008).

Here, the parties expressly chose to define the scope of the grant in their lease to cover the "formation **commonly known as** the Utica Shale." (emphasis added). This phrase invites, and even requires the use of, extrinsic evidence in order to determine the common meaning in 2013, when the lease was signed. Yet in finding that the "formation commonly known as the Utica Shale" excludes the Point Pleasant interval as a matter of law, the court of appeals used the "technical stratigraphic meaning" from today and disregarded Appellants' contemporary evidence regarding the common meaning of that phrase. Majority Opinion, at ¶ 50. The Majority Opinion erred for at least three reasons.

First, the parties expressly adopted a non-technical, "common" meaning. So by adopting the "technical stratigraphic meaning" the court of appeals committed reversible error by effectively deleting "commonly known" from the lease. Indeed, if "commonly" is to be given any effect, then Defendants-Appellants' evidence on this point compels finding, at minimum, that genuine issues of material fact exist.

Second, when the lease was signed in 2013, the "technical stratigraphic meaning" had not yet been established - and certainly was not "commonly" understood. The court of appeals applied a yet-to-be established technical meaning and applied it retroactively. Doing so undermined the parties' intent and the express language of the lease.

Third, the court of appeals' reliance on R.C. 1.42 to justify its adoption of the "technical stratigraphic meaning" is misplaced.[1] On its own terms, R.C. 1.42 does not apply where, as here, the term had not yet acquired a technical meaning. *See State ex rel. Herman v. Klopfleisch*, 72 Ohio St. 3d 581, 584-85 (1995) (declining to apply technical meaning to the term "affiliated" as used in R.C. 733.08 because it had not acquired a technical meaning). Further, application of R.C. 1.42 is misplaced where the contract language expressly notes that the phrase shall take on a "common" meaning.

In the companion federal case, acting under a mandate to "predict how [this Court] would rule", Chief Judge Marbley offered similar critiques to the Majority Opinion. *See Tera II*, No. 2:19-cv-02221, Doc. No. 490 at 28 (S.D. Ohio). In that case, plaintiffs, operating under the same granting clause present in this case, moved for summary judgment seeking a declaration that "the Utica Shale and Point Pleasant formation are separate geological formations and that they reserved to themselves the mineral rights in the Point Pleasant." *Id*. at 22. Essentially, plaintiffs sought the same ruling from the Majority Opinion: that the phrase "formation commonly known as the Utica Shale" does not include the Point Pleasant interval as a matter of law. The court, however, denied summary judgment, holding that the lease was ambiguous given that the phrase Utica Shale "reasonably could be given multiple definitions by those across the scientists, landowners, and drilling companies that make up the oil and gas industry." *Id*. at 30. The court then noted the obvious: "The Ohio Court of Appeals specifically relied on the stratigraphic definitions of 'Utica Shale' in *TERA, LLC*, but the fact that the parties here present two reasonable interpretations demonstrates that ambiguity remains as to which definition should be applied to the leases." *Id*.

[1] Amici note that R.C. 1.42 applies solely to questions of statutory interpretation. *See* R.C. 1.41. But Amici recognize that similar tools exist for interpretation of contracts.

The parties' express intent was to adopt the "common", not technical, meaning of the phrase "Utica Shale." The court of appeals should have been engaged in understanding the common meaning of the "Utica Shale" in 2013, but instead found and implemented a technical meaning from today. Doing so runs contrary to the lease itself and basic canons of contract interpretation. This Court should reverse.

II. PROPOSITION OF LAW NO. 2: "BAD FAITH" TRESPASS IN ENERGY CASES SHOULD—JUST AS IN OTHER CASES—TURN ON THE DEFENDANT'S SUBJECTIVE INTENT.

The Majority Opinion erred by expanding the legal presumption of bad faith from certain old coal conversion cases and, in doing so, ignored the basic rule of presumptions under Ohio law – that they be narrowly construed and based on necessity. Worse yet, the court of appeals further erred by impermissibly shifting the burden of proof in direct violation of the modern rules of evidence and this Court's clear precedent. Then, without any case law, the lower courts usurped the role of the jury and made a finding of bad faith as a matter of law.

The severity of the consequences of a finding of bad faith trespass highlights why presumptions are to be narrowly construed. Ohio courts have held that the measure of damages for a mineral trespass done innocently (in the context of coal) is the value of the minerals in the ground in their undeveloped state. But where the trespasser acts with bad faith, i.e., willfully, the damages are measured by the market value of the minerals at the surface without deduction for the costs of lifting those minerals to the surface. *Bamer v. Tiger, Inc.*, 5th Dist. No. 87-LW-1310, CA-86-17, 1987 Ohio App. LEXIS 6961 at * 12 (1987).

Thus, if allowed to stand, the Majority Opinion would not only rewrite the modern rules of evidence and overturn this Court's precedent concerning the applicability and function of presumptions, but it would allow a punitive measure of damages to be imposed despite substantial evidence of the appellants' good faith belief in the rightness of its interpretation. The Court should

reaffirm that presumptions are to be narrowly applied and, if applied, do not serve to shift the underlying burden of proof. Here, these principles require reversal.

A. The legal presumption of bad faith from old coal conversion cases should not be expanded to oil and gas cases and beyond because presumptions are, as a matter of law, to be narrowly construed and the logic underlying that presumption does not apply.

Presumptions under Ohio law must be narrowly construed and based on necessity. *See Ayers v. Woodard*, 166 Ohio St. 138, syll. 2, 140, 144 N.E. 2d 401(1957) ("Presumptions must be based on some necessity. Courts will not go into the domain of presumptions where direct proof can be obtained."); *Baughman v. State Farm Mut. Auto Ins. Co.*, 88 Ohio St. 3d 480, 490-91, 727 N.E. 2d 1265 (2000) (similar). Here, however, the court of appeals disregarded this principle and extended the presumption of bad faith from certain old coal conversion cases to potentially any agreement governing the use of property (not limited, for example, to oil and gas leases, but including licenses, permits, easements, rights-of-way or leases involving a wide variety of natural resources (such as timber or water) or growing crops).

The Majority Opinion creates a per se rule that a party to an agreement governing the use of property (in this case, an oil and gas lease) who is found to have exceeded the "clear and unambiguous" boundaries of the grant is a presumed bad faith trespasser and carries the burden of proof on the issue of "faith." *See* Majority Opinion at ¶56. In doing so, the Majority Opinion converts a real property use agreement dispute wherein a party uses/enters onto the land into a bad faith trespass dispute. Such conversion exceeds even the ancient coal cases that created the presumption and Ohio law.

The parties and the lower courts all recognize the 1925 coal conversion case, *Athens & Pomeroy Coal & Land Co. v. Tracy*, as the genesis of an ancient legal presumption of bad faith for trespassers who convert coal from unsuspecting landowners. 22 Ohio App. 21, 153 N.E. 240 (4th

Dist. 1925), *aff'd*, 115 Ohio St. 298, 152 N.E. 641 (1926)[2]. In *Athens*, the defendant admitted to going onto a stranger's property, to which it had no interest or rights, and extracting 1,896 tons of coal. *Id*. at 26. Evidence presented at trial showed that the superintendent of the mine knew that he was extracting coal from the plaintiff's land. *Id*. After the trial, the trespasser coal company argued that it was prejudicial error that the trial court refused to issue a jury instruction creating a *presumption of an inadvertent trespass*. *Id*. at 30. The court admitted that "[i]n any other sort of action but that at bar refusal to give [an instruction that the trespass is presumed inadvertent] would probably be prejudicial error." *Id*. The court explained that **the unique circumstances of that case required a different result** because of the "ease" with which a coal operator could "mine over the line and the difficulties surrounding the owner in detecting and preventing such subterranean encroachments." *Id*. at 31. That is not the case here.

The Fifth District Court of Appeals restated this presumption in *Bamer v. Tiger, Inc.*, 5th Dist. No. 87-LW-1310, CA-86-17, 1987 Ohio App. LEXIS 6961 (1987). As in *Athens*, in *Bamer* the plaintiff had no agreement with the converter or any reason to suspect a trespass, and the defendant had actual knowledge that it did not have rights to the coal. 1987 Ohio App. LEXIS 6961 at *10-11. **And, notably, both *Athens* and *Bamer* went to trial on the issue of bad faith**. *Athens*, 22 Ohio App. at 24; *Bamer*, 1987 Ohio App. LEXIS 6961 at *4.

The circumstances in this case are unlike those in *Athens* and *Bamer*. Here, Appellants had a contractual right to be on the property to drill and explore for natural gas and Appellee knew of that and profited from it. In *Athens* and *Bamer*, no contract existed. Instead, the defendants intentionally went on to an unsuspecting party's property and extracted coal. The appellate courts

[2] The Supreme Court's per curiam affirmation was a brief three page entry that did not address the issue of presumptions and came after the *jury* found defendant acted in bad faith.

in *Athens* and *Bamer* adopted the presumption to prevent coal companies from converting coal underground from oblivious third parties. In those cases, the "necessity" for the presumption, a key element of application, stemmed from the lack of an underlying contract and the secrecy of the trespass. *See, e.g.*, *Athens*, 22 Ohio App. 21, 26, 31 (explaining that a coal operator could easily mine over the property line without detection and it would be difficult for the owner to prevent those sorts of clandestine trespasses). That "necessity" is absent in this case, and thus the presumption should not apply.

Aside from having a contract giving Appellants' rights to use the property, **this case is also different in that Appellants' activities were not a secret**. Everything was out in the open, including in the application for the Gold Digger Unit and the testimony at the public hearing on the application. (*See* 01/31/2020 Ds' Supplemental Opp., Exhibit G, ODNR Hearing on Gold Digger Application 43:2-43:5). Appellee indisputably knew that Appellants were engaged in active production and exploration of natural gas under the agreed-upon lease and producing from the Point Pleasant interval. The court of appeals, however, drew no distinction between: (1) an alleged breach of the scope of land use rights under an existing lease; and (2) a stranger intentionally and secretly entering another's property to extract coal. But the situations are entirely different and the "necessity" that created the presumption in *Athens* and *Bamer* (lack of an underlying contract and secrecy of the conversion) does not apply here.

In failing to draw a distinction, the court of appeals failed to follow the narrow construction requirement under Ohio law, and broadened the presumption to contractual disputes concerning the scope of contractual rights.

That both the Chief Judge of the Southern District of Ohio and an Ohio appellate court judge found ambiguity in the scope of the granting clause highlights the impracticality and

harshness of the Majority Opinion's application of the bad faith presumption from the coal conversion cases. In fact, Judge Robb's dissent went a step further than just finding an ambiguity, finding that the "lease clearly granted the lessee rights in the Point Pleasant formation after employing extrinsic evidence on the specialized meaning of certain terminology used in the lease." Dissenting Opinion at ¶136.

At minimum, reasonable minds could differ on the scope of Appellants' rights under the lease. Under that circumstance, it is punitive and unjust to use an ancient and inapplicable presumption in order to convert a lease interpretation case into bet-the-company bad faith trespass litigation. This Court should reiterate the basic principle of presumptions–that they be narrowly applied and used only as a necessity. And then, the Court should reject the application of the presumption here.

B. Even if the bad faith presumption from the ancient coal cases applies, the lower courts improperly used that presumption to also shift the burden of proof, clearly violating the modern rules of evidence and this Court's precedent including its recent *Ohio Power v. Burns* decision.

The court of appeals affirmed the trial court's decision to employ a legal presumption of bad faith to also shift the burden of proof. *See* Majority Opinion, at ¶55 ("The act of trespassing creates a presumption of willfulness and places on the defendant not merely the burden of going forward, **but also of proving by a preponderance of the evidence** that he acted in good faith.") (emphasis added). This shifting of the burden violates the modern rules of evidence, contrary to this Court's recent jurisprudence. *See* ORE 301 and *Ohio Power v. Burns*. No. 2021-1168, 2022-Ohio-4713 (Dec. 2022). ORE 301, *Presumptions in general in civil actions and proceedings*, in relevant part, reads:

> a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, **but does not shift to such party the burden of proof in the sense of the risk of non-persuasion**, which

> remains throughout the trial upon the party on whom it was originally cast. (emphasis added)

Last December, this Court reaffirmed that presumptions do "not shift the ultimate burden of proof" and instead only place on the party against whom the presumption is directed "the burden of going forward with evidence to rebut or meet the presumption." *Ohio Power*, 2022-Ohio-4713, at * 32.

And while the court of appeals cites to *Athens* to support its application of the presumption and to shift the burden of proof (*see* Majority Opinion at ¶55), the *Athens* case was decided in 1925 and predates the modern rules of evidence by nearly 55 years. Moreover, as the commentary to ORE 301 recognizes, even before ORE 301, a presumption did not shift the burden of proof. *See* ORE 301, Commentary, citing *Ayers*, 166 Ohio St. 138, at syll. 3. The lone authority that the *Athens* court cited to in support of shifting the burden, *U.S. v. Ute Coal & Coke Co.*, 158 F.20, 23, 1907 U.S. App. LEXIS 3969 (8th Cir. 1907), another coal conversion case, does nothing to support that proposition. *Athens* misread the *Ute Coal* case. In *Ute Coal*, the federal court of appeals only applied a presumption and did not shift the burden of proof. *Id*. at 27-28. An accurate reading of *Ute Coal* places it squarely in line with *Burns* and ORE 301.

As such, the outlier is *Athens* and the lower courts committed clear error in relying on it. At minimum, the Court should remand the case to the trial court with the instruction to properly place the burden of proof on the plaintiffs to establish bad faith.

C. Even accepting a presumption of bad faith and shifting of the burden of proof, the lower courts should have presented the issue of faith to a trier of fact just as the courts did in each of the ancient coal cases *Athens, Bamer,* and *Ute Coal*.

Appellants presented material evidence below on whether their interpretation of the phrase "formation commonly known as the Utica Shale" included the Point Pleasant interval. Judge Robb went so far as to determine that this evidence showed that it "clearly" did (*Dissenting Opinion*, at ¶136), while Chief Judge Marbley found ambiguity in the clause and held that the issue needed to

be resolved by a trier of fact. *Tera II, LLC*, No. 2:19-cv-02221, Doc. No. 490 at 30. But in finding bad faith as a matter of law, both the Majority Opinion and the trial court usurped the role of the jury and weighed the credibility of that evidence.

That invasion of the province of the jury constitutes reversible error. Even the cases the lower courts and Appellees rely on went to the jury on the issue of "good faith/bad faith". *Athens*, 22 Ohio App. at 24; *Bamer*, 1987 Ohio App. LEXIS 6961 at *4; *Ute Coal*, 158 F.20, 27-28. The court in *Bamer* expressly acknowledged that the issue of good faith *must* be determined by a trier of fact. *Bamer*, 1987 Ohio App. LEXIS 6961 at *14 ("The question of good faith is an issue of ultimate fact as to whether or not there was *bona fide* belief of right in the action taken and complained of, ***to be arrived at by the trier of the facts***…") (emphasis provided). So what makes this situation different? The answer lies in the fact that the presumption should never have been applied. This case really concerns a contract interpretation dispute - each side with its view of the lease. But when the lower courts converted it to a bad faith tort case, it led to the absurd result of a finding of bad faith as a matter of law.

Appellants presented more than enough evidence to at least warrant jury intervention. Given the weight and severity of a finding of bad faith, it should only be made, as it was in *Athens*, *Bamer*, and *Ute Coal*, by a jury of peers after hearing and weighing all the evidence and testimony. By taking that issue out of the hands of the ultimate trier of fact, the lower courts created a precedent that, if left in place, will have grave repercussions to our industry and beyond.

CONCLUSION

For the reasons discussed herein, the Court should reverse the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Amici Curiae Ohio Oil and Gas Association and Southeastern Ohio Oil and Gas Association in Support of Defendants-Appellants was served via U.S. mail this 2nd day of August, 2023, upon the following:

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