NO. 23-0411

THE SUPREME COURT OF OHIO

APPEAL FROM THE COURT OF APPEALS
SEVENTH APPELLATE DISTRICT

RICE DRILLING D, LLC, *et al.*,
APPELLANTS.

v.

TERA, LLC,
APPELLEE.

BRIEF OF AMICUS CURIAE, NATIONAL ASSOCIATION OF ROYALTY OWNERS - OHIO, IN SUPPORT OF THE POSITION OF APPELLEE TERA, LLC, AND AFFIRMANCE

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INTRODUCTION AND STATEMENT OF INTEREST

It is long established in Ohio that "[t]he rights and remedies of the parties to an oil or gas lease must be determined by the terms of the written instrument, and the law applicable to one form of lease may not be, and generally is not, applicable to another and different form. Such leases are contracts, and the terms of the contract with the law applicable to such terms must govern the rights and remedies of the parties." *Swallie v. Rousenberg*, 190 Ohio App.3d 473, 483, 2010-Ohio-4573, 942 N.E.2d 1109 (7th Dist.), quoting, *Harris v. Ohio Oil Co.*, 57 Ohio St. 118, 129, 48 N.E. 502 (1897). Commensurately, both The Belmont County Court of Common Pleas and the Ohio Court of Appeals, Seventh Appellate District, relied upon black letter contract law in reaching their conclusions that the instant Lease unambiguously reserves to the landowner/appellee, Tera, LLC ("Tera"), all rights to the oil and gas and other products originating from Tera's Point Pleasant Formation.

In this era of horizontal drilling and fracturing, the focus is on specific stratigraphic formations and maximizing the oil and gas recovered in the most economical manner. *See*, *generally*, Jason Newman and Louis E. Layrisson, III, OFFSET CLAUSES IN A WORLD WITHOUT DRAINAGE, 9 Tex. J. Oil Gas & Energy L. 1, 11-12 (2013-2014) ("Since shale is typically found in formations that are horizontally wide but vertically narrow, a vertical well is unable to develop enough of the shale formation to be economically viable. Drilling horizontally in the shale allows developers to maximize the amount of oil and gas they can recover from the shale.") (citations omitted). *See also*, Petroleum Geology | Ohio Department of Natural Resources (ohiodnr.gov), https://ohiodnr.gov/discover-and-learn/safety-conservation/about-ODNR/geologic-survey/energy-resources/petroleum-geology) (last accessed August 31, 2023) ("Previously, oil and natural gas were explored by drilling into reservoir rocks. The current paradigm is to drill into the source rocks, such as a black shale; hydraulically fracture the shales to produce larger-scale

permeability; and allow the oil, natural gas, and natural gas liquids to flow into the horizontal well bore. This methodology currently is being used in the exploration and production of oil, natural gas, and natural gas liquids of the Point Pleasant Formation of Ohio.").

Numerous rock layers contain oil and gas reserves and have independent economic value to both producers and the owners of the mineral rights. Mineral owners recognize, for instance, that they may be able to lease certain geological formations containing oil and gas yet reserve other distinct geological formations so they may lease those formations later or pass those interests on to future generations. To preserve and promote those expectations, strict and predictable interpretation of contracts transferring or reserving mineral rights, including the Reservation Clause of the instant Lease, is of utmost importance to both the lessor owners of the mineral rights and the lessee industry operators and producers. The lower courts correctly observed that the relevant and material facts were undisputed and properly applied the unambiguous language of the subject Lease in the only way harmonious with the clearly expressed intent of the parties reflected therein.

NARO-OH is a 501(c)(6) organization that provides education, advocacy and support for the fundamental rights of oil and gas mineral owners, royalty owners and interested persons and entities from Ohio to keep them informed and working together on issues of importance to the preservation and advancement of the contractual and real property interests underlying oil and gas.

In the instant matter, NARO-OH's interest (and the interest of those it represents) is in preserving the precise language of mineral leases as it relates to the conveyance and reservation of specific geological formations. NARO-OH joins this Court, the Supreme Court of Ohio, in finding that mineral leases grant a property interest to the land, which interest and limitation of interest must be strictly construed in order to promote predictable outcomes and relationships between the

contracting parties. Precisely, NARO-OH appears in support of Tera and the Ohio Court of Appeals, Seventh Appellate District, in confirming that

> [i]n Ohio, an oil and gas lease will convey to the lessee/operator the right to produce oil and gas from all geological formations under the leased property, unless there is specific language contained in the lease limiting the depth or formations from which oil and gas can be produced.

Tera, LLC, v. Rice Drilling D, LLC, 2023-Ohio-273, 205 N.E.2d 1168, ¶ 37 (7th Dist.) (hereinafter *Tera*). NARO-OH appears before this Honorable Court to support and emphasize the importance of enforcing the precise terms of conveyance and reservation, which is the hallmark of mineral leases and contract law in Ohio and beyond.

The parties here agree that the Point Pleasant Formation is the geological formation immediately below the Utica Shale formation. *Tera* at ¶ 51. Indeed, even the "[t]he oil and gas companies concede that the Utica Shale and the Point Pleasant are separate rock units." *Id.* at ¶ 12. In the instant Lease, the landowners expressly reserved all formations below the Utica Shale. *Id.* at ¶ 10. Yet each court noted what is undisputed -- that the words "Point Pleasant Formation" appear nowhere in the mineral lease nor was that formation ever referenced in negotiations. *Id.* at ¶ 11. Therefore, the lower courts that have considered these issues have appropriately found that Tera and Rice Drilling D, LLC ("Rice") negotiated the transfer of rights to the Utica Shale formation, reserving, excluding, and leaving inviolate all formations below it, including the Point Pleasant Formation. On the basis of clear contractual analysis, the lower courts found the meaning of the Tera Lease self-evident and determined that Tera had reserved the Point Pleasant Formation, as it is a distinct "formation" below the base of Utica Shale. NARO-OH, with the support of NARO, is particularly well suited to provide the mineral interest owner perspective, given that it is dedicated solely to fostering the improvement, clarification and predictability of the mineral conveyances (and reservations) that are the lifeblood of its members.

NARO sees its members and the other private owners of oil and gas mineral rights as "landlords" that "play a critical first-step role in the development of their vital assets, through an oil and gas lease that assigns the right to drill and produce to an oil and gas operator." NARO Mission Statement, https://www.naro-us.org/about-naro/mission-statement (last accessed August 31, 2023). NARO recognizes that "[t]he rights and responsibilities of both parties are defined in the lease contract and by statute and by case law." *Id.* Yet, all too "[f]requently, however, those rights are misunderstood by inexperienced owners or ignored and/or overlooked or disregarded by their industry partners." *Id.*

Your *amici* respectfully submits the instant situation is one where the oil and gas producers blatantly disregarded the rights of the mineral owner, as specifically delineated in the Lease between the two. In furtherance of the interests of mineral owners, NARO-OH, supported by NARO, appears *amici* to urge affirmance of the lower courts' opinions.

STATEMENT OF FACTS

Amicus adopts by reference the Statement of Facts as set forth by Appellee Tera. NARO-OH further highlights three essential facts found by both the Trial Court and the Court of Appeals:

1. "The reservations section within Article One in each lease reads, in pertinent part, '[t]he Lessor reserves all rights not specifically granted to Lessee in this Lease. Lessor specifically reserves the right to all products contained * * * in all formations below the base of the Utica Shale.'" *Tera* at ¶ 10 (citations omitted).
2. "[I]t is undisputed that the Point Pleasant formation is the geological formation immediately below the Utica Shale formation.' (6/3/2020) J.E., p.2)" *Tera* at ¶ 47. *See also*, *Tera* at ¶ 51.

3. "'The Utica Shale' has a technical stratigraphic meaning." *Tera* at ¶50.

DISCUSSION

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

A. SUMMARY JUDGMENT FOR TERA, LLC, WAS APPROPRIATE, AS THE MATERIAL FACTS RELEVANT TO INTERPRETATION OF THE LEASE WERE UNDISPUTED.

Amicus respectfully submits that the trial court properly granted summary judgment to Tera and the Ohio Court of Appeals, Seventh Appellate District, correctly affirmed. The court rulings were required as the material facts were undisputed and the Lease was clear and unambiguous in its reservation of the Point Pleasant Formation to Tera.

Ohio law does not envision that, for summary judgment, a time must come when all litigants agree about all facts. *Todd Dev. Co. v. Morgan*, 116 Ohio St. 3d 461, 2008-Ohio-87, 880 N.E.2d 88, ¶ 3 ("The language of Civ.R. 56 and our case law do not support the proposition that a party moving for summary judgment has the burden to prove its case and disprove the opposing party's case as well."). However, Ohio law does provide that, summary judgment "is another method available to a party seeking to avoid a trial and is used when the facts of a case are allegedly undisputed." *Parrish v. Jones*, 138 Ohio St. 3d 23, 2013-Ohio-5224, 3 N.E.3d 155, ¶ 13. In ruling on summary judgment, the trial court is to focus on the material facts to determine if there is a "genuine issue for trial." *See*, *Dresher v. Burt*, 75 Ohio St. 3d 280, 293, 662 N.E.2d 264, 274 (1996), citing Civ.R. 56(E). Here, the Trial Court followed its mandate under Ohio law, reaching judgment on the basis of undisputed facts that are determinative of the issues, as follows.

The language within the mineral lease itself is undisputed and "reserves all rights not specifically granted to Lessee" and "specifically reserves the right to all products contained … **in all formations below the base of the Utica Shale**." *Tera* at ¶ 10 (Emphasis added) [citation

omitted]. Further, the parties agree that the Utica Shale and the Point Pleasant are distinct formations. The Court found:

> Tera contends that the Point Pleasant is a distinct geological formation from "the formation[ ] commonly known as the Utica Shale," and that Tera is the sole owner of the Point Pleasant, based on Shaw's express reservation of "all formations below the base of the Utica Shale" in the lease. The oil and gas companies concede that the Utica Shale and the Point Pleasant are separate rock units.

Tera at ¶ 12. "It is undisputed that the Point Pleasant is a formation below the Utica Shale." *Id.* at ¶ 51.

Where Appellants (the producers) would introduce disputed facts relative to the scope of the phrase "commonly known as" (from the granting clause), Appellants are urging this Court to ignore the word "formation" altogether and the import of the Tera Lease's reservation clause and, thus, to violate the maxim that the intent of the parties (both parties) is to be determined from the contract as a whole.

> When confronted with an issue of contract interpretation, our role is to give effect to the intent of the parties. We will examine the contract as a whole and presume that the intent of the parties is reflected in the language of the contract. In addition, we will look to the plain and ordinary meaning of the language used in the contract unless another meaning is clearly apparent from the contents of the agreement. When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties.

Sunoco, Inc. (R&M) v. Toledo Edison Co., 129 Ohio St. 3d 397, 2011-Ohio-2720, 953 N.E.2d 285, ¶ 37. As the Seventh District correctly held, "[w]ords or phrases should not be read in isolation." *Tera* at ¶ 43, citing, *Dominish v. Nationwide Ins. Co.*, 129 Ohio St. 3d 466, 2011-Ohio-4102, 953 N.E.2d 820, ¶ 8 ("In isolation, any word or phrase in the contested policy language may be ambiguous. When considered as a whole, however, the provision is unambiguous…. The fact that the two sentences could have been written more clearly, and they could have, does not mean that they are ambiguous."), citing, *United States Civ. Serv. Comm. v. Natl. Assn. of Letter Carriers*

AFL-CIO, 413 U.S. 548, 578-579, 93 S.Ct. 2880 (1973) (observing with respect to prohibitions in a federal statute that "there are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with.").

The trial court and the Seventh District found it beyond dispute that "the parties to the leases did not engage in any negotiation regarding the Point Pleasant and that the Point Pleasant was never even mentioned during the lease negotiations." *Tera* at ¶ 11. Following this Court's directive in *Sunoco*, the Seventh District also found that the reservation language gave context and clarity by explicitly reserving all rights not "specifically granted" and by expressly reserving the right to all products in "all formations below the base of the Utica Shale." *Tera* at ¶ 51. Inasmuch as the parties did not dispute the fact that the Point Pleasant Formation "is a formation below the Utica Shale," the lower courts reached the only conclusion that is consistent with and gives meaning to all portions of the subject Lease. Succinctly, the lower courts followed their mandate under Ohio law, reaching judgment on the basis of undisputed facts that are determinative of the issues.

Mineral leases affect title and thereby property rights. *French v. Ascent Res.-Utica, LLC*, 167 Ohio St. 3d 398, 2022-Ohio-869, 193 N.E.3d 543, ¶ 15-16. Such leases create an interest in property. *Id.* at ¶ 15. "[W]hen an oil and gas lease burdens property, it prevents the landowner from passing 'title free and clear of all liens and encumbrances.'" *Id.*, quoting, *Karas v. Brogan*, 55 Ohio St.2d 128, 129, 378 N.E.2d 470 (1978). As this Court observed,

> There is no question that oil and gas leases are unique, as they "seemingly straddle the line between property and contract: they are neither residential leases nor commercial contracts for the sale of goods." Keeling & Gillespie, The First Marketable Product Doctrine: Just What Is the "Product"?, 37 St. Mary's L.J. 1, 6

(2005). "Oil and gas leases are unusual in that they are not technically leases at all." Richardson, 46 Akron L.Rev. at 1144.

Chesapeake Exploration, L.L.C. v. Buell, 144 Ohio St. 3d 490, 2015-Ohio-4551, 45 N.E.3d 185, ¶ 41. Nevertheless, Ohio law has long recognized that "[s]uch leases are contracts, and the terms of the contract with the law applicable to such terms must govern the rights and remedies of the parties." *Harris*, 57 Ohio St. at 129; *see also*, *Bohlen v. Anadarko E&P Onshore, L.L.C.*, 150 Ohio St.3d 197, 2017-Ohio-4025, 80 N.E.3d 468, ¶ 13, citing, *Harris*. "[T]his court's duty is to give effect to the words employed by the parties in a contract…." *Bohlen* at ¶ 15. In other words, when evaluating the specific stratigraphic phenomena used in a lease, the lease must be strictly interpreted in that context so as to provide meaning to the words that are written without extending to those that are not.

The Seventh District correctly applied the technical term of "Utica Shale" according to its technical meaning. Such an interpretation is consistent with this Court's enunciation of the cardinal principles of contract interpretation. "Common words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument." *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St. 2d 241, 374 N.E.2d 146 (1978), paragraph two of the syllabus. "Technical terms will be given their technical meaning, unless a different intention is clearly expressed." *Foster Wheeler Enviresponse v. Franklin County Convention Facilities Auth.*, 78 Ohio St. 3d 353, 361, 678 N.E.2d 519, 526 (1997), citing *Cincinnati Ins. Co. v. Duffield*, 6 Ohio St. 200 (1856), syllabus.

As such, the importance of giving effect to the intent of the parties, as expressed in the whole agreement and the words used therein, cannot be overstated. After all, it remains true that for mineral leases, as in contracts generally, "disagreement of the parties as to what the contract

means . . . does not necessarily mean that the contract is ambiguous." *Wildman v. Mary Elk Schroder Home for the Aging, Inc.,* 1975 Ohio App. LEXIS 7550 *4 (First App. Dist., May 19, 1975). For these reasons and those set out further below and in Appellee's brief, the decisions of the trial court and the Seventh Appellate District were aptly reached and clearly and appropriately reflect Ohio law. NARO-OH therefore joins Tera in moving this Court to affirm the lower courts' decisions.

B. OHIO CONTRACT LAW MANDATES THE OUTCOME REACHED BY THE TRIAL AND APPEALS COURTS IN THIS MATTER.

Both the Trial Court and the Seventh District rely upon Ohio's black letter contract law in reaching the same determination relative to this mineral lease. As this Court has held repeatedly, mineral leases are contracts and are governed generally by contract law. *See*, *Harris* and *Bohlen*, *supra*. The Seventh District provided a detailed analysis of the relevant law that starts with intent of the parties and ends with ambiguity in contract two full pages later. The Seventh District tested and approved the trial court's understanding of contract law in Ohio. Given the rich resources of the State of Ohio, however, it also has a rich body of contract law, not all of which has been explored to date but all of which takes the parties to the same destination, as follows.

> Our legal standards for the interpretation of contracts are well established. We seek primarily to give effect to the intent of the parties, and we presume that the intent of the parties is reflected in the plain language of the contract. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 11. As a result, if the language of a contract is plain and unambiguous, we enforce the terms as written, and we may not turn to evidence outside the four corners of the contract to alter its meaning. *See id.; Aultman Hospital Ass'n v. Community Mut. Ins. Co.*, 46 Ohio St.3d 51, 53, 544 N.E.2d 920 (1989) ("Intentions not expressed in the writing are deemed to have no existence and may not be shown by parol evidence"). When considering the language of a particular contractual provision, "[c]ommon words… will be given their ordinary meaning unless manifest absurdity results or unless some other meaning is clear from the face or overall contents of the agreement." [*Cincinnati Ins. Co. v.*] *Anders*, 99 Ohio St.3d 156, 2003-Ohio-3048, 789 N.E.2d 1094, at ¶ 34, citing *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146 (1978), paragraph two of the syllabus.

Beverage Holdings, L.L.C. v. 5701 Lombardo, L.L.C., 159 Ohio St. 3d 194, 2019-Ohio-4716, 150 N.E.3d 28, ¶ 13.

To that end, in light of the undisputed material fact that the Point Pleasant Formation is a distinct geological formation, the omission of the phrase "Point Pleasant Formation" from the Tera Lease is meaningful as a matter of law. If the mineral lease is read as Appellants urge, with the Utica Shale "formation" including by common parlance the admittedly separate and distinct "Point Pleasant Formation", an open-ended controversy as to what was conveyed and reserved by the Tera Lease is unnaturally created. Taking this path would require the Court to divine an intent from Appellants to lease the distinct Point Pleasant Formation when that phrase is conspicuously absent from the lease. To reach that point would also require the Court to ignore (or write out) the technical term, "formation," as employed in the Tera Lease and add the phrase, "commonly known as" where it does not exist in the reservation and covenants and entireties sections of the Tera Lease. On the other hand, if the Court adopts Tera's, the trial court's and the Seventh District's analysis, the terms employed in the Tera Lease are all given effect by considering their plain meaning.

Taking the analysis a step further, if all rights are granted to Appellant Rice (initially and then assigned or transferred to Appellant Gulfport), then the express reservation of "all rights not specifically granted to Lessee in this Lease" and the specific reservation of "all products contained… in all formations below the base of the Utica Shale" has no meaning. Appellants' reading of the Lease makes the reservation clause meaningless, which contract law cannot and does not allow.

> In contract construction, the court should give effect to every provision within the contract, if possible, and if one construction of a doubtful condition would make that condition meaningless, and it is possible to give it another construction that would give it meaning and purpose, then the latter construction must prevail.

Drs. Kristal & Forche, D.D.S., Inc. v. Erkis, 10th Dist. Franklin No. 09AP-06, 2009-Ohio-5671, ¶ 24; *Foster Wheeler*, 78 Ohio St.3d at 361-62. "A court must construe a contract such that every clause is given effect and assumed to have been inserted for some purpose." *Shephard v. Fairland Local Sch. Dist. Bd. of Educ.*, Fourth Dist. Lawrence No. 99CA33, 2000 Ohio App. LEXIS 5342 (Nov. 8, 2000), citing, 18 Ohio Jurisprudence 3d (1980) 43, Contracts, Section 157.

"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[, 1065] (2008)." *Memorandum In Support Of Jurisdiction Of Amici Curiae Ohio Oil And Gas Association And Southeastern Ohio Oil And Gas Association* at 6. For precisely that reason, NARO-OH supports affirmance and dismissal of the instant appeal. NARO-OH respectfully submits that both the trial court and the Seventh District followed their duty under Ohio law. Both lower courts recognized in the contract the intention of the parties and made every clause meaningful in that regard. Both courts also followed this Court's lead in giving the technical terms, "formation" and "Utica Shale," their required meaning. *See*, *Foster Wheeler*, 78 Ohio St. 3d at 361.

Your *amici* urges this Honorable Court to interpret the Tera Lease in a way that renders all of the language meaningful, joining the trial court and Seventh District in so doing. However, the interpretation urged as unambiguous by Appellants and the other Amici would write out of existence the entirety of the reservation clause of the Lease, as well as delete the word "formation" that precedes the phrase "commonly known as Utica Shale" in the granting clause of the Lease. The construction urged by Appellants and the other *Amici* further ignores the technical meaning of the words "formation" and "Utica Shale," as specifically included by the parties in the Lease and as evidenced by the fact that the phrase "Point Pleasant Formation" appears nowhere in the Lease.

It would also have the effect of destabilizing the predictability and reliability of the contract's express terms.

The trial court and the Seventh District apply black letter contract law to the record facts and admissions in finding that the Tera Lease unambiguously reserved the Point Pleasant Formation and that Appellants committed the common law offense of trespass when they admittedly landed all six wells in Tera's Point Pleasant Formation. As it is undisputed the parties did not discuss the Point Pleasant Formation, even though the same is admittedly a separate rock formation located below the base of the Utica Shale, it defies logic for Appellants to suggest that the Lease necessarily (or impliedly) includes the undeniably nonexistent reference to the Point Pleasant Formation. Such a supposition ignores the four corners of the instrument and, in fact, conflicts with the express terms of the reservation clause, in which the Appellee expressly reserved all formations below the Utica Shale. *Tera* at ¶¶ 10, 51. While such a construction might be more palatable to the Appellants and other *Amici*, it is no way supported by the plain language of the Tera Lease.

The only contract interpretation that gives due deference to the language as negotiated and adopted by the parties to the lease, strictly construing all conveyances and reservations, without rendering any language meaningless or superfluous, is that reached by the trial court and Seventh District – that Appellee Tera, LLC and Appellant Rice Drilling negotiated a lease of the Utica Shale **formation**, reserving, excluding, and leaving inviolate the formation below it – the Point Pleasant Formation. For any other analysis to prevail, the Court would need to overlook stratigraphic realities, rendering the technically precise and distinct formations of Utica and Point Pleasant unscientifically joined or merged.

CONCLUSION

The First Proposition of Law, as worded by Appellants, is easily disposed of by observing that the Tera Lease in this instance was not exempted from application of this State's well-established canons of contract interpretation. The Seventh Appellate District's decision correctly applied Ohio law to the undisputed facts in the underlying record and promotes predictable interpretation of contracts transferring and reserving mineral rights, which is a primary aim of NARO-OH. For the reasons discussed herein, NARO-OH joins Appellee Tera in seeking affirmance.

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The undersigned hereby certifies that a copy of the foregoing was served upon the following parties by email on this 1st day of September, 2023:

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