

IN THE SUPREME COURT OF OHIO

TERA, LLC,	)	CASE NO. 2023-0411
	)	
Plaintiff-Appellee,	)	
	)	On Appeal from the Belmont County
v.	)	Court of Appeals, Seventh Appellate
	)	District Case No. 21-BE-0047
	)	
RICE DRILLING D, LLC, <i>et al.</i> ,	)	
	)	
Defendant-Appellants.	)	

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BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLEE TERA, LLC

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## INTRODUCTION

“Ohio has always considered the right of property to be a fundamental right.” *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 38. *See also* Ohio Constitution, Article I, Section 1 (acquiring, possessing, and protecting property is an inalienable right). Individual property rights should not have to cede to powerful industry interests. Although this appeal does not involve a constitutional challenge, the Court should bear in mind the significance of the issues involved. Appellants Gulfport Energy Corporation and Rice Drilling D, LLC (“Appellants”) ask this Court to rewrite mineral trespass law in a manner that is inconsistent with these maxims, and which would fail, from a policy perspective, to adequately protect the property rights of Ohio landowners and mineral interest owners.

Appellants’ second proposition of law asks this Court to hold that a determination of bad faith, in the mineral trespass context, turns entirely on the *subjective intent* of the trespass defendant. The distinction between good faith and bad faith trespass is critical to mineral trespass cases because it impacts the damages available to the landowner. Specifically, good faith trespassers are subject to damages for the value of the minerals before extraction, but bad faith trespassers are subject to damages in the amount of the full value of the minerals, “without any deduction for the cost of labor and other expenses incurred in” extracting and producing them. *See Brady v. Stafford*, 115 Ohio St. 67, 80, 152 N.E. 188 (1926). (*See also* Appellants’ Merit Brief, pg. 27) (citing Court of Appeals R. 35, Opinion and Judgment Entry, filed January 18, 2023 “Seventh District Opinion” at ¶ 53).

If this Court were to adopt the purely subjective standard for bad faith advocated by Appellants, this would all but eliminate the availability of bad faith trespass damages, thus enriching producers at the expense of Ohio landowners. There would be no incentive for producers

to make prudent, reasonable choices about the lawfulness of drilling and producing. Producers could drill first, ask questions later, and reap the same (or more) benefits from the land. This Court should reject Proposition of Law No. II for these, and other reasons, as will be explained in detail herein.

By definition, good faith—which Appellants as trespassers had the burden to prove—must be both honest and reasonable and cannot include reckless conduct. This is consistent with this Court’s recent precedent. *See Connection v. Moundbuilders Country Club Co.*, Slip Opinion No. 2022-Ohio-4345, ¶ 31 (December 7, 2022), citing Black's Law Dictionary. And it also comports with the case law of other oil and gas producing jurisdictions *See* 1 Kuntz, *Law of Oil and Gas*, § 11.5, and fn. 6 (2023) (citing cases). In conformity with this law, the Seventh District Court of Appeals properly applied a standard for bad faith that does not turn on the mineral trespasser’s subjective intent alone. (Seventh District Opinion, at ¶¶ 53-56). This Court should affirm.

Additionally, the Court should reject the improper peripheral arguments raised by Appellants’ amici, as they have been waived by Appellants. Specifically, Appellants’ amici, Ohio Oil and Gas Association and Southeastern Ohio Oil and Gas Association (collectively, “OOGA”) challenge the presumption of bad faith in mineral trespass cases, and the fact that the trespass defendant bears the burden of demonstrating its good faith by a preponderance of the evidence. Ironically, while Appellants’ amici claim that these legal standards stem from “ancient coal cases” and should not be followed, (see OOGA Amici Brief, p. 11) *Appellants themselves* cited and relied on these same bedrock standards *repeatedly* in the courts below. (*See* Trial Court R. 186, Defendants’ Motion for Partial Summary Judgment on Good Faith Trespass, filed July 1, 2020, pg. 7; and Court of Appeals R. 9, Appellants’ Brief, Seventh District Court of Appeals, filed January 18, 2022, pg. 15, both citing *Athens & Pomeroy Coal & Land Co. v. Tracy*, 22 Ohio App.

21, 31, 153 N.E. 240 (4th Dist.1925), *aff'd*, 115 Ohio St. 298, 152 N.E. 641 (1926)). This Court should not consider the merits of these arguments because they have been affirmatively waived. And even if the Court were to consider these arguments, they should be rejected.

For these reasons, as will be explained in more detail below, this Court should (1) decline to adopt Appellants' second proposition of law, (2) hold that bad faith mineral trespass includes conduct that is objectively unreasonable and/or reckless and that it is not a purely subjective standard, and (3) affirm the Seventh District's ruling that Appellants failed to prove that their trespass was done in good faith.

#### **STATEMENT OF INTEREST OF AMICI CURIAE**

Amici curiae Cardinal Minerals, LLC, Portland Resources, LLC, Ray Norris, individually and as Trustee of the Ray Norris Trust U/A Dated March 11, 2014, and Janice K. Emrick, individually and as Trustee of the June E. Norris Trust U/A Dated March 11, 2014 (the "Landowner Amici"), are oil and gas interest owners with mineral trespass litigation pending in Ohio courts: *Cardinal Minerals, LLC v. Susan B. Blatt, et al.*, Monroe County Common Pleas Court, Case No. 2022-104; *Cardinal Minerals, LLC v. Joseph M. Miller, et al.*, Monroe County Common Pleas Court, Case No. 2022-120; *Cardinal Minerals v. Menno D. Miller, et al.*, Monroe County Common Pleas Court, Case No. 2022-140; *Portland Resources, LLC v. Pittman et al.*, Monroe County Common Pleas Court, Case No. 2022-370; and *Ray Norris, et al. v. Beck Energy Corporation, et al.*, Monroe County Common Pleas Court Case No. 2018-080. Collectively, many millions of dollars in potential damages are at issue in these cases.

Proposition of Law No. II is of particular interest to the Landowner Amici, as it relates to the standard for determining whether a mineral trespass was done in good faith. This distinction is critical in that it has significant damages implications: good faith trespassers are subject to

damages only as measured by the value of the minerals before extraction, but bad faith trespassers are subject to damages in the amount of the full value of the minerals, “without any deduction for the cost of labor and other expenses incurred in” extracting and producing them. *See Brady v. Stafford*, 115 Ohio St. 67, 80, 152 N.E. 188 (1926).

By contrast, Proposition of Law No. I presents an issue that is only of concern to a narrow group of parties whose interests are subject to leases with particular language.<sup>1</sup> It does not concern the majority of mineral owners in the State. It merely involves a specific lease form. For these reasons, the Landowner Amici will confine their arguments to Proposition of Law No. II.

Significantly, the issue of whether a trespass was done in good faith or bad faith, as implicated by Proposition of Law No. II, is central to nearly all mineral trespass cases. The Landowner Amici, together with other Ohio landowners and mineral owners across the state, have a substantial economic interest in this issue, and this Court’s decision will undoubtedly have a profound impact on mineral trespass law in Ohio. Accordingly, the Landowner Amici submit the following Brief in support of Appellee TERA, LLC.

### **STATEMENT OF FACTS**

The Landowner Amici adopt and incorporate the statement of facts set forth by Appellee TERA, LLC in its Merit Brief.

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<sup>1</sup> The Landowner Amici note that “According to Section 2, Article IV of the Ohio Constitution, [the Ohio Supreme Court] sits to settle the law, not to settle cases.” *Baughman v. State Farm Mut. Auto. Ins. Co.*, 88 Ohio St.3d 480, 492, 727 N.E.2d 1265 (2000) (Cook, J., concurring). As such, the Court’s role in jurisdictional appeals is to decide issues “which present[] a question or questions of public or great general interest as distinguished from questions of interest primarily to the parties.” *Williamson v. Rubich*, 171 Ohio St. 253, 254, 168 N.E.2d 876 (1960).

## ARGUMENT

I. **PROPOSITION OF LAW NO. II**: BAD FAITH MINERAL TRESPASS INCLUDES CONDUCT THAT IS OBJECTIVELY UNREASONABLE AND/OR RECKLESS; IT IS NOT A PURELY SUBJECTIVE STANDARD.

A. **Bad Faith Mineral Trespass Does Not Turn on Subjective Intent Alone.**

“With few exceptions, the test applied in the determination of good or bad faith is neither a wholly objective test nor is it a wholly subjective test.” 1 Kuntz, *Law of Oil and Gas* § 11.5, and fn. 6 (2023),<sup>2</sup> citing *United States v. Wyoming*, 331 U.S. 440, 67 S.Ct. 1319, 91 L.Ed. 1590 (1947); *Gulf Ref. Co. of La. v. United States*, 269 U.S. 125, 46 S.Ct. 52, 70 L.Ed. 195 (1925); *Mason v. United States*, 260 U.S. 545, 43 S.Ct. 200, 67 L.Ed. 396 (1922); *Guffey v. Smith*, 237 U.S. 101, 35 S.Ct. 526, 59 L.Ed. 856 (1915); *Swiss Oil Corp. v. Hupp*, 253 Ky. 552, 69 S.W.2d 1037 (1934), *abrogated on other grounds*; *Robinson v. Gordon Oil Co.*, 266 Mich. 65, 253 N.W. 218 (1934); *Miller v. Tidal Oil Co.*, 161 Okla. 155, 17 P.2d 967, 87 A.L.R. 811 (1932); *Gulf Production Co. v. Spear*, 125 Tex. 530, 84 S.W.2d 452 (1935), and *Mutual Aid Union v. Whedbee*, 168 Ark. 1017, 272 S.W. 355 (1925). As explained in another oil and gas treatise, a good-faith trespasser is an individual who has an honest and reasonable belief in the superiority of his or her title. 1 Williams & Meyers, *Oil and Gas Law* § 226.3 (2021). Therefore, a mineral trespass defendant must generally prove that he has an “honest belief in the superiority of his right or title, and such belief must be a reasonable one in the light of the circumstances.” 1 Kuntz, *Law of Oil and Gas*, § 11.5.

As a corollary to this, courts have held that where a producer trespasses knowingly or recklessly, this cannot constitute good faith. For example, this Court has instructed that a bad faith mineral trespass is one that is willful and with knowledge or under such circumstances as to charge

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<sup>2</sup> The Ohio Supreme Court has recently deemed the Kuntz treatise a “renowned treatise on the law of oil and gas,” and relied on it as an authoritative source. *See Peppertree Farms, L.L.C. v. Thonen*, 167 Ohio St.3d 52, 2022-Ohio-395, 188 N.E.3d 1061, ¶¶ 16, 17, 21, 25, 27.

the trespasser with knowledge. *Brady v Stafford*, 115 Ohio St. 67, 152 N.E. 188 (1926). Other courts have similarly held that a bad faith trespass occurs where a trespasser proceeds to trespass despite knowledge of an adverse claim of the plaintiffs. *Guffey v. Smith*, 237 U.S. 101, 119 (1915). See also *Houston Production Co. v Medcom Oil Co.*, 62 S.W.2d 75, 75-77 (defendant was a bad faith trespasser where it entered and trespassed upon plaintiff's land and drilled an oil well after it had "full knowledge of" plaintiff's adverse claim); *Pittsburgh & W. Virginia Gas Co. v. Pentress Gas Co.*, 84 W. Va. 449, 100 S.E. 296 (1919) at syllabus ("one who, with full knowledge of the facts which makes his claim [ ] to [the] land invalid, enters thereon and commits acts of trespass, is a willful trespasser within the meaning of the law"); *Dethloff v. Zeiger Coal Co.*, 82 Ill.2d 393, 412 (1980) (defendant was a bad faith trespasser where it proceeded with mining after it had actual notice of plaintiff's claim that the lease had expired under its own terms). See also *Harrod Concrete & Stone Co. v. Crutcher*, 458 S.W.3d 290, 298 (Ky. 2015) (observing that a trespass is more likely to be willful when the trespasser "continued or perpetuated its encroachment *despite cautionary indicators*[.]") (emphasis added).

Bad faith trespass also includes reckless conduct. *Liberty Bell Gold Mining Co. v. Smuggler Union Mining Co.*, 203 F. 795 (8th Cir.1913) and *Central Coal & Coke Co. v. Penny*, 173 F. 340 (8th Cir.1909); and *Kycoga Land Co. v. Kentucky River Coal Corp.*, 110 F.2d 894 (6th Cir.1940). See also 1 Kuntz, *Law of Oil and Gas*, § 11.5 (a good faith trespasser in the oil and gas context "must not have acted with culpable negligence or with willful disregard for the rights of others.")

As defined under Ohio law, reckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances. *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio 5711, 983 N.E.2d 266, at paragraph four of the syllabus. Accord 1 Kuntz, *Law of Oil and Gas* § 11.5. These principles were

appropriately adopted by the Seventh District and should be affirmed. (Seventh District Opinion, ¶¶ 53-55).

In addition, adopting a hybrid objective/subjective standard is consistent with this Court's recent decision in *State ex rel. Ohio History Connection v. Moundbuilders Country Club Co.*, Slip Opinion No. 2022-Ohio-4345 (December 7, 2022). In *Moundbuilders*, the Court examined case law regarding the meaning of good faith and bad faith across several subject areas, along with the Black's Law Dictionary definition. *Id.* at ¶ 30-32. Ultimately, the Court approved a standard that is both objective *and* subjective. Particularly, with regard to the Black's Law Dictionary definition, the Court explained that:

The definition of "bad faith" is "[d]ishonesty of belief, purpose, or motive." Black's Law Dictionary 171 (11th Ed.2019). The definition of "good faith" is "a state of mind consisting in honesty in belief or purpose," "faithfulness to one's duty or obligation," or "observance of reasonable commercial standards of fair dealing in a given trade or business." *Id.* at 836. *In other words, a person can demonstrate good faith through behavior that is reasonable in a particular context or that conforms with justified expectations, not just through a claim of having honest intentions. And conversely, a person can potentially demonstrate a lack of good faith by acting unreasonably or failing to meet justified expectations.*

*Moundbuilders* at ¶ 31 (emphasis added).

This Court should follow the weight of the law on this subject, including *Moundbuilders*, and reject Appellants' second proposition of law. The Court should instead hold that bad faith mineral trespass includes conduct that is objectively unreasonable and/or reckless and that it is not a purely subjective standard.

**B. The Act of Trespassing Creates a Presumption of Willfulness and Places the Burden upon the Mineral Trespass Defendant to Prove Its Good Faith by a Preponderance of the Evidence.**

Under Ohio law, the act of trespassing creates a presumption of willfulness and puts 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. *Athens & Pomeroy Coal & Land Co. v. Tracy*, 22 Ohio App.

21, 31 (4th Dist.1925), *aff'd*, 115 Ohio St. 298, 152 N.E. 641 (1926). Where a plaintiff establishes a *prima facie* case that the defendant has wrongfully interfered with plaintiff's property rights by removing his minerals, there is legal presumption that defendant has acted in bad faith. *Id.* Once this presumption arises, the burden shifts to the defendant to prove that its trespass was done in good faith. This places upon the defendant not merely the burden presenting *some* evidence, but rather requires him to prove by a preponderance of the evidence that he acted in good faith. *Id.* (*See also* Seventh District Opinion, at ¶ 55).

Appellants' amici attempt to challenge this burden-shifting paradigm in their briefing, despite the fact that this issue was *never* raised by Appellants in the trial court, the court of appeals, or even in Appellants' Merit Brief to this Court. This Court should refrain from addressing these issues as they have been waived by Appellants and are not properly before the Court. And even if the Court were to address amici's arguments, they are substantively meritless.

**1. Any challenge to the burden-shifting scheme has been waived.**

In their amici brief, OOGA asks this Court to ignore the weight of established precedent and hold that there is no presumption of bad faith on the part of a mineral trespasser. (*See* OOGA Amici Brief, pp. 8-11). However, this was never raised by Appellants in the trial court or the court of appeals and has accordingly been waived and should not be considered by this Court on appeal. *See, e.g., ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St.3d 520, 2014-Ohio-2382, 13 N.E.3d 1101, ¶ 16 (holding that a party waives any arguments or claims that were not raised or argued in the court of appeals).

Here, not only did Appellants fail to challenge the burden-shifting scheme in the courts below, they also *expressly advocated* for the use of that standard. Specifically, in Defendants' Motion for Partial Summary Judgment on a Finding of Good Faith as to Plaintiff's Claim for Trespass and Conversion Damages, Appellants asserted:

“Ohio law *requires* a defendant to overcome the presumption of bad faith created by the trespass and prove, by a preponderance of the evidence, that he acted in good faith. *Athens & Pomeroy Coal & Land Co. v. Tracy*, 22 Ohio App. 21, 31, 153 N.E. 240 (4th Dist.1925), *aff’d*, 115 Ohio St. 298, 152 N.E. 641 (1926).”

(Emphasis added) (Trial Court R. 186, Defendants’ Motion for Partial Summary Judgment on Good Faith, filed July 1, 2020, pg. 7).

In Appellants’ Brief to the Seventh District Court of Appeals, they likewise asserted:

“Under Ohio law, trespass creates a presumption of bad faith that a defendant can overcome with a showing, by a preponderance of the evidence, that it acted in good faith. *Athens & Pomeroy Coal & Land Co. v. Tracy*, 22 Ohio App. 21, 31, 153 N.E. 240 (4th Dist.1925), *aff’d*, 115 Ohio St. 298, 152 N.E. 641 (1926) (per curiam).”

(Emphasis added) (Court of Appeals R. 9, Appellants’ Brief, filed June 18, 2022, pg. 15).

Any attempt by Appellants’ amici to challenge this standard should be rejected by this Court because the standard was not challenged by Appellants in the courts below and is therefore waived. *ProgressOhio.org, Inc.* 139 Ohio St.3d 520, ¶ 16.

**2. OOGA’s attempt to challenge this established burden-shifting paradigm should be rejected on the merits.**

Assuming *arguendo* this argument was not waived, it should be rejected. The overwhelming majority of jurisdictions in this country, including Ohio, follow the burden-shifting paradigm outlined above and OOGA fails to demonstrate why this Court should depart from the majority rule. Historically, at English common law, all mineral trespassers were considered willful and there was no opportunity for a defendant to demonstrate its good faith. *See, e.g., Martin v. Porter*, 151 Eng. Rep. 149 (1839). This meant that no trespassers were permitted to deduct costs from their liability to the property owner. *Id.* Early American jurisprudence continued to follow this rule. *See Blaen Avon Coal Co. v. McCullah*, 59 Md. 403 (1883) (proper value for measure of damages was the full value of the coal without any deductions for production expenses, even in the case of an innocent trespass).

Over time, U.S. courts relaxed this rule somewhat, providing an exception for good-faith mineral trespassers, permitting to deduct drilling or mining costs, but placing the burden of persuasion on the trespasser to demonstrate its good faith. The overwhelming majority of jurisdictions in this country—including Ohio—follow this burden-shifting paradigm for mineral trespass cases. *See* 1 Williams & Meyers, *Oil and Gas Law* § 226.3, fn. 2 (2021); 1 Kuntz *Law of Oil and Gas* § 11.3(b) (2019) (citing cases). OOGA fails to demonstrate why this Court should depart from the majority rule, although it is clear that OOGA’s relaxed standard will only serve to encourage—not discourage—mineral trespass by lessening the business risk to producers, its members. This Court should decline to address this issue at all, given that Appellants waived it, but assuming the Court does, it should reject OOGA’s argument on the merits.

**C. It is Appropriate for a Court to Determine Bad Faith on Summary Judgment in a Mineral Trespass Case.**

As discussed, the defendant in a mineral trespass case bears the burden of proving its good faith by a preponderance of the evidence. The act of trespassing creates a *presumption of willfulness* and puts on the mineral trespass defendant not merely the burden of going forward, but also of proving by a preponderance of the evidence that he acted in good faith. *Athens & Pomeroy Coal & Land Co. v. Tracy*, 22 Ohio App. 21, 31, 153 N.E. 240 (4th Dist.1925), *aff’d*, 115 Ohio St. 298, 152 N.E. 641 (1926). *See* discussion at Section B, *infra*.

Contrary to OOGA’s arguments at pages 11 through 13 of their amici brief, it was entirely appropriate for the trial court to determine the issue of bad faith in the context of summary judgment proceedings. OOGA cites to Evid.R. 301, which provides in relevant part that “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” Evid.R. 301. However, for a number of reasons, this Rule does not support OOGA’s position.

First, courts have held that “the plain meaning of the language used in Evid.R. 301 shows that the rule applies in all civil proceedings, *including motions for summary judgment.*” *Vakilian v. Globe Am. Cas. Co.*, 6th Dist. Lucas No. L-90-277, 1991 WL 192186, \*3 (Sept. 30, 1991) (emphasis added) (affirming grant of summary judgment where defendant failed to present sufficient evidence to rebut presumption of probable cause). *See also Cummings v. Lyles*, 8th Dist. No. 101446, 2015-Ohio-316, 27 N.E.3d 985, ¶ 25 (holding that defendant failed to rebut a presumption so as to create a triable issue of fact and upholding summary judgment in favor of plaintiff).

Second, the Staff Notes to Evidence Rule 301 provide that only “once a presumption is met with *sufficient countervailing evidence*, is it deemed rebutted.” Evid. R. 301 (1980 Staff Note) (emphasis added). Importantly, “the rule does not resolve difficult issues as to sufficiency of evidence necessary to rebut a presumption[.]” *Id.* In other words, the quantum of evidence necessary is not specified by the rule; rather, that issue is determined by case law and/or by statute.

OOGA’s argument that a party against whom a presumption operates only bears the burden of production (in other words, to show that the evidence is in equipoise) is meritless. There are Ohio cases that provide differing requirements as to the quantum of countervailing evidence required to rebut a given presumption. *See, e.g., Krischbaum v. Dillon*, 58 Ohio St.3d 58, 63, 567 N.E.2d 1291 (1991), at paragraph one of the syllabus (presumption of undue influence under specified circumstances may be rebutted by a preponderance of the evidence). Indeed, as aptly observed by one evidence treatise: “Each presumption is created for its own reasons—reasons

which are inextricably intertwined with the pertinent substantive law.” McCormick On Evid. § 344 (8th ed.).

Further, just because there is a jury question as to bad faith in *some* mineral trespass cases, does not mean that it must be that way in *all* cases. It is well within the province of a trial court to decide that, as matter of law, a mineral trespass defendant has failed to rebut the presumption.<sup>3</sup> Under such circumstances, that issue need not reach the jury—bad faith has been conclusively presumed. Thus, this Court should reject the amici’s contentions that bad faith trespass must *always* be determined at trial.

**D. Appellants Failed to Meet Their Burden of Proving Good Faith.**

Moreover, the evidence in this case presented to the trial court during the summary judgment proceedings demonstrates that Appellants fell far short of meeting their burden to prove good faith. In this regard, among other things, the evidence demonstrated that (1) Appellants knew they did not have rights to the Point Pleasant Formation before they ever drilled wells under TERA’s property; (2) Rice was expressly told by other operators that the lease did not have rights to the Point Pleasant Formation before they ever drilled wells under TERA’s property; (3) when Appellants applied for a permit to drill wells under TERA’s property, the state regulatory agency, the Ohio Department of Natural Resources (“ODNR”), rejected Appellants theory that the Utica Shale included the Point Pleasant Formation, and told them the lease did not convey rights to the Point Pleasant Formation; (4) Appellants discussed the trespass risk amongst other oil and gas

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<sup>3</sup> Although amici curiae Ohio Chamber of Commerce and American Gas Association cite a series of cases at pages six and seven of their Brief for the proposition that bad faith should be a jury question, notably none of those cases (other than the challenged decision below) involve mineral trespass or a situation where the wrongdoer *has the burden to prove his good faith* by a preponderance of the evidence. (See Brief of Amici Curiae Ohio Chamber of Commerce and American Gas Association, at pp. 6-7).

companies in the industry for years after drilling the wells; and (5) the industry does not use the term Utica Shale to include the Point Pleasant Formation. (See Trial Court R. 212, Plaintiff's Motion for Summary Judgment on Bad Faith, filed July 15, 2020, pp. 5-11, and exhibits). Appellants' self-serving attempt to introduce different possible understandings of the term Utica Shale formation does not rebut the presumption of bad faith. "The 'good faith' contemplated by these rules is something more than the trespasser's assertion of a colorable claim to the converted minerals." *United States v. State of Wyo*, 331 U.S. 440, 458, 67 S.Ct. 1319, 91 L.Ed. 1590 (1947).

Under the correct standard, as applied by the courts below, Appellants fell far short of meeting their burden to demonstrate that their conduct was both subjectively and objectively reasonable and therefore failed to rebut the presumption of bad faith.

In sum, for the reasons outlined above, the Court should decline to adopt Appellants' second proposition of law, hold that bad faith mineral trespass includes conduct that is objectively unreasonable and/or reckless, clarify that bad faith is not a purely subjective standard, and affirm the Seventh District's ruling that Appellants failed to prove that their trespass was done in good faith.

### **CONCLUSION**

For the reasons set forth above, together with those in the Merit Brief of Appellee TERA, LLC, this Court should affirm the judgment of the Seventh District Court of Appeals.

Respectfully submitted,

/s/ Emily K. Anglewicz

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Brief of Amici Curiae in Support of Appellee TERA, LLC*, was served on September 1, 2023 by e-mail, pursuant to Civ.R. 5(B)(2)(f) and App.R. 13(C)(6) upon the following counsel of record:

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