[Cite as *Taylor v. Crosby*, 2014-Ohio-4433.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

BENJAMIN F. TAYLOR, ET AL.,	)	
	)	
PLAINTIFFS-APPELLANTS,	)	
	)	CASE NO. 13 BE 32
V.	)	
	)	OPINION
DONALD L. CROSBY, ET AL.,	)	
	)	
DEFENDANTS-APPELLEES.	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from Court of Common Pleas of Belmont County, Ohio Case No. 11CV422
JUDGMENT:	Reversed and Remanded
APPEARANCES:	
For Plaintiffs-Appellants	Attorney David A. Jividen 729 N. Main St. Wheeling, West Virginia 26003
For Defendant-Appellee Reserve Energy Exploration Company	Attorney John K. Keller Attorney Timothy B. McGranor Attorney Lija Kaleps-Clark 52 East Gay Street, P.O. Box 1008 Columbus, Ohio 43216
For Defendants-Appellees Donald L. Crosby Tammy Crosby Richard J. Crosby Janis Crosby	Attorney Richard A. Myser Attorney Adam L. Myser 320 Howard Street Bridgeport, Ohio 43912
JUDGES:	
Hon. Gene Donofrio Hon. Joseph J. Vukovich Hon. Cheryl L. Waite	

Dated: September 24, 2014

[Cite as *Taylor v. Crosby*, 2014-Ohio-4433.]
DONOFRIO, J.

{¶1} Plaintiffs-appellants, Jennifer Taylor, Donald Taylor, and Mary Lou Hutchins, appeal from a Belmont County Common Pleas Court judgment granting summary judgment in favor of defendants-appellees, Donald Crosby, Tammy Crosby, Richard Crosby, Janis Crosby, and Reserve Energy Exploration, on appellants' complaint for declaratory judgment and related claims.

{¶2} This case stems from Benjamin Belt's 108.708 acre parcel of land situated in Belmont County (the property). On August 5, 1971, Belt conveyed the property to Eli and Virginia Bell. In the deed conveying the property, Belt reserved a one-half interest in the oil and gas underlying the property.

{¶3} On July 10, 1975, Belt entered into an oil and gas lease of his one-half interest with United Petroleum Corporation. United Petroleum assigned this interest to EOG, who assigned it back to United Petroleum.

{¶4} In July 1979, the Bells conveyed their entire interest in the property (everything except Belt's one-half interest in the oil and gas) to defendants-appellees, Donald Crosby and Richard Crosby. Donald's and Richard's wives are Tammy Crosby and Janis Crosby. The four will be referred to as "the Crosby Defendants." The deed conveying the property contained Belt's reservation of his one-half oil and gas interest.

{¶5} In January 1993, Belt died in Belmont County. Appellants are Belt's grandchildren.

{¶6} In October 2007, the Crosby Defendants leased the mineral rights in the property to appellee, Reserve Energy Exploration (Reserve Energy). In May 2008, Reserve Energy, along with Equity Oil and Gas Funds, Inc., sold various interests to PC Exploration, including Reserve Energy's lease from the Crosby Defendants.

{¶7} On November 6, 2008, Reserve Energy with the consent of the Crosby Defendants, published a Notice of Abandonment in *The Times Leader*. The Notice stated that the whereabouts of Belt and any subsequent heirs or assigns could not be determined and were unknown. The Notice further provided that Belt's one-half

interest in the oil and gas underlying the property would be deemed abandoned and vested in the surface owners unless Belt or his heirs performed some action to preserve their interest within 60 days from the date of publication. No action was taken.

{¶8} On December 19, 2008, the Crosby Defendants recorded an affidavit of abandonment stating that Belt's one-half oil and gas interest had been abandoned.

{¶9} On May 20, 2011, Belt's last will and testament was admitted to probate in the Belmont County Probate Court. On May 26, 2011, Belt's one-half oil and gas interest was transferred to appellants by Certificate of Transfer recorded in the Belmont County Recorder's Office.

{¶10} On October 19, 2011, appellants filed a complaint against the Crosby Defendants, Reserve Energy Exploration, and three other defendants who were later dismissed. Appellants raised six claims: (1) declaratory judgment to declare the lease between the Crosby Defendants and Reserve null and void; (2) declaratory judgment that R.C. 5301.56(E) requires certified mail service to declare mineral rights abandoned; (3) declaratory judgment that R.C. 5301.56 is unconstitutional; (4) slander of title by recording documents in Belmont County and not affording the allegedly required notice provided in R.C. 5301.56; (5) an accounting of the rentals and royalties paid to the Crosby Defendants; and (6) injunctive relief to preclude the implementation of the lease and removal of oil and gas.

{¶11} The Crosby Defendants filed a motion for summary judgment on all claims. They asserted that the 1989 version of Ohio's Dormant Mineral Act (DMA) applied to this case and pursuant to it, appellants' oil and gas interest was abandoned. They further argued that even if the 2006 version of the DMA applied, appellants failed to take any action to preserve their interest. Reserve Energy joined in this motion as to the slander of title claim.

{¶12} Appellants filed a cross motion for summary judgment. They asserted that under either version of the DMA, their interest was protected.

{¶13} Appellants later filed an amended complaint naming only the Crosby

Defendants and Reserve Energy as the defendants.

{¶14} In ruling on the summary judgment motions, the trial court first found that the 1989 version of the DMA is constitutional. It based its determination on the United States Supreme Court's determination that Indiana's similar dormant mineral act was constitutional. Citing *Texaco Inc. v. Short*, 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982). The court next found that the 1989 version of R.C. 5301.56 provides for a "rolling" look-back period as opposed to a "static" look-back period. The court then found that pursuant to the 1989 version of the DMA, Belt's oil and gas interest was deemed abandoned and vested in the surface owner in 1995. It determined that the current version of the DMA, effective June 30, 2006, did not apply in this case because Belt's oil and gas interest was abandoned and vested in the surface owners prior to the effective date of the current DMA. Therefore, the trial court granted summary judgment in favor of appellees and denied appellants' cross motion for summary judgment.

{¶15} Appellants filed a timely notice of appeal on October 10, 2013.

{¶16} Appellants raise four assignments of error asserting that summary judgment in appellees' favor was improper for various reasons. Therefore, the summary judgment standard of review applies to all of the assignments of error.

{¶17} In reviewing a trial court's decision on a summary judgment motion, appellate courts apply a de novo standard of review. *Cole v. Am. Industries & Resources Corp.*, 128 Ohio App.3d 546, 552, 715 N.E.2d 1179 (7th Dist.1998). Thus, we shall apply the same test as the trial court in determining whether summary judgment was proper. Civ.R. 56(C) provides that the trial court shall render summary judgment if no genuine issue of material fact exists and when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *State ex rel. Parsons v. Flemming*, 68 Ohio St.3d 509, 511, 628 N.E.2d 1377 (1994). A "material fact" depends on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc.*, 104 Ohio App.3d 598, 603, 662 N.E.2d 1088 (8th

Dist.1995), citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247-248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

{¶18} Appellants' first assignment of error states:

> THE TRIAL COURT ERRED WHEN IT HELD THAT THE 1989 VERSION OF O.R.C. § 5301.56 APPLIED AS A "ROLLING" 20-YEAR PERIOD AS OPPOSED TO A STATIC 20-YEAR PERIOD CALCULATED FROM THE DATE OF ITS ENACTMENT, AS THE PLAIN LANGUAGE OF THE ACT EVINCES THAT IT IS TO BE APPLIED AS A STATIC LOOK-BACK FROM ITS EFFECTIVE DATE.

{¶19} Appellants argue the trial court erred in finding that the 1989 DMA has a rolling look-back period. They contend the 20-year look-back period is fixed from the statute's effective date of March 22, 1989.

{¶20} The 1989 DMA was enacted on March 22, 1989. The 1989 version of R.C. 5301.56 provided, in pertinent part:

> (B)(1) Any mineral interest held by any person, other than the owner of the surface of the lands subject to the interest, shall be deemed abandoned and vested in the owner of the surface, if none of the following applies:
>
> * * *
>
> (c) Within the preceding twenty years, one or more of the following has occurred:
>
> (i) The mineral interest has been the subject of a title transaction that had been filed or recorded in the office of the county recorder of the county in which the lands are located[.]
>
> * * *
>
> (2) A mineral interest shall not be deemed abandoned under division (B)(1) of this section because none of the circumstances

> described in that division apply, until three years from the effective date of this section.

{¶21} Appellants assert that the 1989 version contained essentially a 23-year look-back period from March 22, 1969, to March 22, 1992, during which time the non-surface owner could preserve his mineral interest by virtue of one or more of the events set forth in the statute. They contend that the statute's reference to "the preceding twenty years" refers to the 20 years preceding the date of enactment.

{¶22} Appellants go on to assert that their oil and gas interest was preserved by three separate title transactions during the 20-year look-back period: (1) the original oil and gas severance in 1971 to Belt; (2) the July 10, 1975, oil and gas lease from Belt to United Petroleum Corporation; and (3) the 1979 deed to the Crosby Defendants containing reference to Belt's one-half oil and gas interest. Therefore, appellants assert, had the trial court applied a fixed look-back period instead of a rolling look-back period, summary judgment in their favor would have been proper.

{¶23} The issue of whether the 1989 version of the DMA contains a rolling look-back period as opposed to a fixed look-back period was recently addressed by this court in *Eisenbarth v. Reusser*, 7th Dist. No. 13 MO 10, 2014-Ohio-____. In *Eisenbarth*, the trial court used a fixed look-back period. The Eisenbarths appealed arguing the trial court should have applied a rolling look-back period where the surface owner could pick any date during which the 1989 version of the DMA was in effect and then look back 20 years from that date.

{¶24} On appeal, we determined that the statute was ambiguous as to whether the look-back period is anything but fixed. *Id*. at ¶48. We noted that the use of the words "preceding twenty years," without stating the preceding 20 years of what, made any rolling look-back period uncertain. *Id*. We concluded by stating, "we refuse to extend the look-back period from fixed to rolling." *Id*. at ¶49.

{¶25} Based on this court's holding that the look-back period under the 1989 DMA is fixed rather than rolling, the trial court erred in this case in applying a rolling look-back period. A fixed look-back period applies.

{¶26} Applying a fixed look-back period in this case indicates that appellants' interest was not abandoned under the 1989 DMA.

{¶27} In 1971, Belt transferred the property to the Bells. The deed conveying the property contained a reservation to Belt of one-half of the oil and gas underlying the property.

{¶28} On July 10, 1975, Belt leased his one-half oil and gas lease interest to the United Petroleum Corporation. This was a savings event under the 1989 DMA. It occurred within the 20-year fixed look-back period and the mineral interest was the subject of a title transaction filed or recorded in the Belmont County Recorder's Office. Thus, it met the savings requirements of R.C. 5301.56(B)(1)(c)(i).

{¶29} In July 1979, the Bells conveyed their interest in the property to the Crosby Defendants. The deed conveying the property contained Belt's reservation of his one-half oil and gas interest. This conveyance, however, was not a savings event because the oil and gas reservation was not "the subject of" the conveyance. See *Dodd v. Croskey*, 7th Dist. No. 12 HA 6, 2013-Ohio-4257, ¶¶48-49.

{¶30} Nonetheless, the 1975 oil and gas lease from Belt to United Petroleum was a savings event under the 1989 DMA, which preserved Belt's interest under that statute.

{¶31} Accordingly, appellants' first assignment of error has merit.

{¶32} Appellants' second assignment of error states:

> THE TRIAL COURT ERRED WHEN IT FOUND THAT THE LANGUAGE OF THE 1989 VERSION OF O.R.C. § 5301.56(D)(1) EVINCED THAT THE ACT APPLIED AS A "ROLLING" 20-YEAR TIME PERIOD. RATHER, SUBSECTION (D)(1) SUPPORTS THE APPELLANTS' CONTENTION THAT THE ACT APPLIES AS A 20-YEAR LOOK-BACK FROM EFFECTIVE DATE OF THE ACT.

{¶33} Pursuant to the 1989 version of R.C. 5301.56(D)(1):

> A mineral interest may be preserved indefinitely from being deemed abandoned under division (B)(1) of this section by the occurrence of any of the circumstances described in division (B)(1)(C) of this section, including, but not limited to, successive filing of claims to preserve mineral interests under division (C) of this section.

{¶34} The trial court relied on this section in concluding that the 1989 version of the statute contained a rolling look-back period. It reasoned that a fixed look-back period would have no need for a provision providing for indefinite preservation of mineral interests through successive filings of preservation claims.

{¶35} Appellants argue the inclusion of section (D)(1) does nothing to change the fixed application of the look-back period. In fact, they assert it is necessary in order to (1) clarify that mineral interest holders who had interest-preserving events outside of the 20-year look-back period but within the 3-year grace period following the effective date of the statute could preserve their otherwise expired interests with a preserving event in the grace period and (2) emphasize that mineral interests of non-surface owners are indefinitely preserved if any of the saving events occurred within the 20-year look-back period.

{¶36} We directly addressed this argument in *Eisenbarth*, 7th Dist. No.13 MO 10. In that case, the Eisenbarths made the same argument the trial court relied on in this case. *Eisenbarth*, at ¶40. We rejected the argument and noted that the mention of successive claims and indefinite preservation in the 1989 version of R.C. 5301.56(D)(1) could merely be a reference to preservations filed under Ohio's Marketable Title Act prior to the enactment of the 1989 version of the DMA in order to show that a new claim to preserve can still be filed if the old one was filed outside of the 20-year look-back period. *Id*. at ¶49.

{¶37} Accordingly, appellants' second assignment of error has merit.

{¶38} Appellants' third assignment of error states:

THE TRIAL COURT ERRED BY FAILING TO ADDRESS THE 1989 VERSION OF O.R.C. § 5301.56 IN ITS HISTORIC AND LEGISLATIVE CONTEXT. THE TRIAL COURT ESSENTIALLY PULLED A SINGLE SENTENCE FROM THE ACT AND IMPROPERLY DISASSOCIATED IT FROM ITS PROPER CONTEXT.

{¶39} Here appellants assert the trial court erred in relying solely on section (D)(1) in concluding the look-back period was rolling. Instead, appellants assert the trial court should have considered the legislative history and intent surrounding the enactment of the 1989 version of R.C. 5310.56.

{¶40} Given the merit of appellants' first and second assignments of error, their third assignment of error is moot.

{¶41} Appellants' fourth assignment of error states:

HAD THE TRIAL COURT PROPERLY DECIDED THE ISSUES REGARDING THE APPLICATION OF THE 1989 VERSION OF O.R.C. § 5301.56, SUMMARY JUDGMENT IN FAVOR OF THE APPELLANTS WOULD HAVE BEEN APPROPRIATE AS THE APPELLEES FAILED TO PROVIDE THE REQUISITE NOTICE UNDER THE 2006 VERSION OF O.R.C. § 5301.56 TO TRIGGER AN ABANDONMENT OF MINERAL INTERESTS.

{¶42} In their final assignment of error, appellants contend that if the trial court had properly ruled on the application of the 1989 version of the DMA and granted summary judgment on that issue in their favor, the court would have then had to grant summary judgment in their favor on the issue of the application of the 2006 version of the DMA.

{¶43} The current version of R.C. 5301.56 became effective on June 30, 2006. The most substantial change to the statute was the addition of the notice requirements giving the owner of the abandoned mineral interest the opportunity to

reclaim his or her interest. R.C. 5301.56 now provides, in pertinent part:

> (E) Before a mineral interest becomes vested under division (B) of this section in the owner of the surface of the lands subject to the interest, the owner of the surface of the lands subject to the interest shall do both of the following:
>
> (1) Serve notice by certified mail, return receipt requested, to each holder or each holder's successors or assignees, at the last known address of each, of the owner's intent to declare the mineral interest abandoned. If service of notice cannot be completed to any holder, the owner shall publish notice of the owner's intent to declare the mineral interest abandoned at least once in a newspaper of general circulation in each county in which the land that is subject to the interest is located. The notice shall contain all of the information specified in division (F) of this section.
>
> (2) At least thirty, but not later than sixty days after the date on which the notice required under division (E)(1) of this section is served or published, as applicable, file in the office of the county recorder of each county in which the surface of the land that is subject to the interest is located an affidavit of abandonment that contains all of the information specified in division (G) of this section.

{¶44} Appellants argue that under the 2006 DMA, appellees failed to provide the required statutory notice because they only provided notice by publication instead of attempting to serve Belt or his successors by certified mail. It is undisputed that appellees did not attempt to serve a notice of abandonment on appellants by certified mail.

{¶45} Appellants contend that pursuant to the statute, an attempt at service by certified mail is a prerequisite to seeking service by publication. Appellants assert the plain language of the statute requiring notice by “certified mail” at the “last known

address" for the holder of the mineral interest requires the surface owner to exercise due diligence and good faith in determining the "last known address" of the mineral interest owner. Appellants further argue that section (E)(1) does not indicate an "either/or" approach to notification.

{¶46} Because the trial court found that Belt's oil and gas interest was deemed abandoned and vested in the surface owner in 1995, it did not address the application of the 2006 DMA. It determined that any discussion of the 2006 DMA was moot because Belt's oil and gas interest was abandoned and vested in the surface owners prior to the effective date of the 2006 DMA.

{¶47} Appellate courts review trial courts' summary judgment decisions de novo. But appellate courts will not consider issues raised in summary judgment proceedings that the trial court did not rule on. *Tree of Life Church v. Agnew*, 7th Dist. No. 12 BE 42, 2014-Ohio-878, ¶27; *Conny Farms, Ltd. v. Ball Resources, Inc*., 7th Dist. No. 09 CO 36, 2011-Ohio-5472, ¶15. Here, because of its resolution of the 1989 DMA rolling look-back issue, the trial court never considered or ruled on the parties' arguments surrounding notice under the 2006 DMA. Therefore, this issue is not ripe for our review.

{¶48} Accordingly, we cannot address appellants' fourth assignment of error.

{¶49} Additionally, we should note that Reserve also filed a brief in this matter. Reserve notes that the only claim against it is for slander of title. It asserts that regardless of which party owns the oil and gas interest, appellants' slander of title claim is barred by a one-year statute of limitations. The Crosby Defendants raised this statute of limitations argument in their summary judgment motion, but like the issue surrounding the 2006 DMA, the trial court never reached it. Thus, like the issue surrounding the 2006 DMA, this issue is not ripe for our review. In fact, if the trial court determines that summary judgment in the Crosby Defendants' favor is still appropriate under the 2006 DMA, this issue will be moot.

{¶50} For the reasons stated above, the trial court's judgment is hereby reversed. The matter is remanded to the trial court so that it can address the parties'

arguments regarding the application of the 2006 DMA.

Vukovich, J., concurs.

Waite, J., concurs.