[Cite as *Senterra, Ltd. v. Winland*, 2019-Ohio-4387.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

SENTERRA LTD.,

Plaintiff-Appellee,

v.

ALAN T. WINLAND et al.,

Defendants-Appellants.

OPINION AND JUDGMENT ENTRY
Case No. 18 BE 0051

Civil Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 18-CV-56

BEFORE:
Carol Ann Robb, Cheryl L. Waite, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed in part; Reversed in part.

Atty. Gregory W. Watts, *Atty Matthew W. Onest, Atty Wayne A. Boyer*, Krugliak, Wilkins, Griffiths & Dougherty Co., L.P.A., 4775 Munson Street N.W., P.O. Box 36963, Canton, Ohio 44735 for Plaintiff-Appellee and

Atty. Thomas D. White, *Atty. Katherine M.K. Kimble,* The White Law Office Co., 209 N. Washington Street, Millersburg, Ohio 44654 for Defendants-Appellants.

Dated: October 11, 2019

Robb, J.

{¶1} Defendants-Appellants Alan T. Winland, Laura J. Winland, Linda Godek, Clarence Winland, Frances Faulkner, Norman Winland, Teresa Winland, John D. McBrayer, Brenda S. Langkopf, Amy Kay Fahner, Jeff Fahner, Lori Jo Podsobinski, Charles Patterson, Cathy Patterson, Debra Saunders, Bill Saunders, Diane McBrayer Andersen, Brian Andersen, Linda Dollison, and Larry Podsobinski appeal the Belmont County Common Pleas Court's decision to grant summary judgment to Plaintiff-Appellee Senterra, LTD.

{¶2} Three issues are raised in this appeal. The first issue is whether the Marketable Title Act (MTA) is applicable. The second issue is if it is applicable, did the trial court incorrectly determine the "root of title" and the 40 year period. The third issue is whether the *Duhig* Rule is applicable to oil and gas Reservation 5.

{¶3} For the reason expressed below, the trial court's decision is affirmed in part and reversed in part. The MTA is applicable. The trial court correctly determined the root of title for Reservations 1 through 4 and that those interests were extinguished under the MTA. As to Reservation 5, the trial court was incorrect in its determination that the *Duhig* Rule applied. The MTA is applicable to this reservation and George Russel's (his heirs and assigns) 1/4 reservation is preserved through specific repetitions of that reservation through the deed chain.

Statement of Facts and Case

{¶4} The real estate at issue in this case is two tracts of land located in Smith Township, Belmont County, Ohio, and the issues raised in this appeal concern the oil and gas interest underlying that property. Appellants are heirs of the alleged oil and gas holders; they are the heirs of the people who reserved the interest. Appellee bought the surface in 2012 and is now claiming the oil and gas interests are extinguished under the MTA.

{¶5} The first tract of land is 86 acres. The second tract of land is 110 acres, 1 rod, and 22 perches. Both tracts and the oil and gas interest were owned by Lulu E. and James Winland, and Alta H. and William H. Dermot (Winland-Dermot).

{¶6} In 1925, Winland-Dermot sold interest in both tracts to Joseph Russell and George Russell. Exhibit B, 7/17/1925 Deed[1], Volume 259, Page 370. They sold the entire 86 acres and reserved 1/4 of the oil and gas interest underlying that 86 acres. Thus, George Russell and Joseph Russell bought the surface and 3/4 of the oil and gas interest underlying the 86 acre property.

{¶7} Appellee refers to the 1925 Winland-Dermot reservation of the 1/4 interest in the 86 acres as Reservation 1. Thus, references to Reservation 1 is to the 1/4 interest reserved by Winland-Dermot underlying the 86 acres.

{¶8} As to the 110 acres, Winland-Dermot sold that tract of land to George and Joseph Russell. There was no oil and gas reservation pertaining to the 110 acres in the 1925 deed.

{¶9} In 1941, two transactions concerning these lands occurred. Joseph and George Russell conveyed the 86 acres to George Russell, and Joseph and George Russell conveyed the 110 acres to Joseph Russell. Therefore, George Russell owned the 86 acres and Joseph Russell owned the 110 acres. Both of those deeds contained oil and gas reservations.

{¶10} The reservation made in the conveyance of the 86 acres stated, "EXCEPTING, all oil and gas, rights underlaying the above described premises." Exhibit C, 6/20/1941 Deed, Volume 332, Page 161. Therefore, Joseph and George Russell reserved the oil and gas interest to this tract of land. The Winland-Dermot's 1/4 oil and gas interest reservation was not restated in this deed. However, given the chain of title the most Joseph and George Russell could reserve was 3/4 interest, meaning each would have a 3/8 interest. Appellee refers to this 1941 reservation as Reservation 2. It is the reservation that severed Joseph Russell's 3/8 oil and gas interest from the surface.

{¶11} The reservation made in the conveyance of the 110 acres stated, "EXCEPTING and RESERVING all the Oil and Gas [illegible], found underlaying [sic] said described premises." Exhibit D, 6/20/1941 Deed, Volume 332, Page 160. Therefore, Joseph and George were reserving all of the oil and gas interests and since the chain does not indicate any previous reservation they each reserved 1/2 of the interest.

[1]All listed deed dates are the date of recordation.

Appellee refers to this 1941 reservation as Reservation 3. It is the reservation that severed George Russell's 1/2 oil and gas interest from the surface.

{¶12} On November 7, 1952, Joseph Russell sold the 110 tract of land to John Barrett. Exhibit E, 11/10/1952 Deed, Volume 392, page 460. The 110 tract was divided into two tracts – a 62.92 acre tract of land and a 48.19 acre tract of land. The reservation in this deed stated, "EXCEPTING all the Oil and Gas rights found underlying said described premises." Exhibit E, 11/10/1952 Deed, Volume 392, page 460. Appellee refers to this reservation as Reservation 4. It is the reservation that severed Joseph Russell's 1/2 oil and gas interest from the surface.

{¶13} The same day Barrett acquired the 110 acres, he sold 48.19 acres of the 110 acres to George Russell. Out of the 110 acre tract we are only concerned with this 48.19 acres. The reservation language in that deed stated, "EXCEPTING all the oil and gas rights found underlying said described premises." Exhibit F, 11/10/1952 Deed, Volume 392, page 461.

{¶14} Therefore, at this point George Russell owned the 86 acres and a 3/8 interest in the oil and gas underlying that property and owned the 48.19 acres and a 1/2 interest in the oil and gas underlying that property.

{¶15} In 1954, George Russell sold the 86 acres and 48.19 acres to Stanley and Margaret Juzwiak. Exhibit G, 10/30/1954 Deed, Volume 422, Page 203-204. This deed contained reservation language.

{¶16} As to the 86 acres it stated, "EXCEPTING and reserving to George W. Russell, his heirs and assigns, one-fourth (1/4) of all oil and gas in and underlying the above described property." There was no language accounting for the Winland-Dermot interest, Joseph Russell's 3/8 interest or the other 1/8 interest belonging to George Russell. Appellee refers to this reservation as Reservation 5.

{¶17} As to the 48.19 acres, the reservation language stated, "EXCEPTING all the oil and gas rights found underlying said described premises." This reservation was one of the many reservations Appellee refers to as Repetition Reservations.

{¶18} In 1971, the Juzwiaks sold both tracts to Seaway Coal Company. Exhibit H, 3/2/1971 Deed, Volume 522, Page 632-634. At this point the 86 acres was now 77.50 acres. This deed restated the reservations made in the 1954 Deed; it restated the 1/4 oil

and gas interest reserved by George Russell to the 86 acre tract of land and restated the oil and gas reservation for the 48.19 acres. This deed did include a reference to the volume and page numbers of the 1954 Deed; "Sold Second and Third Tracts being the same premises conveyed by George W. Russell to Stanley and Margaret Juzwiak by deed dated Oct. [illegible], 1954, and recorded to Volume 422, Page 203, Records of Belmont County, Ohio." Exhibit H, 3/2/1971 Deed, Volume 522, Page 632-633.

{¶19} Seaway Coal Company then conveyed that land to Shell Mining Company in 1987. Exhibit I, 12/19/1987 Deed, Volume 645, page 232-233. Both reservations were restated in this deed as they were stated in the 1954 deed. A volume and page number reference was made to the 1971 Deed, not any earlier deeds; "Prior Deed Reference: Deed Volume 522, Page 632."

{¶20} Shell Mining Company in 1992 sold the property to R&F Coal Company by Limited Warranty Deed. Exhibit J, 11/16/1992 Deed, Volume 684, Page 439-501. This deed stated, "SUBJECT to easements, covenants, conditions, and restrictions of record; zoning ordinances; legal highways and real estate taxes and assessments hereafter due and payable." After that limitation, the deed indicated that prior instrument references were attached to the deed as an exhibit. It relisted the 1987 deed exactly as written, including the reservations and prior deed volume 522, page 632 reference.

{¶21} In 2000, Capstone Holding Company, successor by merger to R&F Coal sold the property to Lora Lynn Kelly, David Joseph Sensius and Steven George Sensius. Exhibit K, 7/13/2000 Deed, Volume 758, Page 799-802. This deed stated, "UNDER AND SUBJECT to any and all exceptions, reservations, restrictions, easements, rights of way, highways, estates, covenants and conditions apparent on the premises or show by instruments of record." The 1992 deed volume and page number was referenced in this deed.

{¶22} In 2012, by general warranty deed, Kelly, D. Sensius, and S. Sensius sold the property to Appellee. Exhibit A, 5/21/2012 Deed, Volume 324, Page 937-941. It references the 1992 deed. It contained the same deed language concerning reservations and exceptions as the 2000 deed.

{¶23} Actions were taken by Kelly, D. Sensius, and S. Sensius, and/or Appellee to have the oil and gas interest deemed abandoned under the Ohio Dormant Mineral Act (DMA).

{¶24} In 2018, Appellee filed a complaint seeking to quiet title. Appellants and others were listed as defendants. Appellee asked the court to deem the oil and gas interest underlying the property abandoned under the DMA. It also claimed the oil and gas interests were extinguished under the Marketable Title Act (MTA). Appellee also asserted a *Duhig* claim; it claimed George Russell in Reservation 5 reserved and conveyed more interest than he had and therefore, the reservation failed.

{¶25} Appellants filed an Answer. 6/27/18 Answer Kelly Winland.

{¶26} Following discovery, Appellee moved for summary judgment based on the DMA and MTA. Pertinent to the MTA claim, Appellee asserted the "root of title" for Reservation 1 was the 1954 Deed. Appellee claimed the "root of title" for Reservations 2, 3, and 4 was the 1971 Deed. Appellee asserted no deed in the chain of title after the root repeated or referred to Reservations 1, 2, 3, or 4, and 40 years had elapsed. Appellee asserted Reservation 5 failed based on the *Duhig* rule. 9/4/18 Summary Judgment Motion.

{¶27} Appellants responded arguing the interest was not extinguished under the MTA, the reservations were referred to, 40 years had not elapsed, and the *Duhig* rule was not applicable. Appellants admitted the "root of title" for Reservations 2, 3, and 4 was the 1971 deed. As to Reservation 1, Appellees denied the "root of title" was the 1954 deed. Instead they stated it was also the 1971 deed. 9/18/18 Motion in Opposition to Summary Judgment.

{¶28} Appellee filed a reply asserting marketability is determined from the date of the "root of title" deed. 9/25/18 Reply to Motion in Opposition to Summary Judgment.

{¶29} Following a hearing, the trial court granted summary judgment to Appellee based on the MTA and *Duhig* Rule. It agreed with Appellee's assessment that the "root of title" for Reservation 1 was the 1954 deed. It used the 1971 deed for Reservations 2, 3, and 4, which both parties agreed was the correct deed. It then applied our *Blackstone v. Moore,* 7th Dist. Monroe No. 14 MO 0001, 2017-Ohio-5704, decision and found the

restated reservations in those deeds and the deeds following it were not specific and did not preserve the interest. It explained:

> 6. None of the deeds in the chain of title subsequent to Oil and Gas Reservations 1, 2, 3, and 4 refer to the volume and page or the original reserving parties' names in relation to the severed interests. Accordingly, under the *Blackstone* test, any repetition of Oil and Gas Reservations 1, 2, 3, and 4 without reference to their volume and page or the original reserving parties' names was not sufficient to prevent extinguishment of Oil and Gas Reservations 1, 2, 3, and 4 under the MTA.

10/2/18 J.E.

{¶30} It also found the *Duhig* rule applied to Reservation 5; since George Russell conveyed more interest than he had, his reservation was void ab initio. The issues regarding the DMA were deemed moot.

{¶31} Appellants appealed the trial court's decision.

Summary Judgment Standard of Review

{¶32} Summary judgment can be granted when there remains no genuine issues of material fact and reasonable minds can only conclude the moving party is entitled to judgment as a matter of law. Civ.R. 56(C). We consider the propriety of granting summary judgment under a de novo standard of review. *Comer v. Risko*, 106 Ohio St.3d 185, 2005–Ohio–4559, 833 N.E.2d 712, ¶ 8. As such, we review the entry of summary judgment independently and give no deference to the trial court's decision. *Matasy v. Youngstown Ohio Hosp. Co.,* 7th Dist. Mahoning No. 16 MA 0136, 2017–Ohio–7159, ¶ 17.

First Assignment of Error

> "The trial court erred when it used the Marketable Title Act (MTA) to extinguish oil and gas interests."

{¶33} Appellants present two arguments under this assignment. First, they argue the Dormant Mineral Act (DMA) controls the outcome of this case, not the Marketable Title Act (MTA). Second, they contend Appellee is estopped from asserting an MTA claim

because of the actions it took under the DMA. Each argument will be addressed separately.

1. MTA vs. DMA

{¶34} Appellants argue the trial court erred when it applied the MTA instead of the DMA because the DMA is specific, the MTA is general, and DMA conflicts with the MTA. They assert, "the MTA is not available to extinguish mineral interest because of the codification of the specific procedures to claim abandoned minerals in the DMA." They cite to the concurring opinion in the Supreme Court's recent decision in *Blackstone v. Moore*, 155 Ohio St.3d 448, 2018-Ohio-4959, 122 N.E.3d 132 to support their position.

{¶35} Appellee counters arguing Appellants admitted the MTA applies to severed oil and gas interest in their motion in opposition to summary judgment and did not argue the MTA could not be applied. Thus, Appellee asserts this argument is waived and cannot be asserted for the first time on appeal. Despite the alleged procedural hurdles to the argument, Appellee substantively addresses the argument by asserting the MTA and the DMA work parallel to one another and do not conflict.

{¶36} Appellants filed a reply brief acknowledging that the argument concerning the MTA and DMA conflicting was not raised to the trial court. They implicitly acknowledge their motion in opposition to summary judgment stated they did not disagree with Appellee "that the MTA applies to severed oil and gas interests." 9/18/2018 Defendant's Motion in Opposition to Summary Judgment. Appellants assert the basis for raising the argument now and failing to raise it earlier is the concurring opinion in the Ohio Supreme Court's *Blackstone* decision, which was not released until after this appeal was pending.

{¶37} The *Blackstone* concurring opinion of one justice indicated that the holding in *Blackstone* was limited to the narrow issue before it. *Id*. at ¶ 19 (J. DeGenaro, concurring). "[O]ur opinion should not be read to implicitly hold that the more general Marketable Title Act continues to apply to mineral interests following the enactment of the Dormant Mineral Act." *Id*. This justice then went on to question the MTA's applicability to mineral interests. *Id*. at ¶ 20-24. It is on this basis that Appellants are now arguing the MTA is not applicable to mineral interests.

{¶38} We find no merit with Appellants' arguments. The argument could have and should have been raised to the trial court and should not have been raised for the first time on appeal. *See M & H Partnership v. Hines*, 7th Dist. Harrison No. 14 HA 0004, 2017-Ohio-923, 86 N.E.3d 780, ¶ 25 ("'A litigant's failure to raise an argument in the trial court waives the litigant's right to raise the issue on appeal.' *Foster v. Wells Fargo Fin. Ohio, Inc.*, 195 Ohio App.3d 497, 2011-Ohio-4632, 960 N.E.2d 1022, ¶ 24 (8th Dist.).").
Despite Appellants statements, the argument that the DMA is controlling is not novel; it has been made previously. *See Stalder v. Bucher,* 7th Dist. Monroe No. 17 MO 0017, 2019-Ohio-936, ¶ 11-21 (Argument was made in Appellant's brief filed in 2017).

{¶39} Furthermore, the merits of the argument fail. Although the one justice concurrence in *Blackstone* indicated the holding is limited to the question before it, no other justice joined the concurring opinion. Furthermore, the same argument that is raised here was raised to this court in *Stalder v. Bucher* and was found to be meritless. 7th Dist. Monroe No. 17 MO 0017, 2019-Ohio-936, ¶ 11-21. *Stalder* was decided after the Ohio Supreme Court's *Blackstone* decision. In *Stalder,* we explained the MTA applies to all interests and does not differentiate between different types of interests. *Id*. at ¶ 16, citing *Pollock v. Mooney*, 7th Dist. No. 13 MO 9, 2014-Ohio-4435, ¶ 21. We concluded the trial court did not err in finding the MTA applicable because the oil and gas interests are subject to both the MTA and the DMA. *Stalder* at ¶ 19.

{¶40} That reasoning is sound. R.C. 1.51 provides:

> If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

{¶41} Appellants contend the DMA is specific, the MTA is general, and the conflict between the two is irreconcilable.

{¶42} In the context of criminal law, for irreconcilable conflict, it has been explained, "Therefore, in determining the applicability of R.C. 1.51, we must first ascertain whether the statutes at issue in the instant case present an irreconcilable conflict. Such

a conflict arises when the same conduct receives different penalties under two different statutes. [*State v.*] *Chippendale*, 52 Ohio St.3d [118] at 120, 556 N.E.2d 1134 [(1990)]." *State v. Hardy*, 2d Dist. No. 27158, 2017-Ohio-7635, 97 N.E.3d 838, ¶ 49 (2d Dist).

{¶43} While the DMA may be specific as to minerals and the MTA general, the two are not irreconcilable. For example, the DMA deals with a 20 year period and abandonment. The MTA is a 40 year period and extinguishment. Effect can be given to both the DMA and MTA. Therefore, they are not irreconcilable.

{¶44} Consequently, for those reasons the argument that the MTA does not apply to minerals interests fails.

2. Estoppel based on Activities Pursuant to the DMA

{¶45} Appellants argue the trial court erred when it permitted Appellee to use the MTA to extinguish mineral reservations when it had previously availed itself of the DMA. They contend allowing such action is permitting Appellee to have two bites of the apple.

{¶46} We disagree. Recently, this court has stated, "Contrary to Appellant's suggestions, it is permissible for a plaintiff to raise alternative theories of recovery in case one theory is not accepted by the trial court." *Warner v. Palmer*, 7th Dist. Belmont No. 14 BE 0038, 2017-Ohio-1080, ¶ 15 (Statement made in response to Appellees' contention that we should affirm the trial court's judgment based on the findings applicable to the 2006 DMA or the MTA), citing *Eisenbarth v. Reusser*, 7th Dist. Monroe No. 13MO10, 2014–Ohio–3792, ¶ 38 and *Kamposek v. Johnson*, 11th Dist. Lake No. 2003–L–124, 2005–Ohio–344, ¶ 26 (may not recover on two different theories, but may assert alternative theories in the complaint).

{¶47} Furthermore, as Appellee points out when interests are extinguished under the MTA, any action taken by the interest holder after the applicable period cannot revive an already extinguished interest. See R.C. 5301.51. Consequently, it is unclear how any alleged unnecessary action by the surface owner under the DMA would somehow revive an already extinguished interest.

3. Conclusion

{¶48} Neither of Appellants' arguments have merit. This assignment of error is meritless.

Second Assignment of Error

"If the MTA did apply to mineral interests, the trial court erred when it miscalculated the forty-year lookback period vital to the MTA."

{¶49} This assignment of error addresses Reservations 1 through 4. Appellant argues the trial court incorrectly determined the interests in these reservations were extinguished and Appellee has record marketable title to these interests.

{¶50} R.C. 5301.48 indicates a person has record marketable title if they have an unbroken chain of title for 40 years or more with nothing appearing of record purporting to divest the person of the interest. Record marketable title extinguishes interests and claims existing prior to the effective date of the root of title. R.C. 5301.47(A).

{¶51} For purposes of the issues in this case, the starting point for determining whether Appellee has record marketable title is finding the "root of title" for each interest claimed. "Root of title" is defined in R.C. 5301.47(E) as:

> [T]hat conveyance or other title transaction in the chain of title of a person, purporting to create the interest claimed by such person, upon which he relies as a basis for the marketability of his title, and which was the most recent to be recorded as of a date forty years prior to the time when marketability is being determined. The effective date of the "root of title" is the date on which it is recorded.

R.C. 5301.47(E).

{¶52} Accordingly, a "root of title" has two elements. One is a temporal element and one is a substantive element. Both elements have to exist for there to be a root of title.

{¶53} The temporal element for a "root of title" is a title transaction that is at least 40 years preceding the date when marketability is being determined. Once that title transaction is found, it must be determined whether that title transaction meets the second element. This substantive element requires the title transaction to purport "to create the interest claimed by such person, upon which he relies as a basis for the marketability of his title." R.C. 5301.47(E). A "root of title" cannot be the initial severance deed of the

interest the person is seeking to have extinguished. This is because record marketable title extinguishes interests and claims existing prior to the effective date of the root of title, not when the interest and claims were created in the "root of title." R.C. 5301.47(A).

{¶54} In the 1980s this court issued two decisions concerning the MTA - *Christman v. Wells*, 7th Dist. Monroe No. 539, 1981 WL 4773 (Aug. 28, 1981) and *Holdren v. Mann*, 7th Dist. Monroe No. 592, 1985 WL 10385 (Feb. 13, 1985). In those cases, we held that a "root of title" cannot contain a reservation; it cannot be a repetition of a reservation or a first time reservation. We held the root of title has to contain a fee simple conveyance and we reached that conclusion by looking at the definition of "root of title" as defined in R.C. 5301.47, specifically the language of "purporting to create the interest claimed by such person."

{¶55} *Christman* and *Holdren* are not longer good law following the Ohio Supreme Court's decision in *Blackstone*. The deed identified by the Ohio Supreme Court in *Blackstone* as the root of title contained a repetition of prior royalty reservation. *Blackstone*, 2018-Ohio-4959 at ¶ 9. Therefore, the "root of title" can contain a repetition of a reservation; the deed must merely account for the interest the person is claiming to have record marketable title to and not be the severance deed.

{¶56} The next step is then to examine the recordings 40 years succeeding the title transaction to see if there is anything in the record purporting to divest the person of the claimed interest. For purposes of a mineral interest that could be a preservation act by the original reserver or his heirs or assigns. If, for instance there is a preservation act within that 40 year period, then the title transaction at least 40 years preceding the date of when marketability is being determined does not qualify as the "root of title" because it does give the claimant record marketable title. Therefore, the next preceding deed must be examined.

{¶57} This process of title searches under the MTA for the "root of title" was aptly explained in an Oklahoma Law Review Article:

> Assuming the Model Act were enacted as written, an examiner inspecting title would use it as follows: beginning with the date forty years before the date on which he is determining title and moving chronologically backwards

> therefrom, he would find the most recently recorded conveyance of the subject parcel. This document is his potential root of title. After giving a cursory examination of the previous title documents to determine easements, interests owned by the federal government, and reversionary, possessory interests in leases, he would closely scrutinize the documents in the chain of title for the forty years immediately following the root. Finding no competing recorded interests, he could safely assume that all interests previous to the root of title not otherwise excepted were extinguished and that the title was defect free up to the date of the root. If, however, he found competing claims in the chain, he would go back to the next closest preceding conveyance and repeat the process. He would continue moving back until he found a conveyance followed by forty years of clean title. That document would be his root, and he could safely conclude that the act extinguished all competing interests recorded prior to that date.

Jason Hubbert, Rocked by Rocket: Applying Oklahoma's MRTA to Severed Mineral Interests After Rocket v. Donabar, 68 Okla. L. Rev. 381, 386 (2016). See also Jennifer Cohoon McStotts, In perpetuity or for Forty Years, Whichever is Less: The Effect of Marketable Record Title Acts on Conservation and Preservation Easements, 27 J. Land Resources & Envtl. L. 41, 46 (2007) (indicating Ohio has adopted a version of Model Act).

{¶58} Once a 40 year period is found where there is no preserving act, it is important to understand that no act occurring after the 40 year period can revive the extinguished interest. In 2017, we explained there is a difference between abandoned and extinguished; extinguished means null and void and extinguished interests cannot be revived:

> In coming to this conclusion, the Ohio Supreme Court compared the language of the Dormant Mineral Act with the language contained in the remainder of the Marketable Title Act. The Court emphasized the Dormant Mineral Act merely said the mineral interest "shall be deemed abandoned and vested" and did not say the mineral interest was "extinguished" if no

> savings events occurred in the preceding twenty years; nor did it say the mineral interest became "null and void." *Corban*, ––– Ohio St.3d ––––, 2016–Ohio–5796 at ¶ 21. By way of contrast, the terms "extinguish" and "null and void" are used in the Marketable Title Act. *Id.*, citing R.C. 5301.47(A) and R.C. 5301.50. Accordingly, when interests are "extinguish[ed]" due to the forty-year unbroken chain of title defined in the Marketable Title, the interests are automatically "null and void." *See id.* They cannot be revived after extinguishment. *See* R.C. 5301.49(D) (a recording after the effective date of the root of title shall not revive or give validity to any interest which has been extinguished by R.C. 5301.50 prior to the time of recording).

Warner v. Palmer, 7th Dist. Belmont No. 14 BE 0038, 2017-Ohio-1080, ¶ 34.

{¶59} Therefore, while in this case there were leases entered into between drilling companies and purported mineral interest holders in 2016 and 2017, the act of leasing the interest would not revive the interest if it was already extinguished.

{¶60} With those principles in mind, we now turn to each of the Reservations.

1. Reservation 1 and the 1954 Deed

{¶61} For Reservation 1, the Winland-Dermot exception of 1/4 interest of oil and gas in tract 1 (86 acres) of the 1925 deed, the trial court used the 1954 deed as the "root of title" for that interest. Appellants argue the trial court incorrectly used the 1954 deed as the "root of title" for Reservation 1. It contends the "root of title" for Reservation 1 is the 1971 deed. Appellee disagrees and asserts the trial court correctly determined that the "root of title" for Reservation 1 was the 1954 Deed.

{¶62} As stated above, our starting point is the date when marketability is being determined and going back 40 years to find the first deed at least 40 years prior to the date of marketability being determined. The date of determining marketability is not defined by the statute. Appellant contends it is the date of trial or date of summons. In other cases it has been argued it is the date a notice of preservation was filed. The record does not contain a notice of preservation. Thus, the only possible dates are the dates of summons or trial. However, as the below analysis demonstrates, it is irrelevant in this case.

{¶63} The date of summons in this case was February 6, 2018 and the date of the trial court's determination was October 2018. Forty years back is 1978. The closest deed preceding 1978 is the 1971 Juzwiaks to Seaway Coal Company deed. This deed does not restate the Winland-Dermot 1/4 interest reservation. Instead, this deed restates the 1954 1/4 oil and gas interest reservation for George Russell. In 1954, George Russell conveyed the surface to the Juzwiaks and reserved a 1/4 oil and gas interest in the property. The 1954 deed does indicate it was a surface only deed and does not account for the remaining 3/4 oil and gas interest. As such, that deed appears to transfer the surface and 3/4 oil and gas interest to the Juzwiaks. The 1971 deed, by only referencing George Russell's previously reserved oil and gas interest and not referring to any prior reservations, likewise appeared to convey the surface and the remaining 3/4 oil and gas interest to Seaway Coal Company. This 1971 deed could be the basis for the marketability and is a potential "root of title."

{¶64} Pursuant to R.C. 5301.48 a person has marketable title if they have an unbroken chain of title for 40 years or more:

> Any person having the legal capacity to own land in this state, who has an unbroken chain of title of record to any interest in land for forty years or more, has a marketable record title to such interest as defined in section 5301.47 of the Revised Code, subject to the matters stated in section 5301.49 of the Revised Code.
>
> A person has such an unbroken chain of title when the official public records disclose a conveyance or other title transaction, of record not less than forty years at the time the marketability is to be determined, which said conveyance or other title transaction purports to create such interest, either in:
>
> (A) The person claiming such interest; or

> (B) Some other person from whom, by one or more conveyances or other title transactions of record, such purported interest has become vested in the person claiming such interest;
>
> with nothing appearing of record, in either case, purporting to divest such claimant of such purported interest.

R.C. 5301.48.

{¶65} The record in this case does not indicate that from 1971 through 2011 Appellee had an unbroken chain of title to the interest described in Reservation 1. Appellants' admissions to interrogatories indicated from October 30, 1954 through July 13, 2000, Reservation 1 was not subject to any event which would act to preserve it under the MTA or subject to any exception under the MTA. While the express language of the answers to interrogatories does not indicate an event occurred on July 14, 2000 or shortly thereafter which would preserve the interest, it seems implicit that potentially something occurred. If an act occurred prior to 2011, then the 1971 deed cannot be the "root of title" for Appellee's claim to the interest in Reservation 1.

{¶66} Therefore, we go back to the chain of title and look for the deed preceding the 1971 Deed. That deed is the 1954 deed from George Russell to the Juzwiaks. As stated above, in this deed George Russell reserved 1/4 interest in the minerals for himself and his heirs. The previous 1/4 interest Winland-Dermot reservation (nor any other previous reservation) was not restated or referenced in this deed. Failing to account for the prior reservations makes it appear the deed conveyed a 3/4 oil and gas interest to the Juzwiaks and the repetition of this reservation throughout the chain of title with no other reservation of this 3/4 oil and gas interest makes it appear Appellee acquired the 3/4 oil and gas interest. Therefore, the 1954 deed qualifies as the next potential "root of title" because it is the most recent recorded deed as of 40 years prior to the time when marketability is being determined and it purports to create the interest claimed by the person relying on it as a basis for the marketability of his title.

{¶67} The 40 year time period we are concerned with for an unbroken chain of title is 1954 through 1994. As stated above, Appellants admitted there was no preservation act and Reservation 1 was not subject to any exception under the MTA

during that time period. Regardless, application of facts in the record to requirements in R.C. 5301.48 indicates Appellee has an unbroken chain of title to the interest described in Reservation 1 because nothing in R.C. 5301.49 is applicable to limit marketable record title. Division (A) of R.C. 5301.59 states that a general reference to a prior interest must be specific to preserve that interest. Here, there is no reference at all to the Winland-Dermot interest after its creation in 1925. Section (B) states that filing a notice to preserve or possession by same owner for a continuous 40 year period limits marketable record title. R.C. 5301.49(B). There is nothing in the record to suggest this occurred. Division (C) is the adverse possession section and there is nothing in the record to suggest adverse possession occurred. R.C. 5301.49(C). Division (D) is the section on an interest arising out of title transaction recorded after the effective date of "root of title" from which the unbroken chain of title or record is started. R.C. 5301.49(D). This is inapplicable. Division (E) cites the exceptions in R.C. 5301.53, which are railroad/public utility easements, easements that are observable by physical evidence use, easement that is evidence by location beneath, upon or above any part of the land, interest in coal, mortgaged record, or any interest of the United States, the state of Ohio, or any political subdivision. R.C. 5301.59(E). None of these are applicable.

{¶68} In conclusion, the trial court correctly determined the Winland-Dermot 1/4 interest was extinguished. The "root of title" for Reservation 1 was the 1954 Deed where George Russell conveyed the 86 acres to the Juzwiaks and reserved 1/4 interest in the oil and gas and did not account for any other reservations. Appellee, therefore, had record marketable title through the conveyances that appear to convey 3/4 interest in the oil and gas from George Russell to Appellee's predecessors in title. Appellee and its predecessors in title had an unbroken chain of title for over a 40 year period to the interest described in Reservation 1. As such, the Winland-Dermot 1/4 interest was extinguished.

2. Reservations 2 and the 1971 Deed

{¶69} As to Reservations 2, 3, and 4, the parties agree and stipulated the 1971 deed is the "root of title." Appellants argue the references to the reservations in the deeds succeeding it were sufficient to preserve the interest.

{¶70} Reservation 2 concerns the first tract of land, the 86 acres, and the 1941 deed where George Russell and Joseph Russell conveyed the 86 acres to George

Russell. The reservation in that deed excepted all oil and gas interest. Exhibit C, 6/20/1941 Deed, Vol. 332, Page 161. Therefore, George and Joseph reserved the oil and gas. However, the chain of title indicates the most they could reserve was 3/4 interest because when the Winlands and Dermots sold them the 86 acres they reserved 1/4 interest. The interest referenced in Reservation 2 is Joseph Russell's 3/8 oil and gas interest and George Russell's 3/8 oil and gas interest.

{¶71} The "root of title" for this oil and gas interest is the 1971 deed. That deed is the first deed that is at least 40 years preceding the date when marketability is being determined. Furthermore, similar to the analysis under Reservation 1, it is purporting to create the interest claimed by Appellee that it relies upon for the basis of the marketability of his title. This means the 40 year period we are examining is February 1971 through February 2011.

{¶72} The 1971 deed is the Juzwiak to Seaway Coal Company deed. As aforementioned, as to the 86 acre tract of land, the exception states, "EXCEPTING and RESERVING to George W. Russell, his heirs and assigns, one-fourth (1/4) of all oil and gas in and underlying the above described property." 1971 Deed. This is almost exactly the wording from the 1954 George Russell to the Juzwiaks Deed.

{¶73} This language appears to only reserve 1/4 of the oil and gas interest to George Russell underlying the 86 acres. The repetition of this reservation or reference to the deed reciting this reservation throughout the chain of title with no other reservation of the 3/4 oil and gas interest makes it appear Appellee acquired 3/4 oil and gas interest. There is no preservation act in the chain of title from February 1971 through February 2011 of the 3/8 oil and gas interest that was Joseph Russell's or the remaining 1/8 oil and gas interest of George Russell that he did not reserve when he reserved the 1/4 oil and gas interest. There is no specific reference or general reference to Joseph Russell's 3/8 oil and gas interest in any deed following the 1941 deed where the reservation was first made. Also, while every deed following the 1954 deed specifically references George Russell's 1/4 reservation or refers to deeds referencing that specific reservation, there is no specific reference to his remaining 1/8 oil and gas interest he had reserved in 1941. Furthermore, Appellants admitted in the interrogatories that from March 1971 through May 2012, the interest subject to Reservation 2 was not preserved under the MTA and

they were not subject to any exception under the MTA. Consequently, Appellee has an unbroken chain of title and record marketable title to George Russell's previously reserved 1/8 oil and gas interest and Joseph Russell's previously reserved 3/8 oil and gas interest when that interest was not accounted for in the 1971 deed or any succeeding deed. R.C. 5301.48; R.C. 5301.47(A). Therefore, George Russell's 1/8 oil and gas interest and Joseph Russell's 3/8 oil and gas interest was extinguished.[2] The trial court's determination as to Reservation 2 was correct.

{¶74} We acknowledge that when analyzing Reservations 1 and 2, the Ohio Supreme Court's recent *Blackstone* decision was not discussed. *Blackstone* dealt with whether a reference in the "root of title" to a prior reservation was sufficient to preserve the interest. *Blackstone v. Moore*, 155 Ohio St.3d 448, 2018-Ohio-4959, 122 N.E.3d 132. In Reservations 1 and 2 the reservations prior to the "root of title" could not be purported to be preserved by a repetition of the prior reservation because those prior reservations were never specifically or generally repeated. Instead, George Russell did not account for those interests and as such, appeared to convey those interests even though they were not his interests to convey. This was the defect in the deed. That defect/conveyance of that interest remained unbroken for more than 40 years and there was no record of a preservation act. Therefore, under the MTA the defect became valid. R.C. 5301.48. This is not a *Blackstone* issue because there is not a claim that a general reference saved the interest; *Blackstone* dealt with R.C. 5301.49(A). The issues surrounding Reservations 1 and 2 concern R.C. 5301.48.

3. Reservations 3 and 4 and the 1971 Deed

{¶75} Reservations 3 and 4 deal with tract 2, the 110 acres that eventually was dwindled down to 48.19 acres. George and Joseph Russell acquired this land and the oil and gas interest in 1925 when they purchased it from Winland-Dermot. In 1941, Joseph and George Russell conveyed the property to Joseph Russell. That deed contained the following exception, "EXCEPTING and RESERVING all oil and gas [illegible] found underlaying said described premises." Exhibit D, 6/20/1941 Deed, Vol. 332, Page 160. This is Reservation 3. Therefore each of them reserved 1/2 oil and gas interest. In 1952,

[2] The 1/4 oil and gas interest that George Russell reserved concerns Reservation 5 is addressed in the third assignment of error.

Joseph Russell sold the property to John Barrett. It is at this point the property is divided and we are only concerned with 48.19 acres. The exception in this deed states, "EXCEPTING all the Oil and Gas rights found underlying said described premises." Exhibit E, 11/10/1952 Deed, Vol. 392, Page 460. This is Reservation 4.

{¶76} All deeds through 2011 used similar language when referencing the reservation - very general references. Appellants contends these types of references are sufficient to comply with R.C. 5301.49(A), which states general references to prior interests in deed will be sufficient to preserve the interest if the general reference gives a specific identification to the interest.

{¶77} This statute has been recently addressed by the Ohio Supreme Court in *Blackstone v. Moore,* 155 Ohio St.3d 448, 2018-Ohio-4959, 122 N.E.3d 132. The facts in that case were in 1915 the Kuhns conveyed 60 acres to W.D. Brown and his wife. In that deed the Kuhns reserved 1/2 oil and gas royalty interest in the 60 acres. Conveyances occurring after that date included language excepting the Kuhn royalty interest. In 1969, Alfred Carpenter conveyed the property to David Blackstone. The language of that deed specifically indicated the 1/2 oil and gas royalty interest was excepted by the previous exception by Nick Kuhn. In 2001, Blackstone conveyed the property to himself and his wife and included the exception. In 2012, Blackstone filed a complaint against the Kuhn heirs; Blackstone wanted the 1/2 excepted oil and gas royalty interest. Blackstone asserted the interest was extinguished under the MTA.

{¶78} In determining the interest was not extinguished, the Ohio Supreme Court stated the 1969 deed conveying the property from Carpenter to Blackstone is the Blackstone's "root of title." *Blackstone*, 2018-Ohio-4959 at ¶ 9. It then applied R.C. 5301.49, which states:

{¶79} Such record marketable title shall be subject to:

> (A) All interests and defects which are inherent in the muniments of which such chain of record title is formed; provided that a general reference in such muniments, or any of them, to easements, use restrictions, or other interests created prior to the root of title shall not be sufficient to preserve them, unless specific identification be made therein of a recorded title transaction which creates such easement, use restriction, or other interest;

> and provided that possibilities of reverter, and rights of entry or powers of termination for breach of condition subsequent, which interests are inherent in the muniments of which such chain of record title is formed and which have existed for forty years or more, shall be preserved and kept effective only in the manner provided in section 5301.51 of the Revised Code;

R.C. 5301.49(A).

{¶80} The Court explained that the statute starts with the limitation that title is subject to all "interests and defects" in the deed. *Blackstone,* ¶ 11. That limitation is then qualified by the indication that a general reference to the interest is not sufficient unless the general reference includes specific identification of the "record title transaction" that created the interest. *Id*. The Court then stated the statute has a three step inquiry:

> (1) Is there an interest described within the chain of title? (2) If so, is the reference to that interest a "general reference"? (3) If the answers to the first two questions are yes, does the general reference contain a specific identification of a recorded title transaction?

Id. at ¶ 12.

{¶81} In applying this three part test to Reservations 3 and 4, the answer to the first question is yes. The interest described in the chain of title is all the oil and gas rights underlying the 48.19 acres.

{¶82} The second question is whether the reference is a general reference. In *Blackstone*, the Ohio Supreme Court explained a general reference is a broad reference without limitation, while a specific reference is characterized by precise formulation or restriction. *Id*. at ¶ 13-14. The reference in *Blackstone* was deemed to be a specific reference, not a general reference because it clearly indicated it was a 1/2 interest in oil and gas royalty to Nick Kuhn, his heirs and assigns. *Id*. at ¶ 15. It was clear what interest was being referenced. *Id*.

{¶83} The reference in this case is not specific, rather it is general. While it is clear all oil and gas rights are reserved, there is no indication who reserved those

interests. It is not clear what interest was being referenced in the 1971 deed concerning the reservation to the 48.19 acres.

{¶84} Therefore, we go to the third question, which is "does the general reference contain a specific identification of a recorded title transaction?" The answer to this question is "no". There is no reference in the deeds where those interests originated or even who reserved those interests. Thus, the interest is extinguished because R.C. 5301.49(A) was not met. The trial court's conclusion that the interest from Reservations 3 and 4 were extinguished was correct.

Third Assignment of Error

"The trial court erred when it failed to find the sufficiently specific oil and gas reservation in the root of title deed was terminated pursuant to the *Duhig* Rule."

{¶85} Appellants argue the trial court incorrectly determined that Reservation 5 in the 1954 George Russell-Juzwiak deed failed because George Russell purported to reserve and convey more interest than he had. The trial court applied our reasoning from *Talbot v. Ward*, 2017-Ohio-9213, 102 N.E.3d 544, to reach that conclusion.

{¶86} In 1954, George Russell owned the surface to the 86 acres and the surface of the 48.19 acres, which was originally a part of the 110 acre tract. In 1954, George Russell sold the 86 acres and the 48.19 acres to the Juzwiaks. In that deed, which was recorded on October 30, 1954, George reserved 1/4 of the oil and gas interest underlying the 86 acres. As to the 48.19 acres, the language of the deed excepted the entire oil and gas interest underlying that property. It is the reservation of the 1/4 of the oil and gas interest in the 86 acres that is at issue in this assignment of error.

{¶87} The language of the deed does not indicate it is a surface only deed. Thus, as explained above when George reserved the 1/4 interest of oil and gas underlying the 86 acres and did not account for the remainder of the 3/4 oil and gas interest, the plain language of the deed indicates he sold the surface and 3/4 interest of oil and gas to the Juzwiaks. However, given the chain of title that was submitted in this case, the most George had to convey was a 3/8 oil and gas interest. Winland-Dermot reserved a 1/4 oil and gas interest in 1925 when they sold the surface to George and Joseph Russell, and Joseph and George Russell reserved the remainder in 1941 when they sold the surface to George.

{¶88} In determining the 1/4 reservation failed, the trial court cited our precedent in *Talbot* and reasoned:

> 11. Under the ordinary rules of contract construction and the *Duhig* Rule, as applied by the Seventh District Court of Appeals in *Talbot v. Ward*, 7th Dist. Monroe No. 15 MO 0001, 102 N.E.3d 544, 2017-Ohio-9213 (December 8, 2017), if a grantor breaches a warranty of title such that a grant and a reservation both cannot be given effect, then the reservation must fail. Id. at 558.
>
> 12. When applying the *Duhig* Rule to Oil and Gas Reservation 5, George W. Russell purported to convey an undivided three-fourths (3/4) interest in oil and gas underlying Tract 1 in the Juzwiak Deeds, and warranted title to that conveyance, and reserve an undivided one-fourth (1/4) interest to himself. However, at the time of the conveyance, George W. Russell would, at most, have owned an undivided three-eighths (3/8) interest in the oil and gas underlying Tract 1. Accordingly, he was unable to meet his warranty of conveying an undivided three-fourths (3/4) interest in the oil and gas and while at the same time reserving an undivided one-fourth (1/4) interest. Under ordinary rules of contract construction and the *Duhig* Rule, because effect cannot be given to both the grant and reservation, the reservation must fail.
>
> 13. Accordingly, the Court holds that Oil and Gas Reservation 5 was void ab initio due to the application of ordinary rules of contract construction and the *Duhig* Rule, and has never affected and does not affect the Real Estate.

10/2/18 J.E.

{¶89} The trial court's statement of our ruling in *Talbot* is correct.

{¶90} In *Talbot*, we indicated the question before this court was whether the Mellot-Tomolonis deed conveyed the 1/2 interest of the oil and gas royalty, rentals, and bonuses to Tomolonis, or did Mellott retain the 1/2 interest. *Talbot*, 2017-Ohio-9213 at ¶

51. The Mellot-Tomolonis Deed was recorded in 1943 and it conveyed the surface and contained a reservation reserving a 1/2 interest in the oil and gas. The other half interest undisputedly was owned by Ward who sold the interest in 1945 to Christman. By not accounting for the Ward interest and using general reservation language, the Mellot-Tomolonis Deed appeared to convey the unaccounted for interest to Tomolonis, who sold that interest to Christman in 1967. Christman claiming to own all the oil and gas interest recorded a preservation affidavit in 1977 for both halves. Mellott heirs, however, claimed Mellott retained the interest reserved in the 1943 deed and claimed it was not Christman's. We determined based on the Texas *Duhig* case, the Arkansas *Peterson* case, and the ordinary rules of construction that Mellot did not retain a 1/2 oil and gas interest. *Id*. at ¶ 65.

{¶91} In *Talbot* we were not asked to apply the MTA. Given the facts, the MTA could not have been used to extinguish an interest; the MTA could not remove the clouds on the title to the minerals because there were competing interests that were preserved within the 40 year period.

{¶92} When we decided *Talbot* we were not asked to determine the interplay between the *Duhig* rule and the MTA. Thus, we were not considering the MTA in our reasoning in *Talbot*. The rule in *Talbot* is a rule of equity; the MTA is not a rule of equity, it is a rule of law.

{¶93} Thus, the case at hand is distinguishable. There are not competing preserved interests and the MTA, a rule of law, can resolve the issue.

{¶94} The MTA validates the 1/4 oil and gas interest claimed by George Russell's heirs and assigns in the 1971 Deed. As aforementioned, in 1954 George Russell conveyed 86 acres to the Juzwiaks, reserved a 1/4 oil and gas interest, and did not account for the remaining reservations. Thus, he appeared to convey 3/4 oil and gas interest to the Juzwiaks.

{¶95} Had Winland, Dermot, and Joseph Russell challenged the 1954 conveyance earlier or preserved the 1925 and 1941 reservations, there would have been competing interests. Under the *Talbot* rule, George Russell's reservation would then have failed. Winland-Dermot would have retained their 1/4 interest, Joseph would have retained his 3/8 interest, and George Russell's 1/4 interest would have failed. The

Juzwiaks would have received all of George Russell's 3/8 oil and gas interest in order to make them as complete as could be done through equity.

{¶96} However, no challenge occurred until the complaint was filed in 2018. George Russell's 1954 inaccurate conveyance was repeated in the 1971 Juzwiaks to Seaway Coal Deed and specifically indicated that George Russell reserved a 1/4 oil and gas interest. 1971 Deed. The deeds following the 1971 Deed also restated the reservation and/or cited the prior 1954 or 1971 Deeds. For more than 40 years that defect remained in the chain of title without any other documents recorded to indicate that was not correct. There were no acts by anyone to attempt to preserve their interest or correct the defect George Russell created in the chain of title. Thus, while the MTA extinguished the claims not preserved by the Winland-Dermot heirs and Joseph Russell's heirs, it also validated the defect George Russell created and validated his 1/4 oil and gas interest reservation. Similar to the analysis regarding Reservations 1 and 2, George Russell's 1/4 oil and gas interest reservation has remained unbroken in the chain of title for more than 40 years. R.C. 5301.48. Accordingly, George Russell, his heirs, or assigns have marketable title as long as there is nothing in the R.C. 5301.49 that would prevent it.

{¶97} The only applicable section of R.C 5301.49 would be division (A). Thus, *Blackstone* is applicable. The 1/4 oil and gas interest reservation survives under a *Blackstone* analysis. The 1971 repetition of the 1954 reservation describes the interest and is not a general reference; it specifically indicates George Russell reserved 1/4 oil and gas interest underlying the 86 acres. The reservation was repeated in the 1987 deed and referenced by volume and page number in the 1992 deed.

{¶98} Consequently, this assignment of error has merit. The trial court should not have applied *Talbot* and should have instead applied the MTA. That said, it is understandable why the trial court would have applied the *Talbot* reasoning. The nuances between the equitable principle applied in it and the legal principles of the MTA were not explained or addressed in *Talbot*.

Conclusion

{¶99} The first and second assignments of error lacks merit. The third assignment of error has merit. Appellee has record marketable title to the interest described in Reservations 1 through 4. As to Reservation 5, the 1/4 oil and gas interest for George

Russell, his heirs, and assigns was preserved. Appellee has record marketable title to all oil and gas interests under the 48.19 acre tract that was originally part of the 110 acre tract of land. As to the 86 acre tract of land, Appellee has record marketable title to 3/4 oil and gas interest and George Russell, his heirs and/or assigns has title to 1/4 oil and gas interest. The trial court's decision is affirmed in part and reversed in part and judgment for each party is entered in accordance with the above.

Waite, P.J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the first and second assignments of error lack merit. The third assignment of error has merit. The final judgment and order of this Court is that the judgment of the Court of Common Pleas of Belmont County, Ohio, is affirmed in part and reversed in part and judgment for each party is entered in accordance with the above. Costs to be taxed equally against the Appellee and Appellants.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.