

IN THE SUPREME COURT OF OHIO

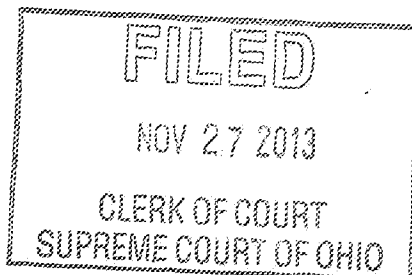
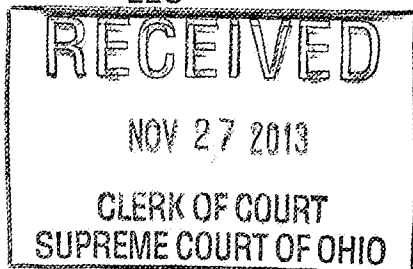
PHILLIP B. DODD, et al.,	:	Case No. 2013-1730
Plaintiffs-Appellants	:	
v.	:	
JOHN CROSKEY, et al.,	:	
Defendants-Appellees	:	
	:	

**MEMORANDUM IN OPPOSITION TO JURISDICTION
OF DEFENDANT-APPELLEE HARRIET C. EVANS**

Marquette D. Evans (0008082)
Evans Law Office
920 Race Street, 2nd Floor
Cincinnati, Ohio 45202
Phone: 513-381-6222
Fax: 513-381-8333
Attorney for Defendant-Appellant

Paul Hervey (0063611)
Jilliann A. Daisher
Fitzpatrick, Zimmerman & Rose Co.,
LPA
PO Box 1014
New Philadelphia, Ohio 44663
330-364-1614
Attorney for Plaintiffs-Appellants

Rupert Beetham
110 South Main Street
PO Box 262
Cadiz, Ohio 43907
Attorney for Defendants-Appellees John William Croskey, Mary E. Surrey, Roy Surrey, Emma Jane Croskey, Margaret Ann Turner, Mary Louise Morgan, Martha Beard, Lee Johnson, Edwin Johnson, Joann Zitko, David B. Porter, Joann C. Wesley, Cindy R. Weimer, Evert Dean Porter, Stuart Barry Porter, Brian K. Porter, Marie Elaine Porter, Kim D. Berry, Samuel G. Boak, Lorna Bower, Sandra J. Dodson and Ian Resources, LLC



Ronald K. Lembright
One Cascade Plaza, 15th Floor
Akron, Ohio 44308

Attorney for Defendants-Appellees William L. Kalbaugh, William H. Boak, Samuel G. Boak, Jennifer Bernay, Charlotte S. Bishop, Richard G. Davis, Harry Roy Davis, Thomas Davis, Harry K. Kalbaugh and Michael Kalbaugh

Karen A. Chaney
794 Breeze Street
Craig, Colorado 81625
Defendant-Appellee

Linda C. Boyd
7068 South Flower Court
Littleton, Colorado 80128
Defendant-Appellee

Terri Hocker
204 South Buckhorn Drive
Bastrop, Texas 78602
Defendant-Appellee

Patty Hausman
1130 Beta Loop
Colorado Springs, Colorado 80906
Defendant-Appellee

Brian Crist
3384 North River Road
Zanesville, Ohio 43701
Defendant-Appellee

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STATEMENT OF APPELLEE WITH RESPECT TO JURISDICTION

It is the position of Appellee Harriet C. Evans that this appeal does not present a question of public or great general interest. She has filed a cross-appeal to preserve the right to argue alternative reasons why the decision of the Harrison County Court of Common Pleas was correct in entering Summary Judgment in favor of the Defendants-Appellees in this action, should this Honorable Court determine to exercise jurisdiction in this matter.

STATEMENT OF THE CASE AND FACTS

This action was instituted in the Harrison County Court of Common Pleas. All parties moved for Summary Judgment, which was entered in favor of the Defendants. The Plaintiffs appealed to the Seventh District Court of Appeals, which affirmed the entry of Summary Judgment in favor of Defendants by its Opinion of September 23, 2013. The Appellants have presented a jurisdictional appeal in this Court. Since the Court of Appeals affirmed the ultimate decision of the Court of Common Pleas in this matter, but determined certain issues contrary to the position of Appellee Harriet C. Evans, she has, along with certain other Appellees, filed a Cross Appeal. The issues presented by the Cross Appeal are presented defensively only, and should not be interpreted as a statement in favor of the exercise of jurisdiction by this Court.

The underlying facts of the case are not in material dispute. The Plaintiffs purchased real estate in Harrison County, Ohio, receiving a deed which was recorded on August 5, 2009. The deed effected a conveyance "Subject to the following:"

Excepting and reserving unto Samuel A. Porter and Blanche Long Porter all of the oil and gas in Warranty Deed to Consolidated Fuel Company filed for record May 27, 1947 in Volume 121, page 381, Deed Records for the 148.105 acre. (Note: No further transfers)

* * *

Excepting a one-third interest in the oil and gas to Samuel A. Porter and Blanche Long Porter in Warranty Deed filed for record may [sic] 27, 1947 in Volume 121, page 383, Deed Records.

Although Plaintiffs made no effort to identify or serve any living person with notice of their intentions, on November 27, 2010, Plaintiffs caused a notice to appear in the *Harrison News Herald*, which was addressed to Samuel A. Porter and Blanche Long Porter (both deceased) and "their unknown successors and assigns", purporting to advise the owners of the oil and gas underlying the property of Plaintiffs' intent to file a Notice of Abandonment of the owners' interests.

On December 23, 2010, Defendant John William Croskey filed an Affidavit Preserving Minerals with the Hamilton County Recorder. The Affidavit traced the history of title of the subject property. It also clearly identified the current holders of interests, and the basis upon which the interests were claimed. The Affidavit indicated that none of the holders, including the moving Defendants, intended to abandon their interest in the minerals underlying the subject property.

Thereafter, it appears that the Plaintiffs recorded an Affidavit of Abandonment with the Harrison County Recorder on two separate occasions. Thereafter, Plaintiffs commenced the underlying action, requesting that the Court of Common Pleas determine that the Defendants' interests in the oil and gas underlying the Plaintiffs' surface interest be declared to have been abandoned to the Plaintiffs.

MEMORANDUM IN OPPOSITION TO JURISDICTION

The question before this Honorable Court is whether the issue raised by the appeal presents a question of public or great general interest. The issue presented is not whether hydraulic fracturing is currently topical, nor whether underground gas rights may have substantial value. Rather, the question presented to the Court is whether the narrow issue upon which this matter was decided in the Court of Appeals is of great interest to the public. Appellants' Memorandum in Support of Jurisdiction is, to a great extent, addressed to the question of the potential value of the interests at stake to the parties, and not the interest of the public in general in the issue presented. Asserting the *possibility* that that the property interests involved *may* be of value to the parties involved in the litigation does not speak to the jurisdictional question.

As ultimately decided by the Court of Appeals, the single issue is whether Ohio Revised Code §5301.56(H)(1)(a) permits a holder of underground mineral interests to file a claim to preserve the holder's rights after proper service of notice of abandonment. As will be discussed below, the Court of Appeals applied elementary concepts of statutory construction, as well as common sense, in determining this issue in favor of the Appellees. Both lower courts simply applied the plain meaning of the words of the statute to the undisputed facts of this case and found that the Appellees' rights had been preserved in accordance with the terms of the statute.

This Appellee has filed a Cross Appeal, which is addressed briefly below as well. The Cross Appeal is presented in a defensive fashion only. It preserves two additional issues which were addressed below. The first issue is based upon the fact that the Appellants took title to the surface rights with unequivocal notice that the underground

mineral rights had been reserved, and were therefore not conveyed by their deed. The Court of Appeals rejected the Appellees' position that the mineral interests were subject to the very title transaction by which the Appellants received the surface rights in 2009.

The second issue is that of the Appellants' failure to comply with the requirements of notice to the holders of the mineral interests of the proposed abandonment of those interests under §5301.56(E), Ohio Revised Code. The Court of Appeals held that this issue was mooted by the fact that Appellee Croskey filed a claim preserving the Appellees' interests under §5301.56(H)(1)(a). Should the Court decide to exercise jurisdiction, this issue could be back in play as well.

In light of the basis upon which the Court of Appeals sustained the entry of Summary Judgment, neither of these issues is essential to the ultimate adjudication of the rights of the parties to this appeal. Appellee therefore does not suggest that either issue presents a justiciable reason for this Court to assert jurisdiction. Her Cross Appeal is simply the assertion of her intention to argue those issues as well, should this Court accept this appeal. The Appellants have asserted that there is pending litigation in the courts of the counties in the area of the state with potential for shale gas exploitation. At some point, it may be appropriate for this Court to grant a jurisdictional appeal in one of those cases. This case, on this narrow and clear point, is clearly not the appropriate case for an exercise of jurisdiction.

PROPOSITION OF LAW PRESENTED BY APPELLANTS

OHIO REVISED CODE SECTION 5301.56(B)(3) REQUIRES A SHOWING BY A PARTY CLAIMING THE PRESERVATION OF A PRIOR MINERAL INTEREST OF A "SAVINGS EVENT" THAT OCCURRED IN THE 20 YEARS PRIOR TO NOTICE BEING SERVED AND NOT A "SAVINGS EVENT" AFTER THE DATE OF THE NOTICE BEING SERVED.

The point of departure in this matter is that the law abhors a forfeiture. *Lessee of Bond v. Swearingen*, 1 Ohio 395 (1824); *State v. Lillock*, 70 Ohio St.2d 23, 25-26 (1982); *State ex rel. Falke v. Montgomery Cty. Residential Dev., Inc.* 40 Ohio St.3d 71, 73 (1988). The Ohio Dormant Minerals Act, §5301.56, Ohio Revised Code, is a forfeiture statute, with very specific and clear requirements to effect a forfeiture. The Appellants do not assert that they complied with the statute.

The requirements for abandonment which are placed upon the surface owner are set forth in §5301.56(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 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.

(Emphasis added.)

The Appellants did not attempt certified mail on anyone, choosing to proceed directly to publication of a notice in local newspaper which named only the two long deceased individuals who had reserved the gas rights in the first place. The Trial Court

relied upon the non-compliance with the mandatory notice requirements of the statute as one of its three bases for Summary Judgment in favor of the Appellees. The Appellate Court noted the non-compliance, but held that it was cured by the fact that Appellee Croskey happened to see the notice and filed a claim to preserve the mineral interests within the sixty day period provided by §5301.56 (H), Ohio Revised Code.

§5301.56(H)(1) provides:

If a holder or a holder's successors or assignees claim that the mineral interest that is the subject of a notice under division (E) of this section has not been abandoned, the holder of the holder's successors or assignees, not later than sixty days after the date on which the notice was served or published, as applicable, shall file in the office of the county recorder of each county where the land that is subject to the mineral interest is located **one of the following**:

(a) **A claim to preserve the mineral interest** in accordance with division (C) of this section;

(b) An affidavit that identifies an event described in division (B)(3) of this section that has occurred within the twenty years immediately preceding the date on which the notice was served or published under division (E) of this section.

(Emphasis added.)

The Appellants have maintained throughout this case that even though the statute plainly states that holders of mineral interests may either testify to a savings event which occurred prior to the notice **or** file a claim under §5301.56(H)(1)(a), the claim must have been filed prior to the service of notice of abandonment. The courts below have simply held that the statute's clear language refutes the Appellants' argument. The statute provides that a holder may do "one of the following", which is described as filing a claim under subsection (a) or filing an affidavit describing a prior event which occurred during the preceding twenty years under subsection (b).

Additionally, the Appellants' insistence that the statute does not provide what it clearly states flies in the face of common sense. If the claim were required to be filed before the notice of abandonment, there would be no reason for subsection (a). Under the Appellants interpretation, there would be no reason for it as subsection (b) covers previously filed claims.

FIRST PROPOSITION OF LAW PRESENTED BY APPELLEE

A PARTY ASSERTING THAT MINERAL RIGHTS HAVE BEEN ABANDONED UNDER SECTION 5301.56, OHIO REVISED CODE IS REQUIRED TO COMPLY WITH THE NOTICE REQUIREMENTS OF THAT STATUTE.

As noted *supra*, Appellee has filed a Cross Appeal. The Cross Appeal is not asserted as an independent basis upon which this Court is urged to assert jurisdiction. However, the failure of the Appellants to comply with the notice requirements was treated as “harmless error” by the Court of Appeals in light of the fact that Appellee Croskey filed a claim which clearly complied with §5301.56(H)(1)(a), Ohio Revised Code.

This issue is intertwined with the single issue presented by the Appellants’ Memorandum, and was addressed under the Proposition of Law asserted by the Appellants. Should this Court decide to accept the appeal, Appellee intends to argue this issue as well.

SECOND PROPOSITION OF LAW PRESENTED BY APPELLEE

A RESTATEMENT OF A PRIOR MINERAL RESERVATION IN LATER DEEDS IS A "TITLE TRANSACTION" WITHIN THE MEANING OF §5301.56, OHIO REVISED CODE.

As noted in the Statement of the Case and Facts, the Appellants received their title to the surface interests by a deed which unequivocally noted that the oil and gas rights on the property were reserved. §5301.56(B)(3)(a), Ohio Revised Code specifically provides that if the mineral interest was the subject of a title transaction within the twenty years preceding the service of the notice required under the statute. Here, of course, the interests were the subject of the title transaction in 2009 by which the Appellants gained their interest in land.

This issue is, again, not asserted as a basis for assertion of jurisdiction in this Court, but is raised here for its preservation in the event that jurisdiction is accepted. Aside from the fact that the interests clearly were the subject of the transaction, it is respectfully submitted that the Appellants cannot claim abandonment when the very deed by which they assert their rights reserved the interest in question.

CONCLUSION

Both of the Lower Courts determined this matter in favor of the Appellees. The Appellants failed to comply with the notice requirements of §5301.56, Ohio Revised Code. The Court of Appeals held the non-compliance to be of no matter since Appellee Croskey filed a claim which met the requirement of §5301.56(H)(1)(a) in any event. In reaching their decisions the courts below simply applied the clear language of the statute to the undisputed facts of this case.

This matter was resolved on a simple and straightforward application of the statutory language. Discussions about the fracking boom and the economic interests involved in this matter do not convert the simple issue upon which this case has been resolved into a question of public or great general interest. In the future, this Honorable Court may be called upon to determine a truly important question regarding the Ohio Dormant Minerals Act. This appeal does not present such an issue. This Court is respectfully urged to decline this jurisdictional appeal.

Respectfully submitted,

EVANS LAW OFFICE



Marquette D. Evans (0008082)
920 Race Street, 2nd Floor
Cincinnati, Ohio 45202
(513) 381-6222
(513) 381-8333 fax
marquette3@hotmail.com
Attorney for Defendant-Appellee, Harriet
C. Evans

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by First Class U.S. Mail upon the following:

Paul Hervey
Jilliann A. Daisher
Attorneys for Plaintiffs-Appellants
PO Box 1014
140 Fair Avenue, NW
New Philadelphia, Ohio 44663
Attorneys for Plaintiffs-Appellants

Rupert Beetham
110 South Main Street
PO Box 262
Cadiz, Ohio 43907
Attorney for Defendants-Appellees John William Croskey, Mary E. Surrey, Roy Surrey, Emma Jane Croskey, Margaret Ann Turner, Mary Louise Morgan, Martha Beard, Lee Johnson, Edwin Johnson, Joann Zitko, David B. Porter, Joann C. Wesley, Cindy R. Weimer, Evert Dean Porter, Stuart Barry Porter, Brian K. Porter, Marie Elaine Porter, Kim D. Berry, Samuel G. Boak, Lorna Bower, Sandra J. Dodson and Ian Resources, LLC

Ronald K. Lembright
One Cascade Plaza, 15th Floor
Akron, Ohio 44308
Attorney for Defendants-Appellees William L. Kalbaugh, William H. Boak, Samuel G. Boak, Jennifer Bernay, Charlotte S. Bishop, Richard G. Davis, Harry Roy Davis, Thomas Davis, Harry K. Kalbaugh and Michael Kalbaugh

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794 Breeze Street
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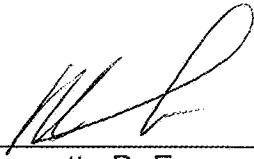
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7068 South Flower Court
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Defendant-Appellee

Terri Hocker
204 South Buckhorn Drive
Bastrop, Texas 78602
Defendant-Appellee

Patty Hausman
1130 Beta Loop
Colorado Springs, Colorado 80906
Defendant-Appellee

Brian Crist
3384 North River Road
Zanesville, Ohio 43701
Defendant-Appellee

This 29th day of November, 2013.



Marquette D. Evans (0008082)
Attorney-at-Law