[Cite as *Hickman v. Consolidation Coal Co.*, 2019-Ohio-4077.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

JEFFREY B. HICKMAN ET AL.,

Plaintiffs-Appellants,

v.

CONSOLIDATION COAL COMPANY ET AL.,

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 17 CO 0012

Application for Reconsideration and Motion to Certify a Conflict

BEFORE:
David A. D'Apolito, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:
Application for Reconsideration Granted. Motion to Certify Conflict Denied.

Atty. Matthew Onest and *Atty. Scott Zurakowski*, Krugliak, Wilkins, Griffiths & Dougherty, 4775 Munson Street, NW, P.O. Box 36963, Canton, Ohio 44735, for Plaintiffs- Appellants and

Atty. Ashley Oliker, and *Atty. Stephen Chappelear,* Frost Brown Todd, LLC, 10 West Broad Street, Suite 2300, Columbus, Ohio 43215, for Defendants-Appellees Kimberly Andric et al. *Atty. Randolph Snow,* and *Atty. James Wherley Jr.,* Black, McCuskey, Souers & Arbaugh, 220 Market Avenue South, Suite 1000, Canton, Ohio 44702, and *Atty. Andrew Shock* and *Atty. Clay Keller*, Jackson Kelly PLLC, 50 South Main Street, Suite 201, Akron, Ohio 44308, for Defendant- Appellee Chesapeake Exploration, LLC. *Atty. Vito Abruzzino*, Harrington, Hoppe & Mitchell, Ltd., 2235 East Pershing Street, Suite A, Salem, Ohio 44460, for Defendants-Appellees Edna F. Taggart et al.

Dated: September 26, 2019

PER CURIAM.

{¶1} On February 15, 2019, Plaintiffs-Appellants, Jeffrey and Leah Hickman, filed an application for reconsideration of this Court's February 5, 2019 decision in *Hickman v. Consolidated Coal Co.*, 7th Dist. Columbiana No. 17 CO 0012, 2019-Ohio-492, in which the Court affirmed the judgment entry of the trial court dismissing Appellants' Marketable Title Act ("MTA") claim. That same day, Appellants filed a motion to certify a conflict with the Fifth District's holding in *Duvall v. Hibbs,* 5th Dist. Guernsey No. CA-709, 1983 WL6483. Responses in opposition to the motions were filed by Defendants-Appellees, Chesapeake Exploration L.L.C. ("Chesapeake") on February 27, 2019, Kimberly Andric, Daniel G. Lawlis, Constance J. Lawlis, Constance A. Sugget, Rick P. Sugget, Bernice Elson, Timothy L. Lawlis, Virginia L. Berube ("Lawlis Appellees") on February 28, 2019, and Edna F. Taggart, Herbert L. Taggart, Jeffrey L. Taggart, Phyllis Jean Stewart, and Attorney in Fact for Edna P. Taggart, Ella Mae Taggart, and Ruth A. Anderson ("Taggart Appellees") on March 5, 2019. Appellants' replies were filed on March 6, 2019. On March 21, 2019, Appellants filed a notice of supplemental authority – this Court's decision in *Stalder v. Butcher*, 7th Dist. Monroe No. 17 MO 0017, 2019-Ohio-936.

{¶2} At issue in both the application for reconsideration and the motion to certify is our conclusion that a root of title must "contain a fee simple title, free of any oil and gas reservation." *Hickman, supra,* ¶ 28, quoting *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, *2 (Feb. 13, 1985). In their application for reconsideration, Appellants argue that our holding in *Hickman* is erroneous because we did not undertake the three-step inquiry announced last year by the Ohio Supreme Court in *Blackstone v. Moore*, 155 Ohio St.3d 448, 2018-Ohio-4959, 122 N.E.3d 132. In their motion to certify conflict, Appellants assert that our holding in *Hickman* is directly at odds with a decision of the Fifth District Court of Appeals, *Duvall v. Hibbs*, 5th Dist. Guernsey No. CA-709, 1983 WL 6483 (June 8, 1983), in which the Fifth District applied the general/specific test to a prior deed reference in a root of title.

{¶3} We grant the motion for reconsideration to clarify our holding in *Hickman*, that the void in the post-severance/pre-root deed history in the record prevented us from concluding that the exception/reservation in the purported root of title was a prior deed reference. We further find that there is no conflict between our holding in *Hickman* and the holdings in *Blackstone, supra,* and *Duvall, supra,* because the record in those cases contained a complete post-severance/pre-root deed history. Therefore, the motion to certify conflict is overruled.

MOTION FOR RECONSIDERATION

{¶4} App.R. 26, which provides for the filing of an application for reconsideration in this Court, includes no guidelines to be used in the determination of whether a decision is to be reconsidered. *Deutsche Bank Natl. Trust Co. v. Knox*, 7th Dist. Belmont No. 09-BE-4, 2011-Ohio-421, ¶ 2, citing *Matthews v. Matthews*, 5 Ohio App.3d 140, 143, 450 N.E.2d 278 (10th Dist.1981). The test generally applied is whether the motion for reconsideration calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered or not fully considered in the appeal. *Id.*

{¶5} An application for reconsideration is not designed for use in instances where a party simply disagrees with the conclusions reached and the logic used by an appellate court. *Duetsche Bank* at ¶ 2, citing *State v. Owens*, 112 Ohio App.3d 334, 336, 678 N.E.2d 956 (11th Dist.1996). Rather, App.R. 26 provides a mechanism to prevent the possible miscarriage of justice that may arise where an appellate court makes an obvious error or renders an unsupportable decision under the law. *Id.*

ANALYSIS

{¶6} Our decision in *Hickman* required the interpretation of two provisions of the MTA, R.C. 5301.47 and R.C. 5301.49. Pursuant to the MTA, a person who has an unbroken chain of title of record to any interest in land for 40 years or more has a marketable record title to such interest. R.C. 5301.48. A marketable record title operates to extinguish interests and claims existing prior to the effective date of the root of title. R.C. 5301.47(A).

{¶7} "Root of title" is defined 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 of forty years prior to the time when marketability is being determined.

R.C. 5301.47(E).

{¶8} Where an interest is inherent in the muniments of the chain of title, the MTA operates to extinguish the interest if it is not specifically identified. R.C. 5301.49 reads in pertinent part:

> 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 * * *.

The three-step inquiry fashioned by the Ohio Supreme Court in *Blackstone* is derived from R.C. 5301.49(A).

{¶9} In *Blackstone*, the root of title was a 1969 deed conveying the real property from Carpenter to Blackstone. The Carpenter deed read, in pertinent part:

> [e]xcepting the one-half interest in oil and gas royalty previously excepted by Nick Kuhn, their [sic] heirs and assigns in the above described sixty acres.

Id. at ¶ 3.

{¶10} In order to determine whether the MTA extinguished the prior interest, the Blackstone Court fashioned 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. The Ohio Supreme Court ultimately concluded that the Kuhn royalty interest could not be extinguished because the prior deed reference was sufficiently specific.

{¶11} In *Hickman*, Appellants acquired the property in 2008. Appellants sought a declaratory judgment that they owned a fee simple interest in the property, including the mineral rights, based on purported root of title deed in 1963 transferring the property from Consolidated Coal Company to the Haverfields, which reads in pertinent part:

> EXCEPTING AND RESERVING also unto said Grantor, Consolidated Coal Company, its successors and assigns, all the oil and gas and other minerals of whatsoever nature, kind or description in and underlying the above described premises:

{¶12} The purported severance deed is a 1948 deed transferring the surface from the Northams to Healy Bros. Co. but "excepting and reserving all oil and gas underlying said premises." Appellants argued that the excepting/reserving clause is a repetition of the severance language from the Northam deed, but that the phrase is not a specific reference as contemplated by R.C. 5301.49(A) and as defined by *Blackstone*, *supra.*

{¶13} Relevant to the application for reconsideration, the deed history in *Hickman* contained a void between the purported severance deed and the purported root of title deed. We recognized this fact, writing:

> There is confusion in the deed history. The deed that contains the Northam reservation from R.C. and Georgia Northam to Healy Bros. and Company was recorded in the Harrison County Recorder's Office on June 25, 1948 in Deed Book 124, Page 128. The Appellants next refer to a 1963 deed from Consolidation Coal Company to Alfred O. Haverfield, Marguerite Haverfield Hurless and Harold C. Haverfield, as their root of title deed, recorded on November 22, 1963 at Deed Book 150, Page 4. *There are no deeds or transfers in evidence to demonstrate the chain of title between Healy Bros.*

> *and Company and Consolidation Coal Company.* There is a reference in the root of title deed, as well as the subsequent conveyances thereafter, to "... 16.922 acres of a 97.437 acre tract conveyed by Charles C. Simpson, et al to Pittsburgh Consolidation Coal Co. by deed dated May 26, 1952, which deed is recorded in Volume 131, page 245, Deed Records of Harrison County, Ohio." *The 1952 deed does not appear in the record.* Regardless, all parties have asserted as an undisputed fact that the Northam heirs are the holders of that reservation.

(Emphasis added) *Hickman* at ¶ 5.

{¶14} Despite making this factual finding, we recognize that we did not clearly articulate the significance of the void in the post-severance/pre-root deed history as it relates to the *Blackstone* analysis.

{¶15} Our holding in *Hickman* relied in part on two decisions from this Court in the 1980s. In *Christman*, *supra,* the purported root of title was a 1926 deed, which read, in pertinent part, "[e]xcepting and reserving the one-half oil and gas royalty being 1/16th of the oil produced and 1/2 of the money received from the sale of gas." *Christman*, *supra,* at *1. The panel found that the 1926 deed contained a repetition of the reservation of royalties from the 1925 severance deed.

{¶16} The panel held that "'[t]he interest claimed' by the [surface holders] is an interest free of [the] reservation of royalties, a fee simple." *Id.* As a consequence, the panel concluded that the 1926 deed was not the root of title "because such instrument contains, within it, a repetition of the original exception of all the oil and gas." The panel reasoned that the 1926 deed could not be the root of title "because it does not contain a fee simple title free of any such oil and gas exception and reservation." *Id.*

{¶17} After disqualifying the 1926 deed, the panel continued back through the deed history and identified a 1923 deed, which transferred a fee simple, as the surface owner's root of title. Because the 1925 severance deed was a title transaction in Christmans' chain, based on the 1923 root, the panel concluded that the MTA did not extinguish the prior mineral interest.

{¶18} Likewise, in *Holdren, supra,* the panel recognized that the purported root of title contained a repetition of an oil and gas exception from the prior severance deed. Because the purported root did not convey "a fee simple, free of any such oil and gas exception," the panel continued back through the deed history and identified an 1881 deed, which transferred a fee simple, as the surface holders' root of title. As a result, the severance deed was a title transaction in Holdrens' chain, based on the 1881 root, the panel, with one judge dissenting, concluded that the MTA did not extinguish the prior interest. In his dissent, Judge O'Neill advocated a specific-analysis test, and concluded that the repetition was not specific enough to prevent extinguishment by operation of the MTA. *Id.* at *3-4.

{¶19} Returning to *Hickman,* Appellants argued that the oil and gas exception in the root of title was a repetition, and, that, post-*Blackstone*, courts must undertake the three-step inquiry to determine whether the prior deed reference is sufficiently specific to survive extinguishment under the MTA. Although we agreed with Appellant's recitation of the law, we found that Appellant's repetition argument could not be substantiated based on the record because of the void in the post-severance/pre-root deed history. In other words, we treated the phrase "EXCEPTING AND RESERVING also unto said Grantor, Consolidated Coal Company, its successors and assigns, all the oil and gas and other minerals of whatsoever nature, kind or description in and underlying the above described premises" as an original exception in the 1963 deed, not a prior deed reference.

{¶20} In *Hickman*, we observed that the *Christman* and *Holdren* panels "focused on the mere existence of the [repetitions] within the purported root of title deeds to prevent extinguishment pursuant to the MTA and did not examine whether the [repetitions] were general or specific within the root of title deed." *Hickman* at ¶ *26.* Because the panels in those cases made a factual finding based on the complete post-severance/pre-root deed history that the exception/reservation in the purported roots of title were repetitions from the severance deed, the holdings in those cases conflict with *Blackstone, supra,* and, as a consequence, they are no longer good law.

{¶21} However, based on the void in post-severance/pre-root deed history in *Hickman*, a fact that distinguished the case from *Blackstone*, *Christman*, and *Holdren*, we could not ascertain that the exception/reservation in the root of title was a repetition. In

the absence of a complete post-severance/pre-root deed history, we treated it as an original exception/reservation. Because the 1963 deed contained an original exception/reservation, which could not be extinguished by operation of the MTA, we concluded that it did not convey a fee simple title, free of any such oil and gas exception or reservation.

{¶22} Appellants assert that "[i]n the present case, this Court ended the MTA analysis after answering only the first [*Blackstone*] question, yes." (App. To Reopen, p. 4). To the contrary, we did not answer the first inquiry – "[i]s there an interest described within the chain of title" – in the affirmative. Based on the incomplete post-severance/pre-root deed history, we did not find that the 1948 exception/reservation was "described" in the purported root of title deed, and, as a consequence, we did not apply *Blackstone*.

{¶23} Next, Appellant argues that our holding in *Hickman* is at odds with our holding in *Covert v. Koontz*, 7th. Dist. Monroe No. 13 MO 8, 2015-Ohio-228, and the Ohio Supreme Court's decision in *Toth v. Berks Title Insurance Co.,* 6 Ohio St.3d 338, 453 N.E.2d 639 (1983). However, there was no void in the post-severance/pre-root deed histories in either of those cases. The same is true of the post-severance/pre-root deed history in *Stalder, supra.*

{¶24} Where the record contains a void in the post-severance/pre-root deed history, and the root of title deed contains what appears to be a repetition of an exception from a prior deed, without any reference to the prior deed, the MTA does not operate to extinguish the prior interest. The *Blackstone* inquiry is undertaken where the root of title, or a deed within the chain, contains a reference to a prior interest. Where, as here, the alleged repetition cannot be determined based on the void in the post-severance/pre-root deed history, we will not presume evidence outside of the record, and, therefore, will not undertake the *Blackstone* analysis.

MOTION TO CERTIFY CONFLICT

{¶25} App.R. 25(A) reads, in pertinent part:

> A motion to certify a conflict under Article IV, Section 3(B)(4) of the Ohio Constitution shall be made in writing no later than ten days after the clerk

> has both mailed to the parties the judgment or order of the court that creates a conflict with a judgment or order of another court of appeals and made note on the docket of the mailing, as required by App. R. 30(A). * * * A motion under this rule shall specify the issue proposed for certification and shall cite the judgment or judgments alleged to be in conflict with the judgment of the court in which the motion is filed.

{¶26} Article IV, Section 3(B)(4) of the Ohio Constitution reads:

> Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

{¶27} Hence, the following conditions must be met before and during certification pursuant to Section 3(B)(4), Article IV of the Ohio Constitution:

> First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict must be "upon the same question." Second, the alleged conflict must be on a rule of law – not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals. (Emphasis deleted.)

State v. Agee, 7th Dist. Mahoning No. 14 MA 0094, 2017-Ohio-7750, ¶ 4, quoting *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 613 N.E.2d 1032, (1993), paragraph one of the syllabus.

{¶28} In addition, the issue proposed for certification must be dispositive of the case. *Agee* at ¶ 4, citing *State ex rel. Davet v. Sutula*, 131 Ohio St.3d 220, 2012-Ohio-759, 963 N.E.2d 811, ¶ 2.

{¶29} The root of title in *Duvall, supra,* provides that the conveyance was "subject to a deed made to R.S. Hibbs for one-half of said royalty making the amount of royalty for all oil pumped from the wells on said lands after March 1, 1908." *Id.* at *1. The *Duvall* Court made two findings of fact, which distinguish the case from *Hickman*. First, the Fifth District found that "[t]he root of title contains a general reference to an interest possessed by R.S. Hibbs," and, second, that the Hibbs interest was "conveyed in an instrument recorded prior to the root of title." *Duvall* at *1. The *Duvall* Court wrote, "The fact that the instrument precedes the root of title is not disputed."

{¶30} The *Duvall* Court made the foregoing findings of fact based on the record in that case. Therefore, it does not appear that there was any void in the post-severance/pre-root deed history in *Duvall.* Based on this factual distinction, we find no conflict between *Miller* and *Duvall.*

CONCLUSION

{¶31} In summary, we grant the application for reconsideration to clarify our prior holding, but find no obvious error or unsupportable decision under the law. The motion to certify conflict is denied based on the incomplete post-severance/pre-root deed history in the record.

JUDGE DAVID A. D'APOLITO

JUDGE GENE DONOFRIO

JUDGE CHERYL L. WAITE

NOTICE TO COUNSEL

This document constitutes a final judgment entry.