[Cite as *Corso v. Miser*, 2020-Ohio-5293.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
JEFFERSON COUNTY

REBECCA MODRANSKY CORSO, et al.,

Plaintiffs-Appellees/
Cross-Appellants,

v.

GEORGE W. MISER,

Defendant-Appellant/
Cross-Appellee.

OPINION AND JUDGMENT ENTRY
Case No. 19 JE 0018; 19 JE 0019

Civil Appeal from the
Court of Common Pleas of Jefferson County, Ohio
Case No. 18 CV 318

BEFORE:
Carol Ann Robb, Gene Donofrio, Cheryl Waite, Judges.

JUDGMENT:
Affirmed.

Atty. Anthony Glase, *Atty. Anthony Richardson II*, P.O. Box 2641 Toledo, Ohio 43606, for Plaintiffs-Appellees/Cross-Appellants and

Atty. Gregory Watts, *Atty. Matthew W. Onest, Atty. Wayne A. Boyer,* Krugliak, Wilkins, Griffiths & Dougherty, 4775 Munson Street, N.W., P.O. Box 36963 Canton, Ohio for Defendant-Appellant/Cross-Appellee

Dated: September 28, 2020

Robb, J.

{¶1} Defendant-Appellant/Cross-Appellee George W. Miser appeals the decision of Jefferson County Common Pleas Court granting summary judgment and quieting title to the oil and gas for Plaintiffs-Appellees/Cross-Appellants Rebecca M. Corso and Paula D. Modransky. Appellees/Cross-Appellants appeal the trial court's decision denying their request for attorney fees. Three issues are raised in this appeal. First, does the language of the 1949 deed reserve the oil and gas to George T. Miser and Isabelle Miser, Appellant/Cross-Appellee's predecessor in interest. Second, if the language is ambiguous, does the parol evidence indicate that the language was meant to reserve the oil and gas interest. Third, did the trial court abuse its discretion when it implicitly denied the Appellees/Cross-Appellants' request for attorneys fees that was made for the first time in the proposed judgment entry for quieting title that was drafted by Appellees/Cross-Appellants' attorney.

{¶2} For the reasons explained below, the language of the 1949 deed is ambiguous and susceptible to different interpretations. However, there is no parol evidence indicating whether or not there was an intent by George T. Miser and Isabelle Miser, Appellant's predecessor in interest, to reserve the oil and gas. Thus, the language is construed against the grantor. The trial court's grant of summary judgment to Appellees is affirmed. As to attorney fees, the argument raised is meritless; counsel did not properly move for attorney fees. The trial court did not abuse its discretion by failing to grant attorney fees.

Statement of the Case

{¶3} This case involves the ownership of oil and gas underlying approximately 140 acres of real estate in Springfield Township, Jefferson County, Ohio. George M. and Mary Miser were the owners of the real estate and subsurface. In 1906 they conveyed the coal, except the number 8 seam, to Henry Wick. In 1943 George M. and Mary

conveyed a portion of their estate to George T. and Isabelle Miser. George T. and Isabelle Miser are Appellant/Cross-Appellee's parents. One exception in this deed stated:

> EXCEPTING that part of the coal underlying said premises heretofore sold and conveyed to Henry Wick, a reference to this deed of conveyance heretofore on record in the Recorder's Office of Jefferson County, Ohio, will more fully show, and being the same premises as is described in Mortgage Record 79, Page 22 of said county.

1943 Deed.

{¶4} George T. and Isabelle Miser in 1949 conveyed a portion of the estate they received in 1943 to John, Mary, and Dola Wylie. John, Mary, and Dola Wylie are Appellees/Cross-Appellants' grandparents and mother. That deed contains the following exception:

> Excepting and reserving from the above described Real Estate, all coal and mineral underlying the same with the right to mine and remove the same as shown in deed to Henry Wick, where in said coal was conveyed, reference to which is hereby made for a more complete statement thereof.

1949 Deed in Volume 257, Page 152.

{¶5} In 1953, George T. and Isabelle Miser executed another deed indicating that 0.7 acres was erroneously omitted from the 1949 deed from George T. and Isabelle Miser to the Wylies. The only exception in that deed is for all legal highways.

{¶6} In 1949, a Coal Lease was executed. This document states:

> WHEREAS, George T. Miser and Isabel Miser are the owners of certain real estate hereinafter described land and,
>
> WHEREAS, J.P. Wiley is the purchaser in a land contract wherein George R. Miser and Isabel Miser are grantors and,
>
> WHEREAS, there exists under said real estate certain coal under a portion of said real estate which contains one acre more or less, located in one plot bordering Route 43 and said coal is the property of said grantors and,

> WHEREAS, Mary Schiappa d.b.a. The Huberta Coal Company desires to remove said coal under said portion of real estate hereinafter described, by the open pit mine method or stripping mining.
>
> Now, therefore, the said George T. Miser, Isabel Miser, and J.P. Wiley, called grantors, and Mary Schiappa, hereinafter called the grantee, agree as follows:

1949 Coal Deed.

{¶7} In 1964, George T. and Isabelle Miser leased the oil and gas rights to Humble Oil & Refining Company. The oil and gas estate leased was identified as, "That certain mineral reservation by lessor appearing in deed dated September 30, 1949, recorded in Book 257, Page 152." This lease is dated March 26, 1964. This lease was signed by the Misers, notarized, and recorded.

{¶8} The record also contains a lease between Dola (Wylie) and Myroslow Modransky and Humble Oil & Refining Company for the oil and gas underlying the same property described in the Miser-Humble Oil and Gas Lease. That lease is dated April 28, 1964. The version of the lease that is in the record is not signed, notarized, or recorded.

{¶9} In 1965, Appellant/Cross-Appellee inherited property from Isabelle Miser. In 2006, Appellees/Cross-Appellants became the sole owners of the interest conveyed in 1949 and 1953. Appellee/Cross-Appellant Rebecca M. Corso owns a 2/3 interest and Appellee/Cross-Appellant Paula D. Modransky owns a 1/3 interest.

{¶10} In 2011, Appellees/Cross-Appellants entered into a lease with Chesapeake Exploration LLC for the oil and gas rights underlying the land at issue in this case. In 2014, Chesapeake Exploration LLC entered into a lease with Appellant/Cross-Appellee for the oil and gas rights underlying the land at issue in this case. Chesapeake is withholding royalties from both Appellant/Cross-Appellee and Appellees/Cross-Appellants due to the parties competing claims to ownership over the oil and gas interest.

{¶11} In 2018, Appellees/Cross-Appellants filed an action to quiet title or in the alternative for declaratory judgment based on the Marketable Title Act against Appellant/Cross-Appellee. 7/23/18 Complaint; 8/8/18 Amended Complaint. Appellees/Cross-Appellants asked for an order granting them all rights, title, and interest

to the oil and gas underlying the real estate and for an order that Appellant/Cross-Appellee was to pay a fair portion of the court costs.

{¶12} Appellant/Cross-Appellee answered and asked for the court to dismiss the claims with prejudice, award him attorney fees and courts costs, and any other equitable relief the court deemed appropriate. 8/22/18 Answer.

{¶13} The parties filed their competing summary judgment motions and argued that the plain language was in their respective favors. Appellant/Cross-Appellee asserted the plain language of the deed meant that the oil and gas interest was reserved. 9/14/18 Summary Judgment Motion; 10/12/18 Response to Summary Judgment Motion; Appellees/Cross-Appellees asserted the language on its face indicated the oil and gas interest was not reserved and accordingly was transferred to their predecessors in interest and therefore inherited by them. 9/14/18 Summary Judgment Motion; 10/15/18 Reply to Opposition.

{¶14} The trial court denied the motions explaining:

> While the Court does have some extrinsic evidence such as the newly-entered oil and gas lease and the statements of both sides claiming that they always thought they owned the oil and gas rights the Court is not convinced that it has access to all of the extrinsic evidence that would be out there or would be available after discovery. For these reasons the Court cannot grant a Summary Judgment to either party.

11/30/18 J.E.

{¶15} Following discovery, the parties filed their second motions for summary judgment. 5/3/19 Appellant/Cross-Appellee Motion for Summary Judgment; 5/6/19 Appellees/Cross-Appellants' Motion for Summary Judgment. Appellant/Cross-Appellee argued the plain language of the deed indicated the oil and gas interest was reserved. 5/3/19 Motion for Summary Judgment. However, even if the plain language of the deed was ambiguous he contended the parol evidence indicated it was the intent of the Misers to reserve the interest. 5/3/19 Motion for Summary Judgment. Appellees/Cross-Appellants argued the plain language of the deed did not reserve the interest and even if

the deed was ambiguous, the extrinsic evidence does not show an intent to reserve the interest. 5/6/19 Appellees/Cross-Appellants' Motion for Summary Judgment.

{¶16} A hearing on the summary judgment motions was held on June 17, 2019. Thereafter, the trial court granted summary judgment for Appellees/Cross-Appellants. 7/16/19 J.E. It held that the word "minerals" standing alone and without qualifying words would have created an effective reservation. 7/16/19 J.E. However, the word "minerals" was followed by qualifying language and that qualifying language was ambiguous. 7/16/19 J.E. Therefore, the court looked to parol evidence and stated there was no parol evidence indicating the Misers intended to reserve the oil and gas. 7/16/19 J.E. Therefore, the limiting language was construed against the drafters, i.e., the grantors Misers, and it was found that the oil and gas interest passed to the Wylies and then to the Appellees/Cross-Appellants. 7/16/19 J.E.

{¶17} At the end of the judgment entry the trial court stated, "Plaintiff shall prepare an Order consistent with this Order quieting title to the Oil and Gas for Plaintiffs and submit same to Defendant for approval pursuant to this Court's Local Rules." 7/16/19 J.E.

{¶18} On July 30, 2019, Appellant/Cross-Appellee objected to the proposed judgment entry prepared by counsel for Appellees/Cross-Appellants because the judgment entry indicated that attorney fees in the amount of $2,500.00 were awarded to Appellees/Cross-Appellants' counsel. Appellant/Cross-Appellee argued the American Rule and there was no indication this fee was reasonable.

{¶19} Appellees/Cross-Appellants filed a response arguing there is a warranty deed exception to the American Rule. 8/5/19 Memo Contra to Objections. Counsel also asserted the fees were more than reasonable considering he was a staff attorney for the Sixth Appellate District until July 2019 and during his tenure at the court he could not practice for compensation. He then added, "Perhaps the Court should do an in camera assessment of what was paid to Krugliak, Wilkins, Griffith & Doughterty Co., L.P.A., from August 2018, to August 2019, for this case, and consider that bill in light of Prof.R. 1.5 in awarding Plaintiffs' final costs and fees in this case." 8/5/19 Memo Contra to Objections.

{¶20} On August 26, 2019, the trial court quieted title to the oil and gas in a judgment entry. In that judgment entry, the trial court does not make any statement

regarding attorney fees. Rather, it merely quiets title and ordered Appellant/Cross-Appellee to pay court costs. 8/26/19 J.E.

{¶21} Both parties filed timely appeals. Appellant/Cross-Appellee appealed the grant of summary judgment in Appellees/Cross-Appellants favor. Appellees/Cross-Appellants appealed the implicit denial of attorney fees.

First Assignment of Error

"The trial court erred when it granted summary judgment to Appellees because the plain language of the reserving deed excluded the minerals from the conveyance."

{¶22} A court properly grants summary judgment "when an examination of all relevant materials filed in the action reveals that 'there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Smith v. McBride*, 130 Ohio St.3d 51, 2011-Ohio-4674, 955 N.E.2d 954, ¶ 12, quoting Civ.R. 56(C). An appellate court reviews the granting of summary judgment de novo. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8.

{¶23} Both parties assert the language of the deed is plain and clear. Appellees/Cross-Appellants contend the plain language indicates the oil and gas was not reserved. Appellant/Cross-Appellee contends the plain language of the deed indicates the oil and gas was reserved.

{¶24} The issue before us requires a review of the deed as a matter of law. Thus, our standard of review is de novo. *Saunders v. Mortensen*, 101 Ohio St.3d 86, 801 N.E.2d 452, 2004-Ohio-24. Under a de novo review, an appellate court may interpret the language of the written instruments, substituting its interpretation for that of the trial court. *Children's Medical Center v. Ward*, 87 Ohio App.3d 504, 622 N.E.2d 692 (2d Dist.1993).

{¶25} Written instruments "are to be interpreted so as to carry out the intent of the parties, as that intent is evidenced by the contractual language." *Skivolocki v. East Ohio Gas Co.*, 38 Ohio St.2d 244, 313 N.E.2d 374 (1974), paragraph one of the syllabus. "The principles of deed construction dictate that a court presumes that a deed expresses the intentions of the grantor and grantee at the time of execution.* * *A court cannot interpret the parties' intent in a manner contrary to the clear, unambiguous language of the deed." *American Energy Corp. v. Datkuliak*, 174 Ohio App.3d 398, 2007-Ohio-7199, 882 N.E.2d 463, ¶ 50 (7th Dist.). When determining the grantor's intent, a court must analyze the

language used in the deed, "the question being not what the parties meant to say, but the meaning of what they did say, as courts cannot put words into an instrument which the parties themselves failed to do." *Id.*, quoting *Larwill v. Farrelly*, 8 Ohio App. 356, 360 (5th Dist. 1918).

{¶26} However, when the plain language of the written instruments is ambiguous, then a court can look to parol evidence to resolve the ambiguity and ascertain the parties' intent. *Illinois Controls, Inc. v. Langham*, 70 Ohio St.3d 512, 521, 639 N.E.2d 771 (1994); *City of Steubenville v. Jefferson Cty.*, 7th Dist. No. 07JE51, 2008-Ohio-5053, ¶ 22.

{¶27} Terms in a contract are ambiguous if their meanings cannot be determined from reading the entire contract, or if they are reasonably susceptible to multiple interpretations. *First Natl. Bank of Pennsylvania v. Nader*, 2017-Ohio-1482, 89 N.E.3d 274, ¶ 25 (9th Dist.). Parol evidence is used only to interpret the terms, and not to contradict the terms. *Id.*, citing *Blosser v. Enderlin*, 113 Ohio St. 121, 134, 148 N.E. 393 (1925). "The decision as to whether a contract is ambiguous and thus requires extrinsic evidence to ascertain its meaning is one of law." *Nader*, quoting *Ohio Historical Soc. v. Gen. Maintenance and Eng. Co.*, 65 Ohio App.3d 139, 146, 583 N.E.2d 340 (10th Dist.1989).

{¶28} If parol evidence fails to clarify the meaning of the contract, then the contract is strictly construed against the drafter. *Envision Waste Services, LLC v. Cty. of Medina*, 2017-Ohio-351, 83 N.E.3d 270, ¶ 15 (9th Dist.); *Cadle v. D'Amico,* 2016-Ohio-4747, 66 N.E.3d 1184, ¶ 33 (7th Dist.) ("Construing a contract against the drafter is a secondary rule of contract construction, and is applicable when the primary rules of contract construction * * * fail to clarify the meaning of the contract."). "Applying this rule, an exception or reservation in a conveyance is construed in favor of the grantee rather than of the grantor.'" *Galambos v. Estep*, 5th Dist. No. 20016 AP 01 0004, 2016-Ohio-5615, ¶ 15, quoting *Pure Oil Co. v. Kindall*, 116 Ohio St. 188, 202–203, 156 N.E. 119 (1927).

{¶29} The language at issue in this case is the reservation from the 1949 deed. It states:

> Excepting and reserving from the above described Real Estate, all coal and minerals underlying the same with the right to mine and remove the same

> as shown in the deed to Henry Wick, wherein said coal was conveyed, reference to which is hereby made for a more complete statement thereof.

1949 Deed.

{¶30} The trial court determined that the language of the 1949 Deed was ambiguous or susceptible to different meanings:

> While it is true that the word "minerals" standing alone without qualification or limited words would have created an effective reservation, that word does not stand alone in this Case. * * * Clearly, the words "As shown in Deed to Henry Wick, wherein said coal was conveyed . . ." defines, qualifies or limits something. The question is what is defined, qualified or limited by those words. Those limiting words could define, qualify or limit the "right to mine and remove" immediately preceding the limiting words. Or, the limiting words could limit "and minerals underlying the same with the right to mine and remove same." or it could limit the entire exception/reservation. There is no way to know for sure, but there is a clue.
>
> The limiting words are followed by the words "wherein said coal was conveyed reference to which is hereby made for a complete statement thereof." That would seem to limit the entire exception/reservation to what is "shown in Deed to Henry Wick." More likely than not that this is exactly what it does mean even though we cannot tell with absolute certainty. But absolute certainty is not necessary here even for a Summary Judgment.
>
> While we cannot know with absolute certainty from the words alone, we can say with absolute certainty that the words are ambiguous.

7/16/19 J.E.

{¶31} In reviewing deed language, we agree with the trial court's well thought out analysis and conclusion that the deed is ambiguous and susceptible to more than one reasonable interpretation.

{¶32} Our previous case law indicates that in 1949, the deed's use of the word "minerals" without qualification could include oil and gas. *See Sheba v. Kautz*, 2017-

Ohio-7699, 97 N.E.3d 893 (7th Dist.); *Coldwell v. Moore*, 2014-Ohio-5323, 22 N.E.3d 1097 (7th Dist.). The issue here becomes: given the words used after the reservation and exception of all coal and minerals were the Misers reserving and excepting all minerals and coal that were not conveyed in the Wick deed and providing notice of the coal that was conveyed in the Wick deed? Or, was the language only giving notice that there was a prior reservation and therefore, not all the subsurface was being conveyed.

{¶33} One interpretation is that the entire reservation is limited by what was "shown in the" Wick Coal Deed. George E. Miser and Mary C. Miser conveyed all coal except for the number eight seam to Henry Wick in 1906. The Wick Coal Deed describes the mining and removal of the coal. 1906 Wick Coal Deed.

{¶34} Given the grammatical construction of the reservation in the 1949 Deed, the reference to the 1906 Wick Deed could be interpreted to be qualifying language. The reservation/exception may have just been notice of the prior conveyance and not a separate reservation of oil and gas. There is not a separate sentence that the grantor was reserving and excepting the minerals for himself. And then, a separate sentence giving notice of the prior coal conveyance.

{¶35} Another possible interpretation is that this one sentence reservation was a reservation of minerals to the grantor and a notice provision of the prior coal conveyance to Wick.

{¶36} Appellant/Cross-Appellee compares the 1943 deed language to the 1949 deed language and contends it is clear that the plain language of the 1949 deed language is that minerals and all other coal not conveyed to Henry Wick was reserved. The 1943 deed is where George T. and Isabelle Miser acquired the real estate from George E. and Mary C. Miser subject to the Wick Coal Deed, and the 1949 deed is where the Misers conveyed the real estate to the Wylies. The 1943 Deed states:

> Excepting that part of the coal underlying said premises heretofore sold and conveyed to Henry Wick, a reference to this deed of conveyance heretofore on record in the Recorder's Office of Jefferson County, Ohio, will more fully show, and being the same premises as is described in Mortgage Record 79, Page 222 of said county.

1943 Deed.

{¶37} Appellant/Cross-Appellee asserts George T. and Isabelle Miser could have repeated the reservation language from the 1943 deed in the 1949 deed. However, they did not and omitted the limiting language "heretofore sold and conveyed" and added mineral language which Appellant/Cross-Appellee contends thereby plainly indicates they were reserving the minerals.

{¶38} We agree that is one possible interpretation of the language used. However, we disagree that when reading the 1943 deed in conjunction with the 1949 deed the language is plain that Appellant/Cross-Appellee was reserving the subsurface that was not previously conveyed. It is true the same language from the 1943 deed could have been used in the 1949 deed to show that everything was being conveyed except the coal that was previously conveyed to Henry Wick. It is also true that they changed the language. The language employed created an ambiguity as the trial court explained. The language "as shown in the deed" which could modify/limit the coal and minerals when no minerals were conveyed in the Wick Coal Deed is confusing. Thus, while the language was changed it did not clarify that minerals were clearly being reserved. For that reason, the 1943 Deed is not very helpful in determining the plain language of the 1949 Deed.

{¶39} In conclusion, we agree with the trial court's analysis that the words used are susceptible to multiple interpretations. We find no merit with this assignment of error and hold that the reservation language is ambiguous.

<u>Second Assignment of Error</u>

"The trial court erred when it granted summary judgment to Appellees because Appellant produced parol evidence indicating that oil and gas production was prevalent in the area of the reservation at the time of the reservation."

{¶40} As we have found that the deed is ambiguous, we must address this assignment of error. As stated above, if the language is deemed ambiguous, we can look to parol evidence to determine the intent of the parties to the deed. In looking at parol evidence, the trial court explained:

> We also know that ambiguous words are resolved against the scrivener, which in this case is the Grantor or maker of the Deed. Because those words were chosen and used by George T. Miser and Isabelle Miser in their

> 1949 Deed to John P. Wiley we must resolve the ambiguity against George T. Miser and Isabelle Miser and in favor of John P. Wiley after applying whatever parole evidence might be out there to resolve the ambiguity.
>
> Plaintiffs outlined the parole evidence in their May 6, 2019 memorandum, labeling those paragraphs "First," "Second" . . . . . "Fourteenth." Most helpful is the fact that no volume and page of the Wick Deed appear in this reservation even though that was clearly intended to be at least part of what was excepted. That would seem to indicate that the scrivener of the 1949 Deed probably didn't know and definitely didn't bother to find out exactly what the Wick exception was. He just drafted language broad enough (and sloppy enough) to cover it.
>
> * * *
>
> Defendant points out no parole evidence tending to indicate that the Misers intended to reserve Oil and Gas. Defendant's sole argument seems to focus on the word "minerals" carefully avoiding the words that follow. None of the language or parole evidence is conclusive to the intended meaning of the 1949 Exception/Reservation but it all leans toward Plaintiffs.
>
> "Leans toward" is not normally sufficient for a Summary Judgment but here it is. That is because Plaintiff need not prove its interpretation to be correct. It need only prove that the Exception/Reservation fails to "clearly" appear in the Deed to prevent Grantor's entire Estate from passing to Grantee pursuant to Section 8510-1, General Code which was effective in all of 1949. While it is clear that the Henry Wick coal was reserved nothing beyond that is clear hence, Grantor's entire Estate (except for the Henry Wick coal) passed in 1949 to John, Mary and Dula Wylie and then on to Plaintiff.

7/16/19 J.E.

{¶41} As aforementioned, parol evidence is used to interpret the terms, not to contradict them. *Nader*, 2017-Ohio-1482, 89 N.E.3d 274, ¶ 25 (9th Dist.). If parol

evidence fails to clarify the meaning of the contract, then the contract is strictly construed against the drafter, which in the case of an exception or reservation it is construed in favor of the grantee. *Envision Waste Services, LLC*, 2017-Ohio-351 at ¶ 15; *Cadle,* 2016-Ohio-4747 at ¶ 33; *Galambos*, 2016-Ohio-5615 at ¶ 15 (Exception or reservation construed in favor of grantee.).

{¶42} Appellant/Cross-Appellee points to the language of the 1949 Deed versus the 1943 Deed. As stated above, while the language of the deeds are different, the differences do not clarify the ambiguity. In fact, it could be suggested that the differences make it murkier. As the trial court noted the drafted language is sloppy.

{¶43} Appellant/Cross-Appellee points out that in 1964 the Misers leased the oil and gas right to Humble Oil & Refining Company. That lease is in the record, and it is signed and dated March, 1964. However, there is also a lease between Humble Oil and Refining Company and Dola (Wylie) and Myroslow Modransky for the oil and gas rights to what appears to be the same property dated April, 1964. The copy of this lease in the record is not signed. Given there are two leases in the record, the signed Humble lease does not provide evidence of what the intent of the parties were in 1949.

{¶44} Appellant/Cross-Appellee also asserts that in our case law the word "minerals" includes oil and gas and helps to resolve the ambiguity. As stated under the first assignment of error the use of the word "minerals" in 1949 in our area would include oil and gas. The problem here is that the language used in the 1949 deed modified the word "minerals." Thus, the issue is what the language used to modify the word "minerals" means. As stated above the word "minerals" could have been used to indicate that any minerals conveyed to Henry Wick were being excepted/reserved. Since none were conveyed to him none were excepted/reserved. Thus, the use of the word "minerals" does not help resolve the ambiguity in this instance.

{¶45} Appellant/Cross-Appellee also points to the historic well information provided by the Ohio Department of Natural Resources. While it is clear there were oil and gas wells drilled at the time of the 1949 Deed, that does not necessarily indicate it was the intention of the Misers to reserve those minerals for themselves. Mere production of oil and gas in the vicinity does not show an intention to reserve/except the oil and gas to the grantor.

{¶46} Consequently, there is no parol evidence indicating the intent of the parties. Therefore, pursuant to rules of construction, we construe the reservation against the drafter/grantor of the exception and conclude that the oil and gas was not reserved by the Misers and therefore it was conveyed to the Wylies and passed to Appellees/Cross-Appellants. The trial court's grant of summary judgment for Appellees/Cross-Appellants is affirmed.

Cross Appeal

Cross Assignment of Error

"The court erred as a matter of law by not awarding attorney fees where there was a breach of explicit covenants of a general warranty deed."

{¶47} Appellees/Cross-Appellants argument on the cross appeal is that the trial court abused its discretion in denying its request for attorney fees. Appellees/Cross-Appellants acknowledge the American Rule, i.e., that parties are responsible to pay their own attorney fees. However, they argue that there are exceptions to this rule and one exception is that a grantee under a general warranty deed may recover all the costs of defending his or her title including attorney fees. They cite a 1997 First Appellate District case to support this position.

{¶48} Appellant/Cross-Appellee counters arguing Appellees/Cross-Appellants failed to raise the issue in the trial court prior to judgment and therefore, cannot raise it for the first time on appeal. He further asserts that Appellees/Cross-Appellants fail to show that the trial court abused its discretion in not awarding attorney fees. Lastly, Appellant/Cross-Appellee also asserts he cannot be held liable for a breach of warranty covenants of a deed to which he was not a party; he was not the grantor.

{¶49} "Ohio has long adhered to the 'American rule' with respect to recovery of attorney fees: a prevailing party in a civil action may not recover fees as part of the cost of litigation." *Wilborn v. Bank One Corp.*, 121 Ohio St.3d 546, 2009-Ohio-306, 906 N.E.2d 396, ¶ 7. Exceptions exist where there is statutory authorization for attorney fees in a certain action, the losing party has acted in bad faith, or an enforceable contract provision provides for an award of attorney fees. *B & B Contrs. & Developers, Inc. v. Olsavsky Jaminet Architects, Inc.*, 2012-Ohio-5981, 984 N.E.2d 419, ¶ 13 (7th Dist.), citing *Krasny–Kaplan Corp. v. Flo–Tork, Inc.,* 66 Ohio St.3d 75, 77-78, 609 N.E.2d 152 (1993).

{¶50} Prior to determining whether a warranty deed can constitute an exception to the American Rule (potentially as an enforceable contract provision for attorney fees), procedural aspects of the request for attorney fees in this case must first be addressed.

{¶51} Appellees/Cross-Appellants did not request attorney fees in the complaint, in summary judgment motions, or at hearing on the motions for summary judgment. Furthermore, Appellees/Cross-Appellants did not file a separate motion requesting attorney fees. The first request for attorney fees appears to have been made in the proposed judgment entry by Appellees/Cross-Appellants' counsel.

{¶52} Following the summary judgment hearing, the trial court issued its July 16, 2019 judgment entry granting summary judgment for Appellees/Cross-Appellants. The last paragraph of that entry reads, "Plaintiff shall prepare an Order consistent with this Order quieting title to the Oil and Gas for Plaintiffs and submit the same to Defendant for approval pursuant to this Court's Local Rules." 7/16/19 J.E. An entry on the docket on July 26, 2019 states, "Notice: Plaintiffs served a proposed judgment entry filed together with proof of service. Copy given to the Court."

{¶53} The first mention of attorney fees for Appellees/Cross-Appellants' counsel is in Appellant/Cross-Appellee's objections to the proposed judgment. 7/30/19 Objections to the Proposed Judgment Entry. Appellant/Cross-Appellee objected to the judgment entry because it awarded attorney fees; he argued the American Rule. 7/30/19 Objections to the Proposed Judgment Entry. Since there are no other requests for attorney fees it can be concluded that the proposed judgment entry was the first place Appellees/Cross-Appellants requested attorney fees.

{¶54} Appellees/Cross-Appellants did file a response to Appellant/Cross-Appellee's objections and argued that there is a warranty deed exception to the American Rule. 8/5/19 Response to Objections. On August 26, 2019, the trial court issued its quiet title judgment entry. In that judgment entry, the court does not address the objections or request for attorney fees. It merely states, "IT IS FURTHER ORDERED that court costs are assessed to Defendant." 8/26/19 J.E.

{¶55} Considering the filings, the trial court did not err in any manner when it did not grant attorney fees for Appellees/Cross-Appellants. A proposed judgment entry is not the place to move for attorney fees; a proposed judgment entry is not a motion, but rather

clerical work to memorialize a decision for journalization. Moreover, the order of the court in its judgment granting summary judgment for Appellees/Cross-Appellants was for Appellees/Cross-Appellants' counsel to prepare an order consistent with the grant of summary judgment that quiets title to the oil and gas for Appellees/Cross-Appellants. When attorney fees are not requested in the complaint, in summary judgment motions, or at the summary judgment hearing, a proposed judgment granting attorney fees would not be considered to be consistent with the trial court's grant of summary judgment. For those reasons alone, the trial court did not err in failing to award attorney fees. The cross assignment of error lacks merit.

Conclusion

{¶56} For the reasons expressed above, all assignments of error raised in the appeal and cross-appeal lack merit. The trial court's decision is affirmed in all respects.

Donofrio, J., concurs.

Waite, P.J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Jefferson County, Ohio, is affirmed. Costs to be taxed against the Appellant.

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.