[Cite as *Cain v. Horn*, 2020-Ohio-3171.]

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JULIA A. CAIN, et al., Plaintiff-Appellees -vs- DIANA BURRETT HORN, et al., Defendant-Appellants	JUDGES: Hon. William B. Hoffman, P.J. Hon. W. Scott Gwin, J. Hon. Patricia A. Delaney, J. Case No. 19CA000031 O P I N IO N
CHARACTER OF PROCEEDINGS:	Appeal from the Guernsey County Court of Common Pleas, Case No. 18OG210
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	May 11, 2020

APPEARANCES:

For Plaintiff-Appellees	For Defendant-Appellants
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Hoffman, P.J.

{¶1} Defendants-appellants Diana Burrett Horn, et al. appeal the October 3, 2019 Judgment Entry entered by the Guernsey County Court of Common Pleas, granting summary judgment in favor of plaintiffs-appellees Julia A. Cain, et al.

STATEMENT OF THE FACTS AND CASE

{¶2} This case arose from disputed ownership of oil and gas rights related to approximately 110 acres of real property ("the Real Estate") in Millwood Township, Guernsey County, Ohio.

{¶3} In a warranty deed executed on or about December 27, 1926, Clara P. Burrett and Claude A. Burrett transferred their interest in a fifty (50) acre tract of the Real Estate to Viola D. Romans ("the Warranty Deed"). The Warranty Deed was recorded in Volume 147, Page 463, of the Guernsey County Deed Records on February 24, 1927. In the Warranty Deed, the Burretts specifically reserved a one-half interest in all of the oil and gas underlying the fifty acre tract transferred to Romans ("the Burrett Reservation").

{¶4} The Estate of Clara P. Burrett was filed in the Guernsey County Probate Court on July 2, 1943. The Inheritance Tax Form, which was filed with the Estate, lists a

single tract of land located in Guernsey County as Clara P. Burrett's only real property.[1] The Burrett Reservation is not listed on the Inheritance Tax Form. The Inheritance Tax Form includes a statement indicating Clara P. Burrett was "possessed of no other property of any kind, real, personal, or mixed, or any interest in other property at the time of her death."

{¶5} Appellees obtained ownership of the Real Estate by virtue of two survivorship warranty deeds. Said deeds were recorded in Volume 324, Page 645, of the Guernsey County Deed Records on August 8, 2002, and Volume 374, Page 884, of the Guernsey County Deed Records on September 25, 2003. The Burrett Reservation is contained in Appellees' chain of title to the Real Estate and previously affected all or a portion of the Real Estate's oil and gas rights. Appellants claim to possess an interest in the Real Estate oil and gas rights through their status as the sole and only heirs of Clara P. Burrett and Claude A. Burrett.

{¶6} In a separate action, Appellees sought to quiet title under the DMA. Appellant Marguerite S. Oakes, on behalf of Appellants, filed a Claim to Preserve Mineral

[1] This sole tract of real property is unrelated to this matter.

Interests pursuant to R.C. 5301.56, with the Guernsey County Recorder on or about November 14, 2017. Subsequently, on April 13, 2018, Appellees filed the instant action against Appellants seeking to quiet title to the oil and gas rights underlying the Real Estate under the MTA. Appellants filed their Answer on June 18, 2018. Appellees filed a motion for summary judgment on July 25, 2019. Thereafter, on August 1, 2019, Appellants filed a motion for summary judgment. The parties subsequently filed memoranda in opposition as well as replies in support of their respective motions.

{¶7} Via Entry filed September 26, 2019, the trial court granted summary judgment in favor of Appellees and against Appellants. The trial court found the Marketable Title Act ("MTA") was applicable to severed oil and gas rights and the Burrett Reservation had been extinguished by the MTA. The trial court further found the Burrett Reservation was not subject to any event which would act to preserve it under the MTA. The trial court ordered Appellees to submit a proposed entry in keeping with the trial court's decision within fourteen (14) days. The trial court approved and adopted Appellees' proposed judgment entry which was filed as order of the court on October 3, 2019.

{¶8} On October 3, 2019, Appellants filed a motion to reconsider. Appellees filed a response in opposition on October 7, 2019, and a supplemental response in opposition on October 15, 2019. Via Entry filed October 29, 2019, the trial court deferred ruling on Appellants' motion, finding it no longer had jurisdiction as Appellants had filed a Notice of Appeal on October 28, 2019.

{¶9} Appellants assign the following as error:

I. THE TRIAL COURT ERRED IN GRANTING PLAINTIFFS-APPELLEES' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS-APPELLANTS' MOTION FOR SUMMARY JUDGMENT.

II. THE TRIAL COURT ERRED BY APPLYING THE MORE GENERAL MARKETABLE TITLE ACT OVER THE MORE SPECIFIC DORMANT MINERAL ACT.

III. THE TRIAL COURT ERRED IN ITS APPLICATION OF THE MARKETABLE TITLE ACT BY IGNORING ORC 5301.51(B).

STANDARD OF REVIEW

{¶10} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.*, 30 Ohio St.3d 35, 36, 506 N.E.2d 212 (1987). As such, this Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996).

{¶11} Civ.R. 56 provides summary judgment may be granted only after the trial court determines: 1) no genuine issues as to any material fact remain to be litigated; 2) the moving party is entitled to judgment as a matter of law; and 3) it appears from the evidence that reasonable minds can come to but one conclusion and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 364 N.E.2d 267 (1977).

{¶12} It is well established the party seeking summary judgment bears the burden of demonstrating that no issues of material fact exist for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1987). The standard for granting

summary judgment is delineated in *Dresher v. Burt*, 75 Ohio St.3d 280 at 293, 662 N.E.2d 264 (1996): " * * * a party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion the nonmoving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56 which affirmatively demonstrates the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. However, if the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56 to set forth specific facts showing there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." The record on summary judgment must be viewed in the

light most favorable to the opposing party. *Williams v. First United Church of Christ*, 37 Ohio St.2d 150, 309 N.E.2d 924 (1974).

I

{¶13} In their first assignment of error, Appellants contend the trial court erred in granting Appellees' motion for summary judgment and denying their motion for summary judgment. Specifically, Appellants argue the MTA should not be used to circumvent the more specific Dormant Mineral Act ("DMA"). Appellants acknowledge rulings from the Seventh District Court of Appeals which have held the MTA is applicable to severed mineral interests, but urge this Court to renounce such application of the MTA and require the utilization of the DMA in order to create a certifiable conflict. We decline to do so.

Marketable Title Act

{¶14} Ohio, like a majority of states, recognizes minerals underlying the surface of real property are part of the realty, but may be severed from the surface estate for purposes of separate ownership. *Chesapeake Exploration, L.L.C. v. Buell*, 144 Ohio St.3d 490, 2015-Ohio-4551, 45 N.E.3d 185, ¶ 21-22. The MTA and the DMA were enacted partly in response to the common-law rule severed mineral rights were not subject to

abandonment or termination for the failure to produce oil or gas. *Corban v. Chesapeake Exploration, L.L.C.*, 149 Ohio St.3d 512, 2016-Ohio-5796, 76 N.E.3d 1089, ¶ 15, 17-19.

{¶15} "[T]he General Assembly enacted the M.T.A. to extinguish interests and claims in land that existed prior to the root of title, with 'the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title.'" *Erickson v.* Morrison, 5th Dist. Guernsey App. No. 19CA18, 2019-Ohio-5430, ¶30 (Citation omitted).

{¶16} R.C. 5301.50 provides, "the record marketable title shall be held by its owner and shall be taken by any person dealing with the land free and clear of all interests, claims, or charges whatsoever, the existence of which depends upon any act, transaction, event, or omission that occurred prior to the effective date of the root of title." A "root of title" is "that conveyance or other title transaction in the chain of title of a person, purporting to create the interest claimed by the 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." R.C. 5301.47(E).

{¶17} A marketable record title, therefore, "operates to extinguish" all other prior interests, which "are hereby declared to be null and void." *Erickson*, supra at ¶31. The MTA operates automatically, and an individual seeking extinguishment is not required to take any action. *Evans v. Cormican*, 5th Dist. Licking App. No. 09 CA 76, 2010-Ohio-541, ¶ 17. The MTA functions as "a 40-year statute of limitations for bringing claims against a title of record." *Id.,* citing *Collins v. Moran,* 7th Dist. Mahoning App. No. 02 CA 218, 2004-Ohio-1381, ¶ 20.

{¶18} The MTA does not differentiate between different types of interests; it applies to all interests and claims against real estate. *Pollock v. Mooney*, 7th Dist. Monroe App. No. 13 MO 9, 2014-Ohio-4435, ¶ 21. Therefore, the MTA can be used to extinguish or preserve oil, gas, and mineral interests. *Stalder v. Bucher,* 7th Dist. Monroe App. No. 17 MO 0017, 2019-Ohio-936, ¶16.

{¶19} In 1989, the General Assembly enacted the DMA, codified at R.C. 5301.56, to supplement the MTA, and to provide "a method for the termination of dormant mineral interests and the vesting of their title in surface owners, in the absence of certain occurrences within the preceding 20 years." *Corban v. Chesapeake Exploration,* supra at

¶ 19. “In enacting the 1989 law, the General Assembly created a conclusive presumption by establishing that a mineral rights holder had abandoned a severed mineral interest if the 20 year statutory period passed without a saving event.” *Id*. at ¶ 25. Former R.C. 5301.56 “was not self-executing and did not automatically transfer ownership of dormant mineral rights by operation of law.” *Id*. at ¶ 28. “Rather, a surface holder seeking to merge those rights with the surface estate under the 1989 law was required to commence a quiet title action seeking a decree that the dormant mineral interest was deemed abandoned.” *Id*.

{¶20} “The 2006 DMA added provisions requiring service of notice of abandonment on the mineral holder and allowing the mineral holder to respond in a timely manner to preserve the mineral interest even after the passing of 20 years without a savings event.” *Richmond Mills v. Ferraro*, 7th Dist. Jefferson App. No. 18 JE 0015, 2019-Ohio-5249, ¶ 19,citing *Dodd v. Croskey*, 143 Ohio St.3d 293, 2015-Ohio-2362, 37 N.E.3d 147.

Analysis

{¶21} In *West v. Bode*, 7th Dist. Monroe App. No. 18 MO 0017, 2019-Ohio-4092, the Seventh District Court of Appeals analyzed whether the specific provisions of the DMA prevail over the general provisions of the MTA. Finding there is no conflict in applying the MTA and/or the DMA to a mineral interest, the Seventh District explained:

> The MTA involves extinguishment after 40 years resulting in a null and void interest. R.C. 5301.50. *See also* R.C. 5301.49(D) (no reviver by title transaction). The DMA involves an abandonment process which can be used after a 20-year absence of certain activity with notice requirements and the ability to file a post-notice-of-abandonment claim to preserve. * * * The fact that the MTA provides a different and separate procedure for the exercise of a different statutory right or remedy does not mean it irreconcilably conflicts with the DMA. They are co-extensive alternatives whose applicability in a particular case depends on the time passed and the nature of the items existing in the pertinent records. "[E]ach applies to a

particular situation independent of the other." *Cook*, 128 Ohio St.3d 120 at ¶ 46 (while finding two statutes did not irreconcilably conflict). If the claim is extinguishment under the MTA, then the 40-year provision and the tests applicable thereto apply; if the claim is abandonment under the DMA, those statutory procedures and 20-year test of R.C. 5301.56 apply.

Id. at ¶ 46-47.

{¶22} We agree with our Brethren in the Seventh District, and hold the MTA and DMA are separate and distinct and the two statutes do not irreconcilably conflict. Appellees' claim for quiet title involved the extinguishment of the Burrett Reservation. Although Appellees had previously filed an action to quiet title under the DMA, such did not prohibit them from filing an action under the MTA.

{¶23} Based upon the foregoing, we find the trial court did not err in granting summary judgment in favor of Appellees.

{¶24} Appellants' first assignment of error is overruled.

II

{¶25} In their second assignment of error, Appellants assert the trial court erred in its application of the MTA by failing to recognize the exception for period of possession under R.C. 5301.51(B).

{¶26} Appellants raised this issue for the first time in their motion for reconsideration filed in the trial court on October 3, 2019, after the trial court had granted summary judgment in Appellees' favor. Because the trial court's ruling on Appellees' and Appellants' respective motions for summary judgment was a final, appealable order, the motion for reconsideration was a nullity. *Frabott v. Swaney*, 5th Dist. Delaware App. No. 13 CAE 05 0047, 2013–Ohio–3354, ¶ 17, citing *Pitts v. Dept. of Transportation*, 67 Ohio St.2d 378, 423 N.E.2d 1105 (1981).

{¶27} Where a party first raises an issue in a motion for reconsideration after the trial court enters final judgment via ruling on a summary judgment motion, the party's failure to timely raise the issue at the trial level constitutes a waiver, which prevents that party from raising the issue on appeal. See, *Terry v. Hancock–Wood Elec. Coop., Inc.,*

Erie App. No. E–08–060, 2009-Ohio-4925, ¶ 26, citing *Shalkhauser v. Medina,* 148 Ohio App.3d 41, 772 N.E.2d 129, 2002–Ohio–222, ¶ 11.

{¶28} Because Appellants failed to raise this issue before the trial court entered final judgment on the motions for summary judgment, we find they have waived the issue on appeal.[2]

{¶29} Appellants' second assignment of error is overruled.

{¶30} The judgment of the Guernsey County Court of Common Pleas is affirmed.

By: Hoffman, P.J.
Gwin, J. and
Delaney, J. concur

[2] We reject Appellant's contention their opportunity to assert R.C. 5301.51(B) did not arise until the trial court entered its decision on the parties' respective motions for summary judgment. Appellants knew Appellees' claim was based upon the applicability of the MTA; therefore, the possibility the trial court would find the statute applicable was clearly a foreseeable result. Appellants could have asserted the argument R.C. 5301.51(B) was an alternative reason for the trial court to deny Appellees' motion for summary judgment. We find their failure to timely do so prior to the trial court's entry of final judgment waived this issue on appeal.