[Cite as *Coldwell v. Moore*, 2014-Ohio-5323.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

DAVID COLDWELL, ET AL, PLAINTIFFS-APPELLANTS, V. MATTHEW MOORE, ET AL., DEFENDANTS-APPELLEES.	)))))))))	CASE NO. 13 CO 27 OPINION

CHARACTER OF PROCEEDINGS:	Civil Appeal from Court of Common Pleas of Columbiana County, Ohio Case No. 2011CV131
JUDGMENT:	Affirmed in part Reversed and remanded in part
APPEARANCES: For Plaintiffs-Appellants	Attorney James L. Blomstrom 26 Market St., Suite 1200 P.O. Box 6077 Youngstown, Ohio 44501-6077
For Defendants-Appellees	Attorney Robert J. Karl Attorney R. Benjamin Franz 88 East Broad St., Suite 1600 Columbus, Ohio 43215

JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: November 21, 2014

[Cite as *Coldwell v. Moore*, 2014-Ohio-5323.]
DONOFRIO, J.

{¶1} Plaintiffs-appellants David Coldwell, et al., appeal the decision of the Columbiana County Common Pleas Court rescinding a purchase agreement between themselves and defendants-appellees Matthew Moore, et al., for the sale of mineral rights.

{¶2} Although this dispute resulted in a bench trial, the facts are generally undisputed on appeal. Plaintiffs-appellants David Coldwell and Lisa Coldwell (collectively, the Coldwells) own and operate a sustainable tree farm that sits atop approximately 600 acres in Salineville, Columbiana County, Ohio. The tree farm is comprised of twelve surface parcels which they own, but they do not own approximately 200 acres of the subsurface parcels.

{¶3} Defendants-appellees Matthew and Lorelei Moore, Michael and Colleen Lester, Blaine and Mary Moore, and Lynette Moore Beeler (collectively, the Moores) each own an undivided one-quarter interest in four subsurface parcels that total approximately 237.41 acres. Three of their subsurface parcels underlie the Coldwell's tree farm and the other underlies a surface parcel contiguous to the Coldwell's tree farm but owned by Marvin and Juanita Hiltabidle (collectively, the Hiltabidles) who are not parties to this case. The Moores, who reside in Harrogate, Tennessee and collectively have owned the parcels since 2007, had purchased some of the subsurface parcels and the others were received as gifts from previous generations of the Moore family, including David O'Mahen, an uncle by marriage to the Moores.

{¶4} In 2007, David Coldwell learned about the Forest Legacy Program (FLP). The FLP is a grant program administered by the U.S. Forest Service. The FLP gives landowners money in exchange for restricting the use and development of their land, particularly the surface of the land. When David Coldwell looked into the FLP, a person with the Division of Forestry indicated to him that participation in the FLP was contingent upon the landowner owning *all* of the mineral rights to the property.

{¶5} The Coldwells also learned that while the FLP restricted exploitation of the surface minerals, such as surface strip mining for coal, it did not foreclose subsurface mineral exploitation with a limited surface impact. In other words, the FLP

did not forbid oil and gas exploration.

{¶6} As it pertained to the Coldwell's surface parcels that were located above the Moore's subsurface parcels, David Coldwell believed that his surface parcels contained the rights to oil and gas while the Moore's subsurface parcels contained only rights to coal and other mineable minerals. Sometime in 2007 or before, David Coldwell contacted the Moore's predecessor in title, David O'Mahen, about purchasing the four subsurface parcels. After consulting with family members, O'Mahen offered to sell the parcels to him for $50,000, but he declined.

{¶7} After 2007, defendant-appellee Matthew Moore replaced O'Mahen as the Moore's representative and David Coldwell contacted him several times through 2008 and 2009 about buying the Moore's subsurface parcels. Coldwell told Moore that he thought that the Moore's subsurface parcels were of little value, but that he wanted to buy them to improve his chances with the FLP.

{¶8} Meanwhile, still believing that they owned the oil and gas rights to all of their property, the Coldwells signed an oil and gas lease with Patriot Energy Partners (Patriot) in 2008. The lease included the Coldwell's surface parcels that were located above three of the Moore's subsurface parcels.

{¶9} In 2010 and after David Coldwell had fallen ill, his son Jed Coldwell renewed his family's efforts to buy the Moore's parcels. Matthew Moore and Jed reached an agreement which Moore understood to mean that they would reserve royalty interests on all minerals, not just coal.

{¶10} The Coldwell's attorney prepared a Purchase Agreement under which the Moores conveyed to the Coldwells "MINERAL RIGHTS ONLY" in the four subsurface parcels for $8,000 with the Moores retaining royalties on coal. The Coldwells signed the agreement and sent it to the Moores along with a $100 earnest money check. The Moores cashed the check, signed the agreement and sent it back to the Coldwells.

{¶11} The Coldwells' attorney then prepared a deed and sent it to the Moores. This time, after examining the deed, Matthew Moore noticed the coal royalties

reservation. He called David Coldwell and told him mistakes had been made but that they would sign the deed if the mistakes were fixed. David Coldwell conveyed his willingness to pay the balance of the purchase price, demanded the Moores sign the deed, but they refused.

{¶12} On February 14, 2011, the Coldwells sued the Moores in Columbiana County Common Pleas Court seeking specific performance of the purchase agreement, or in the alternative, damages resulting for the alleged breach of that agreement. The Moores answered, denying the breach and, in the alternative, contesting the validity of the agreement. They included with their answer counterclaims and cross-claims. The counterclaim alleged that they were fraudulently induced into entering into the Purchase Agreement. Concerning the lease the Coldwells had signed with Patriot which was later assigned to Chesapeake, the Moores sought a declaration that they were the sole owners of all of the mineral rights. Although the Moores also included a third-party complaint against Patriot and Chesapeake, the Moores later dismissed their claims against them without prejudice prior to trial.

{¶13} On May 21, 2012, the Moores filed a motion for partial summary judgment on their counterclaim for declaratory relief. Specifically, the Moores sought a declaration that their mineral rights to the four subsurface parcels included oil and gas in addition to their undisputed rights to the coal. The trial court denied the motion, then, upon the Moores' motion to reconsider, granted the motion. In a January 2, 2013 judgment entry, the trial court declared that the Moores' mineral rights included oil and gas.

{¶14} A bench trial was conducted on February 19-20, 2013, to decide the remaining issues. On May 20, 2013, the trial court filed a judgment entry entering judgment for the Moores, finding that the Coldwells had failed to prove the existence of an enforceable contract. Because the court found that there was no enforceable contract, it did not make any findings "regarding the other issues presented, including whether time was of the essence under the Purchase Agreement or whether the

Moores were fraudulently induced to enter into the Purchase Agreement." This appeal followed.

{¶15} The Coldwells raise three assignments of error. The Coldwells' first assignment of error states:

> THE TRIAL COURT MADE A LEGAL ERROR WHEN IT RESCINDED THE CONTRACT ON THE GROUNDS OF MUTUAL MISTAKE OF FACT[.]

{¶16} Notably, the Coldwells do not take issue with any of the findings of fact the trial court made in the May 20, 2013 judgment entry it filed following the bench trial. They argue that the trial court erred as a matter of law in applying the law of mutual mistake to those facts. The Coldwells contend that there could not have been a mutual mistake where they intended to buy everything they did not have and the Moores intended to sell everything they have, with both intending that the Moores retain the royalties to the coal. In response, the Moores argue that there was a mutual mistake as to the most important term of the Purchase Agreement – the nature and scope of the property interest being conveyed.

{¶17} As indicated, the trial court granted the Moores rescission of the Purchase Agreement based on mutual mistake. The Ohio Supreme Court has expressly recognized the doctrine of mutual mistake as a ground for rescission where there is a mutual mistake as to a material part of the contract and where the complainant is not negligent in failing to discover the mistake. *Irwin v. Wilson*, 45 Ohio St. 426, 15 N.E. 209 (1887) (allowing the buyer in real estate purchase agreement to rescind). The Court reiterated its *Irwin* holding and explained that a mistake is material to a contract when it concerns a basic assumption on which the contract was based and has a material effect on the agreed exchange of performances. *Reilley v. Richards*, 69 Ohio St.3d 352, 353, 632 N.E.2d 507 (1994). If the parties' intentions are frustrated by mutual mistake, rescission is possible. *Id*.

{¶18} Mutual mistake requires a higher degree of proof than "a

preponderance of the evidence." The party alleging mutual mistake bears the burden of proving its existence by clear and convincing evidence. *Frate v. Rimenik*, 115 Ohio St. 11, 152 N.E. 14 (1926), paragraph one of the syllabus. Clear and convincing evidence is evidence that "will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

{¶19} In *Reilley,* the Court reversed an appellate decision and held that where there was mutual mistake as to the fact that the realty was in a flood plain, rescission should be permitted. *Id*. at 353-354, 632 N.E.2d 507. The Court so held even though the appellant was a lawyer who drafted the contract and had sufficient time to discover soil conditions. *Id*. at 354, 632 N.E.2d 507 (describing appellant as "unsophisticated" in such matters).

{¶20} In this instance, the trial court erred as a matter of law in concluding that there was a mutual mistake and ordering rescission of the Purchase Agreement. There was no mutual mistake as to a material part of the Purchase Agreement. While the parties here arguably may have been mistaken about certain facts, none of those mistakes were mutual nor did those mistakes frustrate the intention of the parties. The Coldwells intended to buy all of the Moores' mineral rights (except for coal royalties) and the Moores intended to sell all of their mineral rights (except for coal royalties).

{¶21} The trial court concluded that there was a mutual mistake as to what minerals were being purchased through the Purchase Agreement. As for the Coldwells' portion of the supposed mutual mistake, the trial court noted that David Coldwell did not understand what the term "mineral" meant and that his son, Jed Coldwell, was unsure if the Purchase Agreement included oil and gas. The court also seemed to place importance on the fact that throughout the purchase negotiations over the years the Coldwells' mistakenly believed that they already owned the oil and gas rights to the parcels that they were seeking to buy from the Moores.

{¶22} However, whatever meaning the Coldwells attached to the term

"minerals" and what they believed they already owned is irrelevant. The Purchase Agreement was clear that the Moores were selling *all* of their mineral rights (with a reservation in the coal royalties) to the Coldwells. Regardless of the meaning the Coldwells attached to the term "minerals" or what they believed they already owned, the record is clear that they intended to buy *all* of the mineral rights to those parcels from the Moores. This is supported by evidence presented at trial that David Coldwell and his son, Jed Coldwell, learned that they would stand a better chance of getting approval of their FLP application if they owned *all* of the mineral rights to the surface and subsurface parcels.

{¶23} As for the Moores' portion of the perceived mutual mistake, the trial court noted that the Moores always believed that they were selling all of their mineral rights with a reservation in the coal royalties. The trial court did not explain how the Moores were mistaken about what was meant by the term "mineral." Notably, in an earlier entry filed January, 2, 2013, the trial court had specifically concluded that the Moores could not utilize parol evidence to vary the language of the written Purchase Agreement by expanding it to include more than coal royalties.

{¶24} After the trial court found that Matthew Moore believed that he was negotiating with the Coldwells for the sale of all mineral rights to the parcels, the court interestingly went on to note, "This understanding, coupled with the purchase price recited in the Purchase Agreement, is reasonable in light of the fact that Matthew Moore was not aware of the shale oil and gas boom in Columbiana County in 2010." (May 20, 2013 Judgment Entry, p. 15.) This observation by the trial court reflects that the only thing the Moores may have been mistaken about was the value of their mineral rights when negotiating the purchase price. However, the Moores certainly bore the risk of that and it was not material to the Purchase Agreement.

{¶25} In sum, the trial court erred as a matter of law in rescinding the Purchase Agreement on the basis of mutual mistake. Accordingly, the Coldwells' first assignment of error has merit.

{¶26} The Coldwells' second assignment of error states:

> THE TRIAL COURT MADE A LEGAL ERROR WHEN IT RESCINDED THE CONTRACT DESPITE NO CLAIM OR EVIDENCE OF A TENDER BACK OF CONSIDERATION[.]

{¶27} The Moores cashed the $100 check they received from the Coldwells as down payment towards the Purchase Agreement, but did not tender it back to the Coldwells prior to this litigation. The Coldwells argue that the trial court erred as a matter of law by rescinding the contract when the Moores had failed to tender back the $100 down payment to the Coldwells. In response, the Moores argue that they were not required to tender back the money as an element of any defense they asserted in their pleadings or at trial and that the trial court did not err in having them return it to the Coldwells after final judgment.

{¶28} Given our resolution of the Coldwells' first assignment of error concluding that the trial court erred in rescinding the Purchase Agreement on the basis of mutual mistake, this assignment of error has been rendered moot. App.R. 12(A)(1)(c).

{¶29} The Coldwells' third assignment of error states:

> THE TRIAL COURT ERRED IN CONCLUDING THAT NO GENUINE ISSUE OF MATERIAL FACT EXISTS CONCERNING THE MOORE'S [sic] OWNERSHIP OF OIL AND GAS IN PARCELS 22-01089.000, AND 22-0159.000 AND ERRED AS A MATTER OF LAW IN EVEN CONSIDERING THE MOORE'S [sic] CLAIM REGARDING PARCEL 22-00159.00[.]

{¶30} An appellate court reviews a trial court's decision on a motion for summary judgment de novo. *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St.3d 314, 2002-Ohio-2220, 767 N.E.2d 707, at ¶ 24. Summary judgment can be granted where there remain no genuine issues of material fact for trial and where, after construing the evidence most strongly in favor of the nonmovant, reasonable

minds can only conclude that the moving party is entitled to judgment as a matter of law. *Byrd v. Smith,* 110 Ohio St.3d 24, 2006-Ohio-3455, 850 N.E.2d 47, ¶ 10, citing Civ.R. 56(C).

{¶31} On May 21, 2012, the Moores filed a motion for partial summary judgment on their counterclaim for declaratory relief. Specifically, the Moores sought a declaration that their mineral rights to the four subsurface parcels included oil and gas in addition to their undisputed rights to the coal. The trial court denied the motion, then, upon the Moores' motion to reconsider, granted the motion. In a January 2, 2013 judgment entry, the trial court declared that the Moores' mineral rights included oil and gas.

{¶32} The Coldwells take issue with the trial court's January 2, 2013 judgment entry in two respects. First, they argue that the trial court improperly reviewed the four deeds since the Coldwells' counterclaim for declaratory relief mentioned only two of the four parcels. Second, they argue the construction of the language of two of those deeds does not support the trial court's determination that they include oil and gas.

{¶33} In response, the Moores argue that the Coldwells raised the issue of the scope of each parties' mineral ownership with the Coldwells arguing below that they believed oil and gas rights went with all of their surface parcels. As for the language of the deeds, the Moores contend that caselaw supports the trial court's construction of the deeds to include oil and gas.

{¶34} Civ.R. 15 defeats the Coldwells' argument concerning the Moores' alleged failure to include all four parcels in the counterclaim for declaratory judgment. Civ.R. 15(B) provides that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." The scope of the mineral rights to all four of the Moores' subsurface parcels was the subject of their motion for partial summary judgment. In the summary judgment proceedings below, the Coldwells did not object to the trial court's consideration of the scope of the mineral rights to all four parcels.

Therefore, the scope of the mineral rights to all four parcels was tried by the implied consent of the parties. *See Austintown Local Sch. Dist. Bd. of Edn. v. Mahoning Cty. Bd. of Mental Retardation & Dev. Disabilities*, 66 Ohio St. 3d 355, 365, 613 N.E.2d 167 (1993) (recognizing that issues not raised by the pleadings could be tried by express or implied consent of the parties for purposes of Civ.R. 15(B) by way of summary judgment).

{¶35} On appeal, the Coldwells take issue with the trial court's construction of two of the deeds to the Moores' subsurface parcels to include oil and gas. The first, identified by permanent parcel number (PPN) 22-00159.000, states in relevant part:

> Being all the coal *and other minerals* in and underlying the South half of the Southwest quarter of Section 30, Township 13, Range 3, excepting therefrom that part of said coal *and other minerals* and underlying a fractional part of said land sold and conveyed to the Pennsylvania Company for Railroad purposes. Together with the right and privilege to mine all of said coal without reservation or liability for damages that may arise by reason of mining said coal or the operation of said mine or mines to the surface or to the improvements upon the surface over said coal or to any water or water ways, situated upon or on said premises, and the right to use any and all entries and other passage ways under said lands for the purpose of transporting and coal from adjoining and contiguous territory; and also the right and privilege to the use of the necessary surface over said coal for the purpose of erecting, constructing and maintaining the necessary air shafts and air courses to ventilate mines for the removal of said coal *and other minerals*, and the coal from adjoining and contiguous territory, said air shafts to be kept in such repair and so guarded by said grantee, its successors and assigns, so as not to endanger stock on said premises.

(Emphasis added.)

{¶36} The second, identified by PPN 22-01089.000, states in relevant part:

> Being all the coal *and other minerals* underlying the East half of the Northwest quarter of Section 31, and the Northwest quarter of the northeast quarter of Section 31, Township 13, Range 3 and containing 102.65 acres, be the same more or less, but subject to all legal highways, rights of way and easements.
>
> Also the right to enter upon the surface of said premises with workmen to erect all necessary buildings upon the same for the carrying on of the business of mining and shipping upon the same for the carrying on of the business of mining and shipping coal *and other minerals*; also the right to sink all necessary air shafts on said premises and of building all railroad tracts and car switches necessary for said mining business, and necessary roads to and from any mine or mines that may be opened and operated on said premises.

(Emphasis added.)

{¶37} In support of their argument that the language of the deeds in question do not include oil and gas, the Coldwells rely principally on *Detlor v. Holland*, 57 Ohio St. 492, 49 N.E. 690 (1898), where the Ohio Supreme Court construed language in a deed conveying "all the coal of every variety, and all the iron ore, fire clay, and other valuable minerals, in, on, or under the * * * premises * * * together with the right * * * of mining and removing such coal, ore, or other minerals * * *" along with "the right to the use of so much of the sureface [sic] of the land as may be necessary for pits, shafts, platforms, drains, railroads, switches, sidetracks, etc., to facilitate the mining and removal of such coal, ore, or other minerals, and no more."

{¶38} The Court held that because of the limiting language that followed the initial inclusion of "other minerals," the deed containing the "other minerals" language did not include oil and gas. The *Detlor* court noted that the "other mineral" language in the deed was limited by the fact that the easements conveyed in the deed

specifically mentioned pits, shafts, railroads, platforms, switches, and sidetracks, all of which are necessary for mining minerals, like coal, in place. However, the easements did not mention any of the items necessary for mining minerals of a migratory nature such as oil and gas. The court reasoned that if the parties had intended the "other minerals" language to include oil and gas, the easements granted would have additionally mentioned equipment and structures used in the drilling and operating oil and gas wells.

{¶39} The Moores cite four appellate court cases decided since *Detlor* for the proposition that language relating to the mining and removal of coal following the "other minerals" language does not negate the explicit and broad conveyance of "all the coal and other minerals." In *Hardesty v. Harrison*, 6 Ohio Law Abs. 445, 27 Ohio Law Rep. 282 (5th Dist.1928), the court held that the term "minerals" included oil and gas, absent specific language to the contrary.

{¶40} In *Jividen v. New Pittsburg Coal Co.*, 45 Ohio App. 294, 187 N.E. 124 (4th Dist.1933), the case involved an owner of a surface estate claiming ownership to the oil and gas. The surface estate owner's predecessor in title reserved title to "all coal and other mineral, with the right to mine and hail same." The court held that the "other mineral" language included oil and gas. The court concluded that the term "mineral" includes oil and gas and that nothing in the deed was inconsistent with the development of oil and gas. The court also noted that the surface estate owner was explicitly conveyed the "surface only," making it impossible for him to claim ownership of the oil and gas.

{¶41} In *Wiseman v. Cambria Products Co.*, 61 Ohio App.3d 294, 572 N.E.2d 759 (4th Dist.1989), the court held that "all the coal, iron-ore, and other minerals" included oil and gas. The conveyance included "full and free rights of ingress, egress, regress and of way, and *other necessary or convenient rights and privileges*, in, upon, under and over the (lands) * * *." (Emphasis sic.) *Id*. at 299. The court noted that this range of rights conveyed to the mineral holder was "broad enough to be applicable for the production of oil and gas." *Id*.

{¶42} Lastly, in *Stocker & Sister, Inc. v. Metzger*, 19 Ohio App.2d 135, 250 N.E.2d 269 (5th Dist.1969), the court construed a conveyance containing the language, "all the veins of coal and other substances of value underlying said above conveyed premises, together with all necessary rights of way and privileges of entry thereon to remove same, unto them, their heirs and assigns forever." The court held:

> When the descriptive portion of the granting clause of a deed excepts and reserves unto the grantors all the veins of coal and other substances of value underlying the conveyed premises, together with all necessary rights of way and privileges of entry thereon to remove same, unto them, their heirs and assigns forever, and there is nothing in the language of the deed in question which shows that the parties contemplated something less general than all substances of value underlying the premises, which would include oil and gas, we conclude that a fee simple title to the oil and gas in place, of such value as to make its removal feasible, was excepted and reserved by the grantors, together with the right and privilege to remove same. There was no conveyance of the oil and gas which was excepted and reserved unto the grantors by the terms of the deed.

{¶43} In this case, the trial court correctly determined that these two deeds included oil and gas. Each of the deeds contains easements allowing for the extraction of "other minerals." Nothing in the language of these deeds shows that the parties contemplated something less general than "other minerals." *Metzger*, *supra*. The term "minerals" has long been held to include oil and gas. Also, nothing in the deeds is inconsistent with the development of oil and gas. *Jividen*, *supra*. Most importantly, the Coldwells' surface deeds clearly reflect that they were granted surface rights only, making it impossible for them to also own the oil and gas rights. *Jividen*, *supra*.

{¶44} Accordingly, the Coldwells' third assignment of error is without merit.

{¶45} The May 20, 2013 judgment of the trial court rescinding the parties' Purchase Agreement on the basis of mutual mistake is reversed. The January 2, 2013 judgment of the trial court declaring that the Moores' mineral rights included oil and gas is affirmed. This matter is remanded to the trial court to address what it identified in its May 20, 2013 decision as "other issues presented, including whether time was of the essence under the Purchase Agreement or whether the Moores were fraudulently induced to enter into the Purchase Agreement."

Waite, J., concurs.

DeGenaro, P.J., concurs.