

SUPREME COURT OF FLORIDA

CASE NO.: 70,845

CONWAY LAND, INC., etc., et al.,  
Defendants, Petitioners,

vs.

DAVID E. TERRY, et al.,  
Co-Defendants, Respondents.

FILED  
ED J. WHITE

AUG 12 1987

CLERK, SUPREME COURT

By \_\_\_\_\_

Deputy Clerk

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RESPONDENTS' BRIEF ON JURISDICTION

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Statement of the Case and Facts

There are no areas of disagreement with Petitioner's Statement of the Case and Facts.

Jurisdictional Issue

Whether the Supreme Court of Florida has jurisdiction to review the decision of the District Court of Appeal, supra, under Section 3(b)(3) of Article V of the Florida Constitution on the ground that the decision expressly and directly conflicts with a decision of the Florida Supreme Court on the same question of the law.

Summary of Argument

Contrary to Petitioner's assertion, the Court below was not faced with an "essentially similar fact situation" as that in Miller v. Carr, 137 Fla. 114, 188 So. 103 (1939). Furthermore, the District Court's decision does not expressly and directly conflict with Miller for the reason that no conflict appears "within the four corners of the majority decision" as required by Reaves v. State, 485 So. 2d 829 at 830 (Fla. 1986).

Petitioner's reliance upon David v. State, 369 So. 2d 943 (Fla. 1979), is misplaced. The Reaves Court held that "[n]either a dissenting opinion nor the record itself can be used to establish jurisdiction." Reaves at 830.

Finally, since the Miller facts and these are clearly distinguishable, and since the law applied by the District Court is totally consistent with the rule of law enunciated in Miller, this Court should deny the petition for review.

## Argument

Petitioner's statement that the facts of Miller v. Carr, 137 Fla. 114, 188 So. 103 (1939), and the facts of the case at bar are "essentially similar" is erroneous. The fact pattern in Miller dealt with oral contracts and the enforceability of same, whereas the case sub judice does not involve oral contracts. Miller concerned oil severed from the land. The instant case does not. Miller dealt with the legal sufficiency of pleadings and not the merits of the case. The case at bar is an adjudication on and of the merits.

Miller was rendered before the enactment of F.S. Section 193.481 which provides that retained or reserved mineral rights shall be "treated as an interest in real property". [Subsection (1)]. The District Court here held, consistent with the statute (but not in reliance on the statute), that reserved mineral rights (until severed) are to be treated as an interest in real property. The Miller Court dealt with mineral rights already severed from the ground, and, hence, vested as an interest, whereas the Court below determined whether the future interest was presently vested.

Central to the holding of Miller v. Carr was the application of the doctrine of the Statute of Frauds; central to the opinion of the District Court below is a proper application of the doctrine of the rule against perpetuities [codified as Section 689.22 F.S. (1985)]. Neither case involved the operation or construction of the doctrine discussed in the other! The only

common denominator is a discussion of whether unsevered oil is real or personal property and whether severed oil is real or personal property. Both cases (Miller and the case at bar) agree that unsevered oil is real property and that severed oil is personal property.

A syllogism could easily be established demonstrating the verity of the above proposition. Miller's logic tracks this way: oral contracts are only enforceable if not in violation of the Statute of Frauds; where the interest is one in real property (for potentially more than one year) oral contracts are not enforceable. Therefore, for an oral contract to be enforceable it must concern personal property which it does only if the mineral rights are severed.

The case at bar's only similarity with the legal principles enunciated in Miller is as expressed in the majority opinion of the Court below that "... a royalty interest in unsevered oil is an interest in real property." (footnote omitted). Terry, et al. v. Conway Land, Inc., etc., et al., \_\_\_ So. 2d \_\_\_ (Fla. 5th DCA 1987) 12 FLW 1136 (1987). The logic of the case sub judice is: where a mineral right is unsevered it is vested and not in violation of the rule against perpetuities; a royalty that is a perpetual non-participating royalty is an unsevered interest; therefore, a perpetual non-participating royalty is vested and not in violation of the rule against perpetuities.

Additionally, no conflict appears "within the four corners of the majority decision" as required by Reaves, supra, in that



the District Court's decision does not expressly and directly conflict with Miller. Accord Dept. of H.R.S. v. National Adoption Counseling Service, Inc., 498 So. 2d 888 (Fla. 1986). See also Jenkins v. State, 385 So. 2d 1356 (Fla. 1980) which discusses the impact of the 1980 Constitutional Amendment to Section 3(b)(3), the Court's conflict jurisdiction.

Petitioner's reliance upon David v. State, 369 So. 2d 943 (Fla. 1979), for the proposition that a dissenting opinion may be considered to determine the existence of conflict jurisdiction is misplaced. The 1980 Amendment effected a "dramatic change" (Jenkins at 1357) to Section 3(b)(3) thus requiring an express conflict. The Reaves Court held that "[n]either a dissenting opinion nor the record itself can be used to establish jurisdiction." Reaves at 830.

Conclusion

Based and predicated upon the foregoing, Respondents respectfully submit that the petition for review should be denied in that no express and direct conflict exists between the decision of the District Court and this Court's 1939 Miller decision.

Dated this 11 day of August, 1987.

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CERTIFICATE OF SERVICE

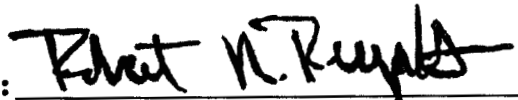
I HEREBY CERTIFY that a true and correct copy of the foregoing Respondents' Brief on Jurisdiction was furnished by U.S. Mail this 11<sup>d</sup> day of August, 1987, to:

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