[Cite as *Mid-Ohio Coal Co. v. Brown*, 2015-Ohio-5111.]

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MID-OHIO COAL COMPANY	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellant	:	Hon. Sheila G. Farmer, J.
	:	Hon. John W. Wise, J.
-vs-	:	
	:	
RALPH C. BROWN, JR., ET AL.	:	Case No. 15CA00012
	:	
Defendants-Appellees	:	O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas, Case No. 14OG000276

JUDGMENT: Reversed and Remanded

DATE OF JUDGMENT: December 2, 2015

APPEARANCES:

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Farmer, J.

{¶1} On January 24, 1940, appellant, Mid-Ohio Coal Company, acquired the mineral rights (subsurface and fee estate) to 134.25 acres, more or less, of property in Guernsey County, Ohio, via a Special Master's Deed from Cambridge Collieries Company.

{¶2} In 1959, 1977, and 1982, Ralph Brown, Sr. and his wife Dorothy acquired the surface rights to the subject property. On June 11, 1993, the Browns, together with their son, Ralph Brown, Jr. and his wife Patricia, filed the "Brown Quiet Title Action," *Brown, et al. vs. Akron and Cambridge Coal Company, et al.,* Guernsey No. 93CV000266, claiming the original conveyance of the subsurface rights (made prior to appellant's acquisition) was clear as to coal rights, but ambiguous as to oil and gas rights. The Browns named Akron and Cambridge Coal Company, aka Wheeling and Lake Erie Coal Company, and Cambridge Consolidated Coal Company as party defendants. Appellant was not named in the action, although it had been the record holder of the subsurface rights for over fifty years. The named defendants failed to plead or otherwise appear; therefore, the Browns received a default judgment on August 26, 1993.

{¶3} Subsequent to the default judgment, the property was conveyed to various parties as fee simple estates, some of whom in turn executed oil and gas leases to their respective property.

{¶4} On June 10, 2014, appellant filed a complaint alleging five causes of action relating to the ownership of the mineral rights: declaratory judgment, quiet title, trespass and continuing trespass, ejectment, and conversion. Named as defendants therein were a multitude of individuals and entities who have claimed an interest in the

surface and subsurface rights of the property, pertinent to this appeal, appellees who have filed appellate briefs, Ralph Brown, Jr. and Patricia Brown of the Brown Quiet Title Action, Frank and Kris Simon, Ned and Cheryl Wakeley, Joe and Patricia LaFave, EQT Production Company, Amarado Oil Company, Mattmark Holdings, LLC, and Mattmark Partners, Inc.

{¶5} On January 29, 2015, appellee EQT filed a motion for summary judgment, claiming appellant's claims were barred under the doctrine of res judicata because of the 1993 Brown Quiet Title Action. Appellees Brown filed a similar summary judgment motion on January 30, 2015. Appellant filed memorandums in opposition on February 12 and 17, 2015. By entry filed April 20, 2015, the trial court granted the motions for summary judgment and dismissed the complaint, finding appellant's claims were barred by the doctrine of res judicata.

{¶6} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶7} "THE TRIAL COURT ERRED AS A MATTER OF LAW BY AWARDING SUMMARY JUDGMENT BASED ON AN INCORRECT APPLICATION OF THE DOCTRINE OF *RES JUDICATA.*"

I

{¶8} Appellant claims the trial court erred in granting summary judgment to appellees because its complaint was not barred by the previous 1993 quiet title action in *Brown, et al. vs. Akron and Cambridge Coal Company, et al.,* Guernsey No. 93CV000266. We agree.

{¶9} Summary Judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins,* 75 Ohio St.3d 447, 448, 1996-Ohio-211:

> Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains 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 nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex. rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274.

{¶10} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.,* 30 Ohio St.3d 35 (1987).

{¶11} The central issue of the motions for summary judgment was whether the doctrine of res judicata barred the matter sub judice. As explained by the Supreme Court of Ohio in *Portage County Board of Commissioners v. City of Akron,* 109 Ohio St.3d 106, 2006-Ohio-954, ¶ 84:

> This court set forth the standard for res judicata in *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, 653 N.E.2d 226, at paragraph one of the syllabus: "[A] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Grava* further noted that 1 Restatement of the Law 2d, Judgments (1982), Comment b to Section 24, defined "transaction" as a "common nucleus of operative facts." Id. at 382, 653 N.E.2d 226. The Sixth Circuit Court of Appeals construed *Grava* as setting forth the following requirements for the issue-preclusion prong of res judicata: "(1) a prior final, valid decision on the merits by a court of competent jurisdiction; (2) a second action involving the same parties, or their privies, as the first; (3) a second action raising claims that were or could have been litigated in the first action; and (4) a second action arising out of the transaction or occurrence that was the subject matter of the previous action." *Hapgood v. Warren* (C.A.6, 1997), 127 F.3d 490, 493.

{¶12} Appellees' motions for summary judgment argued res judicata applied because the 1993 Brown Quiet Title Action was a final, valid decision on the merits, appellant was in privity with the named defendants in said action, appellant had knowledge of the action and failed to intervene, the issues in the present case could have been raised in the action, and the action was predicated on the same root title as in the present case. In the alternative, appellees argued a valid judgment is not subject to a collateral attack. We note in its April 20, 2015 entry granting summary judgment to

appellees and dismissing the complaint, the trial court did not delineate which of these theories it relied upon.

{¶13} R.C. 5303.01 governs action to quiet title and states the following in pertinent part:

> An action may be brought by a person in possession of real property, by himself or tenant, against any person who claims an interest therein adverse to him, for the purpose of determining such adverse interest. Such action may be brought also by a person out of possession, having, or claiming to have, an interest in remainder or reversion in real property, against any person who claims to have an interest therein, adverse to him, for the purpose of determining the interests of the parties therein.

{¶14} In reviewing and analyzing the parties and claims of the Brown Quiet title Action and the affidavit of Thomas Arnold, appellant's president, attached to appellant's February 12, 2015 memorandum in opposition to appellees' motions for summary judgment, we find the genesis of how appellant is a party who "claims an interest" in the property (R.C. 5303.01):

{¶15} 1) On September 5, 1882, Jesse and Sarah Linkhorn conveyed the subsurface rights of the subject property to Akron and Cambridge Coal Company (Recorded Vol. 28, Page 465).

{¶16} 2) Following two name changes (April 9, 1884 - Wheeling and Lake Erie Coal Company, March 4, 1891 - Cambridge and Elyria Coal Company), the Cambridge

and Elyria Coal Company conveyed the subsurface rights to Consolidated Cambridge Coal Company on April 13, 1892 (Recorded Vol. 44, Page 152).

{¶17} 3) On July 5, 1895, Consolidated Cambridge Coal Company changed its name to Cambridge Consolidated Coal Company (Recorded Vol. 50, Page 377).

{¶18} 4) On June 6, 1906, Cambridge Consolidated Coal Company conveyed the subsurface rights to Cambridge and Muskingum Valley Coal Company (Recorded in Vol. 89, Page 62).

{¶19} 5) On November 21, 1907, Cambridge and Muskingum Valley Coal Company changed its name to Cambridge Collieries Company (Recorded in Miscellaneous Vol. 1, Page 313).

{¶20} 6) On January 24, 1940, Cambridge Collieries Company conveyed the subsurface rights to appellant by Special Master's Deed (Recorded in Vol. 180, Page 194).

{¶21} 7) On December 30, 1976, appellant filed a Notice of Preservation of Interest in Land (Recorded in Vol. 321, Page 797).

{¶22} The Brown Quiet Title Action named party defendants claiming an interest as Akron and Cambridge Coal Company and Cambridge Consolidated Coal Company, both with "Address Unknown." The complaint filed on June 11, 1993 (attached to appellee EQT's motion for summary judgment as Exhibit B), averred to the transfers and name changes listed in 1, 2, and 3 above, followed by: "No transfers have been made of the above parcel by The Cambridge Consolidated Coal Company."

{¶23} The Brown Quiet Title Action omitted the 1906 record transfer to Cambridge and Muskingum Valley Coal Company, the 1907 name change to Cambridge Collieries Company, and the 1940 Special Master's Deed to appellant.

{¶24} Whether the decision in the Brown Quiet Title Action was a final, valid decision on the merits also involves the issue of privity.

{¶25} As held by the Supreme Court of Ohio in reviewing the doctrine of res judicata in *Whitehead v. General Telephone Company,* 20 Ohio St.2d 108 (1969), paragraph two of the syllabus in part, *overruled on other grounds, Grava v. Parkman Twp.,* 73 Ohio St.3d 379 (1995): "The prior judgment estops a party, or a person in privity with him, from subsequently relitigating the identical issue raised in the prior action."

{¶26} The *Whitehead* court explained the following at 114-115:

> "Moreover, 'parties in privity,' to the extent that they are bound by a final judgment, includes those who acquire an interest in the subject matter after the beginning of the action or the rendition of the final judgment. *Vasu v. Kohlers, Inc.* (1945), 145 Ohio St. 321, 61 N.E.2d 707, 166 A.L.R. 855, *overruled on other grounds in Rush v. Maple Heights* (1958), 167 Ohio St. 221, 147 N.E.2d 599.

{¶27} Based upon the foregoing, appellant should have been included as a party in the Brown Quiet Title Action, as appellant was the record holder of the subsurface rights via the 1940 Special Master's Deed. Appellant was within the line of title via the recording of the June 6, 1906 conveyance to Cambridge and Muskingum Valley Coal Company and the November 21, 1907 recorded name change to Cambridge Collieries Company, the immediate predecessor to appellant. During oral arguments, appellees

Brown claimed the June 6, 1906 conveyance via Vol. 89, Page 62, did not lead to appellant as a record holder. An affidavit attesting to said title search was not filed.

{¶28} To this undisputed error, appellees argue "appellant was in privity and is therefore bound." As noted in *Whitehead, supra,* a party claiming an interest but omitted from the action is not bound by the judgment. Privity can only be bootstrapped to a subsequent party who acquires an interest in the property.

{¶29} Therefore, the only defense remaining is whether appellant had actual knowledge of the Brown Quiet Title Action. In its response to appellee EQT's Interrogatory No. 7, appellant stated "Mid-Ohio learned of the Brown Quiet Title Action on or about July 21, 1993, when it received correspondence from Donald J. Gadd, President of the Ohio Valley Oil Company." *See* Notice of Filing filed March 16, 2015. This July 21, 1993 "notice" was given beyond the twenty-eight day answer date to the June 11, 1993 action, and thirty-six days prior to the August 26, 1993 entry of default judgment. It was given by a third-party unrelated to the parties of the action. Because the named defendants' addresses were unknown, appellees Brown served notice of the action by publication pursuant to Civ. R. 4.4. The Legal Notice of Publication was filed on June 11, 1993 (attached to appellee EQT's motion for summary judgment as Exhibit A), and cited the parcels involved and their prior deed references, none of which were in appellant's line of title per the Arnold affidavit.

{¶30} The error in the line of title used in the Brown Quiet Title Action cannot be corrected or bootstrapped by a non-party's notice to appellant. The primary and ultimate responsibility is with the complainants to ensure all proper "parties of interest" are notified. Neither the 1993 complaint nor the publication nor the third-party notice is sufficient to bar the complaint sub judice.

{¶31} We therefore conclude the doctrine of res judicata does not bar the filing of the complaint in the present case. The Brown Quiet Title Action is not binding or enforceable against appellant. The action never cleared the title as to the named defendants who at the time were not the record holders of the subsurface rights in question. Therefore, the judgment is subject to collateral attack by appellant.

{¶32} Upon review, we find the trial court erred in granting summary judgment to appellees.

{¶33} The sole assignment of error is granted.

{¶34} The judgment of the Court of Common Pleas of Guernsey County, Ohio is hereby reversed.

By Farmer, J.

Hoffman, P.J. and

Wise, J. concur.

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