IN THE SUPREME COURT OF OHIO

HARRY A. FONZI, III, et al., **Plaintiffs-Appellees,** **v.** **ALLEN B. MILLER, *et al.*,** **Defendants-Appellants.**	**On Appeal from Monroe County Court of Appeals, Seventh Appellate District** **Case No.: 2020-0861** **Court of Appeals Case No.: 19 MO 0011**

REPLY BRIEF OF APPELLANTS, ALLEN B. MILLER, M. CRAIG MILLER, AND BRENDA THOMAS

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I.

CORRECTIONS TO THE FONZIS' STATEMENT OF FACTS

The Fonzis say that this case involves an attempt by the Millers to obtain the Severed Royalty Interest from them. Brief, p. 1. Actually, this case was filed by the Fonzis against the Millers. In 2012 the Millers completed all the steps in the extrajudicial process in divisions (E) through (I) and recorded the abandonment in the Monroe County Recorder's Office. This case actually involves an attempt by the Fonzis, more than five year later, to invalidate the Miller's record title to the Severed Royalty Interest.

The Fonzis like to remind this Court that the Severed Royalty Interest is a "valuable" mineral royalty interest. Brief, p. 1, 33. That may indeed be true today, but Elizabeth Henthorn Fonzi (the original owner) did not think that it was valuable enough to ever bother filing a claim to preserve the Severed Royalty Interest or to even tell her children about it before she died in 1989. The fact that her children later discovered it in 2017 (after the value had subsequently increased) does not excuse their failure to preserve it over the 65 year period from 1952 to 2017. At one time, this Court was not afraid to recognize that mineral holders had some responsibility to protect their own interests. *See Heifner v. Bradford,* 4 Ohio St.3d 49, 52, 446 N.E.2d 440,443 (1983)("If he fails to take the step of filing the notice as provided, he has only himself to blame if his interest is extinguished.").

The Fonzis say that Elizabeth Henthorn Fonzi and Harry A. Fonzi, Jr. were both "former owners of the Property" and that they both "joined the reservation" of the Severed Royalty Interest in 1952. Brief, pp. 1, 39. Actually, the record title is clear that Elizabeth Henthorn Fonzi acquired an interest in the Property by virtue of a certificate of transfer from the estate of George Henthorn that was recorded on June 26, 1952. Her husband, Harry A. Fonzi,

Jr., was not a transferee on the certificate of transfer; he never acquired an ownership interest in the Property from anyone. Although Harry A. Fonzi, Jr. signed the 1952 Deed (in which the Severed Royalty Interest was reserved), this was simply to release his dower rights. The Severed Royalty Interest therefore could not have been, and was not, reserved by Harry A. Fonzi, Jr. He was never a holder of the Severed Royalty Interest.

In a footnote, the Fonzis say that, according to their expert witness, "any number of simple [internet] searches would have resulted in finding the obituary of Elizabeth Henthorn Fonzi and the current residence of Harry A. Fonzi, III." Brief, p. 4, fn. 5. Actually, the internet obituary was for Elizabeth White (she changed her name after her divorce and second marriage). Also, the Fonzi's own expert admitted that he "cannot be definitively confirm that each [address] listing for Fonzi III was posted during the relevant time periods." Supp. 654. The best that the Fonzis' own technology expert could do was speculate that it was "more likely than not" that these address listings were available online at the time of the Millers' search.

Moreover, the Millers did not have a duty to search for the Fonzis on the internet. As this Court just recently held in *Gerrity v. Chervenak*, Slip Opinion No. 2020-Ohio-6705, ¶35 "[t]he ever-changing quantum and quality of information available on the Internet, the inconsistent reliability of that information, and the variability of Internet-search results all weigh against a bright-line requirement for online searches, let alone a bright-line requirement that a surface owner consult any particular paid subscription services." The Seventh District has also been skeptical about the reliability of online searches, saying that "the information available on the internet is not always reliable," that it "changes continually," and that "the availability of information may vary depending on the search engine used, the exact search terms employed, the use of quotation marks, and even the searcher's geographic location and past search history."

Crum v. Yoder, 7th Dist. Monroe No. 20 MO 0005, 2020-Ohio-5046, ¶61. Since internet search results were never considered in the decisions below, they are irrelevant to the propositions of law in this case. The Fonzis admit that their objections concerning the Millers' internet searches "are not applicable to the limited issues before this Court." Brief, p. 2, fn. 3.

II.

REPLY IN SUPPORT OF PROPOSITION OF LAW NO. 4

Proposition of Law No. 4: If a Landowner files an action to quiet title to a mineral interest under the DMA, such mineral interest is abandoned and vested in the Landowner if the requirements of R.C. 5301.56(E) are satisfied and none of R.C. 5301.56(B) (1) through (3) apply.

There is no shortage in the Fonzis' Brief of hyperbole. They say that the Miller's Proposition of law No. 4 is "convoluted," "contrived," "idiosyncratic," "odd," "unusual," a "'Hail Mary' pass," and a "self-serving fiction," that is "unsupported by any conceivable interpretation of the ODMA." Brief, pp. 6, 8, 11, 12, 22, 23, 41. The Millers' Proposition of Law No. 4 deserves very serious consideration because it is, by far, the most important proposition of law that this Court has ever accepted related the DMA and mineral title. The Fonzis' exaggerations and disparaging statements add nothing of substance to the strength of their arguments and should be completely disregarded in this Court's evaluation of the merits.

A. The Millers satisfied the requirements of division (E).

The Fonzis say that the Millers' Proposition of Law No. 4 would allow a landowner to "forego the requirements of division (E)," to "simply file a quiet title action based upon division (B)," that "it does not matter whether he [the landowner] complied with the notice obligations of the ODMA," and that the requirements of division (E) are "irrelevant." Brief, pp. 7, 10, 16, 22.

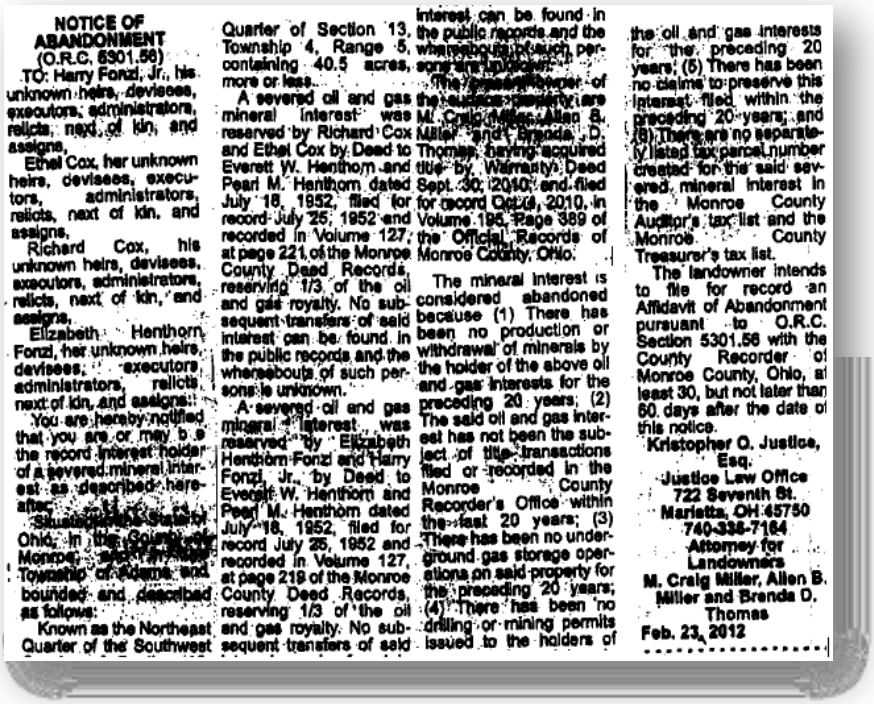
The Millers are not saying that a landowner can forego the requirements of division (E). They said the exact opposite in their Brief:

> the landowner must serve a notice of intent to abandon the mineral interest under division (E)(1) and then record an affidavit of abandonment under division (E)(2). By its plain language, the conclusive presumption cannot arise unless the landowner satisfies these requirements. Thus, as this Court recognized in *Albanese. v Batman*, 148 Ohio St.3d 85, 90, 2016-Ohio-5814, 68 N.E.3d 800, ¶30, "the notice and affidavit obligations are mandatory."

Millers' Brief, pp. 16-17. What the Millers are really saying in this case is that a landowner's search efforts preceding the publication of notice do not make any difference in whether the conclusive presumption arises under division (B). Why? Because under the conclusive presumption it does not matter whether the mineral holder responds to the notice.[1] The statute expressly states that all the Savings Events that prevent the conclusive presumption must have occurred in the 20 years "immediately preceding" the division (E)(1) notice.

The Fonzis say over and over again that the Millers have "not complied with the notice and service requirements of the ODMA." Brief, pp. 6, 9. This is false. The Fonzis admit that the Millers satisfied the requirements of division (E)(2) by recording an affidavit of abandonment on April 6, 2012. Brief, p. 1. Prior to recording the affidavit, the Millers also published a division (E)(1) notice of intent to abandon the Severed Royalty Interest on February 23, 2012. Here is the notice:

[1] The Fonzis also suggest that the Millers' abandonment claim is somehow precluded by the claim to preserve that they recorded in 2017. Brief, pp. 3, 6, 8, 23. This claim to preserve was not recorded within 60 days after publication of the February 23, 2012 notice or within 20 years "immediately preceding" the notice. The Fonzis' 2017 claim to preserve is therefore completely irrelevant; it does not prevent an abandonment under the extrajudicial process or the conclusive presumption because it was filed far too late.



NOTICE OF ABANDONMENT
(O.R.C. 5301.56)

TO: Harry Fonzi, Jr., his unknown heirs, devisees, executors, administrators, relicts, next of kin, and assigns,

Ethel Cox, her unknown heirs, devisees, executors, administrators, relicts, next of kin, and assigns,

Richard Cox, his unknown heirs, devisees, executors, administrators, relicts, next of kin, and assigns,

Elizabeth Henthorn Fonzi, her unknown heirs, devisees, executors administrators, relicts next of kin, and assigns:

You are hereby notified that you are or may be the record interest holder of a severed mineral interest as described hereafter:

Situated in the State of Ohio, in the County of Monroe, and in the Township of Adams, and bounded and described as follows:

Known as the Northeast Quarter of the Southwest Quarter of Section 13, Township 4, Range 5, containing 40.5 acres, more or less.

A severed oil and gas mineral interest was reserved by Richard Cox and Ethel Cox by Deed to Everett W. Henthorn and Pearl M. Henthorn dated July 18, 1952, filed for record July 25, 1952 and recorded in Volume 127, at page 221 of the Monroe County Deed Records, reserving 1/3 of the oil and gas royalty. No subsequent transfers of said interest can be found in the public records and the whereabouts of such persons is unknown.

A severed oil and gas mineral interest was reserved by Elizabeth Henthorn Fonzi and Harry Fonzi, Jr., by Deed to Everett W. Henthorn and Pearl M. Henthorn dated July 18, 1952, filed for record July 25, 1952 and recorded in Volume 127, at page 219 of the Monroe County Deed Records, reserving 1/3 of the oil and gas royalty. No subsequent transfers of said interest can be found in the public records and the whereabouts of such persons are unknown.

The present owner of the surface property are M. Craig Miller, Allen B. Miller and Brenda D. Thomas, having acquired title by Warranty Deed Sept. 30, 2010, and filed for record Oct. 6, 2010, in Volume 195, Page 389 of the Official Records of Monroe County, Ohio.

The mineral interest is considered abandoned because (1) There has been no production or withdrawal of minerals by the holder of the above oil and gas interests for the preceding 20 years; (2) The said oil and gas interest has not been the subject of title transactions filed or recorded in the Monroe County Recorder's Office within the last 20 years; (3) There has been no underground gas storage operations on said property for the preceding 20 years; (4) There has been no drilling or mining permits issued to the holders of the oil and gas interests for the preceding 20 years; (5) There has been no claims to preserve this interest filed within the preceding 20 years; and (6) There are no separately listed tax parcel number created for the said severed mineral interest in the Monroe County Auditor's tax list and the Monroe County Treasurer's tax list.

The landowner intends to file for record an Affidavit of Abandonment pursuant to O.R.C. Section 5301.56 with the County Recorder of Monroe County, Ohio, at least 30, but not later than 60 days after the date of this notice.

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Attorney for Landowners
M. Craig Miller, Allen B. Miller and Brenda D. Thomas
Feb. 23, 2012

The Fonzis do not deny that the newspaper circulates in Monroe County or assert that there is any deficiency in the contents of the notice. They admit that in 2012 the Millers "utilized the ODMA statutory procedures." Brief, p. 6. So, when the Fonzis say that the Millers have "not followed" the notice requirement of division (E)(1), they simply want this Court to treat the notice as "invalid" because they believe it should have been mailed instead of published.

A dispute concerning the manner in which a division (E)(1) notice is served does not invalidate the notice for purposes of the conclusive presumption in division (B). A notice can establish the 20 year look-back period for determining whether a Saving Event has occurred under division (B)(3) regardless of whether it should have been mailed or published. Since the Fonzis' response to the notice is not a Saving Event under division (B), an alleged lack of effort in searching for the mineral holders prior to publication does not mean that the notice is "invalid" or that the landowner has failed to satisfy the requirements of division (E)(1).

B. At the time the Millers conducted their search, the law did not disincentivize them from trying to find the holders of the Severed Royalty Interest.

The Fonzis agree that *Bayes v. Sylvester*, 7th Dist. Monroe No. 13 MO 0020, 2017-Ohio-4033, disincentivizes landowners from finding the mineral holders. Brief, p. 26. In this case, however, the Millers' title search occurred before *Bayes* was decided. Thus, the perverse incentive created by *Bayes* for landowners to exercise only minimal search efforts did not exist and therefore did not affect the efforts that were undertaken by the Millers. Prior to *Bayes*, the Millers' Proposition of Law No. 4 was the law in Monroe County, Ohio. *See Marty v. Dennis*, C.P. Monroe No. 2012-203 (Apr. 11, 2013), p. 11, attached as Exhibit A (Apr. 11, 2013)(holding that, when a mineral holder files a response under division (H), the mineral holder "must show the existence of one of the savings conditions under ORC §5301.56(B)" if the landowner files a lawsuit). Counsel for the Millers conducted what he believed was a reasonable search (in Ohio) based on the law at the time. Prior to *Bayes*, there was no incentive for the Millers not to find the Fonzis.

C. The 2006 DMA still includes a conclusive presumption in division (B), which operates separately, and has always operated separately, from the extrajudicial process in divisions (E) through (I).

The Fonzis say that there is just "one process" for a landowner to abandon a severed mineral interest. Brief, p. 7. They insist that there is "zero indication in the plain language of the DMA that a surface owner can obtain an abandonment under division (B) through a quiet title action." Brief, p. 10. They then falsely accuse the Millers of having engaged in "no analysis of the statutory language" and of trying to "avoid the language of the statute." Brief, pp. 11-12.

The plain language of the statute (along with this Court's precedents interpreting that language) is the primary basis of the Millers' arguments in support of Proposition of Law

No. 4. This Court has already very closely scrutinized the plain language of division (B). In *Corban v. Chesapeake Exploration L.L.C.*, 149 Ohio St.3d 512, 2016-Ohio-5796, 76 N.E.3d 108, ¶28, this Court held that the words "deemed abandoned" in division (B) of the 1989 DMA created a "conclusive presumption of abandonment," which is a type of evidentiary rule. Those exact same words ("deemed abandoned") remained in the statute after it was amended in 2006. In *West v. Bode*, Slip Opinion No. 2020-Ohio-5473, ¶25, this Court expressly recognized that, because the 2006 DMA uses the same operative language in division (B) as the 1989 DMA, it likewise creates a conclusive presumption of abandonment.

The Fonzis say there is "nothing about the concept of a 'presumption' that would indicate that 'litigation' must be intended." Brief, p. 18. They scoff at the idea that "a conclusive presumption only makes sense in the context of 'litigation.'" Brief, p. 17. Yet, in *Corban*, this Court held that because division (B) created a conclusive presumption, the DMA required "litigation seeking to quiet title to a dormant mineral interest." *Id.* at ¶26 (emphasis added). This is entirely consistent with the arguments that the Millers have presented. The Millers are asking this Court to follow and uphold Supreme Court precedent, not to overturn it.

The Fonzis present the novel argument that the conclusive presumption has been somehow merged into and is now a part of a "single statutory process" (the extrajudicial process), which was added in 2006. But the concept of an "extrajudicial evidentiary rule " is an oxymoron. Evidentiary rules apply only in legal proceedings (in court). This is opposite the meaning of "extrajudicial."

Returning once again to the DMA's plain language (which the Fonzis say should be of paramount importance), there is clear textual support for the idea that the statute provides two methods of abandonment. Under division (C)(1), division (D)(1), division (E), and division

(G)(3), the statute expressly references the abandonment of a mineral interest "under division (B)" or "pursuant to division (B)," which is the conclusive presumption. At the end of division (H)(2), however, it expressly references the abandonment and vesting of a mineral interest "pursuant to divisions (E) to (I)," which is the extrajudicial process. A mineral interest may be abandoned "pursuant to" either process. The word "pursuant" means "in accordance with." The Fonzis simply ignored this statutory language in their Brief.

The Fonzis say that they want this Court to interpret the DMA as written, but they do not and cannot cite to a single word in the statute which suggests that the conclusive presumption in division (B) depends on a mineral holder's timely response under division (H)(1). The conclusive presumption in the 2006 DMA has the exact same Saving Events as under the 1989 DMA, and the language is clear that these must have occurred within the 20 years "immediately preceding" the division (E)(1) notice. In order to accept the Fonzis position, this Court would have to delete the words "immediately preceding" from the statute.

D. The extrajudicial process in divisions (E) through (I) operates the same way as the extrajudicial process in R.C. 5301.332.

The Fonzis believe that they have cleverly distinguished the extrajudicial process in R.C. 5301.332 from the extrajudicial process in divisions (E) through (I). Specifically, they say that (unlike the DMA) R.C. 5301.332 did not create "a separate quiet title action." Brief, p. 19. The termination of a lease under the statute, they say, is "not caused by the Act."[2] Brief, p. 19. Since it does not include the words "deem" or vest," R.C. 5301.332 "does not provide a basis

[2] The Fonzis make the obvious point that R.C. 5301.332 does not have a conclusive presumption. Brief, p. 20. Revised Code 5301.332 does not need a conclusive presumption because lease termination is governed by the language in the lease between the lessor and lessee. The legislature determined that a conclusive presumption should apply to mineral abandonments because, by contrast, there is no contract governing the relationship between a landowner and a mineral holder.

for a forfeiture." Brief, p. 20. Instead, the statute is simply "a method to put the fact of a forfeiture on the record." Brief, p. 21. This stands in stark contrast, they say, to the DMA, which was "created to address the substantive problem of proving abandonment and replacing the common law action of abandonment." Brief, p. 21 (emphasis in original).

Once again, the Fonzis do not seem to be aware that their argument is directly contrary to this Court's holding in *Corban*. In *Corban*, this Court recognized that, prior to the enactment of the DMA in 1989, mineral rights could be abandoned at common law if there was "proof of the owner's intent to abandon it" (which could not be presumed from mere nonuse). *Corban*, ¶15. Thus, the DMA did not create a separate cause of action for the abandonment of mineral rights. Instead, the DMA was merely an "evidentiary rule" that enabled a landowner to terminate abandoned mineral rights "absent proof of the property owner's subjective intent." *Corban*, ¶¶15, 35. The legislature did not address the "problem of proving abandonment" that existed prior to the DMA by enacting a "substantive" statute (as the Fonzis assert). Nothing in *Corban* states that the conclusive presumption "replaced" the common law action of abandonment. In fact, this Court expressly held that evidentiary rules (such as the DMA) are procedural in nature. *Id.* (citing *Ackison v. Anchor Packing Co.*, 120 Ohio St.3d 228, 2008-Ohio-5243, 897 N.E.2d 1118, ¶29).

This Court's determination that the DMA was a procedural evidentiary rule was absolutely essential to its holding in *Corban*. Changing evidentiary rules does not alter a vested substantive right. If the DMA had instead been interpreted as a substantive rule of law that created a new cause of action or replaced an existing cause of action (as the Fonzis assert), the 2006 amendment to the DMA would have violated the Retroactivity Clause contained in Article II, Section 28 of the Ohio Constitution.

The striking parallels between R.C. 5301.332 and divisions (E) through (I) are by no means a "red herring." Prior to 1963, leases could only be terminated in a quiet title action. Prior to 2006, mineral interests could only be abandoned in a quiet title action (with proof of intent before 1989, or with the help of the conclusive presumption after 1989). The legislature did not use the exact same extrajudicial process for a completely different purposes. Under both statutes, landowners could put the termination/abandonment of a lease/mineral interest of-record "without having to resort to" litigation in the courts. *Corban*, ¶35; *Browne v. Artex Oil Co.*, 158 Ohio St.3d 398, 423, 2019-Ohio-4809, ¶82, 144 N.E.3d 378. But this extrajudicial process is merely an additional remedy for the landowner. It did not supplant a landowner's right to terminate a lease (according the language of the lease) or to abandon a mineral interest (according the DMA's conclusive presumption) in a quiet title action. So, even if a lessee prevents a lease from being terminated under the extrajudicial process (by filing a response under R.C. 5301.332(C)) or if a mineral holder prevents a mineral interest from being abandoned under the extrajudicial process (by filing a response under division (H)(1)), the landowner can still obtain the exact same relief by filing a quiet title action in court.

E. The Fonzis do not deny that *Bayes* renders certain provisions in the DMA meaningless.

In the Millers' Brief (pages 17-19), they pointed out that if a mineral interest could be preserved in a quiet title action without any Saving Events, 1) there would be no reason for a mineral holder to ever identify a Saving Event in the affidavit under division (H)(1)(b) and 2) the landowner's affidavit under division (E)(2) would be meaningless. These arguments are important because, in *Dodd v. Croskey*, 143 Ohio St.3d 293, 2015-Ohio-2362, 37 N.E.3d 147, ¶34, this Court held that when construing the DMA a court "should avoid a construction that renders a provision superfluous, meaningless, or inoperative." Although The Fonzis say that

they want this Court to interpret the DMA as-written, their Brief does not even attempt to respond to these glaring problems.

F. This Court's denial of a motion for reconsideration in *Farnsworth* does not constitute a statement of the law.

The Fonzis point out that when the Seventh District issued its decision in *Bayes*, it expressly relied upon this Court's ruling in *Farnsworth v. Burkhart*, 140 Ohio St.3d 1446, 2014-Ohio-4284, 17 N.E.3d 593. Brief, p. 13, fn. 9. Prior to *Bayes*, there was indeed another case before this Court that raised this same issue (*Farnsworth*), but all briefing had been held. After this Court issued its decision in *Dodd* on June 18, 2015, the Farnsworths filed a motion with this Court on October 28, 2015 requesting leave to file briefs that would address whether the 2006 DMA contained "separate abandonment provisions." They argued that *Dodd* had not decided this issue. Without permitting any briefing, and without any further explanation, this Court affirmed *Farnsworth* on September 15, 2016 on the basis of *Dodd*. The Farnsworths attempted to present their arguments for the first time in a motion for reconsideration filed on September 20, 2016, but on November 9, 2016 their motion was denied without an opinion.

Although *Farnsworth* may seem like an unremarkable case, it had a significant impact on the Seventh District's ruling in *Bayes*. Before rendering its decision in *Bayes*, the Seventh District had been waiting for this Court to address the proposition of law in *Farnsworth*. On December 8, 2014, the Seventh District sua sponte held the *Bayes* appeal in abeyance pending decisions by this Court. See the Entry, attached as Exhibit B. Then, on September 15, 2015 (almost three months after *Dodd* had been decided), the Seventh District denied the mineral holders' motion to lift the stay and ordered that the stay should continue "pending final ruling by the Ohio Supreme Court on the issue presented in this appeal." See attached Exhibit C. After *Farnsworth* was affirmed on September 15, 2016, the Seventh District lifted the stay in *Bayes* on

October 19, 2016. In its Entry filed December 12, 2016, the Seventh District said that it would consider this Court's ruling in *Farnsworth* "as part of this appeal." See the Entry, attached as Exhibit D. But, since this Court had offered only a very brief opinion in *Farnsworth*, the Seventh District was forced to decide *Bayes* by essentially reading between the lines, based on its interpretation of this Court's denial of the *Farnsworth* motion for reconsideration.

The Seventh District expressly relied upon this Court's denial of the *Farnsworth* motion for reconsideration as a reason for its decision in *Bayes*. *Bayes*, ¶24. The Fifth District also cited to the denial of the *Farnsworth* motion for reconsideration to support its decision in *Wendt v. Dickerson*, 2018-Ohio-1034, 108 N.E.3d 1147, ¶47 (5th Dist.). The problem with this approach to deciding cases is that this Court establishes the law of Ohio through its opinions. This principle is embodied in Supreme Court Rule for the Reporting of Opinions 2.2 “Statement of Law” which states that: “the law stated in an opinion of the Supreme Court shall be contained in its text, including its syllabus, if one is provided, and footnotes.” The denial of the motion for reconsideration in *Farnsworth* was not accompanied by an opinion. It therefore does not constitute a "statement of law." Also, this Court's decision in *Farnsworth* was made without any briefs or arguments on the merits (a motion for reconsideration is no substitute for a full merit brief). The Seventh District therefore should not have relied on the denial of a motion for reconsideration in *Farnsworth* when it decided *Bayes*.

G. Conclusion.

The Fonzis say that the DMA is working just as intended because "many surface owners have acquired substantial and valuable oil and gas rights through this process." Brief, p. 26. By "many" the Fonzis really mean "exactly three." In more than 31 years and out of dozens of cases, that is the sum total of the reported decisions in which landowners have succeeded in recovering abandoned mineral rights under this statute. *See Gerrity*; *Shilts v. Beardmore*, 7th

Dist. Monroe No. 16 MO 0003, 2018-Ohio-863; *Sharp v. Miller*, 2018-Ohio-4740, 114 N.E.3d 1285 (7th Dist.). The Fonzis do not deny that it is more difficult to abandon a mineral interest under the DMA than it was at common law. Without any supporting evidence, they assure this Court that "it is not expensive" to search for mineral holders in foreign states and that "many surface owners" will pay for such a search, despite the almost impossible odds against them. Brief, p. 27, fn. 14. The Fonzis believe that landowners will be happy to pay the cost of notifying mineral holders about their interests because it may lead the drilling of a well on their land (even though all the royalties from that well will go so someone else). Brief, p. 28.

Bayes transforms the DMA into an absurd and utterly pointless contradiction. In one recent DMA case, the trial judge ruled in favor of the mineral holders and explained the operation of the statute as follows:

> Under the 2006 version [of the DMA], the Legislature goes to great lengths to set forth a remedy to surface owners, and then takes that remedy away, for all practical purposes, in Subsection 5301.56(J) (1) [sic].

McAuley v. Brooker, C.P. Noble No. 214-0146 (Feb. 22, 2017), attached as Exhibit E. Although the trial judge obviously found the result "troubling," he dutifully followed the Seventh District's binding precedent anyway, and his decision was unanimously affirmed on the basis of *Bayes*. *See McAuley v. Brooker*, 7th Dist. Noble No. 17 NO 0445, 2017-Ohio-9222. Deciding cases on the basis of this kind of reasoning is an embarrassment. But since trial judges cannot explain the inexplicable, this is the only written explanation that some landowners will ever receive for the dismissal of their DMA claims.

III.

REPLY IN SUPPORT OF PROPOSITION OF LAW NO. 5

Proposition of Law No. 5: If a mineral holder is not prevented under R.C. 5301.56 (H)(2) from presenting the record of a mineral interest in court as evidence against the owner of

the surface of the lands formerly subject to the interest, insufficient service of the R.C. 5301.56(E)(1) notice on the mineral holder is harmless and irrelevant to whether a mineral interest has been abandoned under R.C. 5301.56(B) or (H)(2).

The Fonzis are partially correct when they say that the Millers' Proposition of Law No. 5 is derivative of Proposition of Law No. 4. When determining whether it is relevant that publication of a division (E)(1) notice was proper, the Millers are indeed asking this Court to 1) distinguish between an abandonment under the conclusive presumption and an abandonment under the extrajudicial process and 2) distinguish between the mineral holders' rights in the mineral interest itself and their right to present evidence in court.

It is also true that, as stated in the Millers' Brief (page 38), they tried to avoid making their search a relevant issue in this case by not asking the trial court to strike any of the evidence presented by the Fonzis on the basis of division (H)(2). But that does not mean that this Proposition of Law is unimportant. The Millers are not saying that it never matters whether a landowner has exercised reasonable diligence in his search for mineral holders. Rather, the Millers are saying that the extent to which a landowner's search matters depends on whether a mineral holder's failure to respond to the published notice has had any adverse effect on the mineral holder's rights.

A landowner can decide whether or not to rely upon the mineral holder's failure to respond (by attempting to prevent the mineral holder from presenting evidence in court). If the landowner does not, then a court does not need to scrutinize whether the mineral holder was given a fair opportunity to respond to the notice. Why? Because the lack of any response did not affect the mineral holder's rights. If, on the other hand, a landowner does attempt to prevent a mineral holder from presenting evidence in court based on his failure to respond to a published

notice, then a court must evaluate the sufficiency of the landowner's search efforts based on the standard for diligence described by this Court in *Gerrity*.

IV.

REPLY IN SUPPORT OF PROPOSITION OF LAW NO. 2

Proposition of Law No. 2: In order to set aside the evidentiary bar in R.C. 5301.56 (H)(2) that arises when the county recorder memorializes the record on which a mineral interest is based, the former holder of a mineral interest has the burden of establishing that service of the R.C. 5301.56(E)(1) notice was insufficient.

In attempting to defend the Seventh District's decision in *Miller v. Mellott*, 2019-Ohio-504, 130 N.E.3d 1021 (7th Dist.), the Fonzis say that "[i]f, in fact, the surface owners made no [search] efforts [at] all, it is possible (even likely) that the holders would not have 'evidence' to bring on summary judgment, other than a statement that no efforts were made." Brief, p. 32. This statement is absurd. A mere allegation that no efforts were made should never be sufficient for a former holder to meet his initial summary judgment burden in challenging a landowner's record title to a mineral interest. If it was, then DMA litigation would be the only type of case in which the initial summary judgment burden is placed on the non-moving party. Mineral holders are not entitled to special treatment under the Civil Rules.

When a landowner has failed to use reasonable efforts in his search, a former holder always has the ability to offer proof, even if the former holder is completely unable to discover what efforts the landowner actually made.[3] Once they are filed, the records in the Recorder's Office and the Probate Court[4] are indexed by name and maintained forever, and they

[3] In this case, the trial court compelled the Millers' attorney to testify in a deposition about the reasons for each decision made in the search he was hired to perform (even though the Millers objected to the deposition on the basis of privilege and work product).

[4] In *Gerrity*, ¶36, this Court held that a landowner's search requires a "[r]eview of public-property and court records in the county where the land subject to a severed mineral interest is located."

are publicly available to everyone. Anyone can conduct a search today to reveal what information was available one year ago, five years ago, or 50 years ago. A former holder is always capable of determining on his own what a landowner would have found in the course of a diligent search. So, even if a landowner made no search efforts at all, a former holder can still prove this (very easily) by presenting the court with copies of the filed or recorded documents that the landowners missed by not searching. There is no reason to relieve a former holder of the duty to present evidence when challenging a DMA abandonment because of a potential absence of available proof.

The Fonzis believe that, even after a landowner has completed the extrajudicial process by recording his division (H)(2) notice, he should still have the burden of proof if his record title is subsequently challenged in court. Why? Because, they say, the process in divisions (E) through (I) "is done without judicial participation." Brief, p. 33. But that is the whole point of having an extrajudicial process! As this Court held in *Corban*, ¶35, the extrajudicial process is intended to enable a landowner "to obtain marketable record title to an abandoned mineral interest without having to resort to litigation" (emphasis added). If a landowner still has the burden of proof in any judicial challenge, even after having completed the extrajudicial process, then the landowner's record title to the mineral interest will not be marketable until that challenge has been defeated in court. Why bother creating an extrajudicial process in the first place if actually obtaining marketable title still requires litigation? Upon completing the extrajudicial process, the landowner would be in no better position than he was before the process was initiated. This would render the entire extrajudicial process meaningless.

The Fonzis also say the burden of proof should be on the landowner because, unlike Civil Rule 4.4, the DMA does not require a landowner to file an affidavit stating that the

mineral holder's address is unknown prior to publishing. Brief, p. 34. Since a landowner can publish notice without any filed statement of the efforts made to find the mineral holders, they say it is "logical and just" that the landowner should have the burden of proving what efforts were taken. Brief, p. 34.

The Fonzis are simply asking this Court to insert an additional requirement into the DMA that the legislature did not enact. Division (G)(5) already requires the landowner's affidavit to state that "notice was served on each holder or each holder's successors or assignees or published in accordance with division (E) of this section." If the legislature wanted the landowner's affidavit to also include a description of the efforts made to find the mineral holders it could have done so. This Court should not add such a requirement to the statute simply because the Fonzis think it would be "logical and just" to do so.

V.

REPLY IN SUPPORT OF PROPOSITION OF LAW NO. 3

Proposition of Law No. 3: A former holder cannot establish that service by publication of the R.C. 5301.56(E)(1) notice was insufficient without showing that, with additional efforts by the Landowner, service by certified mail, return receipt requested, would have been possible to complete.

The Fonzis deny that the decision below would invalidate a mineral abandonment whenever a mineral holder can later identify any further steps that might have been taken. Brief, p. 36. But that that is exactly what happened in this case. The Fonzis came along more than five years after the Severed Royalty Interest had been abandoned and asserted that the Millers should have taken the further step of searching for them in Pennsylvania. The Fonzis admit that the Seventh District found this possibility "determinative" (Brief, p. 38); the mere suggestion that a further step might have been taken was all the Seventh District needed to make its decision.

Without even considering whether this further step would have enabled the notice to be served by certified mail, the court invalidated the abandonment as a matter of law (without a trial).

A. Landowners are required to search for mineral holders to determine whether service by certified mail can be completed.

The Fonzis say that a failure to use sufficient search efforts "disqualifies the surface owners attempts to obtain abandonment." Brief, p. 35. They repeatedly assert that a landowner must perform a reasonably diligent search for the mineral holders (Brief, p. 38) but never address why the statute requires a search in the first place. Is it to ensure that the landowner serves the division (E)(1) notice in a manner that affords the mineral holders a fair opportunity to respond? If so, then a court must consider whether the search would have made any difference in the manner of service (certified mail instead of publication).

If the search is not intended to reveal whether certified mail service can be completed, then what is its purpose? Although the Fonzis insist that the Seventh District applies an "objective standard" to evaluate the reasonableness of a landowner's search (Brief, p. 36, fn. 20), it appears that the court has actually been using the search requirement to determine whether the landowners are "sincere" (an actual word used in the decision below). In this case, the failure to search in Pennsylvania, alone, satisfied the court that the Millers were insincere and therefore unworthy of any relief. The results of any search in Pennsylvania were considered irrelevant. There is not a single word in the opinion below about whether certified mail service could have actually been completed based on the "facts and circumstances" of this case.

B. Landowners are not required to search for every other family member that might be a potential heir of a mineral holder.

The Fonzis insist that, if the Seventh District had actually considered the evidence, if would have concluded that the Millers could indeed have identified the names and addresses of the Fonzis and served the division (E)(1) notice on them by certified mail. Brief, p.

2. This argument is based on a belief that the Millers should have searched not just for the holder of the Severed Royalty Interest (Elizabeth Henthorn Fonzi, aka Elizabeth White) but also her ex-husband, Harry A. Fonzi, Jr. The Fonzis say that, even if Harry A. Fonzi, Jr. was not an actual holder of the Severed Royalty Interest, he was nevertheless "an obvious heir" because "the spouses and children of the original holders are the most likely individuals to be the current holders." Brief, pp. 39-40. In other words, the Fonzis say that the Millers should have assumed (or guessed) that the Severed Royalty Interest might have later transferred to him at some point after 1952.

A diligent search requires a landowner to continue his search for the holder along the record chain of title, but it does not require a landowner to search for every other family member that might be a potential heir. Assumptions made about potential heirs can be wrong. In this particular case, the assumption that the Fonzis say the Millers should have made (that Harry A. Fonzi, Jr. was an heir of Elizabeth Henthorn Fonzi) was wrong. Why? Because the couple divorced in 1967.[5] Supp. 649. Harry A. Fonzi, Jr. never inherited anything from Elizabeth Henthorn Fonzi and was never a holder of the Severed Royalty Interest.

C. Since neither the trial court nor the court of appeals analyzed the relevant evidence, this matter should be remanded.

For all the reasons set forth above and in their initial Brief, the Millers disagree that the Fonzis' names and addresses would have been revealed by a search for Elizabeth Henthorn Fonzi in Pennsylvania. This Court should not attempt analyze the evidence in this

[5] The Fonzis say that, despite the divorce, the Millers should have searched for Harry A. Fonzi, Jr. anyway because, at the time they did their search, the Millers did not know about the divorce. Brief, p. 39. On this issue, the Fonzis are trying to have it both ways. The Fonzis also say that the Millers should have known that an online obituary for Elizabeth White was for Elizabeth Henthorn Fonzi. But the Millers would not have been able to know that Elizabeth Henthorn Fonzi changed her name to Elizabeth White if they did not also know about her divorce and second marriage. Brief, p. 4, fn. 5.

appeal. As it recently recognized in *Browne v. Artex Oil Co.*, 158 Ohio St.3d 398, 2019-Ohio-4809, 144 N.E.3d 378, ¶18, when neither the trial court nor the court of appeals has considered relevant evidence because of a legal error, the better practice is to remand the case to allow the trial court to analyze the evidence in the first instance.

D. Considering whether certified mail service could have been completed will not disincentivize landowners from searching for mineral holders.

The Fonzis say that the Millers' Proposition of Law No. 3 would create an incentive for surface owners to make no search efforts at all and to simply publish the notice. Brief, p. 35. This is false. When a landowner conducts a proper search, he can potentially recover an abandoned mineral interest through the extrajudicial process (without having to resort to costly, time-consuming litigation) by serving the division (E)(1) notice by certified mail. By contrast, if a landowner were to publishing a notice without making an effort to search, it would be impossible for him to obtain marketable record title to the mineral interest without resorting to litigation. Litigation will require the landowner to serve the mineral holders with a summons in accordance with the Civil Rules. And, in any such litigation, the landowner would be unable to rely on the evidentiary bar in division (H)(2) to prevent the mineral holder from presenting evidence of the mineral interest in court. The benefits of completing proper service of the division (E)(1) notice provide plenty to incentivize landowners to use reasonable search efforts.

VI.

CONCLUSION

For all the foregoing reasons, and for the reasons set forth in the Millers' initial brief, this Court should reverse the judgment of the Seventh District and either enter judgment as a matter of law in favor of the Millers or remand this action to the trial court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the **Reply Brief of Appellants, Allen B. Miller, M. Craig Miller, and Brenda Thomas** was served upon the following party by emailing same on this 28th day of April, 2021:

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(517083)

COURT OF COMMON PLEAS
MONROE COUNTY, OHIO

IN THE COURT OF COMMON PLEAS OF MONROE COUNTY, OHIO

2013 APR 11 PM 1:32

BETH ANN ROSE
CLERK OF COURTS

NEAL D. MARTY, *etal*,

Plaintiffs,

v.

Case No. 2012-203

LINDA DENNIS (WINKLER), *etal*,

Defendants.

JUDGMENT ENTRY

This matter is before the Court for non-oral hearing on the following motions:

(1). Plaintiffs' Motion for Summary Judgment;

(2). Defendants' Motion for Summary Judgment;

(3). Plaintiffs' Memorandum Contra to Defendants' Motion for Summary Judgment.

Based on the filings of the parties and the applicable law, the Court makes the following findings and orders.

The Court first notes that both parties acknowledge that there is no dispute as to the facts in this case.

Neal D. Marty and Diana L. Marty, Trustees under the Diana L. Marty Trust Agreement dated the 25th day of June 2010 (hereinafter "Plaintiffs") are the fee owners of 107.39 acres, more or less, situated in Adams Township, Monroe County, Ohio. The subject property is described as Tract I and Tract II in the deed conveying the property to Plaintiffs, dated June 25, 2010, filed July 30, 2010, and recorded in Volume 193, Page 509

Monroe County
Common Pleas
Court

Julie R. Selmon
Judge

FINAL APPEALABLE
ORDER

Exhibit A

of the Official Records of Monroe County, Ohio.

That part of the Plaintiffs' property that is in Section 24 is approximately sixty-eight (68) acres. This property is contained in Tract II of the above-referenced deed. This sixty-eight (68) acre parcel, or Tract II, is the only parcel in the above-referenced deed that is in dispute in this case. The sixty-eight (68) acres shall hereinafter be referred to as the "Property."

Plaintiffs' predecessors in title, John J. Winkler and Mary M. Winkler, conveyed the Property to Carl W. Ambler and Alice Mae Ambler. The instrument reflecting this transaction is the deed dated August 24, 1949, filed August 25, 1949 and recorded in Volume 123, Page 186 of the Deed Records of Monroe County, Ohio (hereinafter the "Reservation Deed"). The Reservation Deed contained the following language:

> "Also excepting and reserving unto the grantors herein, their heirs and assigns, the one-half (1/2) of the oil and gas royalty, same being one-sixteenth (1/16) of all the oil and one-half (1/2) of all monies received from the sale of gas from the east half of the south east quarter of Section 24, Township 3 of Range 4, containing sixty-eight (68) acres."
> (Hereinafter the "Severed Mineral Interest").

Defendants in this case are the heirs of John J. Winkler and Mary M. Winkler and are claiming title to the Severed Mineral Interest as reserved in the Reservation Deed.

On February 3, 2012, the Plaintiffs filed an Affidavit with the Monroe County Recorder's Office declaring that the reserved royalty interest of the Defendants was abandoned and vested in the Plaintiffs. This Affidavit was filed pursuant to R.C. 5301.56 as it existed prior to its most recent amendment on June 30, 2006.

On February 9, 2012, the Plaintiffs published a notice in the *Monroe County Beacon* again declaring that the reserved royalty interest of the Defendants was abandoned and vested in the Plaintiffs. This publication was made pursuant to the current version of R.C. 5301.56.

On March 14, 2012, the Plaintiffs filed another Affidavit of Abandonment again declaring that the reserved royalty interest was abandoned and vested in the Plaintiffs. This second Affidavit was filed purportedly pursuant to the current version of R.C. 5301.56.

On April 5, 2012, the Defendants filed their Notice to Preserve Mineral Interests with the Monroe County Recorder.

As set forth above, there is no dispute as to the facts in this case. The Plaintiffs are asking the Court to declare that any royalty interest of the Defendants in the Property has been forfeited under the current version of R.C. 5301.56 as well as the version of the statute as it existed prior to its amendment in 2006. The Defendants assert that their purported interest is only the right to receive a royalty payment and is not a mineral interest that can be forfeited under R.C. 5301.56 and that even if it is such an interest subject to forfeiture, the interest has been preserved by the filing of Defendants' Notice to Preserve Mineral Interest.

Certain requirements must be met before the Court can find that a party is entitled to Summary Judgment as a matter of law.

Civil Rule 56(C) specifically provides that before Summary Judgment may be granted, it must be determined that:

(1). No 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 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 (1977).

The Dormant Minerals Act (" DMA "), as enacted on March 13, 1989, is set forth below in its entirety:

§5301.56 Mineral Interests in Realty.

(A) As used in this section:

(1) "Holder" means the record holder of a mineral interest, and any person who derives the person's rights from, or has a common source with, the record holder and whose claim does not indicate, expressly or by clear implication, that it is adverse to the interest of the record holder.

(2) "Drilling or mining permit" means a permit issued under Chapter 1509., 1513., or 1514. of the Revised Code to the holder to drill an oil or gas well or to mine other minerals.

(B)(1) Any mineral interest held by any person, other than the owner of the surface of the lands subject to the interest, shall be deemed abandoned and vested in the owner of the surface if none of the following applies:

(a) The mineral interest is in coal, or in mining or other rights pertinent to or exercisable in connection with an interest in coal, as described in division (E) of section 5301.53 of the Revised Code.

(b) The mineral interest is held by the United States, this state, or any political subdivision, body politic, or agency of the United States or this state, as described in division (G) of section 5301.53 of the Revised Code.

(c) Within the preceding twenty years, one or more of the following has

occurred:

(i) The mineral interest has been the subject of a title transaction that has been filed or recorded in the office of the county recorder of the county in which the lands are located;

(ii) There has been actual production or withdrawal of minerals by the holder from the lands, from lands covered by a lease to which the mineral interest is subject, from a mine a portion of which is located beneath the lands, or, in the case of oil or gas, from lands pooled, unitized, or included in unit operations, under sections 1509.26 to 1509.28 of the Revised Code, in which the mineral interest is participating, provided that the instrument or order creating or providing for the pooling or unitization of oil or gas interests has been filed or recorded in the office of the county recorder of the county in which the lands that are subject to the pooling or unitization are located;

(iii) The mineral interest has been used in underground gas storage operations by the holder;

(iv) A drilling or mining permit has been issued to the holder, provided that an affidavit that states the name of the permit holder, the permit number, the type of permit, and a legal description of the lands affected by the permit has been filed or recorded, in accordance with section 5301.252 [5301.25.2] of the Revised Code, in the office of the county recorder of the county in which the lands are located;

(v) A claim to preserve the mineral interest has been filed in accordance with division (C) of this section;

(vi) In the case of a separated mineral interest, a separately listed tax parcel number has been created for the mineral interest in the county auditor's tax list and the county treasurer's duplicate tax list in the county in which the lands are located.

(B)(2) A mineral interest shall not be deemed abandoned under division (B)(1) of this section because none of the circumstances described in that division apply, until three years from the effective date of this section.

(C)(1) A claim to preserve a mineral interest from being deemed abandoned under division (B)(1) of this section may be filed for record by

its holder. Subject to division (C)(3) of this section, the claim shall be filed and recorded in accordance with sections 317.18 to 317.201 [317.20.1] and 5301.52 of the Revised Code, and shall consist of a notice that does all of the following:

(a) States the nature of the mineral interest claimed and any recording information upon which the claim is based;

(b) Otherwise complies with section 5301.52 of the Revised Code;

(c) States that the holder does not intend to abandon, but instead to preserve, his rights in the mineral interest.

(C) (2) A claim that complies with division (C)(1) of this section or, if applicable, divisions (C)(1) and (3) of this section preserves the rights of all holders of a mineral interest in the same lands.

(C)(3) Any holder of an interest for use in underground gas storage operations may preserve the holder's interest, and those of any lessor of the interest, by a single claim, that defines the boundaries of the storage field or pool and its formations, without describing each separate interest claimed. The claim is prima-facie evidence of the use of each separate interest in underground gas storage operations.

(D)(1) A mineral interest may be preserved indefinitely from being deemed abandoned under division (B)(1) of this section by the occurrence of any of the circumstances described in division (B)(1)(c) of this section, including, but not limited to, successive filings of claims to preserve mineral interests under division (C) of this section.

(D)(2) The filing of a claim to preserve a mineral interest under division (C) of this section does not affect the right of a lessor of an oil or gas lease to obtain its forfeiture under section 5301.332 [5301.33.2] of the Revised Code.

HISTORY: 142 v S 223. Effective Date: 03-22-1989

The current version of the Dormant Minerals Act, amended effective June 30, 2006, is virtually identical to the previous version set forth above, with the exception that a

"notice" requirement (ORC §5301.56[E]) has been added, whereby the surface owner of the land subject to the Severed Mineral Interest may utilize a statutory process of abandonment. That process requires the surface owner to give notice, (by certified mail, if possible, or by publication) of the intent to have the mineral interest abandoned, to the "holder" of the mineral interest or each holder's successors or assignees "before the mineral interest becomes vested" in the surface owner. (ORC 5301.56[E]). The surface owner (after thirty, but not more than sixty days) then files an Affidavit of Abandonment putting on record the fact that none of the savings conditions outlined in ORC §5301.56(B) have occurred, and therefore the interest is deemed abandoned. The surface owner must then wait an additional thirty (but not more than sixty) days, and if nothing is filed under ORC §5301.56(H), the surface owner may send a letter to the recorder instructing him/her to note on the "Reservation Deed" that the interest has been abandoned.

By its very terms, and in comparison with the current version of the DMA , the previous version of the DMA was self-executing in the sense that nothing was required of the surface owner before the mineral interest was deemed abandoned, except to show that none of the savings conditions set forth in paragraphs/subparagraphs (B)(c)(i)(ii)(iii)(iv)(v)(vi) had occurred within "the preceding twenty years...". The only other qualifications to have the mineral interest deemed abandoned was that the mineral interest could not involve coal (B)(a) and was not a mineral interest "held by the United States, this state, or any political subdivision..." (B)(b). The previous version of the DMA also provided that no mineral interest could be deemed abandoned based upon the absence of the

savings conditions set forth in (B)(1) until three years from the effective date of the law (B)(2).

Defendants assert that the Severed Mineral Interest that is the subject of this action "is not a 'mineral interest' as contemplated by the statute and therefore the Plaintiffs have no right to ask the Court to declare the [abandonment] of this right under the Dormant Minerals Act."

This Court addressed the very issue of whether a royalty interest is subject to the provisions of the previous version of the Dormant Minerals Act in *Cyril T. Burkhart v. George A. Burkhart*, Monroe C.P. CVH 92-278. The Defendants in *Burkhart* argued that because the statute does not provide a definition of "mineral interest", the statute, if read as a whole, should preclude the abandonment of a royalty interest. This Court explicitly rejected that argument, holding "[t]he Court finds that the oil and gas rights, including the royalty interest, in and under the real estate described in Paragraph 1 of the Complaint [...] are owned by the Plaintiffs and that any interests of the Defendants have been abandoned pursuant to the Dormant Minerals Act (ORC 5301.56)." *Cyril T. Burkhart v. George A. Burkhart*, Monroe C.P. CVH 92-278 at 1.

In this case, Defendants claim that "there is clearly a difference between a right to receive a royalty payment and an actual mineral interest in property." Plaintiffs agree that there is a difference, however, a royalty interest remains an interest in realty until the minerals are removed from the ground and materialized as personal property. See 68 O.Jur 3d, Mines and Minerals, Section 8.

This Court finds that the issue of whether a royalty interest may be extinguished by the previous version of the DMA has been previously decided by this Court and that decision is favorable to Plaintiffs' position and contrary to Defendants' argument.

Additionally, the Court further finds that a royalty interest is subject to abandonment under the current version of the Ohio Revised Code §5301.56.

More specifically, the current version of the Dormant Minerals Act, added a definition of "Mineral Interest". ORC §5301.56(A)(3) provides:

> "Mineral Interest" means a fee interest in at least one mineral regardless of how the interest is created and the form of the interest, which may be absolute or fractional or divided or undivided.

This Court finds that the definition of a "Mineral Interest" includes an oil and gas royalty interest, as a royalty interest remains an interest in realty until the minerals are removed from the ground and materialized as personal property. See 68 O.Jur 3d, Mines and Minerals, Section 8.

Moreover, the *Buegel* Court noted that "[a]n oil and gas 'royalty' has been described as that fractional interest in the production of oil and gas that was created by the owner of land, either by reservation when the mineral lease was entered into, or by direct grant to a third person." See *Buegel v. Amos*, 1984 WL 7725 (7th District, 1984), citing 38 American Jurisprudence 2d 670, Gas and Oil, Section 189.

Because a royalty interest is a fractional interest of the oil and gas estate, this Court finds that such an interest falls within the definition of "Mineral Interest" outlined by ORC

§5301.56(A)(3).

In the present case, the Court finds that the undisputed facts of this case reflect that during the twenty (20) year period immediately preceding every date in which the previous version of ORC §5301.56 was effective, none of the savings conditions outlined by ORC §5301.56(B) [quoted above] occurred to keep the Severed Mineral Interest from being deemed abandoned. Defendants are unable to show any evidence to the contrary. The Severed Mineral was then deemed abandoned as of March 13, 1992, allowing for the three year grace period. Accordingly, the Court finds that the Defendants no longer have any right, title or interest in and to the mineral estate under Plaintiffs' property.

Furthermore, notwithstanding the above analysis, this Court further finds that the amended version of the DMA (effective after June 30, 2006) also operates to extinguish Defendants' interest. As outlined above, the amended version of Ohio Revised Code §5301.56 added a notice requirement. The amended version provides that the holder of a Severed Mineral Interest may file a claim at some point after he receives a notice of abandonment to stop the statutory process. See ORC §5301.56(H).

More specifically, Ohio Revised Code §5301.56(H)(1) provides:

> If a holder or a holder's successors or assigns claim that the mineral interest that is the subject of a notice under division (E) of this section has not been abandoned, the holder or the holder's successors or assignees, not later than sixty days after the date on which the notice was served or published, as applicable, shall file in the office of the County Recorder of each County where the land that is subject to the mineral interest is located one of the following:
>
> (a) A claim to preserve the mineral interest in accordance with division (C)

of this section;

(b) An affidavit that identifies an event described in division (B)(3) of this section that has occurred within the twenty years immediately preceding the date on which the notice was served or published under division (E) of this section.

The holder or the holder's successors or assignees shall notify the person who served or published the notice under division (E) of this section of the filing under this division.

Accordingly, this Court finds the if a severed interest holder files a notice under paragraph (H) above, the landowner's statutory remedy to abandon a Severed Mineral Interest has been exhausted, requiring the filing of a lawsuit. At that point, the severed interest holder must be required to show why the severed interest has not been abandoned. A preservation notice itself cannot be the basis for establishing that the mineral interest has not been abandoned. The holder must show the existence of one of the savings conditions under ORC §5301.56(B).

Again, the Court finds that Defendants in this case have not shown that existence of any of the savings conditions provided for in ORC §5301.56(B).

Accordingly, the Court finds that the Severed Mineral Interest in the within case is hereby deemed abandoned under the current version of the Dormant Minerals Act as well.

Based on all of the foregoing, the Court finds that no genuine issue of material fact exists in the within matter and Plaintiffs are entitled to judgment as a matter of law under both the prior and current version of the Dormant Minerals Act, Ohio Revised Code §5301.56.

Plaintiffs' Motion for Summary Judgment is granted. The Clerk shall note the same on both the Reservation Deed (Volume 123, Page 186, Deed Records of Monroe County, Ohio) and the Claim to Preserve (Monroe County, Ohio Official Records, Volume 217, Pages 263-265).

Costs assessed in full to the Defendants. Judgment granted the Clerk of Courts to collect on her costs.

IT IS SO ORDERED.

Hon. Julie R. Selmon
Dated: *Enter as of the date of filing*

Copies to: Craig E. Sweeney, Esquire
Stephen R. McCann, Esquire

C: \ General Entries \
marty - dennis entryonSummaryJudgmentMotions
April 10, 2013 (2:38PM)Jay

Monroe County
Common Pleas
Court
- - -
Julie R. Selmon
Judge

bk

STATE OF OHIO	)	IN THE COURT OF APPEALS OF OHIO
	)	
MONROE COUNTY	) SS:	SEVENTH DISTRICT
DAVID W. BAYES, et al.,	)	
	)	CASE NO. 13 MO 20
PLAINTIFFS-APPELLANTS,	)	
	)	
VS.	)	JUDGMENT ENTRY
	)	
S. TODD SYLVESTER, et al.,	)	
	)	
DEFENDANTS-APPELLEES.	)	

This Court sua sponte holds this appeal in abeyance pending decisions by the Ohio Supreme Court on the same issues presented in this appeal. Further proceedings stayed until further order from this Court.

JUDGE GENE DONOFRIO

JUDGE JOSEPH J. VUKOVICH

JUDGE CHERYL L. WAITE

Exhibit B

mb

STATE OF OHIO)
)
MONROE COUNTY) SS:

IN THE COURT OF APPEALS OF OHIO

SEVENTH DISTRICT

DONALD W. BAYES et al.)
)
PLAINTIFFS-APPELLANTS)
)
VS.)
)
S. TODD SYLVESTER et al.)
)
DEFENDANTS-APPELLEES)

CASE NO. 13 MO 20

JUDGMENT ENTRY

On consideration of Appellees' Motion to Lift the Stay of Proceedings and the Appellant's August 13, 2015 Memorandum in Opposition, it is ordered that the motion to lift the stay is denied.

Stay continues pending final ruling by the Ohio Supreme Court on the issue presented in this appeal.

JUDGE GENE DONOFRIO

JUDGE CHERYL L. WAITE

JUDGE CAROL ANN ROBB

Exhibit C

STATE OF OHIO)
)
MONROE COUNTY) SS:

IN THE COURT OF APPEALS OF OHIO
SEVENTH DISTRICT

DONALD W. BAYES, ET AL.,

PLAINTIFFS-APPELLANT,

VS.

S. TODD SYLVESTER, ET AL.,

DEFENDANTS-APPELLEES.

CASE NO. 13 MO 0020

JUDGMENT ENTRY

Appellees have filed a motion to lift the stay of proceedings ordered by this Court on December 8, 2014. We lifted that stay on October 19, 2016. Motion overruled as moot.

Oral argument to be scheduled.

Appellees motion to file supplemental authority is granted. This Court will consider *Corban v. Chesapeake Exploration, L.L.C.*, Slip Opinion No. 2016-Ohio-5796, and *Farnsworth v. Burkhart*, Slip Opinion No. 2016-Ohio-5816, as part of this appeal.

JUDGE GENE DONOFRIO

JUDGE CHERYL L. WAITE

JUDGE CAROL ANN ROBB

jh

Exhibit D

IN THE COURT OF COMMON PLEAS
NOBLE COUNTY, OHIO

2017 FEB 22 PM 1:59

GUDRUN MCAULEY
PLAINTIFF
VS
DONALD L. BROOKER
DEFENDANT

CASE NO. 214-0146

JOURNAL ENTRY

This matter is before the Court on cross motions for Summary Judgment.

The parties have comprehensibly briefed the issues. The facts as set forth by the parties are not in dispute.

The Court is persuaded that the Atkinson mineral interest was reserved by the Estate under the 1961 deed.

The Dormant Mineral Act argument is more troubling.

Under the 2006 version, the Legislature goes to great lengths to set forth a remedy to surface owners, and then takes that remedy away, for all practical purposes, in Subsection 5301.56(J) (1). As now interpreted, in 1989, the Legislature did not mean what it said, and in 2006 the Legislature meant what it said.

Motion of Defendant for Summary Judgment is granted.

Motion of Plaintiff for Summary Judgment is overruled and denied.

So ordered.

JOHN W. NAU, JUDGE

FINAL APPEALABLE ORDER
Copy to be sent per Civ. R. 5 (B),
to all parties not in default

Exhibit E