[Cite as *Fonzi v. Brown*, 2020-Ohio-3631.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MONROE COUNTY

HARRY A. FONZI, III and LINDA GRIMES

Plaintiffs-Appellants,

v.

GARY D. BROWN and ECLIPSE RESOURCE I, LP

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 19 MO 0012

Civil Appeal from the
Court of Common Pleas of Monroe County, Ohio
Case No. 2017-154

BEFORE:
Cheryl L. Waite, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Reversed.
Summary Judgment Entered in Favor of Appellants.

Atty. Mark Fischer, Yukevich, Marchetti, Fischer, Zangrilli, P.C., 11 Stanwix Street, Suite 1024, Pittsburgh, Pennsylvania 15222-1324, for Plaintiffs-Appellants

Atty. Daniel P. Corcoran, *Atty. Adam J. Schwendeman*, Theisen Brock, LPA, 424 Second Street, Marietta, Ohio 45750, for Defendant-Appellee, Appellee, Gary D. Brown

Atty. Holly S. Planinsic, Herndon, Morton, Herndon & Yaeger, 83 Edgington Lane, Wheeling, West Virginia 26003, for Eclipse Resources

Atty. Brant T. Miller, Gordon & Rees LLP, 707 Grant Street, 38th Floor, Pittsburgh, Pennsylvania 15219, for Eclipse Resources.

Dated: June 1, 2020

WAITE, P.J.

{¶1} In this Dormant Mineral Act ("DMA") action, Appellants Harry A. Fonzi, III ("Harry III") and Linda Grimes (collectively referred to as Appellants) appeal an April 29, 2019 Monroe County Court of Common Pleas judgment entry granting summary judgment in favor of Appellee Gary D. Brown. We note that despite being a named defendant in the trial court proceedings, Eclipse Resources I, L.P. ("Eclipse") is not a party to this appeal. Preliminarily, Appellants argue that the trial court erroneously determined that they lacked standing to contest the abandonment process at issue in this case. As to the merits of the trial court's decision, Appellants argue that the court erred in finding that Appellee exercised reasonable due diligence in locating potential heirs before serving notice of abandonment by publication. In the alternative, Appellants argue that an oil and gas lease entered into between Appellee and Eclipse is a savings event that prevented abandonment of the mineral interests. For the reasons provided, Appellants' arguments regarding standing and notice by publication have merit. The remaining argument regarding the lease is moot. Accordingly, as both parties agree that there are no outstanding issues of material fact, the judgment of the trial court granting summary judgment to Appellee is reversed and summary judgment is entered in favor of Appellants.

Factual and Procedural History

{¶2} On June 2, 1952, Elizabeth Henthorn Fonzi (also referred to as Elizabeth "Henthorne" Fonzi) inherited real estate and mineral interests located in Salem Township,

Monroe County. The warranty deed that conveyed those interests noted that she resided in Pittsburgh, Pennsylvania. Elizabeth was married to Harry A. Fonzi II ("Harry II"). The marriage between Elizabeth and Harry II produced two children, Harry III and Linda.

{¶3} On October 4, 1952, Harry II and Elizabeth transferred the surface rights to Donald and Eva Jean Brown. Within the deed, Harry II and Elizabeth reserved a one-half interest in the royalty interests. The deed specifically stated that Harry II and Elizabeth resided in Finleyville, Washington County, Pennsylvania. At some point thereafter, Harry II and Elizabeth divorced and both later remarried. Neither second marriage produced additional children. Harry II passed away on July 7, 1996. His probate paperwork reflects that his children were co-executors of his estate and his sole heirs. According to Appellants, Elizabeth died intestate on August 24, 1989. (Plaintiffs' Motion in Opposition to Defendant's Motion for Summary Judgment, Exh. A.) Her second husband preceded her in death.

{¶4} On January 13, 2006, Donald and Eva Jean transferred the surface rights of the property to Appellee through a general warranty deed. On November 12, 2012, Appellee entered into an oil and gas lease with Eclipse. The lease was recorded on December 6, 2012. The lease provided a five-year primary term with an option to extend the term for another five years. The lease also provided a typical secondary term that extended the lease beyond the primary term in the event that oil and gas were producing in paying quantities.

{¶5} Seeking to have the Fonzi interest abandoned, Appellee hired an attorney, Kristopher Justice. According to Justice's deposition, he determined that Harry II and Elizabeth were both deceased, but could not locate any potential heirs. Justice stated

that he searched the Monroe County public records and additionally conducted an internet search.

{¶6} On March 21, 2013, Appellee published notice of intent to declare the Fonzi interest abandoned in the Monroe County Beacon. On April 2, 2013, Appellee filed notice of intent to declare the Fonzi interest abandoned. On April 29, 2013, Appellee recorded an affidavit of abandonment.

{¶7} The timeline of events from the recording of the affidavit of abandonment through the filing of the complaint is unclear in this matter. The facts do not indicate how Appellants learned that their interests had been deemed abandoned. Regardless, on May 12, 2017, Appellants filed a complaint against Appellee. Again, Eclipse was originally a named defendant, however, it is not involved in the instant appeal. The complaint sought declaratory judgment and quiet title. In summation, Appellants claimed that Appellee failed to exercise reasonable due diligence in attempting to locate potential heirs of the Fonzi interest before completing the abandonment process. According to Appellants, because notice was improper, their interests in the minerals remain intact. In the alternative, Appellants argued that the oil and gas lease between Appellee and Eclipse constitutes a savings event that prevented abandonment.

{¶8} On July 20, 2017, Appellee filed an answer and counterclaim. The counterclaim sought declaratory judgment and quiet title based on the DMA and common law abandonment. Unlike the companion case, *Fonzi v. Miller* (case number 19 MO 0011), the counterclaim in this case did not raise the Marketable Title Act. On August 24, 2017, the trial court dismissed the common law abandonment claim raised within

Appellee's counterclaim. On January 24, 2018, Appellants filed an amended complaint which added new facts but did not raise any new claims.

{¶9} On January 18, 2019, the parties filed competing motions for summary judgment. On April 29, 2019, the trial court granted summary judgment in favor of Appellee. The trial court made several findings: (1) Appellants lacked standing to bring the action as they had not proved that they are lineal descendants of Harry II and Elizabeth or that the mineral interest was transferred to them, (2) Appellee took reasonable efforts to locate potential heirs, (3) Appellants cannot use the 2012 oil and gas lease as a savings event as their interest is limited to royalties, and (4) Appellants failed to file a claim to preserve. It is from this entry that Appellants timely appeal.

Summary Judgment

{¶10} An appellate court conducts a *de novo* review of a trial court's decision to grant summary judgment, using the same standards as the trial court set forth in Civ.R. 56(C). *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Before summary judgment can be granted, the trial court must determine 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, (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most favorably in favor of the party against whom the motion for summary judgment is made, the conclusion is adverse to that party. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). Whether a fact is "material" depends on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc.*, 104 Ohio App.3d 598, 603, 662 N.E.2d 1088 (8th Dist.1995).

{¶11} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." (Emphasis deleted.) *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 662 N.E.2d 264 (1996). If the moving party carries its burden, the nonmoving party has a reciprocal burden of setting forth specific facts showing that there is a genuine issue for trial. *Id*. at 293. In other words, when presented with a properly supported motion for summary judgment, the nonmoving party must produce some evidence to suggest that a reasonable factfinder could rule in that party's favor. *Brewer v. Cleveland Bd. of Edn.*, 122 Ohio App.3d 378, 386, 701 N.E.2d 1023 (8th Dist.1997).

{¶12} The evidentiary materials to support a motion for summary judgment are listed in Civ.R. 56(C) and include the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact that have been filed in the case. In resolving the motion, the court views the evidence in a light most favorable to the nonmoving party. *Temple*, 50 Ohio St.2d at 327.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED BY FINDING THAT THE APPELLANTS DID NOT HAVE STANDING UNDER ODMA TO CHALLENGE THE ABANDONMENT OF THE APPLICABLE ROYALTY INTEREST.

{¶13} Appellants point out that their motion for summary judgment included an affidavit from Harry III and probate records from the estate of Harry II. The affidavit stated that Harry III and Linda are the children of and the sole beneficiaries of both Harry II and

Elizabeth. The probate records for Harry II demonstrate that Harry III and Linda are the sole heirs to his estate. Appellants argue that this is more than sufficient to demonstrate that they are lineal descendants of Elizabeth and Harry II. Appellee concedes that Appellants have shown that they are the lineal descendants of Harry II and Elizabeth.

{¶14} There is currently no statutory or caselaw that specifies the level of evidence that must be presented in order to prove individuals who claim to be heirs are, in fact, heirs. Thus, this issue presents a matter of first impression.

{¶15} Appellants filed an affidavit from Harry III on April 7, 2017. (1/18/19 Plaintiffs' Motion for Summary Judgment, Exh. 1.) The affidavit averred that Harry III and Linda are the sole children of Harry II and Elizabeth. Both Harry II and Elizabeth are deceased and Harry III and Linda are the sole heirs to the respective estates. Appellants also filed documents pertaining to the estate of Harry II, including a petition for grant of letters, oath of personal representative, and Harry II's will. The petition for grant of letters states that Harry II died on July 7, 1996 in Pittsburgh, PA. Harry III and Linda are listed, along with their addresses, as the petitioners. Harry II's address at the time of his death was in Washington County, Pennsylvania. The oath of personal representative asserts that Harry III and Linda are the executors of their father's estate. In the final document, Harry II's will, he bequeathed all his personal and real property to his "two (2) children, LINDA M. GRIMES and HARRY A. FONZI, III, in equal shares." (Plaintiffs' Motion for Summary Judgment, Exh. 1.) Elizabeth died intestate. Her second husband preceded her in death and their marriage did not produce any children.

{¶16} Appellants have presented sufficient evidence to demonstrate that they are lineal descendants of Elizabeth and Harry II. In addition to Harry II's probate records,

Harry III filed an affidavit averring that he and his sister are the sole heirs to both their parents' estates. Appellee concedes this fact. Appellee appears to take issue only with his contention that Appellants untimely presented this information. However, most of this information was contained in the interrogatories, and both the affidavit and probate records were attached to Appellants' motion for summary judgment.

{¶17} As Appellants have established that they are lineal descendants of Elizabeth and Harry II, their first assignment of error has merit and is sustained.

ASSIGNMENT OF ERROR NO. 2

> THE TRIAL COURT ERRED BY FINDING THAT THE APPELLANTS' MINERAL ROYALTY INTEREST WAS ABANDONED UNDER ODMA

{¶18} Appellants contend that Appellee failed to exercise reasonable due diligence in searching for potential heirs to the Fonzi interest before serving notice by publication. Appellants argue that Appellee's counsel limited his search to Monroe County public records despite having knowledge that Harry II and Elizabeth lived in Washington County, Pennsylvania as specifically stated in the reservation deed. Appellants contend that, had Appellee conducted a search in Washington County, the estate documents for Harry II would have been easily found and would have revealed that Harry III and Linda were heirs to the Fonzi interest. Appellants also contend that the uniqueness of the name "Harry Fonzi" should have alerted Appellee that an internet search may have been helpful.

{¶19} In response, Appellee argues that he performed a complete public records search in Monroe County and that the law does not require a search beyond the public

records in the county where the property is located. Thus, he argues that he was not required to search any public records of Washington County. Even so, Appellee argues that this is a matter involving *in rem jurisdiction,* which refers to jurisdiction pertaining to property. Although interested parties must be given notice in DMA matters, Appellee asserts that the property's location is fixed and a trial court may reasonably expect that the name of any person with an interest in the property would be available through a public records search in the county where the property is located. As Ohio law does not recognize the "whatever it takes" standard, Appellee asserts that the uniqueness of the Fonzi name did not trigger any special duty.

{¶20} The notice requirements of the DMA are found within R.C. 5301.56(E)(1) which provides:

> Serve notice by certified mail, return receipt requested, to each holder or each holder's successors or assignees, at the last known address of each, of the owner's intent to declare the mineral interest abandoned. If service of notice cannot be completed to any holder, the owner shall publish notice of the owner's intent to declare the mineral interest abandoned at least once in a newspaper of general circulation in each county in which the land that is subject to the interest is located. The notice shall contain all of the information specified in division (F) of this section.

{¶21} The parties spend great efforts comparing this subsection to cases that have interpreted similar notice statutes. However, we have addressed the DMA notice requirement in terms of the requisite level of reasonable due diligence in several other

cases and need not delve into other notice statutes. See *Harmon v. Capstone Holding Co.*, 7th Dist. Noble No. 14 NO 0413, 2017-Ohio-4155; *Shilts v. Beardmore*, 7th Dist. Monroe No. 16 MO 0003, 2018-Ohio-863, appeal not allowed in *Shilts v. Beardmore*, 153 Ohio St.3d 1433, 2018-Ohio-2639, 101 N.E.3d 464; *Sharp v. Miller*, 2018-Ohio-4740, 114 N.E.3d 1285 (7th Dist.); *Miller v. Mellott*, 2019-Ohio-504, 130 N.E.3d 1021 (7th Dist.).

{¶22} In *Harmon,* we held that a surface owner must attempt to locate potential heirs of a mineral interest. *Id.* at ¶ 16. In *Shilts,* we acknowledged that a surface owner may serve notice by publication if a reasonable search fails to reveal potential heirs to the mineral interests. *Id.* at ¶ 14-15. We stressed that "[b]ecause the standard relies on the reasonableness of any party's actions, whether that party's efforts constitute 'due diligence' will depend on the facts and circumstances of each individual case. In other words, reasonable actions in one case may not be reasonable in another case." *Id.* at ¶ 17.

{¶23} In *Sharp*, the appellants argued that an internet search should be required in order to constitute reasonable due diligence. *Id.* at ¶ 17. We rejected that bright-line approach, and held that the public records search was sufficient to constitute reasonable due diligence as there was no reason to believe that, based on the facts available to the surface owners, an exhaustive internet search would have been helpful in locating potential heirs. *Id.* at ¶ 21.

{¶24} Appellee contends that our conclusion was based on the assertion that a search would not have revealed the names of the heirs, and we considered the end-result over the process employed. Contrary to Appellee's assertion, our conclusion was not end-result driven and does not require a researcher to prove that a specific search would

have revealed the heirs. Appellee refers to a single sentence within the *Sharp* Opinion where we stated that there was no evidence that a simple internet search would have revealed the Sharps' interest. Reading that sentence in context, we merely pointed out that requiring an internet search in that case would have been unreasonable based on the limited facts known to the researcher. The only names known to the researcher were the last names "Smith" and "Poole." Public records searches did not reveal the last name "Sharp." The appellants argued that a more broad-based internet search would have connected the last name "Sharp" to "Smith" and "Poole." However, the facts and circumstances of that case did not reveal there was any specific knowledge that would have assisted the researcher and lead him or her to broadly search the internet. Thus, we determined that it would not have been reasonable to require the researcher to conduct an exhaustive internet search in that case.

{¶25} Requiring a party to prove that a search would have revealed the specific heirs is contrary to the spirit of the law, which clearly focuses on the reasonableness of the opposing party's search process. In reading the notice requirement, it states that a party may serve notice by publication only *after* a search does not reveal heirs. Any given search must be conducted in a manner that demonstrates the searcher exercised due diligence in conducting the search and the search itself was reasonable. The entire goal of the search is to uncover potential interest-holders so that they can receive appropriate notice of the request to declare those interests abandoned. The search must, then, be geared towards this goal in a reasonable, diligent fashion.

{¶26} This case is in no way similar to *Sharp*. Here, Appellants assert that it is unreasonable for Appellee to have limited his search to Monroe County when he had

specific knowledge that the Fonzi family did not reside in Monroe County and did reside in Finleyville, Washington County, Pennsylvania. This is completely inapposite to the facts of *Sharp*, where the surface owners lacked any specific knowledge that would have reasonably extended their search beyond the public records of the county where the property was located or would have assisted in some further search.

{¶27} The Fifth District similarly analyzed the reasonable due diligence standard in *Gerrity v. Chervenak, Trustee of Chervenak Family Trust*, 2019-Ohio-2771, -- N.E.3d -- (5th Dist.), appeal allowed by *Gerrity v. Chervenak,* 157 Ohio St.3d 1440, 2019-Ohio-4211, 132 N.E.3d 700. In *Gerrity,* the surface owner searched the public records in two counties. The first was Guernsey County, where the property was located. *Id.* at ¶ 25. The second was Cuyahoga County, because Cuyahoga County was the last known address of the mineral interest owner. Neither of these searches revealed information leading to the identity of additional heirs. Because these searches did not reveal any additional information that would have reasonably required or assisted in an extended search, the *Gerrity* court found the two-county search to be reasonable. *Id.* at ¶ 26.

{¶28} In this case, Justice stated that he searched the public records within the Monroe County courthouse in late 2011. (7/25/18 Justice Depo., p. 19.) According to Justice, he began by searching the Monroe County Recorder's Office records, where he discovered the Fonzi reservation. (7/25/18 Justice Depo., p. 27.) At that point, Justice learned from the reservation deed that the Fonzis lived in Finleyville, Washington County, Pennsylvania.

{¶29} Justice searched the Monroe County Auditor and Probate records but did not find any information regarding potential heirs during these searches. Justice was

asked whether he attempted to search any public records in Washington County after learning that the Fonzis resided in that county. Justice responded that he did not because the property was located within Monroe County and he believed that any relevant records should be located within that county. He also rationalized that the reservation deed was old, as it was executed in 1952. (10/8/18 Justice Depo., p. 48.)

{¶30} He claims that he then conducted an internet search, but could not remember the details of that search. He did remember finding a listing for “Harry Fonzi” on a website called “FindAGrave.com,” however, the site did not provide any specifics. (7/25/18 Justice Depo., p. 35.)

{¶31} We have made it abundantly clear that what constitutes reasonable due diligence will depend on the facts and circumstances of each case. We again decline to establish a bright-line rule requiring a specific search process, and reaffirm that what constitutes reasonable due diligence will depend on the facts and circumstances of each case. We emphasize that R.C. 5301.56(E)(1) makes it clear that since notice by publication is a last resort, a sincere, diligent effort by the researcher is required before service by publication is appropriate.

{¶32} The researcher in this case knew that the Fonzis lived in Washington County, Pennsylvania at the time they filed their reservation. The reservation deed expressly stated that this is where the Fonzis lived. As in *Gerrity*, the last known address of a mineral interest holder was not in the county where the property was located. Justice conceded that he learned this fact early in his search process. This fact alone would have led any reasonable researcher to extend the search into Washington County, Pennsylvania since it should be apparent at that point a search of Monroe County records,

exclusively, may not lead to discovery of any Fonzi heirs. Justice admitted he failed to take the next, logical step.

{¶33} Appellee urges that it is unreasonable to require him to extend a search into another state, but provides no logical reason in support. The fact that the Fonzis lived in another state does not relieve the researcher of the burden to conduct a reasonable, diligent search. Appellee had specific knowledge that the Fonzis lived in Finleyville, Washington County. The failure to conduct any search into the Washington County public records after learning that this is where the Fonzis resided is *per se* unreasonable based on the facts of this case. As such, Appellee failed to comply with the notice requirements of R.C. 5301.56(E) and notice by publication was improper. Accordingly, Appellants' second assignment of error has merit and is sustained.

ASSIGNMENT OF ERROR NO. 3

> THE TRIAL COURT ERRED BY FINDING THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT REGARDING WHETHER APPELLEE EXERCISED REASONABLE DILIGENCE TO LOCATE THE HOLDERS PRIOR TO PUBLISHING NOTICE OF ABANDONMENT UNDER ODMA AND THAT APPELLEE'S NOTICE SATISFIED THE REQUIREMENTS OF ODMA.

{¶34} Appellants alternatively argue that an oil and gas lease entered into between Appellee and Eclipse acts a savings event under R.C. 5301.56(B)(3). The lease is dated December 6, 2012, well before Appellee filed his affidavit of abandonment. Because an oil and gas lease is a savings event and the lease was entered into within

the twenty years before the affidavit of abandonment was filed, Appellants believe the lease act to preserve their interests. Appellants concede that they are not a party to that lease, they argue that they could never be a party to a lease, because they only own an interest in the royalties.

{¶35} Due to the resolution of Appellants' second assignment of error, however, this assignment of error is moot.

Conclusion

{¶36} Appellants argue that the trial court erroneously determined that they lacked standing to contest the abandonment process. Appellants also argue that the trial court erred in finding that Appellee exercised reasonable due diligence in attempting to locate potential heirs before serving notice of abandonment by publication. Additionally, Appellants argue that an oil and gas lease entered into between Appellee and Eclipse acts as a savings event. For the reasons provided, Appellants' arguments regarding standing and notice of publication have merit. The remaining argument regarding the lease is moot. As both parties filed competing motions for summary judgment, the parties agree that there is no outstanding question of material fact in this case. Accordingly, the judgment of the trial court granting summary judgment to Appellee is reversed and summary judgment is entered in favor of Appellants.

Donofrio, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, Appellants' first and second assignments of error are sustained and their third assignment is moot. It is the final judgment and order of this Court that the summary judgment in favor of Appellee from the Court of Common Pleas of Monroe County, Ohio, is reversed. Summary judgment is hereby entered in favor of Appellants. Costs to be taxed against the Appellee.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.