[Cite as *Fonzi v. Miller*, 2020-Ohio-3739.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MONROE COUNTY

HARRY A. FONZI, III and LINDA GRIMES

Plaintiffs-Appellants,

v.

ALLEN B. MILLER, M. CRAIG MILLER, BRENDA THOMAS, and

ECLIPSE RESOURCE I, LP

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 19 MO 0011

Civil Appeal from the
Court of Common Pleas of Monroe County, Ohio
Case No. 2017-153

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

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

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 Defendants-Appellees, Allen B. Miller, M. Craig Miller, and Brenda Thomas.

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 29, 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 25, 2019 Monroe County Court of Common Pleas judgment entry granting summary judgment in favor of Appellees Allen B. Miller, M. Craig Miller, Brenda Thomas, and Eclipse Resource I, LP (collectively referred to as "Appellees"). Despite being a party at the trial court level, Eclipse Resource is not a party to this appeal. As a threshold issue, Appellants argue that the trial court erroneously determined that they lacked standing to contest the abandonment process at issue in this case. Appellants contend the trial court erred in finding that Appellees exercised reasonable due diligence in attempting to locate potential heirs before serving notice of abandonment by publication. Appellants also argue that an oil and gas lease entered into between Appellees' predecessor in land and Premiere Land Services ("Premiere") is a savings event that prevented abandonment of their mineral interests. For the reasons provided, Appellants' arguments regarding standing and notice by publication have merit. The remaining argument regarding the savings event is moot. Accordingly, as the parties agree there is no issue of material fact, the judgment of the trial court granting summary judgment to Appellees is reversed and

summary judgment is entered in favor of Appellants. The matter is remanded for consideration of Appellees' Marketable Title Act ("MTA") counterclaim.

Factual and Procedural History

{¶2} On June 2, 1952, Elizabeth Henthorn Fonzi (also referred to as Elizabeth "Henthorne" Fonzi) inherited a one-third interest in real estate and mineral interests situated in Salem Township, Monroe County. The recorded warranty deed stated that Elizabeth lived in Pittsburgh, Pennsylvania. Elizabeth was married to Harry A. Fonzi, II ("Harry II"). It is unclear when they married. The marriage produced two children, Harry III and Linda.

{¶3} On July 17, 1952, Harry II and Elizabeth deeded the surface rights of the property at issue to Everett W. and Pearl M. Henthorn. Within the deed, Harry II and Elizabeth jointly reserved a one-third interest in one-eighth of the oil and gas royalties that Elizabeth inherited. The reserving deed specifically stated that Harry II and Elizabeth resided in Finleyville, Washington County, Pennsylvania.

{¶4} At some point thereafter, Harry II and Elizabeth divorced and both later remarried. Neither subsequent marriage produced any children. Estate records show that 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 an affidavit filed by Harry III, Elizabeth died intestate on August 24, 1986. (2/15/19 Plaintiffs' Motion in Opposition to Defendant's Motion for Summary Judgment, Exh. A.) Elizabeth's second husband preceded her in death.

{¶5} On July 21, 1977, Everett and Pearl transferred the surface rights to Aaron and Charlene Miller. On October 5, 2005, Aaron and Charlene entered into an oil and

gas lease with Premiere. On September 30, 2010, Aaron and Charlene transferred the surface rights to Appellees. The Premiere lease was cancelled and surrendered on December 12, 2011. It is unclear whether the lease lead to any production of oil and gas.

{¶6} Seeking to have the Fonzi interest abandoned, in 2011 Appellees hired an attorney, Kristopher Justice, to commence the abandonment process. During his search, Justice discovered the reservation deed executed by the Fonzis. According to Justice's deposition, he determined that Harry II and Elizabeth were both deceased but he could not locate any potential heirs. Justice stated that he searched the Monroe County public records and additionally conducted an internet search. He learned that the Fonzis had moved to Washington County, Pennsylvania, but admits that after discovering this information he did not conduct any search in that county.

{¶7} On November 17 and December 1, 2011, Appellees published a notice of intent to declare the interest abandoned in the Monroe County Beacon. On January 10, 2012, Appellees recorded an affidavit of abandonment. On April 6, 2012, Appellees recorded a corrected affidavit of abandonment.

{¶8} On December 8, 2012, Appellees entered into an oil and gas lease with Eclipse. The lease provided for a five-year primary term and included a typical secondary term. The lease also provided Eclipse with the option of extending the primary term an additional five-years. The lease was apparently amended on February 2, 2016.

{¶9} The timeline of events from the recording of the affidavit of abandonment in April of 2010 through the filing of the complaint in this matter is unclear. The record also does not reveal how Appellants learned that their interests had been deemed abandoned. Regardless, on May 12, 2017, Appellants filed a complaint against Appellees. As

previously noted, Eclipse Resources was originally a named defendant, however, they are not involved in the instant appeal. The complaint sought quiet title and declaratory judgment. In summation, Appellants claimed that Appellees failed to exercise reasonable due diligence in attempting to locate potential heirs of the Fonzi interest before commencing the abandonment process. Because the abandonment process was flawed, their interests in the minerals remain intact. In the alternative, Appellants contended that the October 5, 2005 Premiere oil and gas lease was a savings event that prevented a declaration of abandonment.

{¶10} On July 20, 2017, Appellees filed an answer and counterclaim. Among the defenses raised by Appellees, they asserted that Appellants failed to establish ownership of the interest at issue, thus lacked standing. As to the counterclaim, Appellees sought declaratory judgment and quiet title pursuant to R.C. 5301.56, the marketable title act, and common law abandonment.

{¶11} On August 24, 2017, the trial court granted Appellants' request to dismiss the common law abandonment counterclaim. On September 19, 2017, Appellants filed an answer to the remaining counterclaims. On January 24, 2018, Appellants filed an amendment to their complaint which included additional facts, but did not raise any new claims. Appellees filed an answer to the amended complaint on February 7, 2018.

{¶12} On January 18, 2019, the parties filed competing motions for summary judgment. In Appellees' motion they sought summary judgment pursuant to the DMA and, in the alternative, the MTA. On April 25, 2019, the trial court granted summary judgment in favor of Appellees. The trial court made several findings: (1) Appellants lacked standing to bring the action, as they failed to prove that they are lineal descendants

of Harry II and Elizabeth Fonzi or that the mineral interest was transferred to them, (2) Appellees used reasonable due diligence in attempting to locate potential heirs, (3) Appellants cannot use the 2005 oil and gas lease as a savings event as their interest is limited to royalties, and (4) Appellants failed to file a timely claim to preserve. The court did not address Appellees' MTA counterclaim. It is from this entry that Appellants timely appeal.

Summary Judgment

{¶13} 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).

{¶14} "[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).

{¶15} 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.

{¶16} Appellants point out that Harry III filed an affidavit averring that he and his sister, Linda, are the sole heirs of Harry II and Elizabeth. Appellants also assert that the estate records for Harry II demonstrate that Harry III and Linda are the sole beneficiaries under his will. Appellants argue that this is more than sufficient to demonstrate that they are lineal descendants of Harry II and Elizabeth, thus have standing to contest the abandonment process. Appellees concede that Appellants have presented evidence that they are lineal descendants of Harry II and Elizabeth.

{¶17} There is currently no statutory or caselaw that specifies the amount 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.

{¶18} Appellants filed an affidavit from Harry III on April 7, 2017. (1/18/19 Plaintiff's Motion for Summary Judgment, Exh. 1.) In the affidavit it was averred that Harry III and Linda are the sole children from the marriage of Harry II and Elizabeth. While both Harry II and Elizabeth entered second marriages following their divorce, neither remarriage produced additional children. Both Harry II and Elizabeth are deceased and Harry III and Linda are the sole heirs to their respective estates. Appellants also filed documents pertaining to the estate of Harry II, including: a petition for grant of letters, oath of personal representative (Harry III), 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 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." (Plaintiff's Motion for Summary Judgment, Exh. 1.) It does not appear that Elizabeth's probate records were made part of the record.

{¶19} Based on this record, there is evidence to establish Appellants' standing in the form of Harry II's probate records and Harry III's affidavit. Appellees concede that this is sufficient to demonstrate standing and take issue only with their belief that Appellants

untimely presented this information. However, both the affidavit and probate records were attached to Appellants' motion for summary judgment.

{¶20} As the evidence shows that Appellants are lineal descendants of Harry II and Elizabeth, their first assignment of error has merit and is sustained.

ASSIGNMENT OF ERROR NO. 2

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

{¶21} Appellants contend that Appellees failed to exercise reasonable due diligence in searching for potential heirs to the Fonzi interest before serving notice by publication. Appellants argue that Appellees' counsel limited his search to Monroe County public records despite having actual knowledge that Harry II and Elizabeth moved to Finleyville, which is located within Washington County, Pennsylvania. Appellants contend that had Appellees conducted a search in Washington County, the estate documents for Harry II would have been easily discovered 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 Appellees that an internet search may have been helpful.

{¶22} In response, Appellees argue that the statute does not require a search beyond the public records in the county where the property is located. Thus, they believe that they were only required to search the public records of Monroe County. Even so, Appellees argue 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, Appellees assert 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, Appellees assert that the uniqueness of the Fonzi name did not trigger any special duty.

{¶23} The notice requirement of the DMA is found within R.C. 5301.56(E)(1) which provides that:

> 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.

{¶24} 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.).

{¶25} 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.

{¶26} 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.

{¶27} Appellees contend that our conclusion was based on the assertion that a specific search would not have revealed the names of the heirs, and we considered the end-result over the process employed. Contrary to Appellees' 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. Appellees refer 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 not have been reasonable 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.

{¶28} 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.

{¶29} This case is in no way similar to *Sharp*. Here, Appellants assert that it is unreasonable for Appellees to have limited their search to Monroe County when they 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.

{¶30} 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.

{¶31} 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.

{¶32} 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.)

{¶33} 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.)

{¶34} 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.

{¶35} 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 that next, logical step.

{¶36} Appellees urge that it is unreasonable to require them 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. Appellees 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, Appellees 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.

{¶37} Appellees additionally sought summary judgment on their MTA counterclaim. As previously noted, the trial court did not consider the MTA. As the DMA aspect of this case has been resolved, the matter is remanded to allow the trial court to consider the MTA arguments.

ASSIGNMENT OF ERROR NO. 3

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

{¶38} Because the Premiere lease was entered into within the twenty years before the affidavit of abandonment was filed, Appellants alternatively argue that it constituted a savings event, preserving their interests. Appellants concede that they are not a party to

that lease, but argue that they could never be a party to a lease, as they own only an interest in the royalties.

{¶39} Due to the resolution of Appellants' second assignment of error, however, their third assignment is moot.

Conclusion

{¶40} 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 Appellees exercised reasonable due diligence in their attempt to locate potential heirs before serving notice of abandonment by publication. Alternatively, Appellants argue that an oil and gas lease entered into between Appellees' predecessor in land and Premiere acts as a savings event. For the reasons provided, Appellants' arguments regarding standing and notice of publication have merit and are sustained. The remaining argument regarding the lease is moot. As the 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 to grant summary judgment to Appellees is reversed and summary judgment is entered in favor of Appellants as to their claims regarding the DMA. The matter is remanded for consideration of Appellees' MTA counterclaim.

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 judgment granting summary judgment to Appellees of the Court of Common Pleas of Monroe County, Ohio, is reversed and summary judgment is entered in favor of Appellants as to the Dormant Mineral Act. We hereby remand this matter to the trial court for further proceedings pertaining to the Marketable Title Act according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellees.

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.