OHIO APPELLATE COURT
Rules In Another DMA Notice Dispute

David J. Wigham | *Attorney*

On June 1, 2020, Ohio's Seventh District Court of Appeals ruled in *Fonzi v. Brown*, 2020-Ohio-3631, that a surface owner's failure to conduct a search in a place where the mineral owner's heirs are known to reside is per se unreasonable. As a result, the Court held that the surface owner failed to comply with the notice requirements of Ohio's Dormant Mineral Act found at R.C. 5301.56, (the "DMA").

This case involved an appeal from the Monroe County Common Pleas Court, which had previously granted summary judgment in favor of the surface owner, holding, among other things, that the surface owner took "reasonable efforts to locate potential heirs of the original heirs of the mineral holder who originally reserved the oil and gas interest in dispute."

The fact pattern in *Fonzi v. Brown* is similar to hundreds of DMA disputes between surface owners and mineral owners across Eastern Ohio. In 1952, Elizabeth Fonzi inherited real estate in Monroe County, Ohio, and later that year, along with her husband, sold the property, reserving a one-half royalty interest. The deed she signed indicated that she lived in Washington County, Pennsylvania. The Fonzis thereafter divorced, were remarried and then died in Washington County, with two children from their marriage. In 2006, the property was transferred to the Browns, who took title subject to the one-half royalty interest originally reserved by Fonzi and then signed an oil and gas lease with Eclipse Resources in 2012.

Thereafter, the Browns, through their attorney, at-

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tempted to abandon the Fonzi interest pursuant to the DMA by publishing a Notice of Abandonment in a newspaper of general circulation in Monroe County, and then subsequently recording an Affidavit of Abandonment. However, under the DMA, a surface owner seeking to abandon severed mineral interests must first serve its notice of intent to abandon the minerals via certified mail. Only if the heirs of the mineral owner cannot be located may the surface owner then skip the step of certified mail service and—as a last resort—publish a Notice of Abandonment in the local newspaper. Thus, one of the primary issues in *Fonzi v. Brown* was whether the Browns used reasonable diligence in attempting to locate the heirs of the Fonzis before publishing their abandonment notice in Monroe County.

Notably, prior to the Fonzi decision, the Seventh District Court of Appeals issued at least three recent rulings that outline the circumstances when a surface owner may publish its notice of abandonment, rather than first serving it via certified mail. In *Shilts v. Beardmore*, 2018-Ohio-863, the Court of Appeals held that surface owners must use "reasonable diligence" in attempting to locate heirs before they can skip the certified mail requirement and serve by publication. And then in *Sharp v. Miller*, 2018-Ohio-4740, the Court ruled that there is no "bright-line rule" as to what efforts constitute "reasonable due diligence," rather, a surface owner's reasonable diligence must be determined on a case-by-case basis. *Id*. at ¶ 17. Finally, in *Miller v. Mellott*, 2019-Ohio-504, the Seventh District found the burden of proof is on the surface owner to demonstrate compliance with the DMA.

Turning back to Fonzi, Browns' attorney testified that he limited his search to Monroe County, despite having knowledge, via Elizabeth Fonzi's deed, that she lived in Washington County, Pennsylvania. The Fonzis argued that, had the Browns' attorney searched the records of Washington County, Elizabeth Fonzi's heir would have been easily discovered. Conversely, the Browns argued that they were not required to search outside of Monroe County, Ohio.

The Court of Appeals observed that: "Requiring a party to prove that a search would have revealed the specific heirs is contrary to the spirit of the law, which focuses on the reasonableness of the opposing party's search process." *Id*. at ¶ 25. Since a surface owner may only publish its notice of abandonment after a search fails to reveal heirs, the surface owner must use "due diligence" in its search and "the search itself [must be] reasonable." *Id*. Because the Browns' attorney learned early in his search that that the Fonzis lived in Washington County, Pennsylvania, but did not conduct a search there, the Court concluded that "any reasonable researcher" would have been led "to extend the search into Washington County" and that 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 the case." *Id*. at ¶ 32-33. As a result, the Browns' notice of abandonment was defective, the original judgment of the trial court was reversed, and judgment was entered in favor of the Fonzis awarding them ownership of the royalty interest at issue.

Fonzi v. Brown illustrates the legal hurdles that surface owners and severed mineral owners in Ohio continue to face when seeking to terminate or preserve ownership of valuable oil and gas interests. Ohio law in this important area is in a state of flux; it evolves seemingly every day. This uncertainty in the law highlights the importance of retaining an experienced oil and gas attorney for advice regarding the extinguishment, preservation, and ownership of severed oil and gas interests.

David J. Wigham is a second-generation oil and gas attorney at the firm of Roetzel & Andress, with more than 28 years of experience in the industry. He maintains offices in Akron and Wooster, Ohio, and can be reached at 330-762-7969 or dwigham@ralaw.com.