



Ohio Supreme Court Gives a Thumbs Up to *Fonzi v. Brown*

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On July 8, 2020, we reported on the Ohio Seventh District Court of Appeals decision in *Fonzi v. Brown*, which held, as a matter of law, that a surface owner's failure to search for holders in Washington County, Pennsylvania did not meet the Ohio DMA's due diligence requirements. That article can be read [here](#).

On March 24, 2022, the Ohio Supreme Court affirmed, agreeing with the Seventh District that the surface owners' failure to consult the Washington County, Pennsylvania, public records for the specific location of the holder when the Monroe County public records pointed there, fell below the due diligence requirements for the Ohio Dormant Mineral Act (R.C. 5301.56(E)) as a matter of law.^[1] Not surprisingly, the Supreme Court did not set a bright-line rule, but instead applied the directive from *Gerrity*^[2] for reasonable diligence to be determined on a case-by-case basis, noting, however, that: "generally, a review of public records in the county where the mineral interest is located will establish a baseline of reasonable diligence."^[3]

In addition to confirming that there is only one route for abandonment under the Ohio DMA (i.e., not two avenues, as the surface owners argued),^[4] the Court did something this author did not foresee when it affirmatively established that the surface owner **always** has the burden of proving compliance with the Ohio DMA due diligence requirements:

We also note that R.C. 5301.56(E) requires that the surface owner "shall" comply with the statutory notice requirements. Compliance with the reasonable-diligence standard is entirely in the hands of the surface owner, and thus, the surface owner has the burden of showing that he or she was reasonably diligent in attempting to identify and locate the holders of the mineral interest before resorting to service by publication. For these reasons, we conclude that in a subsequent action challenging a surface owner's compliance with the DMA's notification requirements, the surface owner has the burden of proving that he or she complied with those

requirements and that he or she exercised reasonable diligence in doing so.^[5]

The use of the prospective language “in a subsequent action” appears to mean that in all future cases involving a claimed abandonment under the Ohio DMA, **the surface owner has the burden of proof, even if they are the defendant.** Although this may not drastically change the effort or evidence that a surface owner proffers in defending his or her DMA abandonment efforts in litigation, a permanent shift in the burden of proof from the default of always being on the plaintiff is significant—especially so considering that surface owners are usually defendants in Ohio DMA lawsuits. While the impact of this announcement will vary depending on the circumstances, after *Fonzi*, the strategy of going to straight to service by publication has jumped the shark.

For more information, contact [Chris Rogers](#) or any attorney with Frost Brown Todd’s [Oil and Gas](#) industry team.

[1] *Fonzi v. Brown*, Slip Opinion No. 2022-Ohio-901. A full copy can be found [here](#).

[2] *Gerrity v. Chervenak*, 162 Ohio St.3d 694, 2020-Ohio-6705, 166 N.E.3d 1230.

[3] *Id.* at ¶ 11.

[4] *Fonzi* at ¶¶ 17–20.

[5] *Id.* at ¶ 23.