[Cite as *Hein Bros., L.L.C. v. Reynolds*, 2021-Ohio-4633.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

HEIN BROS., L.L.C.,

Plaintiff-Appellee,

v.

PATSY L. REYNOLDS et al.,

Defendants-Appellants.

OPINION AND JUDGMENT ENTRY
Case No. 21 BE 0017

Civil Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 13 CV 180

BEFORE:
Carol Ann Robb, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Matthew W. Onest, *Atty. Owen J. Rarric, Atty. Terry A. Moore*, KRUGLIAK, WILKINS, GRIFFITHS & DOUGHERTY CO., L.P.A., 4775 Munson Street NW/P.O. Box 36963, Canton, Ohio 44735 for Plaintiff-Appellee and

Atty. J. Benjamin Fraifogl, *Atty. Jeremy D. Martin,* Roetzel & Andress, LPA, 222 South Main Street, Akron, Ohio 44308 and *Atty. Christopher W. Tackett*, Roetzel & Andress,

LPA, 41 South High Street, Huntington Center, 21st Floor, Columbus, Ohio 43215 for Defendants-Appellants.

Dated: December 20, 2021

Robb, J.

{¶1} Appellants (five movants who call themselves the "Huddleston Heirs") appeal the decision of the Belmont County Common Pleas Court in Case Number 13 CV 180 denying their motion to vacate a default judgment, which they filed nearly seven years after the court quieted title to the oil and gas underlying the property of Plaintiff-Appellee Hein Bros., L.L.C. Appellants claim the court lacked personal jurisdiction due to service of the complaint by publication, rendering the judgment void and subject to vacation at any time. Specifically, they allege Appellee failed to use reasonable diligence in attempting to locate addresses for the four defendants at issue. For the following reasons, the trial court's judgment is affirmed.

STATEMENT OF THE CASE

{¶2} Appellee acquired approximately 152 acres in Belmont County. (4/13/01, Vol. 765, Pg. 873; 11/15/01, Vol. 772, P. 427). In 1970, a predecessor in Appellee's title purchased the property along with one-half of the oil and gas from Darby L. Jones, Mildred Huddleston, Martha Lee Mitchell, and Verda Strunk. (3/2/70, Vol. 516, P. 82).[1] Those grantors reserved the other half of the oil and gas.

{¶3} On May 15, 2013, Appellee filed a complaint seeking to obtain this outstanding one-half mineral interest underlying the property through declaratory judgment, quiet title, and injunctive relief. Eighteen defendants were named, including John Wayne Huddleston, Richard Huddleston, Linda Hanes,[2] and Nancy Payne (the defendants at issue). These and some of the other defendants had been named in the

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[1] This deed to Seaway Coal Company conveyed multiple parcels, including those at issue in *Franks v. Reynolds*, 7th Dist. Belmont No. 21 BE 0004, 2021-Ohio-3248 and *Mammone v. Reynolds*, 7th Dist. Belmont No. 21 BE 0005, 2021-Ohio-3247. In those cases, different plaintiffs sued the same defendants at issue herein. As in the case at bar, service was by publication, default judgment was entered, the declaratory judgment granting quiet title was recorded, and Appellants filed the same September 2020 motion to vacate.

[2] Linda's last name was spelled Haynes in the complaint (instead of Hanes). Below, the motion to vacate noted the misspelling of her last name, but Appellee explained Haynes (with a y) was the spelling in her aunt's will which is where they discovered Linda's identity as an heir. Appellants do not maintain an argument on appeal as to this issue. (Her Social Security number was also in the will.)

will of their Aunt Martha Lee Mitchell, which was probated in 1995 in Texas. (Complaint Ex. E). Claims for slander of title and negligence were filed against six defendants who had recorded claims to preserve on February 27, 2012; these defendants later entered consent judgments in favor of Appellee.

{¶4} The complaint said Nancy Payne and Linda Hanes were unable to be located after reasonable due diligence and thus service by publication was appropriate under R.C. 2703.14 and Civ.R. 4.4(A). As for the two Huddleston defendants, service by certified mail was attempted at a Texas address for each but returned as undeliverable; regular mail was also returned as undeliverable.

{¶5} On June 24, 2013, Appellee filed an affidavit for publication wherein their attorney attested the addresses for John Wayne Huddleston, Richard Huddleston, Linda Hanes, and Nancy Payne were unknown and could not be ascertained with reasonable diligence. (Three other defendants and the unknown heirs of Margaret and Wayne Huddleston were also listed.) Appellee's attorney averred he unsuccessfully searched "numerous databases containing public records, including Westlaw's People Search and Public Records" and "requested probate searches and records from various probate courts, including Belmont County, Ohio and Hidalgo and Kleberg County, Texas."

{¶6} Notice of the lawsuit was published weekly for six weeks in the Times Leader, a newspaper published in Belmont County.[3] Appellee thereafter filed a motion for default judgment against the defendants named in the affidavit of publication as they failed to answer within 28 days after the last publication.

{¶7} On September 20, 2013, the trial court granted default judgment, noting the defendants at issue failed to answer or appear after being served via publication for six consecutive weeks. The court declared these defendants held no interest in the real estate or minerals which were quieted in favor of Appellee but said a more specific judgment would be forthcoming.

{¶8} On January 15, 2014, the court entered judgment quieting title against the defendants at issue (and other defaulting defendants). The court declared the one-half

[3] In the meantime: four defendants filed a joint answer with counterclaim (6/12/13); a pro se defendant filed an answer with counterclaim (6/13/13); another pro se defendant filed a pleading explaining she inherited no interest in the property (6/17/13); and a seventh defendant filed an answer (7/19/13). Some defendants were served by certified mail, failed to answer, and had default judgments entered against them. (8/19/13, 8/23/13 J.E.s). After discovery, the defendants who had filed claims to preserve signed consent judgments granting the oil and gas to Appellee, and the judgments were recorded. (2/13/14, 3/4/14, 3/24/14 J.E.s).

reservation in the 1970 deed was abandoned. Property descriptions were attached, and instructions were provided for the auditor and recorder. The judgment was recorded on February 12, 2014.

{¶9} Nearly seven years later, on September 15, 2020, a motion to vacate the default judgment was filed by the "Huddleston Heirs" who are the five Appellants herein: John Wayne Huddleston; Cynthia Huddleston (who was not a defendant in the lawsuit but the wife of John, who was still alive); Richard Huddleston; Linda Hanes; and Billy G. Payne (the husband of Nancy Payne, who was an heir named as a defendant but who died after the judgment). Appellants said they had no knowledge of the judgment until January 2020 when they were served with a complaint in a different lawsuit; they also said they did not see the notification in the Ohio newspaper which "is not available in Texas."

{¶10} John Wayne Huddleston's affidavit disclosed his address in 2013, attesting he lived there with his wife since 2006. He said he never received mail at the post office box where the complaint was attempted to be served before publication.

{¶11} Richard Huddleston's affidavit listed his address in 2013 (without stating when he moved there). He said the address where the complaint was attempted to be served before publication was an office building where he once worked and he did not receive mail there.

{¶12} Linda Hanes attested to the address where she had been residing since 2000. She added, "It is unknown to me how anyone, in using due diligence, did not find my address * * * when at the time of the filing of the lawsuits, I had lived there for thirteen (13) years."

{¶13} Billy G. Payne's affidavit listed the address where he lived with Nancy Payne in 2013, disclosing they began residing there in 2010. He also expressed, "It is unknown to me how anyone, using due diligence, did not find our address * * *."

{¶14} While noting Civ.R. 60(B)(5) allows the court to vacate a judgment for any reason, Appellants argued the court should use its inherent authority to vacate the default judgment, claiming it was void for lack of personal jurisdiction due to the failure to perfect service. They cited case law unrelated to notice by publication and claimed when the plaintiff follows the Civil Rules governing service of process, there is a rebuttable presumption of proper service and the defendant can rebut the presumption by merely swearing he "did not reside at the address to which process was sent" at which point the

burden would shift to the plaintiff to produce evidence "demonstrating that defendant resided at the address in question." (Appellants no longer rely on this law which does not apply to service by publication.)

{¶15} Appellee responded by emphasizing service by publication does not require true notice or publication in other states, quoting from Civ.R. 4.4(A) and R.C. 2703.14(A). They explained compliance with the Civil Rules *for service by publication* raised a rebuttable presumption of reasonable diligence in the address search. They urged Appellants failed to rebut the presumption as they did not disclose what was wrong with the search or state how they could have been located.

{¶16} Alternatively, Appellee provided evidence in support of any shifting burden to prove their reasonable diligence. Appellee's attorney submitted an affidavit listing the records searched prior to seeking service by publication: public records, including probate records in Belmont County, Ohio and Hidalgo and Kleberg County, Texas; the records of the Ohio Department of Natural Resources; the subscription services of Westlaw People Search and idocket.com; and the databases of Whitepages, Google, Peoplesmart, deathrecord.com, billiongraves.com, familysearch.org, and zabasearch.com. (Aff. at ¶ 8).

{¶17} The affidavit incorporated various attachments, including a file showing the law firm's search efforts from late 2012 through April 2013, while searching for the record holders and then for the heirs. (Aff. Ex. C). Appellee also attached a notice of abandonment recorded for Appellee by a different law firm and a legal filing by another landowner (in *Menges v. Strunk*, Belmont Cty. C.P. No. 13 CV 269), claiming this showed other law firms were also unsuccessful in locating Appellants. Yet, as we pointed out in *Mammone* and *Franks*, these items appeared to show the other firms did not *identify* the defendants at issue, not that they could not find their addresses. (Aff. Ex. D & E).

{¶18} Appellee alternatively raised waiver and laches, pointing out the court granted default judgment nearly seven years before the motion to vacate was filed and Appellants waited eight months from allegedly learning of the judgment to seek vacation. Appellants replied by pointing out the timeliness of the motion was irrelevant as they were not relying on Civ.R. 60(B). Appellants' reply also noted the lengthy file attached to the affidavit of Appellee's attorney was "inclusive of all the defendants, not just the four (4) individuals filing to vacate judgment."

{¶19} During the hearing delays in this case,[4] a different trial judge in Belmont County denied motions to vacate filed by Appellants in two other lawsuits. Appellee presented the trial court's decisions in *Franks* and *Mammone* as supplemental authority.

{¶20} On March 26, 2021, the hearing on the motion to vacate proceeded. Appellants presented the testimony of a private investigator from Infoquest Information Services. Appellee unsuccessfully objected to the presentation of expert testimony without a disclosure of identity and subject matter under Civ.R. 26(E). This witness testified he had been using the CLEAR database by Thompson Reuters for seven or eight years. (Tr. 23-25, 43). He said the database draws information from various credit reports, utility bills, vehicle registrations, and driver's license records. (Tr. 24).[5] Before switching to CLEAR, the investigator used IRBsearch and said it would have searched the same Bureau of Motor Vehicles (BMV) and credit records. (Tr. 25-26).

{¶21} The investigator said he ran the relevant Social Security numbers in the CLEAR database in March 2021. (Tr. 22). This search produced the addresses listed in the affidavits attached to the motion to vacate. (Tr. 24, 32, 34-35, 38). The investigator opined he would not have been doing his job if he failed to find the address for Nancy Payne or Linda Hanes in 2013. (Tr. 28, 33). He pointed out Linda Hanes had been associated with her address for a long time. (Tr. 33). He opined Nancy Payne's credit information would have been available to identify her address in 2013. (Tr. 25). He asserted a high degree of confidence in the address he found for Nancy Payne, citing the length of time she had been associated with it.

{¶22} We note his opinion as to the likelihood of finding Nancy Payne in 2013 seemed to be based on a belief that she lived at the pertinent address since 1983 as this was the start date for "Household Listing" in the report. (Tr. 27, 57-58); (Def.Ex. 4). However, the complaint was filed in May 2013, and her husband specifically attested they began living there in 2010. The investigator's report shows this address for Nancy Payne was first reported to Experian and Equifax in 2010 (while Transunion's record of that

[4] Appellants' attorney was absent from the October 2020 hearing. The court ordered Appellee to prepare a judgment overruling the motion to vacate. The court reconsidered this ruling upon learning the attorney was not notified of the hearing. (The clerk previously had no information on file for these parties, and a notice of appearance was not filed with the motion to vacate.)

[5] The reference to information from a credit report appears to refer to "credit header" data (name, address, former address, and other identifying information) rather than the full report.

address did not begin until December 2013). If the "Household Listing" category was correct, then the investigator may have been attributing the wrong information to the category.[6]

{¶23} On Richard Huddleston, the investigator said his search returned an address matching the address in the affidavit; this was based on credit bureau information that he believed would have been readily available in 2013. (Tr. 34, 37). As for John Huddleston, the investigator said the address he found to be associated with him in 2013 was consistent with what John's affidavit reported (and was still his address). (Tr. 38).

{¶24} The investigator did not know the cost to subscribe to the CLEAR database he used in 2021 or the IRBsearch database he used in 2013. (Tr. 43-44). When asked if the subscription was available to the general public, the investigator seemed unsure and mentioned a different non-subscription version which could provide some information. (Tr. 44-45). He estimated his firm would charge a client $300 a person for a full background search. (Tr. 54). He could not say what the various databases searched by Appellee would have generated at the time the complaint was filed (or at the time of the hearing). (Tr. 48-51). He opined Whitepages would have had information for those who lived at their addresses a long time. (Tr. 51).

{¶25} At the hearing on the motion to vacate, Appellants' attorney pointed out some of the defendants at issue had long-term addresses. He said the failure to find the correct addresses showed the search was unreasonable considering Appellee had the Social Security numbers (from the will). He pointed to the file attached to Appellee's response to the motion to vacate and noted it mostly related to the search for the identity of heirs or the address of other heirs. He said only one page represented the search for John Huddleston (without mentioning the page with the address Appellee used in an attempt to serve Richard Huddleston by certified mail). Appellant's attorney informed the court he would have hired a process serving firm to perform the location search.

{¶26} Appellee's attorney explained the print-outs in the file related to John and Richard Huddleston showed each search was conducted by entering a Social Security number in the subscription service of Westlaw People Search. He explained Westlaw

[6] The information in his report for Linda Hanes and John Huddleston confirms the dates for "Household Listing" do not coincide with the date the party moved to the address: Linda Hanes specifically attested she did not move to that address until 2000, but the Household Listing category for that address began in 1993; and John Huddleston specifically attested he moved to his address in 2006, but the Household Listing category near that address begins in 1987.

returned results for two of the four defendants at issue and the lack of printouts in the file for the other two defendants at issue did not mean a search was not conducted; if the search did not yield results, a page was not printed for the file. He noted Appellants' witness did not perform searches in the sources Appellee used in order to contest whether the information was available in those sources. Appellee's attorney urged the search must be reasonable, not exhaustive, and there was no requirement to search every database. He also noted the investigator ran the search in 2021 and there was no testimony on the status of the CLEAR database during the time period preceding the complaint.

{¶27} The trial court overruled the motion to vacate from the bench and asked Appellee's counsel to prepare a judgment entry. On the same day, the court issued a judgment overruling the motion and asking Appellee's counsel to prepare an entry, circulate it to opposing counsel, and submit it to the court by April 2, 2021. (3/26/21 J.E.). On March 31, 2021, Appellants filed a motion for findings of fact and conclusions of law. The court instructed the parties to prepare proposed findings of fact and conclusions of law by April 12, 2021. (4/1/21 J.E.).

{¶28} On April 5, 2021, Appellee filed a notice to inform the court of Appellants' objections to the proposed judgment entry, which Appellee had provided to the court. Appellants crossed out pages of reasoning, which indicated they wished the court to merely issue a general judgment denying the motion to vacate.

{¶29} On April 6, 2021, the court filed a judgment denying the motion to vacate (which closely corresponded to the entry proposed by Appellee). The court stated: a plaintiff can serve a complaint by publication under Civ.R. 4.4(A) where addresses are unknown and R.C. 2703.14 authorized service as the defendants lived out of state; the affidavit of publication complied with the rule; and publication was accomplished. The court then found Appellants failed to rebut the presumption of reasonable diligence in the search for addresses. The court alternatively found Appellee submitted sufficient evidence to prove reasonable diligence was exercised (even if the presumption was rebutted by Appellants). In addition, the court denied the motion "for the alternative and independent reason" of waiver and also "for the alternative and independent reason" of laches.

{¶30} Both sides then filed the proposed findings of fact and conclusions of law on the April 12, 2021 deadline.[7] Contrary to the decision announced by the court, Appellants' submission proposed the entry of judgment in their favor. On April 13, 2021, the court issued findings of fact and conclusions of law in support of the announced decision. Appellants filed a timely notice of appeal on May 6, 2021.

ASSIGNMENT OF ERROR ONE: CIV.R. 52

{¶31} Appellants set forth two assignments of error, the first of which contends:

"The Trial Court Erred When It Entered Its April 6, 2021 Judgment Entry Denying Appellants' Motion to Vacate Prior to Issuing Findings of Fact and Conclusions of Law in Violation of Civ.R. 52, After It Granted Appellants' Motion For Findings of Fact and Conclusions of Law."

{¶32} Appellants raise an issue with the timing of the court's judgment denying their motion to vacate when a motion for findings of fact and conclusions of law was pending and when the court had ordered proposed findings and conclusions. The first paragraph in Civ.R. 52 states:

> When questions of fact are tried by the court without a jury, judgment may be general for the prevailing party unless one of the parties in writing requests otherwise before the entry of judgment pursuant to Civ. R. 58, or not later than seven days after the party filing the request has been given notice of the court's announcement of its decision, whichever is later, in which case, the court shall state in writing the findings of fact found separately from the conclusions of law.

{¶33} Appellee initially contends Appellants were not entitled to use Civ.R. 52. It emphasized the rule only applies "[w]hen questions of fact are tried by the court without a jury" and the third paragraph states: "Findings of fact and conclusions of law required by this rule and by Civ.R. 41(B)(2) and Civ.R. 23(G)(3) are unnecessary upon all other motions including those pursuant to Civ.R. 12, Civ.R. 55 and Civ.R. 56." Civ.R. 52.

[7] On the same day, Appellants filed a motion to reconsider stating the court's decision was made without deliberation. They relied on the contents of their proposed findings and conclusions and noted the decision was not yet final. On April 13, 2021, the court denied the motion to reconsider, pointing out the court's decision "was not made without deliberation" and also stating, "The proposed findings of fact and conclusions of law from both sides were considered in conjunction with the record."

{¶34} The list of motions is clearly not exhaustive. We note if Appellants had appeared before the final judgment, their motion contesting personal jurisdiction due to service by publication would have been filed under Civ.R. 12. *See* Civ.R. 12(B)(2) (lack of jurisdiction over the person), (5) (insufficiency of service of process). We also note it has been theorized that "all other motions" refer to those motions which do not fall under the first paragraph in the rule (and thus requires consideration of even the listed motions if facts were tried by the court).

{¶35} Appellee cites this district's observation on Civ.R. 52 as applying "only after a bench trial * * *." *See Shrock v. Mullet*, 7th Dist. Jefferson No. 18 JE 0018, 2019-Ohio-2707, ¶ 59. Still, one must consider the context of the decision and the observation after the asterisks in the above quote, which more fully reads: "only after a bench trial, not after a ruling on a summary judgment motion." In that case, one party argued the other waived an argument about a lack of findings where he failed to file a Civ.R. 52 motion, and we pointed out such a motion would have only applied to the bench trial and not the prior summary judgment ruling. The cited observation was made in the context of a discussion comparing the two distinct stages of proceedings occurring in that particular case.

{¶36} More specifically, this district has concluded Civ.R. 52 does not apply to a ruling on a motion to vacate a judgment. *Buoscio v. Krichbaum*, 7th Dist. Mahoning No. 99CA318 (Mar. 24, 2000) (refusing to compel the court to rule on a Civ.R. 52 motion after the denial of a Civ.R. 60(B) motion), citing *Briggs v. Deters*, 1st Dist. Hamilton No. C-961068 (June 25, 1997); *Blankenship v. Rick Case Honda/Isuzu*, 11th Dist. Portage No. 1669 (March 27, 1987); *Hadley v. Hadley* 10th Dist. Franklin No. 82AP-637 (March 10, 1983). It should be pointed out *Buoscio* broadly stated the holding and did not discuss whether the case involved an evidentiary hearing on the motion.

{¶37} The Fourth District has disagreed with a broad rule and concluded: "when a trial court must resolve disputed factual issues to reach a decision on a Civ.R. 60(B) motion and when the movant timely requests Civ.R. 52 findings of fact and conclusions of law, the court must issue Civ.R. 52 findings of fact and conclusions of law." *First Natl. Bank v. Netherton*, 4th Dist. Pike No. 04CA731, 2004-Ohio-7284, ¶ 16. Regardless, the trial court here granted the Civ.R. 52 motion and issued findings of fact and conclusions of law, and the appeal was timely even without the tolling available for a timely and appropriate motion.

{¶38} Appellants believe the trial court's decision is reversible because the court issued the April 6, 2021 judgment entry without waiting for the proposed findings of fact and conclusions of law requested by the court and due on April 12, 2012. Notably, the April 6, 2021 entry repeated the decision announced in the March 26, 2021 entry.

{¶39} Additionally, "When a request for findings of fact and conclusions of law is made, the court, in its discretion, may require any or all of the parties to submit proposed findings of fact and conclusions of law; however, only those findings of fact and conclusions of law made by the court shall form part of the record." Civ.R. 52. Accordingly, the court did not have to ask for proposed findings of fact and conclusions of law. In fact, the court could have requested proposed findings and conclusions from only Appellee.

{¶40} Contrary to Appellants' suggestion, the rule does not prohibit a judgment followed by findings of fact and conclusions of law. In most cases, the Civ.R. 52 motion is made after the final judgment. Courts rarely ask for an additional judgment entry to be prepared when the court already issued one denying a motion to vacate, for instance. But here, the court entered a judgment announcing its decision overruling the motion to vacate and asked Appellee's attorney to prepare an additional entry. Where a court uses this procedure, the filing of the additional entry (with intent to subsequently issue findings and conclusions) is not a reversible error merely because a Civ.R. 52 motion was filed and an order for proposed findings of fact and conclusions of law was outstanding.

{¶41} The proposals were thereafter timely filed by the parties as ordered by the court. *The court then issued findings of fact and conclusions of law* on April 13, 2021. Even if a different trial judge may have abstained from issuing the April 6, 2021 judgment, waited for the proposals, and issued a single judgment containing the findings of fact and conclusions of law, prejudice from the procedure utilized by this trial judge has not been demonstrated by Appellants.

{¶42} Notably, after a court announces its decision, the chance to file proposed findings of fact and conclusions of law is not meant to be a reconsideration procedure. *See, e.g., Vanderhoff v. Vanderhoff*, 3d Dist. Seneca No. 13-09-21, 2009-Ohio-5907, ¶ 12. The purpose of separate conclusions of law and findings of facts is to "aid the appellate court in reviewing the record and determining the validity of the basis of the trial court's judgment." *Werden v. Crawford*, 70 Ohio St.2d 122, 124, 435 N.E.2d 424 (1982). Civ.R. 52's purpose does not change merely because a trial judge filed an entry

announcing the decision but asking the winning side to prepare an additional entry and the other party sought findings of fact and conclusions of law prior to the court's adoption of the proposed entry.

{¶43} Moreover, Appellants' objections to the proposed judgment entry entailed the deletion of pages of reasoning (leaving a general denial of their motion). They provided this to Appellee's attorney on the same day they filed a motion for findings of fact and conclusions of law, and they would have anticipated the court would be made aware of their objections. Their objections constituted an invitation for the court to merely issue a general judgment denying the motion to vacate (and essentially encouraged the court to issue the findings and conclusions later). We also note Appellee's April 5, 2021 notice of Appellants' objections was electronically served on Appellants on April 1, 2021, and the court was not advised that Appellants believed their objections to the proposed judgment entry did not survive their motion for findings and conclusions.

{¶44} Appellants also suggest the timing of the decisions indicates the court failed to consider the evidence. As Appellee points out, the court had much of the information before the hearing: Appellants' motion to vacate with the affidavits on the 2013 addresses was filed on September 15, 2020; the response with the affidavit of Appellee's counsel and exhibits (including the file showing how Appellee found heirs and located old addresses for the Huddlestons) was filed on October 6, 2000; the reply was filed a week later; and a notice of supplemental authority citing the December 2020 *Mammone* and *Franks* decisions was filed in February 2021. The court then heard arguments and testimony at the March 26, 2021 hearing and announced its decision from the bench and in an entry issued that day. Announcing a ruling on a motion from the bench is not an unusual occurrence.

{¶45} Contrary to Appellants' contention, there is no sign the court failed to consider their notice of objection to the judgment the court asked Appellee to prepare. In fact, the court specifically pointed to their objection in the April 6, 2021 judgment denying the motion to vacate. Furthermore, there is no indication the court failed to consider Appellants' proposed findings of fact and conclusions of law merely because the court's findings and conclusions were issued the day after the proposals were filed. The court could not have used Appellants' proposal as their proposal went the opposite way of the court's decision. In any event, the issuance of an entry soon after requested proposals

were filed does not signify a failure to consider a filing. In fact, another ruling the court issued the same day said the court reviewed the proposals of both sides.

{¶46} Lastly, the repetition of information from the April 6, 2021 judgment in the conclusions of law portion of the April 13, 2021 judgment was not inappropriate; nor is it inappropriate for a court to adopt in full a party's proposed entry or proposed findings of fact and conclusions of law. As aforementioned, the rule specifically allows a court to solely ask for proposed findings and conclusions from the winning party. As Appellee points out, a trial court's signed decision can incorporate a party's proposal verbatim if the court so chooses. *Mummey v. Mummey*, 7th Dist. Noble No. 10 NO 371, 2010-Ohio-4243, ¶ 16; *Yobe Elec. Inc v. Jarvis, Downing & Emch Inc.*, 7th Dist. Jefferson No. 83-J-1 (Apr. 12, 1984).

{¶47} Whether the trial court's decision was correct falls under the discussion in Appellants' other assignment of error which argues the court erred in failing to find the judgment granting title to Appellee was void for lack of personal jurisdiction due to the lack of reasonable diligence in searching for addresses. Before proceeding to the next assignment of error, we set forth the law on this topic.

LAW ON PERSONAL JURSIDICTION & SERVICE BY PUBLICATION

{¶48} "[F]or a court to acquire jurisdiction there must be a proper service of summons or an entry of appearance, and a judgment rendered without proper service or entry of appearance is a nullity and void." *Lincoln Tavern Inc. v. Snader*, 165 Ohio St. 61, 64, 133 N.E.2d 606 (1956). A void judgment can be directly attacked without complying with any legal requirements related to the vacation of a voidable judgment. *Id.* Therefore, a party who can show a judgment is void need not meet the requirements of Civ.R. 60(B) and can rely on the trial court's inherent authority to vacate a void judgment. *Patton v. Diemer*, 35 Ohio St.3d 68, 518 N.E.2d 941 (1988), paragraph four of the syllabus.

{¶49} More specifically, we have stated if the plaintiff fails to perfect service on a defendant due to the lack of reasonable diligence before service by publication, then the trial court lacked jurisdiction to enter default judgment against the defendant and the judgment is void. *American Tax Funding, LLC v. Robertson Sandusky Props.*, 2014-Ohio-5831, 26 N.E.3d 1202, ¶ 24 (7th Dist.).

{¶50} A statute provides: "Service may be made by publication in * * * an action for the recovery of real property or of an estate or interest in real property, when the defendant is not a resident of this state or his place of residence cannot be ascertained *

* *." R.C. 2703.14(A). Nevertheless, the Rules of Civil Procedure "prescribe the procedure to be followed in all courts of this state in the exercise of civil jurisdiction." Civ.R. 1(A). *See also State ex rel. Loyd v. Lovelady*, 108 Ohio St.3d 86, 2006-Ohio-161, 840 N.E.2d 1062, ¶ 6 (the constitution vests the Supreme Court with exclusive authority on rules governing court practice and procedure, and the law shall not conflict with the rules).

{¶51} "[T]he statute does not provide authority to serve by publication without following the rule." *Mammone v. Reynolds*, 7th Dist. Belmont No. 21 BE 0005, 2021-Ohio-3248, ¶ 27 and *Franks v. Reynolds*, 7th Dist. Belmont No. 21 BE 0004, 2021-Ohio-3247, ¶ 27, citing *Sizemore v. Smith*, 6 Ohio St.3d 330, 331, 453 N.E.2d 632 (1983) (requiring reasonable diligence under Civ.R. 4.4. notwithstanding the statute permitting service by publication). Rather, the statute is utilized to satisfy a requirement within the rule governing service by publication.

{¶52} Pursuant to Civ.R. 4.4(A), "when service of process is required upon a party whose residence is unknown, service shall be made by publication in actions where such service is authorized by law." As Appellee points out, service would be "authorized by law" here under R.C. 2703.14(A), and Appellants do not argue otherwise.

{¶53} Before initiating service by publication, an affidavit of the party requesting service or the party's counsel shall be filed with the court, and the affidavit "shall aver that service of summons cannot be made because the residence of the party to be served is unknown to the affiant, all of the efforts made on behalf of the party to ascertain the residence of the party to be served, and that the residence of the party to be served cannot be ascertained with reasonable diligence." Civ.R. 4.4(A). "Upon the filing of the affidavit, the clerk shall cause service of notice to be made by publication in a newspaper of general circulation in the county in which the action or proceeding is filed * * * at least once a week for six successive weeks unless publication for a lesser number of weeks is specifically provided by law." *Id.*

{¶54} A sufficient averment in the affidavit for publication filed under Civ.R. 4.4(A) "gives rise to a rebuttable presumption that reasonable diligence was exercised." *Sizemore*, 6 Ohio St.3d at 331. *See also American Tax Funding*, 2014-Ohio-5831 at ¶ 28. The parties agree Appellants had the initial burden to rebut the presumption of reasonable diligence.

{¶55} When "challenged" by the defendant, the plaintiff must "support the fact that he or she used reasonable diligence." *Sizemore*, 6 Ohio St.3d at 332 (before the rule instructed the plaintiff to list the search efforts in the affidavit for publication); *American Tax Funding*, 2014-Ohio-5831 at ¶ 28. The parties also agree Appellee would have had the burden to prove reasonable diligence if Appellants rebutted the presumption.

{¶56} Reasonable diligence is a "fair, proper and due degree of care and activity, measured with reference to the particular circumstances; such diligence, care, or attention as might be expected from a man of ordinary prudence and activity." *Sizemore*, 6 Ohio St.3d at 332 (using the definition in *Black's Law Dictionary*). "[R]easonable diligence will depend on the facts and circumstances of each particular case." *Id.*

{¶57} In *Sizemore*, the defendant raised insufficient service of process before trial, and the Court found the efforts to locate his address did not constitute reasonable diligence where the plaintiff's counsel merely asked if the address was known by his own client (whose husband was struck by the defendant's vehicle) and contacted the post office (where he learned there was no forwarding address for the defendant who had moved). The Court noted the post office only saves forwarding addresses for a year, making the post office of limited value when a defendant moved over a year ago, and observed:

> Certainly a check of the telephone book or a call to the telephone company would hold more promise than a contact of one's own client. Other probable sources for a defendant's address would include the city directory, a credit bureau, county records such as the auto title department or the board of elections, or an inquiry of former neighbors.

Sizemore, 6 Ohio St.3d at 332. *However:* "These examples do not constitute a mandatory checklist. Rather, they exemplify that reasonable diligence requires counsel to use common and readily available sources in his search." *Id.*

{¶58} We note Appellants' brief refers to due process protections while Appellee responds by claiming Appellants failed to raise due process below. Nevertheless, due process is the purpose of the reasonable diligence test within Civ.R. 4.4(A). It is well-settled that the reasonable diligence standard protects due process rights. *See In re Foreclosure of Liens for Delinquent Taxes,* 62 Ohio St.2d 333, 336, 405 N.E.2d 1030 (1980), citing *Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306, 317, 70 S.Ct.

652, 94 L.Ed. 865 (1950) ("This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning. Those beneficiaries [whose] whereabouts could not with due diligence be ascertained come clearly within this category"). We note "due process does not require that an interested party receive actual notice [or] 'heroic efforts' to ensure the notice's delivery." *In re Thompkins*, 115 Ohio St.3d 409, 2007-Ohio-5238, 875 N.E.2d 582, ¶ 14.

{¶59} In discussing the evidence necessary to rebut a presumption in general, both parties cite Evid.R. 301, which states: "In all civil actions and proceedings not otherwise provided for by statute enacted by the General Assembly or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast."

{¶60} Appellee urges Appellants were required to introduce "evidence of a substantial nature [to] counterbalance the presumption," quoting *Adamson v. May Co.*, 8 Ohio App.3d 266, 270, 456 N.E.2d 1212 (8th Dist.1982), citing *Carson v. Metropolitan Life Ins. Co.,* 165 Ohio St. 238, 241, 135 N.E.2d 259 (1956). *See also Kennedy v. Walcutt*, 118 Ohio St. 442, 161 N.E. 336 (1928) ("When a party is not required to sustain the burden of proof upon some particular issue, a rebuttable presumption arising out of such issue may be overcome by evidence which counterbalances the evidence to sustain the presumption"). The trial court said Appellants were required to set forth legitimate evidence to challenge the plaintiff's due diligence efforts. Appellants also refer to the *Adamson* case cited by Appellee and acknowledge they were required to overcome the presumption by introducing "legitimate, credible evidence to counterbalance the presumption." (Apt.Br. 20).

{¶61} Yet, Appellants voice a concern the trial court shifted the burden of proof to them because the trial court said they "failed to present sufficient evidence which proves that Plaintiff failed to exercise due diligence * * *." (4/6/21 J.E. at ¶ 14-15). However, the trial court made the statement in the context of discussing whether the presumption was rebutted. And, the court recognized the burden of proving reasonable diligence shifted to the plaintiff if the presumption was rebutted.

{¶62} We note, in discussing a challenge to service by publication, the Supreme Court has observed: "The defendant is further protected because she * * * may bring in independent evidence to contradict the reasonable diligence of the plaintiff's search." *Brooks v. Rollins*, 9 Ohio St.3d 8, 11, 457 N.E.2d 1158 (1984). The Eighth District recently concluded the defendant "failed to present sufficient independent evidence to contradict the plaintiff's exercise of reasonable diligence" before service by publication. *Corrao v. Bennett*, 2020-Ohio-2822, 154 N.E.3d 558, ¶ 22 (8th Dist.). The trial court did not shift the ultimate burden to Appellants by making the aforequoted statement.

{¶63} Regarding our standard of review, the parties recognize this court has ruled the abuse of discretion standard applies when reviewing a trial court's decision on a motion to vacate a void judgment for lack of personal jurisdiction where the question is whether reasonable diligence was exercised prior to service by publication. *American Tax Funding*, 2014-Ohio-5831 at ¶ 17, citing *Spotsylvania Mall Co. v. Nobahar*, 7th Dist. Mahoning No. 11 MA 82, 2013-Ohio-1280, ¶ 14. *See also Fernwalt v. Our Lady of Kilgore*, 7th Dist. No. 15 CA 0906, 2017-Ohio-1260, 88 N.E.3d 499, ¶ 13 ("The trial court's decision regarding the validity of service should be upheld absent an abuse of discretion."). An abuse of discretion implies that a decision is unreasonable, arbitrary, or unconscionable; we do not substitute our judgment for that of the trial court. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶64} Various other districts have likewise concluded the appellate court reviews the question of reasonable diligence for an abuse of discretion notwithstanding the jurisdictional implications. *See, e.g., Flaugher v. Flaugher*, 2020-Ohio-299, 143 N.E.3d 623, ¶ 9 (2d Dist.) (abuse of discretion standard of review applies regardless of whether the motion was granted under Civ.R. 60(B) or pursuant to the trial court's inherent authority to vacate void judgments); *Name Change of Rowe*, 2019-Ohio-4666, 135 N.E.3d 782, ¶ 16 (4th Dist.) (although an appellate court reviews a determination of personal jurisdiction under a de novo standard of review, a trial court's finding regarding whether service was proper is not reversed absent an abuse of discretion); *Matter of M.R.J.*, 4th Dist. Lawrence No. 18CA17, 2019-Ohio-2755, ¶ 24 (as to reasonable diligence before publication, the "reviewing court will not disturb a trial court's finding regarding whether service was proper unless the trial court abused its discretion"); *Nationstar Mtge. LLC v. Williams*, 5th Dist. Delaware No. 14 CAE 04 0029, 2014-Ohio-4553, ¶ 34 ("Whether a party exercised reasonable diligence is fact dependent and

conducted at the trial court's discretion."); *Motorists Mut. Ins. Co. v. Roberts*, 12th Dist. Warren No. CA2013-09-089, 2014-Ohio-1893, ¶ 30 ("an Ohio court has the inherent power to vacate a void judgment" and "reviews the denial of a common law-motion to vacate under an abuse of discretion standard"). *See also Corrao*, 2020-Ohio-2822 at ¶ 16, 23 (8th Dist.).

{¶65} Appellants do not specifically argue we should reject the abuse of discretion standard of review set forth in *American Tax Funding* and apply a de novo standard of review to some issues. Still, a footnote in their brief sets forth the general holding: "Personal jurisdiction is a question of law that appellate courts review de novo." *Fraley v. Estate of Oeding*, 138 Ohio St.3d 250, 2014-Ohio-452, 6 N.E.3d 9, ¶ 11 (in the context of a Civ.R. 12(B)(2) motion to dismiss without an evidentiary hearing where the court must view the allegations in the light most favorable to the plaintiff and make all reasonable inferences in the plaintiff's favor). *Id.*[8]

{¶66} The footnote in Appellants' brief also notes the Tenth District recently applied a de novo standard of review to a motion to vacate which alleged lack of reasonable diligence in locating the defendant. *J.M. v. J.C.*, 10th Dist. Franklin No. 19AP-739, 2020-Ohio-4963, ¶ 16-17, 21. Previously, that district addressed reasonable diligence before publication by stating: "to attack a judgment on the grounds that it is void due to a lack of personal jurisdiction, a defendant must file a common-law motion to vacate. * * * Appellate courts review the denial of a common-law motion to vacate under the abuse of discretion standard." *Third Fed. Savings & Loan Assn. of Cleveland v. Taylor*, 10th Dist. Franklin No. 17AP-254, 2017-Ohio-7620, ¶ 11.

{¶67} A non-majority Supreme Court opinion once opined the reviewing courts need guidance on the topic and proposed: "when a reviewing court assesses a trial court's conclusion that service by publication was proper, the reviewing court should apply the same standards, and should not defer to the trial court's conclusion." *In re Thompkins*, 115 Ohio St.3d 409 at ¶ 55 (O'Connor, J. concurring in part and dissenting in part, with

[8] Where a Civ.R. 12(B)(2) motion is denied and the lack of personal jurisdiction defense is maintained, the plaintiff bears the burden of proving jurisdiction by a preponderance of the evidence at an evidentiary hearing or trial. *Giachetti v. Holmes*, 14 Ohio App.3d 306, 307, 471 N.E.2d 165 (8th Dist.1984). Generally, the review of questions to be proved at trial entails an evaluation of the sufficiency of the evidence to meet the applicable standard which is a legal question and the weight of the evidence which is generally left to the fact-finder. *See Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 11, 19.

two other justices agreeing) (where the majority addressed a mailing issue without addressing reasonable diligence before publication as the Court found the parties and the appellate court did not address the issue).

{¶68} In general, "A court of appeals may review findings of fact for an abuse of discretion by the trial court." *See generally In re Guardianship of Rudy*, 65 Ohio St.3d 394, 396, 604 N.E.2d 736, 738 (1992). And, Appellants' brief frames the issue as one involving the manifest weight of the evidence. The credibility of counsel's statements on the search efforts made at the hearing or in his affidavit relied upon at the hearing were questions for the trial court. And, it was for the trial court to determine the weight to be assigned to the investigator's opinion on what a diligent search would have revealed eight years before he ran his search. A mixed standard of review is commonly employed when there are factual and legal questions, where we would accept the trial court's factual findings if supported by competent, credible evidence but review de novo whether the facts meet the applicable legal test.

{¶69} Apparently realizing certain arguments raised on appeal were not voiced to the trial court, Appellants ask this court to recognize plain error. "[T]he fundamental rule is that an appellate court will not consider any error which could have been brought to the trial court's attention." *Schade v. Carnegie Body Co.*, 70 Ohio St.2d 207, 210, 436 N.E.2d 1001 (1982). The plain error doctrine in civil cases "is sharply limited to the extremely rare case involving exceptional circumstances where the error, left unobjected to at the trial court, rises to the level of challenging the legitimacy of the underlying judicial process itself." *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 122, 679 N.E.2d 1099 (1997). The decision on whether to recognize plain error is left to the discretion of the reviewing court. *Paulus v. Beck Energy Corp.*, 2017-Ohio-5716, 94 N.E.3d 73, ¶ 30 (7th Dist.), citing *Risner v. ODNR*, 144 Ohio St.3d 278, 2015-Ohio-3731, 42 N.E.3d 718, ¶ 27.

ASSIGNMENT OF ERROR TWO: REASONABLE DILIGENCE

{¶70} Appellants' second assignment of error alleges:

"The Trial Court Erred by Denying Appellants' Motion to Vacate the Default Judgments Entered Against Them Because the Judgments Were Void Due to Lack of Personal Jurisdiction."

{¶71} Appellants acknowledge a rebuttable presumption of reasonable diligence arose upon the affidavit of publication. They contend they sufficiently rebutted the

presumption and Appellees thereafter failed to sustain their reciprocal burden of proving reasonable diligence was used.

{¶72} Appellants initially make some of the same arguments we rejected in *Mammone* (and in *Franks*). The complaint in *Mammone* was filed against the same defendants on the same day as the complaint in this case. Each case was filed by different plaintiffs who were represented by the same law firm. The affidavit of publication was the same, and the search efforts in both cases were the same. The motion to vacate, response, reply, affidavits, and other attachments to the filings were the same. The difference here is the presentation of the investigator's testimony on his search efforts and his opinion about what a search in 2013 would have revealed using his firm's former subscription service. We will discuss this difference last, after setting forth the arguments we rejected in *Mammone* and in *Franks*.

{¶73} For instance, Appellants complain John Huddleston's certified mailing was sent to a post office box and Richard Huddleston's certified mailing was sent to his former work address. We note the address attempted for Richard contained no indicator of it being a business address. As we observed in *Mammone* and *Franks*, they cite nothing which would prohibit attempted service at those location types. *Mammone*, 7th Dist. No. 21 BE 0005 at ¶ 49; *Franks*, 7th Dist. No. 21 BE 0004 at ¶ 50.

{¶74} Appellants also complain certified mail was only attempted on John Wayne Huddleston at one of the addresses listed in the report generated by Westlaw People Search and did not appear to be the most recently reported address. Nevertheless, the address Appellee used for attempted service was reported by Westlaw as the "Current Address" under the heading of "Last Known Address Information." As Appellants point out, under "Other Address Information" there were two addresses with more recent "Last Reported" dates. However, Westlaw placed these under the heading "Previous Address." In any event, none of the addresses matched the address John Wayne Huddleston listed in his affidavit, and he did not aver he would have received the certified mailing if one of those prior addresses had been used. Furthermore, Appellants did not argue this below.

{¶75} Appellants contend the trial court must have failed to scrutinize the file attached to the affidavit of Appellee's attorney or the court would have noticed most pages involved the search for the location of the record holders and the identity of their heirs and only a few pages were relevant to the search for the addresses of the four defendants at issue. They generally noted this to the trial court in their reply in support of their motion

to vacate, stating: "the file was inclusive of all the defendants, not just the four (4) individuals filing to vacate judgment." Then, at the hearing, Appellants claimed the file only contained one relevant page: a print-out for John Huddleston. They did not acknowledge or discuss the print-out related to Richard Huddleston.

{¶76} On appeal, Appellants complain the Westlaw printout suggests the search related to Richard Huddleston was linked to Mildred Huddleston (a record holder) rather than independently performed under his name. The printout showed Westlaw found two old addresses for Richard Huddleston plus a more recent address (listed as his current address) which Appellee used in the attempt to serve him by certified mail. Appellants did not set forth an argument below about Richard Huddleston's search result being linked to Mildred's search or the ramifications of a notation listing him as a potential relative of Mildred.

{¶77} Regarding the lack of printouts in the file for Linda Hanes or Nancy Payne, Appellee's attorney informed the trial court at the hearing that they only generated printouts when information was supplied by the database; i.e., if nothing pertinent was generated, then nothing was printed. "There is no requirement for a party or counsel to maintain evidence of unsuccessful searches by printing unsuccessful results. (Nor is there a requirement to print seemingly successful, but ultimately incorrect, search results; Appellees happened to have saved some search results for many years.)" *Mammone*, 7th Dist. No. 21 BE 0005, at ¶ 57; *Franks*, 7th Dist. No. 21 BE 0004 at ¶ 58.

{¶78} In any event, as we observed in *Mammone* and *Franks*, the file attached to the affidavit was a separate piece of evidence from the averment in ¶ 8 of the affidavit. Although Appellee emphasized the size of the file showing their search efforts, they pointed to other evidence as well, including the efforts listed in the affidavit of publication which were further explained in ¶ 8 of the affidavit attached to the response to the motion to vacate. The trial court additionally relied on the statement in ¶ 8 of the affidavit on the efforts to locate the four defendants at issue. The court quoted from a list of databases and records searched while looking for these defendants. The affidavit attested to unsuccessfully searching for the addresses of the defendants at issue by searching the public records, including the probate records in Belmont County, Ohio and Hidalgo and Kleberg County, Texas, the records of the Ohio Department of Natural Resources, the subscription services of Westlaw People Search and idocket.com, the databases of

Whitepages, Google, and Peoplesmart, and additional websites including deathrecord.com, billiongraves.com, familysearch.org, and zabasearch.com.

{¶79} Appellants' investigator did not search any of these records. He offered an opinion that there was a high probability a search of Whitepages would have returned addresses for those with a long history at their addresses. Yet, a reasonable person could conclude two of the four defendants at issue did not have a long history at their addresses at the time the complaint was filed according to Appellants' own affidavits. And, the investigator acknowledged he had no idea what Whitepages would have reported when the search was conducted on Appellee's behalf. The trial court could reasonably find the statements of Appellee's attorney as to the search he conducted to be credible.

{¶80} As in *Mammone* and *Franks*, Appellants emphasize the four affidavits attached to their motion to vacate. John Wayne Huddleston said he lived at his address with his wife Cynthia since 2006. Linda Hanes said she lived at her address since 2000 and "It is unknown to me how anyone, in using due diligence, did not find my address * * * when at the time of the filing of the lawsuits, I had lived there for thirteen (13) years." Billy G. Payne stated he lived with Nancy Payne at his 2013 address since 2010 and also expressed, "It is unknown to me how anyone, using due diligence, did not find our address * * *." While the others provided the year they moved to the address where they lived when the lawsuit was filed in May 2013, Richard Huddleston did not say when he moved to that address, giving the impression he moved there that same year. Appellants ignore this fact as to Richard Huddleston, and generally conclude the evidence of established addresses "necessarily means there are ample public records showing their addresses."

{¶81} As this court has concluded: "the mere statement that a defendant lived at an address cannot rebut a presumption of reasonable diligence; everyone lives somewhere. A further statement providing the length of time a defendant lived at an address does not rebut the presumption of reasonable diligence, even for the two who lived at their address for a fairly long time." *Mammone*, 7th Dist. No. 21 BE 0005 at ¶ 63; *Franks*, 7th Dist. No. 21 BE 0004 at ¶ 66.

{¶82} Next, Appellants claim Appellee failed to utilize information contained in Appellee's own file pointing to the will attached to the complaint which contained the Social Security numbers for the defendants at issue. Although Appellants did not raise the issue of a search for Social Security numbers in their motion to vacate or reply, they

did raise the issue at the hearing before the trial court. In response, Appellee's attorney informed the trial court the Social Security numbers obtained from the will were utilized when running the search in Westlaw People Search. Appellee pointed out how this is reflected in the Westlaw printouts for John and Richard Huddleston (which show the Social Security numbers). The trial court found these assertions to be credible.

{¶83} Appellants argue Appellee was required to pull credit reports with the Social Security numbers and suggest the situation of having Social Security numbers to go with the names in the file is similar to a case where this court found the trial court did not abuse its discretion in finding a default judgment void based in part on information in the plaintiff's own file. *American Tax Funding*, 2014-Ohio-5831 at ¶ 32-37. In that case, the plaintiff's own file contained the mailing address of a similarly named controlling company who paid the principal balance, provided its address to the plaintiff, and received a receipt at that address from the plaintiff stating interest was still due. *Id.* at ¶ 7-8, 34. The plaintiff also had the telephone number of the defendant, who was a business entity, and it was the plaintiff's call to this number that prompted the payment. *Id.* at ¶ 5. In addition, the defendant presented testimony from the Treasurer's Office showing the defendant's correct address was on file before the plaintiff's attorney conducted his search. Although the address was not displayed on the website of the Treasurer's Office, the Auditor's website (which the plaintiff's attorney claimed he searched) showed the defendant's name as the owner and specifically said to call the Treasurer's Office for mailing information (due to a negotiated tax lien). *Id.* at ¶ 32-33.

{¶84} The situation here is not akin to the one existing in *American Tax Funding*. Furthermore, the decision to uphold an exercise of discretion to vacate a judgment in one case does not mean a case with allegedly similar facts must be reversed where a trial court refused to vacate the judgment. *Mammone*, 7th Dist. No. 21 BE 0005 at ¶ 52; *Franks*, 7th Dist. No. 21 BE 0004 at ¶ 53.

{¶85} Although the Supreme Court in *Sizemore* listed a credit bureau as a common source of information, the Court specifically noted it was not announcing a mandatory checklist. *Sizemore*, 6 Ohio St.3d at 332 (a decision issued before the internet was available); *American Tax Funding*, 2014-Ohio-5831 at ¶ 31. "Although use of a subscription search service is not required for reasonable diligence, it can assist in showing reasonable diligence." *Mammone*, 7th Dist. No. 21 BE 0005 at ¶ 54 (also noting Westlaw is not a free search engine). Regardless, the court believed Appellee utilized

Westlaw People Search for the four defendants at issue, and Appellee's *printouts from Westlaw People Search* for two of those defendants *reported TransUnion as a source of information*.

{¶86} In the case at bar, unlike in *Mammone* and *Franks*, Appellants additionally presented the testimony of an investigator who ran a search in the CLEAR database using the Social Security numbers of the defendants at issue and found the addresses reported in Appellants' affidavits. He said the database collected information from the three main credit bureaus, utilities, and the BMV (driver's license and vehicle registration). This database generated a report with the information organized according to the reported dates for the addresses. From this, the investigator opined the addresses reported to be associated with each defendant in 2013 would have been available on that service in 2013.

{¶87} As the trial court pointed out, the investigator's search on CLEAR was conducted in March 2021, which was more than eight years after the April 2013 Westlaw People Search performed by Appellee before filing the May 2013 complaint. When the court asked how long the investigator had been using the database, he answered, "I want to say seven years, eight years." The court then asked what he used ten years before the March 2021 hearing, and he said he used IRBsearch. He said it "does the exact same thing," answering that it collected information from BMV records and credit reports. He opined the pertinent addresses would have been available in 2013 using IRBsearch and said he would not have been performing his job adequately if he was hired to find the addresses in 2013 and failed to do so.

{¶88} The trial court found the addition of the investigator's testimony did not rebut the presumption of reasonable diligence. Even assuming the addition of the investigator's testimony pushed the case past the presumption stage and invoked Appellee's burden to show the efforts were reasonably diligent, the trial court alternatively found Appellee met any burden to prove reasonable diligence was exercised.

{¶89} A paid private investigator with access to a special investigative data aggregator service said he would have found the addresses in 2013. His opinion was at least partly based on his 2021 search using a service he may not have been using in 2013, and there was little testimony on the prior service he used. He did not factually dispute the results obtained by Appellee's search. As to the suggestion that a more advanced database should have been used, the investigator could not provide the cost

of the subscription database. And, he could not answer whether it could have been purchased for use by the public in 2013. Appellants' counsel urged Appellee's attorney should have hired a process serving firm who would have access to a more exhaustive database. The investigator estimated his firm would charge a client $300 per person for a background search. This would have been costly.

{¶90} A plaintiff is not required to hire a process serving firm in order to conduct a reasonably diligent search for addresses of the heirs of deceased property owners. Moreover, the trial court did not seem convinced the database used by the investigator in 2013 would have produced the same results he received on CLEAR in 2021.

{¶91} The affidavit of Appellee's counsel on the steps he took in the search for addresses was believable. There were eighteen defendants (due to the death of the original grantors and the research revealing the heirs). Appellee found more than half of the addresses in their search, but the four defendants at issue here plus three other defendants were served via publication. General internet searches were conducted with some common and readily available sources. Westlaw People Search and Public Records was a subscription service using Transunion as the credit bureau source. The service returned no information for two of the defendants at issue, leaving Appellee without a general location on which to focus for finding county level records (besides the Ohio county where the property was located and two Texas counties related to the deceased record holders, where public records were consulted). The other two defendants were no longer at the addresses reported by the service. The addresses where each subsequently said they lived in 2013 was in a different Texas county than the addresses Westlaw listed as their last known address; one was not at his 2013 address long. Appellee concludes an attorney would not be unreasonable in 2013 for relying on this database in addition to the other consulted sources.

{¶92} Due diligence requires the use of "common and readily available sources"; however, not every readily available source must be consulted. *Sizemore*, 6 Ohio St.3d at 332 (where the Supreme Court listed "a credit bureau" {in the singular} as an available source and said the "examples do not constitute a mandatory checklist"). We cannot say a plaintiff who consults one credit bureau must obtain information from the other two credit bureaus when a credit bureau is not a mandatory source in the first place. Under the facts and circumstances of this case, it was not unreasonable, arbitrary, or unconscionable to find counsel was reasonably diligent in conducting his 2013 search by

utilizing Westlaw People Search and Public Records in addition to the other sources such as Google, Whitepages, Peoplesmart, and Zabasearch. As Appellee points out, a plaintiff is required to conduct a reasonably diligent search, not an exhaustive search.

{¶93} Appellee's evidence of reasonable diligence was legally sufficient, and the trial court's factual decisions were supported by competent, credible evidence. The trial court did not legally err or abuse its discretion in concluding the locations searched were reasonable and "steps [were taken] which an individual of ordinary prudence would reasonably expect to be successful in locating a defendant's address." *See Sizemore*, 6 Ohio St.3d at 332. Accordingly, Appellants' assignment of error is overruled.[9]

{¶94} For the foregoing reasons, the trial court's judgment is affirmed.

Donofrio, P J., concurs.

D'Apolito, J., concurs.

[9] Appellees alternatively ask this court to affirm on other grounds: waiver or laches. There is no need to address the topics as we are affirming the trial court's judgment finding reasonable diligence and proper service by publication. *See Franks,* 7th Dist. No. 21 BE 0004 at fn. 6; *Mammone*, 7th Dist. No. 21 BE 0005 at fn. 6.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, is affirmed. Costs to be taxed against the Appellant.

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.