[Cite as *Beckett v. Rozsa*, 2021-Ohio-4298.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
JEFFERSON COUNTY

LEROY BECKETT, III ET AL.,

Plaintiffs-Appellants,

v.

JOSEPH ROSZA ET AL.,

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 21 JE 0003

Civil Appeal from the
Court of Common Pleas of Jefferson County, Ohio
Case No. 19 CV 469

BEFORE:
David A. D'Apolito, Cheryl L. Waite, Carol Ann Robb, Judges.

JUDGMENT:
Reversed and Vacated.

Atty. Jeffrey J. Bruzzese, Bruzzese, Agresta, & Hanlin, LLC, P.O. Box 1506, 100 North 4th Street, 10th Floor, Steubenville, Ohio 43952, for Plaintiffs-Appellants and

Atty. Tom M. Kidlow and *Atty. Heidi R. Kemp,* Emens Wolper Jacobs & Jasin Law Firm, 250 West Main Street, Suite A, St. Clairsville, Ohio 43950, for Defendants-Appellees.

Dated: November 18, 2021

D'APOLITO, J.

{¶1} Plaintiffs-Appellants, Leroy M. Beckett, III, his children, Scott Beckett and Mark Beckett, and Wolf Run Land LLC (purported holders), appeal the entry of summary judgment by the Jefferson County Court of Common Pleas in favor of Defendants-Appellees, Joseph Rosza, Richard Dawson, Robert Omaits, and Dona Omaits (surface owners), in this action for declaratory judgment, slander of title, trespass, ejectment, forcible entry and detainer, and to quiet title, filed pursuant to the Dormant Mineral Act, R.C. 5301.56.

{¶2} After considering the parties' cross-motions for summary judgment, the trial concluded that Appellees employed due diligence in their effort to locate the heirs of Leroy M. Beckett II ("Leroy II") and Grace L. Beckett prior to proceeding to notice by publication. The trial court predicated its conclusion that the search, which was limited to Jefferson County, was reasonable on "the passage of time without any preservation action [and] the limited nature of the information in the certificate of transfer [conveying the property from Roy Beckett to his children, Leroy II and Grace.]" (2/1/2021 J.E., p. 2.)

{¶3} Appellants advance three assignments of error. First, they argue that the trial court erred in concluding that the single county search was reasonable based on probate records indicating that Leroy II and Grace lived in states other than Ohio. In their second and third assignments of error, which Appellants raise for the first time on appeal, they assert that Appellees failed to demonstrate that notice sent by certified mail to the last known address of Leroy II and Grace would have been futile, and that the affidavit of abandonment was ineffective due to the Appellees' failure to describe the steps undertaken to find the holders prior to notice by publication.

{¶4} For the following reasons, we find that Appellants' first assignment of error has merit insofar as the attorney who conducted the search in 2011 concedes that Roy's probate records included out-of-state addresses for Leroy II and Grace, but the attorney did not extend the search for holders beyond Jefferson County. Accordingly, the entry of summary judgment in favor of Appellees is reversed and vacated, and summary judgment is entered in favor of Appellants. Further, the entry of summary judgment in

favor of Appellants on their first assignment of error renders their second and third assignments of error to be moot.

FACTS

{¶5} This case relates to approximately 110.5551 acres situated in Smithfield Township, Jefferson County, Ohio, known as Auditor's Parcel Nos. 30-02371-000, 30-02367-000, 30-02377-000, 30-02369-000, and 30-02378-000 ("Property"). On December 10, 1966, Roy died, leaving the Property to his two children, Leroy II and Grace, each a one-half interest, pursuant to Roy's Last Will and Testament, filed in Case No. 56253 of the Probate Division of the Court of Common Pleas of Jefferson County, Ohio.

{¶6} The certificate of transfer filed in the Jefferson County Probate Court and recorded in the County Recorder's Office identifies Grace's address as "R.F.D. Rayland, Ohio," and Leroy II's address as 259 Hollister Street, Manchester, Conn." A title report for the Property likewise identifies 259 Hollister Street, Manchester, Connecticut as Leroy II's address.

{¶7} According to the affidavit of Richard Bell, probate records in Jefferson County for the Estate of Roy Beckett confirm Leroy II's 259 Hollister Street address in Manchester, Connecticut and identify Grace's address as 25 Hailey Hall, Urban[a], Illinois. (Bell Aff., ¶ 12.) According to the affidavit of Matthew Warnock, "an address for [Leroy II] was included on the face of the "Certificate of Transfer." (Warnock Aff. at ¶ 18.) Further, "the address for [Grace], along with the Connecticut address of [Leroy II], were included on the face of the Application for Probate of Will filed in Roy's estate in Jefferson County Probate Court Case No. 56053 on December 20, 1966, namely 25 David Hailey Hall, Urbana, Illinois." (*Id.* at ¶ 19.) The averments of Bell and Warnock regarding the content of the "probate records" are uncontroverted, however, the probate records are not in the record.

{¶8} On January 28, 1980, Grace conveyed her one-half interest in the Property to Fred and Helen D. Straus as evidenced by the Warranty Deed recorded in Volume 571, Page 882 of the Deed Records of Jefferson County, Ohio. That same day, Leroy II likewise conveyed his one-half interest in the Property to the Strauses as evidenced by the Warranty Deed recorded in Volume 571, Page 884 of the Deed Records of Jefferson

County, Ohio. Both deeds contain a reservation of oil and gas minerals underlying the Property ("severance deeds").

{¶9} The notary on Grace's severance deed is from Champaign County, Illinois, the county in which Urbana is located. The notary is illegible on the photo of the deed attached to Appellants' Motion for Summary Judgment and the copies attached to the complaint and Appellees' Motion for Summary Judgment, but Warnock attests to the fact in his uncontroverted affidavit. (Warnock Aff., ¶ 22.)

{¶10} Through successive conveyances, the surface was transferred to Appellees. In 2011, Appellees, through counsel, searched the public records of both the Jefferson County Recorder and the Jefferson County Probate Court for any conveyance and/or preservation of the Beckett reservation by Leroy II, Grace, or anyone who could claim to derive rights therefrom.

{¶11} The attorney who undertook the search on behalf of Appellees provided the following summary of his efforts in an affidavit attached to their Motion for Summary Judgment:

> That I have searched the Jefferson County Records (Recorder's Records, Probate Court Records, Auditor's Records, Engineer's Records and Clerk of Courts) and I have not found notice of a transfer, preservation, assignment or person having a common source with the deceased holders of the mineral interest reserved [in the severance deed].
>
> * * *
>
> I reviewed the Jefferson County Probate Records and there was no Ancillary Administration or Application for Certificate of Transfer filed for [Grace].
>
> I reviewed the Jefferson County Probate Records and there was no Ancillary Administration or Application for Certificate of Transfer filed for [Leroy II].
>
> * * *

> Because the public records of Jefferson County did not include evidence of any holders, persons with rights transferred or assigned from a holder or notice of any person having a common source of record to the [mineral interest], it was determined that service by certified mail could not be completed to any holder pursuant to R.C. 5301.56(E)(1).

(Lawrence Piergallini Aff., ¶ 5, 13, 14, 17.)

{¶12} The affidavit concludes:

> As an attorney that had thirty years of experience searching titles and administering estates I was very much aware that to clear title and provide notice of a transfer of real estate when a person dies that an estate should be administered in the county in which the real estate is located. I did not find any estate filings for [Grace or Leroy II].
>
> That in my opinion [Appellants] failed to preserve the interest as required pursuant to R.C. 5301.51; they failed to file an Application for a Certificate of Transfer and/or an Ancillary Estate; and, their failure to file an action to quiet title in the interest is evidence that the [mineral interest] is truly abandoned and no longer in existence pursuant to R.C. 5301.56(H)(2)(c).

(Piergallini Aff. ¶ 20-21.)

{¶13} Despite the information regarding the Connecticut address for Leroy II and the Illinois address for Grace found in the Jefferson County probate records, Appellees each published notices of their intent to declare the Beckett reservation abandoned in the Jefferson County Herald-Star newspaper on September 8 and 12, 2011. When no holder filed a notice of preservation within thirty days, Appellees each recorded an "Affidavit of Abandonment of Oil and Gas Interests" in the Official Records of Jefferson County, Ohio. Approximately 30 days thereafter, the Jefferson County Recorder made marginal notations on the severance deeds, which read, "This mineral interest abandoned pursuant to affidavit of abandonment recorded in [references to the affidavits of abandonment]."

{¶14} In or about August, 2011, Dawson executed an oil and gas lease with

Marquette covering a portion of the oil and gas minerals underlying his portion of the Property. Likewise, Rosza executed an oil and gas lease with Marquette covering the oil and gas minerals underlying his portion of the Property. On or about October 20, 2011, the Omaits executed an oil and gas lease with Hess Ohio Resources, LLC covering the oil and gas minerals underlying their portion of the Property ("Appellees' leases"). On April 2, 2014, the Appellees' leases were conveyed to American Energy Utica, LLC, pursuant to the Assignment and Bill of Sale recorded in Volume 1093, Page 173 of the Official Records of Jefferson County, Ohio. American Energy Utica, LLC merged into and became Ascent Resources-Utica, LLC ("Ascent").[1]

{¶15} The Becketts leased the oil and gas minerals underlying the Property to Wolf Run on December 8, 2017. In February 2018, Kathleen Beckett, Leroy II's daughter, also conveyed an interest in the oil and gas underlying the Property to Wolf Run. Leroy III filed an "Affidavit of Heirship" pursuant to R.C. 5301.252 in the Jefferson County Recorder's office on February 2, 2018, which reads that Grace died on August 2, 1996 and Leroy II died on February 19, 2007. That same day, Leroy III filed an Affidavit of Preservation of Mineral Rights, which explains that the mineral interest passed from Leroy II's widow, Irene Beckett, through her will to her children, Kathleen Beckett (50%), Leroy III (25%), and her grandsons, Scott and Mark Beckett (12.5% each).

{¶16} After cross-motions for summary judgment were fully briefed, the trial court sustained Appellees' Motion for Summary Judgment and overruled Appellants' Motion for Summary Judgment. The trial court provided the following analysis:

> The issue for the Court is whether the surface owners used due diligence in their search limited to Jefferson County when the search of the public

[1] Ascent Resources-Utica, LLC ("Ascent") was a named defendant in this case. After a period of discovery, the Becketts and Ascent settled all claims asserted by the Becketts against Ascent, and Ascent was dismissed with prejudice from the above-captioned action.

Appellees filed a cross-claim against Ascent for indemnification pursuant to paragraph 29 of the addendum to the oil and gas lease. However, in paragraph 29, Ascent agrees to hold Appellees harmless for any damages resulting from the removal of oil and gas from the Property. There is no agreement to defend Appellees in the event of a competing claim to the mineral interests in the Property.

On January 8, 2020, Ascent filed a Motion to Stay the Cross-Claim Pending Arbitration. The trial court never ruled on the motion.

> records of Jefferson County revealed out of state addresses for [Grace and Leroy II].
>
> The surface owners did not attempt to serve notice of the intended amendment by certified mail because the parties were deceased and no ancillary proceedings or other actions were filed in Jefferson County to preserve the mineral interest. No search of the public records where the Becketts had resided was undertaken.
>
> It is clear from [the Ohio Supreme Court's decision in *Gerrity v. Chervenak*, 162 Ohio St.3d 694, 2020-Ohio-6705, 166 N.E.3d 1230] that a search of the public-property records in the county where the land subject to the severed mineral interest is located will generally establish a baseline of reasonable diligence in identifying the holders of this severed mineral interest.
>
> In this case, the searcher had addresses that were out of state, created in the certificate of transfer.
>
> As stated in Gerrity, Id. [sic] whether the additional search is required depends on the circumstances of each case. This Court holds that said additional searches in Urbana Illinois and Manchester Connecticut were not required. The Certificate of Transfer created the surface and mineral rights of [Leroy II and Grace] in 1967. Their severance deeds reserving the mineral rights were recorded in 1980. The affidavit of abandonment was signed in 2011. Because of the passage of time without any preservation action, [and] the limited nature of the information in a certificate of transfer, the surface owners were not charged with going any further to meet their duty.

(2/1/2021 J.E., p. 1-2.)

{¶17} In support of their summary judgment motion and in their appellate brief, Appellants cite liberally to "TR." There is no transcript of an evidentiary hearing in the record and no evidentiary hearing is memorialized on the docket. Although a hearing was

held on the cross-motions for summary judgment, no testimony was accepted by the trial court.

{¶18} Typically, it is the duty of the appellant to provide a transcript to the reviewing court. *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980); App. R. 9(B). When no transcript is filed, the appellate court must "presume the regularity of the proceedings and the validity of the trial court's judgments. Consequently, arguments that could rely only on the record for support would be deemed meritless in the absence of a record." *Marsilio v. Brian Bennett Constr.*, 7th Dist. No. 06 MA 180, 2008-Ohio-5049, 2008 WL 4416523, ¶ 14.

{¶19} In circumstances where a transcript is unavailable, App.R. 9(C) permits an appellant to submit a narrative transcript of the proceedings, subject to objections from the appellee and approval by the trial court. *Knapp*, supra, at 199–200, 400 N.E.2d 384. However, no App.R. 9(C) narrative transcripts is in the record.

{¶20} Appellants rely on the testimony of Piergallini or Appellees from the transcript to establish they had personal knowledge, in varying degrees, that Leroy II and Grace had moved to different states. Because the transcript was not included in the record, we predicate no part of our decision on the excerpts of testimony from the transcript cited in Appellants' trial court or appellate briefs.

SUMMARY JUDGMENT STANDARD

{¶21} This appeal is from a trial court judgment resolving a motion for summary judgment. 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).

{¶22} "[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. *Doe v. Skaggs*, 7th Dist. No. 18 BE 0005, 2018-Ohio-5402, ¶ 11.

{¶23} 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.

ANALYSIS

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED BY FINDING THAT THE APPELLANTS' MINERAL OWNERSHIP INTEREST WAS ABANDONED UNDER ODMA BECAUSE THE SURFACE OWNERS FAILED TO EXERCISE REASONABLE DUE DILIGENCE TO IDENTIFY THE NAMES AND ADDRESSES OF THE HOLDERS IN ORDER TO PROVIDE NOTICE TO THE HOLDERS.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED BY FINDING THAT THE APPELLANTS' MINERAL OWNERSHIP INTEREST WAS ABANDONED UNDER THE

ODMA BECAUSE THE SURFACE OWNERS VIOLATED THE 2006 DMA BY FAILING TO SERVE NOTICE TO ANY LAST KNOWN ADDRESS BY CERTIFIED MAIL, AS REQUIRED BY R.C. 5301.56 AND BY FAILING TO PRODUCE ANY EVIDENCE THAT CERTIFIED MAIL WOULD HAVE BEEN FUTILE.

ASSIGNMENT OF ERROR NO. 3

THE TRIAL COURT ERRED BY FINDING THAT THE APPELLANTS' OWNERSHIP INTEREST WAS ABANDONED UNDER THE ODMA BECAUSE THE AFFIDAVITS OF ABANDONMENT ARE INVALIDATED BECAUSE THEY ARE VOID ON THEIR FACE FOR FAILING TO COMPLY WITH THE ODMA BY INCLUDING A STATEMENT OF THE EFFORTS OF THE DILIGENCE THAT WAS UNDERTAKEN TO ASCERTAIN THE NAMES AND ADDRESSES OF MINERAL HOLDERS TO COMPLETE SERVICE BY CERTIFIED MAIL.

{¶24} The General Assembly enacted the Dormant Mineral Act in 1989 as a supplement to the Ohio Marketable Title Act, R.C. 5301.47, et seq., to provide a mechanism for reuniting abandoned, severed mineral interests with the surface estate. *Dodd v. Croskey*, 143 Ohio St.3d 293, 2015-Ohio-2362, 37 N.E.3d 147, ¶ 7-8. As amended in 2006, the Dormant Mineral Act provides, unless a severed mineral interest is in coal or is coal related, the interest is held by the United States, the state or any other political body described in the statute, or a saving event enumerated in R.C. 5301.56(B)(3) has occurred within the preceding 20 years, the mineral interest "shall be deemed abandoned and vested in the owner of the surface of the lands" if the surface owner has satisfied the requirements of R.C. 5301.56(E). R.C. 5301.56(B).

{¶25} R.C. 5301.56(E) reads:

> Before a mineral interest becomes vested under division (B) of this section in the owner of the surface of the lands subject to the interest, the owner of the surface of the lands subject to the interest shall do both of the following:

> (1) 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.
>
> (2) At least thirty, but not later than sixty days after the date on which the notice required under division (E)(1) of this section is served or published, as applicable, file in the office of the county recorder of each county in which the surface of the land that is subject to the interest is located an affidavit of abandonment that contains all of the information specified in division (G) of this section.

A surface owner's failure to satisfy R.C. 5301.56(E) precludes application of the Dormant Mineral Act and renders unnecessary any further analysis. *Gerrity, supra*, at ¶ 10, citing *Albanese v. Batman*, 148 Ohio St.3d 85, 2016-Ohio-5814, 68 N.E.3d 800, ¶ 20.

{¶26} The Ohio Supreme Court recently held in *Gerrity* that a surface owner's search for mineral estate holders is to be measured against a standard of "reasonable diligence." *Gerrity* at ¶ 31. The *Gerrity* Court opined:

> [B]ecause every case will be different, we agree with the Seventh District that whether a party has exercised reasonable diligence will depend on the facts and circumstances of each case. See *Sharp [v. Miller*, 2018-Ohio-4740, 114 N.E.3d 1285, ¶ 17 (7th Dist.), 2018-Ohio-4740, 114 N.E.3d 1285,] at ¶ 17. If there is to be a bright-line rule delineating what a surface-owner must do to comply with the Dormant Mineral Act, it should come from the General Assembly, not from this court. Nevertheless, without drawing a bright line, we can provide guidance in the context of the facts before us, and we turn to those facts now.

* * *

The surface owner's chain of title is the necessary starting point for determining the applicability of the Dormant Mineral Act. Before issuing notice of an intent to declare a severed mineral interest abandoned, the surface owner must first determine whether the Dormant Mineral Act applies. A severed mineral interest may not be deemed abandoned and vested in the owner of the surface of the lands subject to the interest if any of the six saving events set out in R.C. 5301.56(B)(3) has occurred within the previous 20 years. Four of those saving events—each one that does not involve actual use of the mineral interest—requires a filing, recording or notation in the property records of the county in which the surface property is located. See R.C. 5301.56(B)(3)(a), (d), (e), and (f). Accordingly, the surface owner must consult the public-property records in the county in which the surface property is located to determine whether a saving event has occurred. If no saving event is evident, the surface owner must also consult the chain of title to determine the record holder or record holders of the mineral interest—the starting point for determining who the surface owner must attempt to notify pursuant to R.C. 5301.56(E)(1). In addition to property records in the county in which the land that is subject to the mineral interest is located, a reasonable search for holders of a severed mineral interest will generally also include a search of court records, including probate records, in that county.

Review of publicly available property and court records in the county where the land subject to a severed mineral interest is located will generally establish a baseline of reasonable diligence in identifying the holder or holders of the severed mineral interest. There may, however, be circumstances in which the surface owner's independent knowledge or information revealed by the surface owner's review of the property and court records would require the surface owner, in the exercise of reasonable diligence, to continue looking elsewhere to identify or locate a holder. But

> whether that additional search is required will depend on the circumstance of each case, and it was not required in this case. McCombs's diligent search of the public records in both Guernsey County and Cuyahoga County revealed no indication that the sole record holder was deceased and offered no clue as to the identity of any potential successors or assigns.

Id. at ¶ 31, 35-36.

{¶27} In *Gerrity*, the Chervenak chain of title identified Jane F. Richards as the sole holder of the severed mineral estate and listed a Cleveland address for Richards. A search of public records from the recorder's office and probate court in Guernsey County, where the property was located, failed to reveal a more recent address, an estate, or any heirs. A search of the public records in the Cuyahoga County recorder's office and probate court, based on Richards' last known address, was equally fruitless. As a consequence, the Chervenaks sent notice by certified mail to Richards at the Cleveland address, which was returned as undeliverable, then filed notice by publication in Guernsey County.

{¶28} The *Gerrity* Court opined that the two-county search was reasonable, and the surface owners were under no obligation to search beyond the two counties' records. The Court further opined that "[w]hen a surface owner's reasonable search fails to reveal the names or addresses of holders of the mineral interest, the surface owner may provide notice by publication, pursuant to R.C. 5301.56(E)(1), and need not attempt to serve the unknown or unlocated holders by certified mail." *Id.* at ¶ 41.

{¶29} We reached the same conclusion with respect to last known addresses in different states in *Fonzi v. Brown*, 7th Dist. Monroe No. 19 MO 0012, 2020-Ohio-3631, appeal allowed, 159 Ohio St.3d 1487, 2020-Ohio-4232, 151 N.E.3d 634. The researcher in that case conceded that he knew that the Fonzis lived in Washington County, Pennsylvania at the time they filed their reservation, as the reservation deed contained the Fonzis' Washington County address.

{¶30} As in *Gerrity*, *supra*, the Fonzis' last known address was not in the county where the property was located. We opined that "[t]his 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." *Id.* at ¶ 32.

{¶31} Here, Appellees' search began and ended with the public records in Jefferson County. However, Roy's probate records contained an address for Leroy II in Manchester, Connecticut and an address for Grace in Urbana, Illinois. The Ohio Supreme Court in *Gerrity* recognized generally that "there may * * * be circumstances in which the * * * information revealed by the surface owner's review of the property and court records [in the county where the property is located] would require the surface owner, in the exercise of reasonable diligence, to continue looking elsewhere to identify or locate a holder." *Gerrity, supra,* at ¶ 36. The *Gerrity* Court recognized such a circumstance where the public records from the county in which the property was located contained an out-of-county address for the holder. Applying *Gerrity,* we find that Appellees' search was unreasonable because there was evidence in the Jefferson County probate records that established that Leroy II lived in Connecticut and Grace lived in Illinois.

{¶32} Appellants attached two affidavits to their Motion for Summary Judgment, one from an attorney and the other from a man whose "primary job since 2014 has been determining mineral ownership in real estate by conducting and reviewing title and heirship reports in Ohio." Both affidavits describe the relative ease with which the affiants were able to find the Beckett heirs. However, we previously declined to adopt an "end-result over the process employed" test in *Fonzi v. Miller*, 7th Dist. No. 19 MO 0011, 2020-Ohio-3739, 155 N.E.3d 986, ¶ 27, appeal allowed, 160 Ohio St.3d 1407, 2020-Ohio-4574, 153 N.E.3d 105, ¶ 27. We predicate our decision in this appeal on the information available to the surface owners and the parameters of their search, and conclude that they did not fulfill their statutory burden of a reasonably diligent search for holders before defaulting to notice by publication.

{¶33} Here, the attorney attests that he searched Roy's probate records, but ignored evidence in the probate records that Leroy II and Grace, and/or their heirs, may be found in other states. Based on the averments in his affidavit, the attorney appears to have believed in 2011, and continues to espouse in 2021, that a holder can forfeit the right to notice due to his or her failure to file an ancillary estate in the county where the

property is located. To the contrary, a holder's failure to file a notice of preservation or to comply with Ohio property law does not release a surface owner from his or her obligation to conduct a reasonably diligent search for holders prior to serving notice of abandonment by publication.

{¶34} While it is true that Appellees' interpretation of R.C. 5301.56(E)(1) was predicated solely on the statutory language in 2011, Ohio courts have uniformly concluded that the failure to continue a search for heirs in the state of the last known address of the holders is unreasonable, regardless of the year that the search was undertaken. Insofar as the Jefferson County probate records contained out-of-state addresses for the holders in this case, we find that the search undertaken by Appellees was unreasonable, and that the trial court erred as a matter of law in sustaining Appellees' Motion for Summary Judgment and overruling Appellants' Motion for Summary Judgment. Further, insofar as Appellants' first assignment of error is meritorious, we find that Appellants' second and third assignments of error are moot.

CONCLUSION

{¶35} For the foregoing reasons, we find that Appellees failed to conduct a reasonably diligent search prior to serving notice by publication, based on the information regarding the holders found in the probate records in Jefferson County. Accordingly, the trial court's entry of summary judgment in favor of Appellees is reversed and vacated, and summary judgment is entered in favor of Appellants.

Waite, J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Jefferson County, Ohio, granting summary judgment in favor of Appellees is reversed and vacated. Summary judgment is entered in favor of Appellants. 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.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.