

OHIO COURT OF APPEALS, SEVENTH APPELLATE DISTRICT, BELMONT COUNTY

Sutherly v. Theaker

2026-Ohio-444 · No. 25 BE 0003 · Decided February 11, 2026

SUMMARY

The Seventh District Court of Appeals of Ohio denied Laura Sutherly’s applications for reconsideration and en banc consideration of the court’s prior decision concerning ownership of gas royalty interests transferred through transfer-on-death designations. The court held that Sutherly identified neither an obvious error nor an intradistrict conflict warranting further consideration.

CASE DETAILS

COURT	Ohio Court of Appeals, Seventh Appellate District, Belmont County
WRITING FOR THE COURT	Per Curiam; Carol Ann Robb; Cheryl L. Waite; Mark A. Hanni
JURISDICTION	Ohio Court of Appeals, Seventh Appellate District, Belmont County
DECIDED	February 11, 2026
DOCKET	25 BE 0003
DISPOSITION	other
PROCEDURAL POSTURE	Plaintiff-appellant sought reconsideration and en banc consideration of the court's prior appellate opinion. The court denied both applications.
STANDARD OF REVIEW	An application for reconsideration is evaluated under whether the applicant identifies an obvious error in the decision or raises an issue that the court failed to consider or failed to fully consider when it should have. En banc consideration requires a determination that two or more decisions of the district conflict on a dispositive issue and that en banc review is necessary to secure or maintain uniformity.
PRECEDENTIAL VALUE	Published opinion
PARTIES	Laura Sutherly v. Richard M. Theaker, II, et al.

TOPICS

- appellate procedure
- probate procedure
- minerals
- trusts
- res judicata

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether Sutherly identified an obvious error or an overlooked issue warranting reconsideration of the court's prior decision.
2. Whether the prior decision conflicted with decisions of the Seventh District on a dispositive legal issue so as to require en banc consideration.

HOLDINGS

1. Reconsideration was not warranted because Sutherly merely reiterated arguments made on appeal and identified neither an obvious error nor an issue that the court had failed to consider or fully consider.
2. En banc consideration was not warranted because Sutherly failed to identify an intradistrict conflict concerning a dispositive issue and failed to show that en banc review was necessary to maintain uniformity within the district.

KEY QUOTATIONS

“Because the royalty rights vested automatically in Theaker II in his personal capacity upon the decedent's death, Theaker II's efforts to convey the same pursuant to the decedent's will and/or trust by Theaker II in his fiduciary capacity were of no legal consequence.” (¶ 5)

“The test generally applied to reconsiderations is whether the applicant identifies “an obvious error in [the] decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been.”” (¶ 3)

FACTUAL BACKGROUND

The dispute concerns ownership of half of a gas royalty or mineral interest associated with property connected to the decedent's estate or trust. The probate court's proceedings were stayed after Sutherly initiated a declaratory-judgment action against Theaker individually and as trustee. The prior appellate decision held that the royalty rights vested automatically in Theaker in his personal capacity upon the decedent's death and that his attempted conveyance of those rights in a fiduciary capacity had no legal consequence.

PROCEDURAL HISTORY

Sutherly previously appealed a trial-court decision concerning ownership of gas royalty or mineral interests. In the prior appeal, the court rejected the trial court's res judicata analysis but held that Theaker, acting in a representative capacity, lacked authority to transfer the royalty interest because the property did not belong to the decedent or his trust. Sutherly then sought reconsideration and en banc consideration, asserting obvious error and an intradistrict conflict; both applications were denied.

DISPOSITION

other

CASES CITED

- Sutherly v. Theaker, 2025-Ohio-5208 (7th Dist.)
- State v. Burke, 2006-Ohio-1026, ¶ 2 (10th Dist.)
- State v. Owens, 112 Ohio App.3d 334, 336 (11th Dist. 1996)
- State v. Wellington, 2015-Ohio-2095, ¶ 9 (7th Dist.)
- Electronic Classroom of Tomorrow v. State Bd. of Edn., 2019-Ohio-1540, ¶ 3 (10th Dist.)
- Electronic Classroom of Tomorrow v. State Bd. of Edn., 2021-Ohio-3445
- State v. Carosiello, 2018-Ohio-860, ¶ 12 (7th Dist.)
- State v. Forrest, 2013-Ohio-2409, ¶ 8
- In re Estate of Montgomery, 2014-Ohio-1401 (7th Dist.)

OPINION

Sutherly v. Theaker

2026 Ohio 444

PER CURIAM.

[Cite as Sutherly v. Theaker, 2026-Ohio-444.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT

BELMONT COUNTY

LAURA SUTHERLY,

Plaintiff-Appellant, v. RICHARD M. THEAKER, II, et al., Defendants-Appellees.

OPINION AND JUDGMENT ENTRY

Case No. 25 BE 0003 Application for Reconsideration and En Banc Consideration BEFORE: Carol Ann Robb, Cheryl L. Waite, Mark A. Hanni, Judges. JUDGMENT: Application for Reconsideration and En Banc Consideration Denied. Atty. Mac P. Malone, Atty. Thomas L. Feher, Thompson Hine LLP, for Plaintiff-Appellant and Atty. Karen S. Hockstad, Atty. Matthew H. Sommer, Dinsmore & Shohl LLP, for Defendants-Appellees. Dated: February 11, 2026 –2– PER CURIAM. {¶1} Laura Sutherly seeks reconsideration and en banc consideration of this court’s November 7, 2025 opinion in Sutherly v. Theaker, 2025-Ohio-5208 (7th Dist.). Richard Theaker, II opposes. Both applications are denied. Application for Reconsideration {¶2} App.R. 26(A)(1) permits a party to file an application for reconsideration after an appeal. An application for reconsideration “is not designed for use in instances where a party simply disagrees with the logic or conclusions of the court.” State v. Burke, 2006-Ohio-1026, ¶ 2 (10th Dist.), citing State v. Owens, 112 Ohio App.3d 334, 336 (11th Dist.1996). Moreover, an application for reconsideration does not permit the applicant to raise new arguments or issues for review that were not raised on appeal. State v. Wellington, 2015-Ohio-2095, ¶ 9 (7th Dist.). {¶3} The test generally applied to reconsiderations is whether the applicant identifies “an obvious error in [the] decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us

when it should have been.” *Electronic Classroom of Tomorrow v. State Bd. of Edn.*, 2019-Ohio-1540, ¶ 3 (10th Dist.), *aff’d sub nom. Electronic Classroom of Tomorrow v. State Bd. of Edn.*, 2021-Ohio-3445; *State v. Carosiello*, 2018-Ohio-860, ¶ 12 (7th Dist.). {¶4} Sutherly asserts we committed an obvious error by finding *res judicata* did not bar the trial court’s decision, which essentially vacated the probate court’s judgment determining that half the gas royalty interest belonged to her. This was a primary issue before this court on appeal. {¶5} We disagreed with the trial court’s *res judicata* analysis, but nevertheless determined Theaker II lacked the authority in his representative capacity to transfer the royalty interest because the property did not belong to the decedent or his trust. *Sutherly v. Theaker*, at ¶ 70-74. We held that “[b]ecause the royalty rights vested automatically in Theaker II in his personal capacity upon the decedent’s death, Theaker II’s efforts to convey the same pursuant to the decedent’s will and/or trust by Theaker II in his fiduciary capacity were of no legal consequence.” *Id.* at ¶ 76. Case No. 25 BE 0003 –3– {¶6} Sutherly’s reconsideration arguments reiterate her contentions on appeal. Because Sutherly does not identify an obvious error in our decision or raise an issue we either did not consider or that we did not fully consider, her application for reconsideration is denied. Application for En Banc Consideration {¶7} En banc consideration is governed by App.R. 26(A)(2), which states:

(2) En banc consideration

(a) Upon a determination that two or more decisions of the court on which they sit are in conflict, a majority of the en banc court may order that an appeal or other proceeding be considered en banc. * * * Consideration en banc is not favored and will not be ordered unless necessary to secure or maintain uniformity of decisions within the district on an issue that is dispositive in the case in which the application is filed. (b) The en banc court may order en banc consideration sua sponte. A party may also make an application for en banc consideration. An application for en banc consideration must explain how the panel’s decision conflicts with a prior panel’s decision on a dispositive issue and why consideration by the court en banc is necessary to secure and maintain uniformity of the court’s decisions. {¶8} Under this rule, applications for en banc consideration progress through three-steps: “(1) a party files the application, (2) a determination is made regarding whether an intradistrict conflict exists, and (3) if a conflict is found, a majority of the full court may order en banc consideration of the case. App.R. 26(A)(2)(a) and (b).” *State v. Forrest*, 2013-Ohio-2409, ¶ 8. An en banc proceeding is one in which all full-time judges of a court who have not recused themselves or otherwise been disqualified participate in the hearing and resolution of a case. . . . The purpose of en banc proceedings is to resolve conflicts of law that arise within a district. . . . These intradistrict conflicts develop when different panels of judges hear the same issue, but reach different results. . . . This “create[s] confusion for lawyers and litigants and do[es] not promote public confidence in the Case No. 25 BE 0003 –4– judiciary.” . . . Resolution of intradistrict conflicts promotes uniformity and predictability in the law, and a larger appellate panel provides the best possible means of resolution. (Citations omitted.) *State v. Forrest*, 2013-Ohio-2409, ¶ 8. {¶9} First, Sutherly urges us to find our decision conflicts with this court’s

prior decision in *In re Estate of Montgomery*, 2014-Ohio-1401 (7th Dist.). She contends Montgomery held an “order of the probate court in settlement of the account has the effect of a judgment and may only be vacated as provided for in R.C. 2109.35.” *Id.* at ¶ 6. {¶10} The appellant in *Montgomery* challenged the disposition and valuation of two vehicles distributed to him during the administration of the estate. We concluded his arguments should have been raised in a direct appeal from the judgment approving the final accounting and that his motion to vacate was an attempted substitute for a direct appeal. *Id.* at ¶ 10-11. Our conclusion on which Sutherly now relies was made in this context. {¶11} Sutherly contends the trial court erred by addressing the merits of this case in the subsequently filed civil action rather than under the statutory provision governing the vacation of a final judgment. She contends the court erred by not following R.C. 2109.35. However, Sutherly did not raise an assignment of error raising this issue or R.C. 2109.35, and as such, we did not render a decision on this issue or address the propriety of the underlying procedure. {¶12} Further, Sutherly initiated the declaratory judgment proceedings, which she now contends were improper. *Id.* at ¶ 15-16. As a result of Sutherly’s complaint, the probate court stayed the estate proceedings and its decision on whether to reopen the estate to address these issues. Thereafter, we dismissed Sutherly’s appeal from that judgment as lacking a final, appealable order. We stated in that dismissal judgment: Approximately four and a half months prior to Theaker filing his Motion to Reopen the estate of their father, Sutherly filed a complaint against Theaker personally and as trustee of their father’s trust. Sutherly is seeking half of the mineral rights that were part of the trust. . . . The probate court stayed the estate proceedings in the interest of judicial economy and in the exercise of its inherent power to control its own docket. Case No. 25 BE 0003 –5– (November 30, 2023 Judgment.) {¶13} Regardless, no intradistrict conflict exists, and en banc consideration is not necessary to maintain uniformity within the district. {¶14} Sutherly also contends our decision conflicts with two other Seventh District decisions. Sutherly contends issue preclusion prevents parties, or those in privity with a party, from re-litigating facts or issues in a subsequent suit that were fully litigated in a prior case. Sutherly asserts the instant case conflicts in light of our holding that the property did not belong to her, despite the final judgment stating otherwise. She also directs us to another decision for the proposition that an administrator of an estate is in privity with herself for res judicata purposes, and thus res judicata bars subsequent ownership disputes. {¶15} Theaker counters that neither case demonstrates a conflict since neither conflicts on a dispositive issue. We agree. None of the cases Sutherly advances involves conveyances of property via transfer on death (TOD) designations or the application or interpretation of Ohio’s TOD provisions. Consequently, Sutherly has not identified a conflict of law within this district, and her application for en banc consideration is denied.

JUDGE CAROL ANN ROBB

JUDGE CHERYL L. WAITE

JUDGE MARK A. HANNI

NOTICE TO COUNSEL

This document constitutes a final judgment entry. Case No. 25 BE 0003

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