[Cite as *Weyand v. Barnes*, 2009-Ohio-3239.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Betty Weyand,	:	
Plaintiff-Appellee,	:	No. 08AP-857 (C.P.C. No. 06CVC-10-14305)
v.	:	(REGULAR CALENDAR)
Donna L. Barnes et al.,	:	
Defendants-Appellants.	:	

D E C I S I O N

Rendered on June 30, 2009

Fusco, Mackey, Mathews & Gill LLP, and *Jeffrey D. Mackey*, for appellee.

Tyack Blackmore & Liston Co., L.P.A., Thomas M. Tyack and *Jonathan T. Tyack*, for appellants.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Defendants-appellants, Donna Barnes ("Donna") and Keith Barnes ("Keith"), collectively referred to as "appellants," appeal from the judgment of the Franklin County Court of Common Pleas entered upon a jury verdict in favor of plaintiff-appellee, Betty Weyand ("Betty" or "appellee") on her claim for constructive trust.[1]

{¶2} Kathleen Morris ("Kathleen") was the mother of Donna and the grandmother of Keith and Kevin Barnes. Kathleen was married to Leroy Morris ("Leroy"),

[1] The complaint initially named Donna Barnes, Keith Barnes, Kevin Barnes, and Julie Barnes as defendants; however, during the proceedings in the trial court, Kevin Barnes and Julie Barnes were dismissed as party defendants.

who passed away some 15 years prior to this litigation. Betty was Leroy's sister and Kathleen's sister-in-law.

{¶3} On May 12, 2005, Kathleen, accompanied by Keith and Betty, went to three banks in which Kathleen had various accounts. The first account at issue was an account at National City Bank, ending in account number 1755 ("the 1755 account"). Though this account had been in Kathleen's name alone, on May 12, 2005, Kathleen converted the 1755 account to a joint account between herself, Keith, and Betty. It does not appear that the 1755 account contained any survivorship language but, rather, was a joint account with no right of survivorship.

{¶4} The second account at issue was at Huntington National Bank, ending in account number 2460 ("the 2460 account"). On May 12, 2005, this account was converted to a joint and survivorship account between Kathleen, Keith, and Betty.

{¶5} The third account at issue was a certificate of deposit held at Fifth Third Bank, ending in account number 5081 ("the 5081 account"). On May 12, 2005, Kathleen had Betty, Keith, and Kevin Barnes added to the 5081 account as payable-on-death beneficiaries.

{¶6} Kathleen died on June 5, 2005. On June 7, 2005, Keith closed the 1755 account that held $82,556.91, and transferred the entire amount to Donna. Also on this date, Keith closed the 2460 account that held $74,013.42, and had a check prepared payable to Donna. On June 22, 2005, the 5081 account was closed, and the money was given to Donna. In essence, it is undisputed that all of the monies at issue in this matter were given to Donna.

{¶7} Betty filed this complaint on October 31, 2006, alleging constructive trust and unjust enrichment. Betty sought 50 percent of the monies from the 1755 account, 50 percent of the monies from the 2460 account, and $4,000 from the 5081 account. The matter was referred to a magistrate for trial.[2] During the trial, appellants moved for a directed verdict, and said motion was denied. At the conclusion of the evidence, appellants made a renewed motion for a directed verdict that was again denied. The jury returned a verdict of $78,285.56 against Keith and $4,000 against Donna on the basis of constructive trust. This appeal followed, and appellants bring the following five assignments of error for our review:

> I. THE TRIAL COURT ERRED IN REFUSING TO GRANT A DIRECTED VERDICT IN FAVOR OF DEFENDANT, KEITH BARNES ON PLAINTIFF'S CLAIM THAT DEFENDANT WAS HOLDING $79,285.36 [SIC] IN CONSTRUCTIVE TRUST FOR HER BENEFIT.
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> II. THE TRIAL COURT ERRED IN THAT THE JURY VERDICT AND JUDGMENT ENTRY AWARDING PLAINTIFF JUDGMENT IN THE SUM OF $79,285.26 [SIC] AGAINST DEFENDANT, KEITH BARNES ON THE BASIS OF A CONSTRUCTIVE TRUST THEORY IS CONTRARY TO LAW AND NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.
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> III. THE TRIAL COURT ERRED IN REFUSING TO GRANT A DIRECTED VERDICT IN FAVOR OF DEFENDANT, DONNA BARNES, ON PLAINTIFF'S CLAIM THAT DEFENDANT, DONNA BARNES, WAS HOLDING $6,666.00 IN "CONSTRUCTIVE TRUST" FOR THE BENEFIT OF PLAINTIFF, BETTY WEYAND.
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> IV. THE TRIAL COURT ERRED IN THAT THE JURY VERDICT AND JUDGMENT ENTRY AWARDING PLAINTIFF JUDGMENT IN THE SUM OF $4,000.00 ON THE BASIS OF A CONSTRUCTIVE TRUST THEORY IS CONTARY TO

[2] Although two theories were pled in the complaint, appellee dismissed her claim for unjust enrichment and proceeded solely on her claim for constructive trust.

> LAW AND NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.
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> V. THE TRIAL COURT ERRED IN REFUSING TO ALLOW DEFENDANT, KEITH BARNES, TO TESTIFY AS TO A TELEPHONE CONVERSATION HE HAD WITH HIS GRANDMOTHER, KATHLEEN MORRIS, THE NIGHT THE PLAINTIFF'S NAME WAS ADDED TO KATHLEEN MORRIS' ACCOUNTS WHEREIN SHE INSTRUCTED DEFENDANT, KETIH BARNES, THAT IF ANYTHING HAPPENED TO HER TO GO TO THE BANK AND GET THE MONEY ON THE BASIS THAT THE STATEMENT WAS HEARSAY.

{¶8} In their first and third assignments of error, appellants argue the trial court erred in denying their motion for a directed verdict. Civ.R. 50(A)(4) provides as follows:

> When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue.

{¶9} "In addition to Civ.R. 50(A), it is well established that the court must neither consider the weight of the evidence nor the credibility of the witnesses in disposing of a directed verdict motion. * * * Thus, 'if there is substantial competent evidence to support the party against whom the motion is made, upon which evidence reasonable minds might reach different conclusions, the motion must be denied.' " *Estate of Cowling*, 109 Ohio St.3d 276, 2006-Ohio-2418, ¶31, quoting *Hawkins v. Ivy* (1977), 50 Ohio St.2d 114, 115.

{¶10} In *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, ¶4, the Supreme Court of Ohio stated, " 'A motion for directed verdict * * * does not present factual issues, but a question of law, even though in

deciding such a motion, it is necessary to review and consider the evidence.' " Id., quoting *O'Day v. Webb* (1972), 29 Ohio St.2d 215, paragraph three of the syllabus. Being presented with a question of law, we apply a de novo standard of review. Id., citing *Cleveland Elec. Illum. Co. v. Pub. Util. Comm*. (1996), 76 Ohio St.3d 521, 523.

{¶11} Thus, we must consider whether appellee presented sufficient evidence regarding her claim for the imposition of a constructive trust to defeat a motion for directed verdict.

{¶12} As explained in *Cowling*, supra:

> A constructive trust is a " 'trust by operation of law which arises contrary to intention and in invitum, against one who, by fraud, actual or constructive, by duress or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable means, or who in any way against equity and good conscience, either has obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy. It is raised by equity to satisfy the demands of justice.'" (Footnotes omitted.) *Ferguson v. Owens* (1984), 9 Ohio St.3d 223, 225, quoting 76 American Jurisprudence 2d (1975) 446, Trusts, Section 221. A constructive trust is considered a trust because " '[w]hen property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.' " Id. at 225, quoting *Beatty v. Guggenheim Exploration Co.* (1919), 225 N.Y. 380, 386, 389.
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> A constructive trust is an equitable remedy that protects against unjust enrichment and is usually invoked when property has been obtained by fraud. *Ferguson,* 9 Ohio St.3d at 226; *Aetna Life Ins. Co. v. Hussey* (1992), 63 Ohio St.3d 640, 642. "[A] constructive trust may also be imposed where it is against the principles of equity that the property be retained by a certain person even though the property was acquired without fraud." *Ferguson,* 9 Ohio St.3d at 226, citing 53 Ohio Jurisprudence 2d (1962) 578-579, Trusts, Section 88; V Scott on Trusts (3d Ed.1967) 3412, Section 462. "In applying the theories of constructive trusts, courts also apply the well

> known equitable maxim, 'equity regards [as] done that which ought to be done.' " *Ferguson,* 9 Ohio St.3d at 226.
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> The party seeking to have a constructive trust imposed bears the burden of proof by clear and convincing evidence. *Univ. Hosps. of Cleveland, Inc. v. Lynch,* 96 Ohio St.3d 118, 2002-Ohio-3748, paragraph three of the syllabus.

Id. ¶18-20.

{¶13} In contending they were entitled to a directed verdict, appellants rely on R.C. 1109.07, which provides, in part:

> (A) When a deposit is made in the name of two or more persons, payable to either or the survivor, the bank may pay all of the deposit, any part of the deposit, or any interest earned on the deposit, to either of the named persons, or the guardian of the estate of either of the named persons, whether or not the other person is living. The receipt or acquittance of the person paid is a sufficient release and discharge of the bank for any payments made from the account to that person.

{¶14} According to appellants, this statute conclusively gave Keith, as a joint account holder, the authority to take the actions he did with respect to the three accounts before us. The purpose of R.C. 1109.07, however, is to protect financial institutions in circumstances such as this and does not necessarily determine ownership. *Dunlap v. Bank One, Youngstown, N.A.*, 7th Dist. No. 88-C-53 (noting that R.C. 1107.08, predecessor of R.C. 1109.07, protects banks and absolves them of the responsibility of having to investigate each and every transaction where two or more people are named in a joint account and one seeks to cash the account). Thus, what R.C. 1109.07 instructs is that any of the persons named on a joint account can withdraw a portion or all of the funds from said account and the bank is without responsibility for having released such funds, regardless of to whom the funds actually belong. Though appellants rely on R.C.

1109.07, and in essence argue that the right to withdraw funds is superior to the right of ownership of the funds, case law instructs otherwise. *Kopp v. Bank One, NA*, 11th Dist. No. 2002-L-025, 2003-Ohio-64 (Ownership of the funds of an account does not mean that one joint owner is the owner of the entire account.).

{¶15} In *In re Estate of Thompson* (1981), 66 Ohio St.2d 433, the Supreme Court of Ohio held that "[a] joint and survivorship account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent." Id., syllabus paragraph one. The *Thompson* court also held that "[s]ums remaining on deposit at the death of a party on a joint survivorship account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created." Id., syllabus paragraph two.

{¶16} Thereafter, due to remaining uncertainties with respect to joint accounts, in *Wright v. Bloom*, 69 Ohio St.3d 596, 1994-Ohio-153, the Supreme Court of Ohio revisited the issue and expressly overruled the above-stated language from paragraph two of the syllabus in *Thompson*. In *Wright*, Mr. Bloom, prior to his death in 1983, transferred his personal bank and credit union accounts into three joint accounts with his brother Raymond who later became executor of Mr. Bloom's estate. Raymond did not include the three accounts in the inventory of the estate.

{¶17} The three plaintiffs in *Wright* were each bequeathed specific sums of money in Mr. Bloom's will. Because there were insufficient estate assets to satisfy the bequests, the plaintiffs filed a complaint and sought a declaration that the funds in the three accounts belonged to the estate. Essentially, the plaintiffs argued Mr. Bloom did not

intend to create a present, vested interest in the joint accounts at the time they were opened; thus, Raymond was forbidden from using those assets and was required to include them in the estate's inventory.

{¶18} Recognizing the need for stabilization in the relationships of parties to joint and survivorship accounts, the *Wright* court held as follows:

> 1. The survivorship rights under a joint and survivorship account of the co-party or co-parties to the sums remaining on deposit at the death of the depositor may not be defeated by extrinsic evidence that the decedent did not intend to create in such surviving party or parties a present interest in the account during the decedent's lifetime.
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> 2. The opening of a joint and survivorship account in the absence of fraud, duress, undue influence or lack of capacity on the part of the decedent is *conclusive evidence* of his or her intention to transfer to the *surviving party or parties* a survivorship interest in the balance remaining in the account at his or her death. (*In re Estate of Thompson* [1981], 66 Ohio St.2d 433, 20 O.O.3d 371, 423 N.E.2d 90, paragraph two of the syllabus, overruled.)
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> 3. The opening of a joint or alternative account without a provision for survivorship shall be *conclusive evidence*, in the absence of fraud or mistake, of the depositor's intention not to transfer a survivorship interest to the joint or alternative party or parties in the balance of funds contributed by such depositor remaining in the account at his or her death. Such funds shall belong in such case *exclusively* to the depositor's estate, subject only to claims arising under other rules of law.

(Emphasis added.) Id., syllabus paragraphs one through three.

{¶19} We must first note there is no evidence, nor is there an allegation of fraud, duress, undue influence, lack of capacity, or mistake. Further, there appears to be no dispute that we are presented with a payable-on-death account, a joint account with right of survivorship, and a joint account with no right of survivorship. Additionally, it is

undisputed that neither Betty nor Keith made any contributions to any of the accounts at issue.

{¶20} We will first address the 5081 account as it was a payable on death certificate of deposit ("P.O.D. C.D."). A P.O.D. C.D. is an estate-planning device allowing for the disposition of property at death without compliance with the formalities of R.C. Chapter 2107. *Jamison v. Soc. Natl. Bank* (1993), 66 Ohio St.3d 201, 203. A beneficiary of a P.O.D. C.D. has no interest in the proceeds of the P.O.D. C.D. until the death of the owner. Id. at 204. As R.C. 2131.10 instructs:

> A natural person, adult or minor, referred to in sections 2131.10 and 2131.11 of the Revised Code as the owner, may enter into a written contract with any bank, building and loan or savings and loan association, credit union, or society for savings, authorized to receive money on an investment share certificate, share account, deposit, or stock deposit, and transacting business in this state, whereby the proceeds of the owner's investment share certificate, share account, deposit, or stock deposit may be made payable on the death of the owner to another person or to any entity or organization, referred to in such sections as the beneficiary, notwithstanding any provisions to the contrary in Chapter 2107. of the Revised Code. In creating such accounts, "payable on death" or "payable on the death of" may be abbreviated to "P.O.D."
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> Every contract of an investment share certificate, share account, deposit, or stock deposit authorized by this section shall be deemed to contain a right on the part of the owner during the owner's lifetime both to withdraw the proceeds of such investment share certificate, share account, deposit, or stock deposit, in whole or in part, as though no beneficiary has been named, and to designate a change in beneficiary. The interest of the beneficiary shall be deemed not to vest until the death of the owner.
>
> No change in the designation of the beneficiary shall be valid unless executed in the form and manner prescribed by the bank, building and loan or savings and loan association, credit union, or society for savings.

{¶21} Further, multiple beneficiaries for a P.O.D. account are legally permissible. *Wingate v. Hordge* (1979), 60 Ohio St.2d 55. Given that Betty was named as a P.O.D. beneficiary of the 5081 account, appellants were not entitled to a directed verdict regarding her claim for the imposition of a constructive trust over a portion of the monies withdrawn from this account after Kathleen's death. Accordingly, appellants' third assignment of error that argues the same is overruled.

{¶22} Similarly, appellants were not entitled to a directed verdict on appellants' claim for the imposition of a constructive trust over 50 percent of the monies from the 2460 account, as it was a joint and survivorship account and fits squarely within paragraph two of *Wright*'s syllabus. *Chapin v. Nameth*, 7th Dist. No. 08 MA 18, 2009-Ohio-1025 (under *Wright*, the opening of a joint and survivorship account is in and of itself conclusive evidence of the depositor's intent that the joint account holders have survivorship rights); *Lewis v. Keybank*, 6th Dist. No. L-02-1115, 2003-Ohio-71. As stated by the Supreme Court of Ohio in *Wright*, the opening of a joint and survivorship account, absent fraud, duress, undue influence or lack of capacity, is "conclusive evidence" of the decedent's intent to transfer to the "surviving parties" a survivorship interest in the balance remaining at his or her death. Thus, because the 2460 account was a joint and survivorship account, appellants were not entitled to a directed verdict on Betty's claim for the imposition of a constructive trust over 50 percent of the monies withdrawn from this account.

{¶23} The 1755 account was a joint account between Kathleen, Keith, and Betty. The 1755 account was opened and funded solely by Kathleen and contained no survivorship language. Because there is no survivorship language, the 1755 account fits

squarely within paragraph three of *Wright*'s syllabus, which provides that the opening of a joint account without a provision for survivorship shall be "conclusive evidence[,]" absent fraud or mistake, of the depositor's intent *not* to transfer a survivorship interest to the joint parties in the balance remaining at his or her death. Thus, Betty was not entitled to any portion of this account upon Kathleen's death and as a result there is no basis for the imposition of a constructive trust. *In re Estate of Pallay*, 4th Dist. No. 06CA46, 2007-Ohio-2754 (Pursuant to *Wright*, the distinction between a joint account and a joint account with rights of survivorship is critical since accounts without survivorship belong to the estate and not the joint account holder.). Therefore, appellants were entitled to a directed verdict as to the 1755 account. Based on the foregoing, appellants' first assignment of error is sustained in part and overruled in part.

{¶24} In their second assignment of error, appellants contend the trial court's judgment awarding appellee $78,285.56 on the basis of a constructive trust is contrary to law and not supported by clear and convincing evidence.

{¶25} The jury verdict of $78,285.56 represents 50 percent of the monies withdrawn from the 1755 account and 50 percent of the monies withdrawn from the 1460 account. We have already determined appellants were entitled to a directed verdict with respect to 50 percent of the funds withdrawn from the 1755 account; therefore, we must determine whether there was clear and convincing evidence for the imposition of a constructive trust over 50 percent of the funds withdrawn from the 1460 account.

{¶26} Again appellants argue that, pursuant to R.C. 1109.07, Keith had the authority as a joint account holder to withdraw any and all funds from the 1460 account. Additionally, appellants contend there was no tracing of the funds at issue; therefore, the

imposition of a constructive trust was in error. As previously stated, Keith's right to withdraw the funds is not superior to the parties' ownership rights. Though pursuant to R.C. 1109.07, either Betty or Keith could have made withdrawals during Kathleen's lifetime, pursuant to *Thompson* and its progeny, without clear and convincing evidence of a different intent, each of them would be entitled to retain only their respective net contributions. Since in this case neither Betty nor Keith made any contributions, none of the money "belonged" to them during Kathleen's lifetime.

{¶27} In other words, if Keith had closed this account while Kathleen was alive, he would only have been entitled to retain the portion of the funds he actually deposited, which undisputedly was zero, and Kathleen would have been entitled to seek return of those funds from Keith regardless of R.C. 1109.07. *In re Estate of Platt*, 148 Ohio App.3d 132, 2002-Ohio-3382 (A constructive trust can be imposed in an amount withdrawn by a co-owner of a joint and survivorship account that is in excess of his contributions.). It seems illogical to conclude, particularly in light of the fact there is conclusive evidence that the remaining balance in the 1460 account was to go to the surviving parties, and neither Keith nor Betty made any contributions to this account, that simply because Keith got to the bank first after Kathleen's death that he would be entitled to the entire remaining balance to the exclusion of Betty. The evidence showed that a few weeks prior to her death, Kathleen converted the 1460 account that was solely in her name to a joint and survivorship account with Keith and Betty. There is no evidence of fraud, duress, undue influence, or lack of capacity.

{¶28} This case is in equity, and to accept appellants' theory that, upon the sole depositor's death, Keith was entitled to remove and retain all of the funds remaining in the

joint and survivorship account to the exclusion of Betty, is to encourage the undesirable practice of one party racing to the bank to claim funds in an account after the death of the sole depositor. See, e.g., *Stanley v. Stanley* (2005), 175 Md. App. 246, 927 A.2d 40. Given the record here, we find imposition of a constructive trust over 50 percent of the funds from the 1460 account to be equitable, not contrary to law and supported by clear and convincing evidence.

{¶29} Appellant is correct, however, that before a constructive trust can be imposed, there must be adequate tracing, and "constructive trusts should be placed over the property of the party who wrongfully obtained the property." *Cowling* ¶26. "When, as in this case, the property was subsequently transferred to third parties, a constructive trust can be imposed." Id.

{¶30} As candidly admitted by appellants, Keith caused the funds to be removed from the accounts and transferred them to Donna. Thus, it would appear the constructive trust would have to be placed over the assets currently held by Donna, rather than Keith, as was expressed in the trial court's judgment entry. *Cowling* (instructing the trial court to modify the order and place a constructive trust over the assets held by the county court rather than the individual defendants).

{¶31} Accordingly, appellants' second assignment of error is sustained in part and overrruled in part.

{¶32} In their fourth assignment of error, appellants contend the judgment of $4,000 pertaining to the funds from P.O.D. C.D. is contrary to law and not supported by clear and convincing evidence. Under this assigned error, however, appellants make no

additional arguments and incorporate those already made under their previous assigned errors. For reasons previously stated, we overrule appellants' fourth assignment of error.

{¶33} In their fifth assignment of error, appellants contend the trial court erred in prohibiting Keith from testifying about a conversation he had with Kathleen prior to her death. During the trial, appellants sought to introduce Keith's testimony that on the evening of May 12, 2005, he had a conversation with Kathleen, wherein Kathleen instructed that if anything happened to her, Keith was to "go to the bank quickly and get the money." (Appellants' brief, at 7.) It is irrelevant, however, whether or not such testimony should have been excluded on the basis of hearsay because, under *Wright*, the opening of the joint and survivorship account is conclusive evidence that the amounts remaining after the sole depositor's death were to pass to the surviving parties. Accordingly, appellants' fifth assignment of error is overruled.

{¶34} For the foregoing reasons, appellants' third, fourth, and fifth assignments of error are overruled, and appellants' first and second assignments of error are sustained in part and overruled in part. The judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to that court for further proceedings in accordance with law and consistent with this decision.

Judgment reversed and cause remanded.

BROWN and SADLER, JJ., concur.

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