

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

LINDA S. TIMBERLAKE,	:	Case No. 09CA3269
	:	
Plaintiff-Appellant,	:	
	:	
v.	:	<u>DECISION AND</u>
	:	<u>JUDGMENT ENTRY</u>
	:	
CHADWICK K. SAYRE, et al.,	:	
	:	
	:	Released 10/28/09
Defendants-Appellees.	:	

APPEARANCES:

Mark C. Brookes, Worthington, Ohio, for appellant.

Daniel P. Ruggiero, RUGGIERO & HAAS, Portsmouth, Ohio, for appellees.

Harsha, J.

{¶1} Linda S. Timberlake (“Ms. Timberlake”) brought a legal malpractice action against Chadwick K. Sayre, Jerry L. Buckler, and Buckler, Tieman & Sayre, LLC (collectively “the appellees”) after they unsuccessfully defended writings purporting to be the Last Will and Testament and Codicil of her former husband, Charles Timberlake (“Mr. Timberlake”), deceased, in a will contest action. Ms. Timberlake appeals the trial court’s decision granting the appellees a summary judgment.

{¶2} Ms. Timberlake contends that when it used the “case-within-a-case” doctrine, the trial court applied the wrong legal standard in deciding that the appellees were entitled to judgment as matter of law. She claims that to prevail at trial on the legal malpractice action based upon a “lost opportunity,” she only had to provide “some evidence” of the merits of the underlying will contest action. We assume, without

deciding, that the trial court erred and that the appropriate legal standard for Ms. Timberlake's burden of proof at trial was only "some evidence." However, this error is harmless because, as we note in the next paragraph, she failed to produce any summary judgment evidence that would have created a triable issue of fact under that standard.

{¶3} Ms. Timberlake argues that genuine issues of material fact remain concerning whether she would have prevailed in the underlying action. Specifically, she claims that she submitted summary judgment evidence creating a genuine issue about whether the purported will and codicil were properly attested and subscribed in Mr. Timberlake's presence by two or more competent witnesses. From the face of these documents, it appears that Iona Brickey ("Brickey") and Robin Tackett ("Tackett") signed them as witnesses. However, Ms. Timberlake failed to produce any evidence refuting Brickey's unequivocal testimony that she did not know Mr. Timberlake or sign either document. Furthermore, we reject Ms. Timberlake's contention that Tamela Wolfe ("Wolfe") signed the purported will as a second witness. The record clearly shows that Wolfe signed the document as a notary public, not a witness. Timberlake's summary judgment evidence does not create a genuine issue of material fact about whether the purported will was properly witnessed. Accordingly, we affirm the trial court's judgment.

I. Facts

{¶4} Mr. Timberlake died on April 5, 2003. Ms. Timberlake submitted his purported Last Will and Testament, dated November 4, 2002, and Codicil to that will, dated March 24, 2003, to the probate court. These documents named Ms. Timberlake as the executrix and a beneficiary of the estate. Both documents contain an attestation

clause and were purportedly subscribed by Tackett and Brickey. On the purported will, Wolfe's signature and notary stamp appear below their signatures, without a notary seal or jurat. On the purported codicil, their signatures are followed by a jurat and the signature, seal, and stamp of notary David A. McSweeney ("McSweeney").

{¶15} Although the record does not contain a copy of the probate court's order admitting the purported will and codicil to probate, it apparently did so as the parties agree the court appointed Ms. Timberlake executrix of the estate. Angela Wallace ("Wallace") filed a complaint contesting the validity of the purported will and codicil and challenging Ms. Timberlake's appointment as executrix. Wallace argued that another purported will dated March 22, 2003 was Mr. Timberlake's real will. In May 2004, Ms. Timberlake retained Buckler, Tieman & Sayre, LLC to represent her in the will contest action. Initially, Chadwick K. Sayre ("Sayre") assumed responsibility for her case and filed an answer on her behalf.

{¶16} In November 2004, Wallace filed a motion for summary judgment. She argued that the will and codicil Ms. Timberlake submitted to the probate court had not been attested and subscribed in Mr. Timberlake's presence by two or more competent witnesses. Specifically, Wallace claimed Brickey testified during her deposition that she did not know Mr. Timberlake or sign the will or codicil. The appellees did not file a response to the motion on Ms. Timberlake's behalf, and the probate court granted Wallace a summary judgment in December 2004.¹ In January 2005, Sayre left Buckler, Tieman & Sayre, LLC, and Jerry L. Buckler ("Buckler") assumed responsibility for the case. The probate court granted Buckler leave to withdraw as Ms. Timberlake's

¹ The probate court then apparently scheduled a hearing to determine whether to admit the purported will dated March 22, 2003. The record in this case is unclear about whether the court ultimately probated this will or declared Mr. Timberlake intestate.

counsel in November 2005.

{¶7} In November 2006, Ms. Timberlake filed a legal malpractice action against the appellees. Ms. Timberlake claimed that she consulted with attorney Marie Hoover (“Hoover”) in February 2006 regarding the will contest action, and Hoover informed her for the first time that the probate court had granted Wallace a summary judgment. Because the time for a direct appeal had expired, Hoover filed a motion for relief from the judgment, which the probate court denied.

{¶8} In her complaint, Ms. Timberlake alleged that the appellees were professionally negligent because they failed to (1) respond to the motion for summary judgment, (2) tell her that they had not responded to the motion, and (3) appeal the probate court’s decision. She argued that if the appellees had “properly and with due care prosecuted her legal position[,] she would have been meritorious in having the validity of the will and codicil in question affirmed by the Court.” Ms. Timberlake claimed she suffered damages including, but not limited to, the loss of real estate she would have received under the purported will and codicil, the attorney fees she paid appellees, and the attorney fees she paid Hoover.

{¶9} The appellees admitted that they represented Ms. Timberlake and that they did not respond to Wallace’s motion for summary judgment. However, they denied any causal connection between their failure to respond to this motion and the probate court’s ultimate rejection of the purported will and codicil Ms. Timberlake submitted. The appellees filed a motion for summary judgment arguing that under the Supreme Court of Ohio’s decision in *Environmental Network Corp. v. Goodman Weiss Miller, L.L.P.*, 119 Ohio St.3d 209, 2008-Ohio-3833, 893 N.E.2d 173, Ms. Timberlake had to

prove by a preponderance of the evidence that but for their conduct, she would have successfully defended the will contest action. The appellees claimed that Ms. Timberlake could not prove the purported will and codicil had been properly attested and subscribed in Mr. Timberlake's presence by two or more competent witnesses.

{¶10} In support of its motion for summary judgment, the appellees submitted the deposition transcripts of Brickey and McSweeney. Brickey testified that she knew Wolfe and her sister, Tackett, but she did not know Mr. Timberlake or McSweeney. Brickey denied ever signing a will or codicil as a witness for Mr. Timberlake. She acknowledged that around the time the purported will was executed, Wolfe worked at a law firm, and she occasionally met Wolfe there to go out for lunch. But Brickey denied ever being asked to sign documents as a witness while visiting the firm.

{¶11} Brickey testified that prior to giving her deposition in the will contest, in which she also denied knowing Mr. Timberlake or signing the purported will or codicil, she had a heart attack and was taking medications for depression and high blood pressure. However, Brickey testified that the medications did not cause her to experience memory loss. Brickey testified that after that deposition, she met Ms. Timberlake for the first time at a fast food restaurant in Portsmouth, Ohio. Ms. Timberlake convinced Brickey to tell Sayre that she lied during the deposition and that she did sign the purported will and codicil. However, Brickey felt guilty for lying to Sayre, so she returned to his office the next day and told him that her deposition testimony had in fact been truthful.

{¶12} At his deposition, McSweeney acknowledged that the signature and notary stamp on the bottom of Mr. Timberlake's purported codicil were his. However,

McSweeney testified that he did not know Mr. Timberlake or recall ever seeing him. Although the jurat on the codicil indicates the document was signed in Franklin County, Ohio, McSweeney testified that he never notarized documents outside of Scioto County. McSweeney thought he remembered Ms. Timberlake coming in to his store with two other women and a group of papers for him to notarize, but he did not specifically recall the codicil. McSweeney testified that he would normally not notarize a person's will unless that person appeared before him, so he thought he may have mistakenly notarized the codicil.

{¶13} In response, Ms. Timberlake argued that (1) she only had to provide “some evidence” of the merits of her position in the underlying will contest claim; (2) genuine issues of fact existed as to whether Brickey and Tackett properly signed the will and codicil as witnesses; and (3) genuine issues of fact existed as to whether Wolfe, who purportedly notarized the will, also signed it as a witness.

{¶14} In support of her memorandum contra, Ms. Timberlake submitted various exhibits, including a copy of an affidavit from Tackett² and Wolfe's deposition transcript. Tackett averred that she “witnessed Charles Timberlake's signature” on the purported will and codicil. Wolfe testified that she knew Mr. Timberlake, Ms. Timberlake, Brickey, and Tackett. She also testified that Mr. Timberlake knew she worked for a law firm in

² The original affidavit was apparently attached as an exhibit to Hoover's motion for relief from the judgment in the will contest. Ms. Timberlake submitted a copy of that motion and its exhibits with her memorandum contra in this case. The appellees filed a motion to strike these documents, arguing in part that the motion for relief from the judgment “should have been, at a minimum, a certified copy from the Scioto County Probate Court[.]” and that the court should not consider the affidavits attached to the motion for various reasons, including the fact that Tackett had not appeared for depositions on two occasions. In response, the appellees filed a certified copy of the motion for relief from the judgment, but they failed to incorporate the motion into a properly framed affidavit as required under Civ.R. 56. See *Davis v. Eachus*, Pike App. No. 04CA725, 2004-Ohio-5720, at ¶37. The appellees did not object to the court's consideration of the motion on these grounds. Although the trial court ultimately granted a summary judgment in the appellees' favor, its decision indicates that it did consider Ms. Timberlake's exhibits in reaching a decision, implicitly overruling the appellees' motion to strike. Because the appellees do not challenge this ruling on appeal, we do not address it.

Portsmouth, Ohio. He asked her if someone could prepare a will for him and if she would notarize it. According to Wolfe, a paralegal at the firm prepared the will, and Wolfe printed it out. Wolfe testified that when Mr. Timberlake came to the law office, she was preparing to go to lunch with Brickey and Tackett. According to her, no one else was at the law office, so Brickey and Tackett “witnessed it for him.” Wolfe testified that Timberlake “asked [her] to notarize it[,]” and she did. Wolfe speculated, without objection, that Brickey may have testified that her signature did not appear on the will due to memory problems caused by her blood pressure medication. She also testified that she had no knowledge regarding Mr. Timberlake’s purported codicil.

{¶15} The trial court found that the case-within-a-case doctrine applied to the dispute and that Ms. Timberlake “did not and could not produce two competent attesting witnesses in the underlying litigation and could not have prevailed.” After the trial court granted the appellees’ motion for summary judgment, Ms. Timberlake filed this appeal.

II. Assignments of Error

{¶16} Ms. Timberlake assigns the following errors for our review:

Assignment of Error Number One:

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS-APPELLEES, AS GENUINE ISSUES OF MATERIAL FACT EXISTED IN REGARD TO LIABILITY, AND DEFENDANTS-APPELLEES WERE NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW.

Assignment of Error Number Two:

THE TRIAL COURT ERRED IN HOLDING THAT THE DECISION OF THE OHIO SUPREME COURT IN *Environmental Network Corp. et al. v. Goodman Weiss Miller, LLP* [sic], 119 Ohio St.3d 209, REQUIRED PLAINTIFF-APPELLANT HEREIN TO PROVE THAT SHE WOULD HAVE WON THE UNDERLYING ACTION UNDER THE “CASE WITHIN A CASE” DOCTRINE.

For ease of analysis, we will address Ms. Timberlake’s assignments of error out of

order.

III. Summary Judgment

{¶17} When reviewing a trial court's decision on a motion for summary judgment motion, we conduct a de novo review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241. Accordingly, we must independently review the record to determine whether summary judgment was appropriate and do not defer to the trial court's decision. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711, 622 N.E.2d 1153. Summary judgment is appropriate when the movant has established: (1) there is no genuine issue of material fact, (2) reasonable minds can come to but one conclusion, and that conclusion is adverse to the nonmoving party, with the evidence against that party being construed most strongly in its favor, and (3) the moving party is entitled to judgment as a matter of law. *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 146, 524 N.E.2d 881, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46. See Civ.R. 56(C).

{¶18} The burden of showing that no genuine issue of material fact exists falls upon the party who moves for summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 294, 1996-Ohio-107, 662 N.E.2d 264. To meet its burden, the moving party must specifically refer to "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any," which affirmatively demonstrate that the non-moving party has no evidence to support the non-moving party's claims. Civ.R. 56(C); See, also, *Hansen v. Wal-Mart Stores Inc.*, Ross App. No. 07CA2990, 2008-Ohio-2477, at ¶8. Once the movant supports the motion with appropriate evidentiary materials, the nonmoving party "may not rest upon

the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E). "If the party does not so respond, summary judgment, if appropriate, shall be entered against the party." *Id.*

IV. Legal Malpractice Standard

{¶19} "To establish a cause of action for legal malpractice based on negligent representation, a plaintiff must show (1) that the attorney owed a duty or obligation to the plaintiff, (2) that there was a breach of that duty or obligation and that the attorney failed to conform to the standard required by law, and (3) that there is a causal connection between the conduct complained of and the resulting damage or loss." *Vahila v. Hall*, 77 Ohio St.3d 421, 1997-Ohio-259, 674 N.E.2d 1164, at syllabus, following *Krahn v. Kinney* (1989), 43 Ohio St.3d 103, 538 N.E.2d 1058.

{¶20} The *Vahila* Court recognized that "the requirement of causation often dictates that the merits of the malpractice action depend upon the merits of the underlying case." *Id.* at 427-428. The Court found that "depending on the situation, [a plaintiff may be required] to provide some evidence of the merits of the underlying claim," but declined to "endorse a blanket proposition that requires a plaintiff to prove, in every instance, that he or she would have been successful in the underlying matter." *Id.* at 428.

{¶21} In *Environmental Network*, *supra*, at ¶16, the Court elaborated on this holding:

The language quoted above shows that the court rejected a wholesale adoption of a "but for" test for proving causation and the mandatory application of the "case-within-a-case doctrine." The doctrine, also known as the "trial-within-a-trial doctrine," provides

that “[a]ll the issues that would have been litigated in the previous action are litigated between the plaintiff and the plaintiff’s former lawyer, with the latter taking the place and bearing the burdens that properly would have fallen on the defendant in the original action. Similarly, the plaintiff bears the burden the plaintiff would have borne in the original trial; in considering whether the plaintiff has carried that burden, however, the trier of fact may consider whether the defendant lawyer’s misconduct has made it more difficult for the plaintiff to prove what would have been the result in the original trial.” Restatement of the Law 3d, Law Governing Lawyers (2000) 390, Section 53, Comment b.

{¶22} In her second assignment of error, Ms. Timberlake asserts that the trial court used the wrong legal standard in deciding whether the appellees were entitled to summary judgment as a matter of law. Timberlake cites *Vahila* and contends that to prevail at trial on the legal malpractice action, she only had to produce “some evidence” that her former counsel’s negligent representation proximately caused her to lose the will contest action. The appellees counter that under the Supreme Court’s more recent holding in *Environmental Network*, Timberlake had to prove by a preponderance of the evidence that “but for” their conduct, she would have successfully defended the will contest.

{¶23} In this matter, which is best described as being based upon a “loss of opportunity” theory, we assume without deciding that the appropriate legal standard for the plaintiff’s burden of proof at trial was that expressed in *Vahila*, i.e. “some evidence” that counsel’s negligent representation caused her to lose the will contest. Thus, we will also assume that the trial court erred to the extent that it adopted the test established in *Environmental Network*.³ However, we also conclude that error was harmless because Timberlake failed to produce any summary judgment evidence that would have created

³ But, see, *Neighbors v. Ellis*, 120 Ohio St.3d 276, 2008-Ohio-6105, 898 N.E.2d 46, reconsideration and clarification denied, applying the holding of *Environmental Network* in a “lost opportunity” claim in the summary judgment context.

a triable issue of fact under the *Vahila* standard. See our discussion below of the first assignment of error where we conclude Timberlake failed to meet her burden under Civ.R. 56. Therefore, although we assume the trial court used the wrong legal standard to determine whether Timberlake could establish proximate cause, this error did not prejudice her based upon the state of the summary judgment evidence in the record before us. We overrule her second assignment of error.

V. Will Contest Action

{¶24} Under R.C. 2107.74, the probate court's order admitting the purported will and codicil Ms. Timberlake submitted to probate is prima facie evidence of the attestation, execution, and validity of those documents. However, that provision only entitles Ms. Timberlake to a rebuttable presumption as to the documents' validity. *Krischbaum v. Dillon* (1991), 58 Ohio St.3d 58, 567 N.E.2d 1291, at paragraph two of the syllabus. "[W]here a rebuttable presumption exists, a party challenging the presumed fact must produce evidence of a nature that counterbalances the presumption or leaves the case in equipoise. Only upon the production of sufficient rebutting evidence does the presumption disappear." *Myocare Nursing Home, Inc. v. Fifth Third Bank*, 98 Ohio St.3d 545, 2003-Ohio-2287, 787 N.E.2d 1217, at ¶35. As we recently explained:

[A] rebuttable presumption does not carry forward as evidence once the opposing party has rebutted the presumed fact. *Forbes v. Midwest Air Charter* (1999), 86 Ohio St.3d 83, 711 N.E.2d 997. Thus, once the presumption is met with sufficient countervailing evidence, it fails and serves no further evidentiary purpose. We have previously characterized the effect of rebutting the presumption as 'bursting the bubble,' with the case then proceeding as if the presumption had never arisen. See *Ellis v. [Miller]* (Aug. 16, 2001), Gallia App. No. 00CA17, [2001-Ohio-2549] * * *.

Meek v. Cowman, Washington App. No. 07CA31, 2008-Ohio-1123, at ¶10, quoting

Horsley v. Essman, 145 Ohio App.3d 438, 444, 2001-Ohio-2557, 763 N.E.2d 245.

{¶25} At the time of Mr. Timberlake's death, R.C. 2107.03, which outlines the requirements for the proper execution of a will, provided⁴:

Except oral wills, every last will and testament shall be in writing, but may be handwritten or typewritten. Such will shall be signed at the end by the party making it, or by some other person in such party's presence at his express direction, and be attested and subscribed in the presence of such party, by two or more competent witnesses, who saw the testator subscribe, or heard him acknowledge his signature.

{¶26} Attestation and subscription are distinct acts, and the statute requires both for the proper execution of a will or codicil. "Subscription is the physical act of affixing a signature for purposes of identification." *Stischok v. Stischok* (June 28, 2001), Franklin App. No. 00AP-696, 2001 WL 721812, at *3, citing *In re Estate of Wachsmann* (1988), 55 Ohio App.3d 265, 267, fn. 2, 563 N.E.2d 734. Attestation is "the act by which the subscribing witnesses hear the testator acknowledge his signature or see him sign the document in their presence." *Id.*

{¶27} In her first assignment of error, Ms. Timberlake does not contend that the appellees failed to put forward sufficient evidence to rebut the presumption that the purported will and codicil were valid or that they failed to meet their initial burden to demonstrate entitlement to a summary judgment. Instead, she argues that she put forward sufficient evidence to create a genuine issue of material fact concerning whether these documents were attested and subscribed in the presence of Mr. Timberlake by two or more competent witnesses.

{¶28} From the face of the purported will and codicil, it appears that Brickey and Tackett signed the documents as witnesses. While the appellees submitted no direct

⁴ The General Assembly subsequently amended R.C. 2107.03. We note that R.C. 2107.24, the "harmless error in will execution" statute, was enacted after Mr. Timberlake's death.

evidence to challenge Tackett's signature on the documents, Brickey unequivocally testified that she did not know Mr. Timberlake or sign the documents. Although Wolfe speculated that Brickey might have denied signing the will due to memory problems, Wolfe's testimony that Brickey "witnessed [the will] for [Mr. Timberlake]" amounts to nothing more than an improper legal conclusion. Furthermore, Wolfe did not testify that: (1) She actually saw Brickey sign the will; or (2) Brickey saw Mr. Timberlake sign the will or heard him acknowledge his signature. Ms. Timberlake offered no summary judgment evidence indicating that Brickey in fact signed the will or codicil.

{¶29} Ms. Timberlake argues that even if she cannot establish a valid signature from Brickey on the purported will, Wolfe's signature as a notary creates a genuine issue of fact concerning whether she also signed as a witness.

{¶30} We disagree with the appellees' contention that under R.C. 147.07 notary publics are per se disqualified from signing a will as a witness. See, generally, *In re Jordan*, Pike App. No. 08CA773, 2008-Ohio-4385. However, it is clear from the record that Wolfe signed the purported will solely in her capacity as a notary public and not as a witness. Wolfe's signature appears on the purported will below the pre-printed lines for witness names and addresses. Her notary stamp appears directly below her signature but without a jurat. Furthermore, Wolfe testified that Mr. Timberlake "asked [her] to notarize [the will]" – not act as a witness. Moreover, in the absence of a jurat, there is nothing to establish that Mr. Timberlake signed the will in Wolfe's presence or that she heard him acknowledge his signature.

{¶31} Because Ms. Timberlake can at most show that one person, i.e. Tackett, signed the purported will and codicil as a witness, the trial court correctly found that as a

matter of law, Tackett could not have prevailed in the underlying will contest action. Therefore, we overrule Ms. Timberlake's first assignment of error.

VI. Conclusion

{¶32} Having overruled each of the assignments of error, we affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Kline, P.J. & Abele, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.