

COURT OF APPEALS  
TUSCARAWAS COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

IN THE MATTER OF: THE ESTATE :  
OF PAUL T. HARMON, DECEASED :

STATE OF OHIO, EX REL. BY :  
DENNIS D. TRAVER, ADMIN, WWA :

Plaintiff-Appellee :

-VS- :

DIANNA L. HARMON, ET AL. :

Defendants-Appellants :

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Sheila G. Farmer, J.

Hon. John W. Wise, J.

Case No. 2014 AP 07 0029

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Court of Common  
Pleas, Probate Division, Case No.  
2012 ES 56781

JUDGMENT:

Dismissed

DATE OF JUDGMENT:

July 30, 2015

APPEARANCES:

For Plaintiff-Appellee

THOMAS W. FOX  
232 West Third Street  
Suite 309  
Dover, OH 44622

For Defendants-Appellants

AMANDA K. SPIES  
300½ East High Avenue  
New Philadelphia, OH 44663

*Farmer, J.*

{¶1} Paul Harmon died on May 21, 2012. His will was filed on June 4, 2012. Pursuant to the will, the decedent named appellant, Dianna Harmon, as his executrix. Appellant is married to the decedent's grandson, appellant, Jon Harmon. The will specifically disinherited the decedent's son, Thomas Harmon, and left everything to appellant Dianna Harmon. No provisions were made for the decedent's wife, Audrey, who suffered from dementia and resided in a nursing home.

{¶2} On June 4, 2012, Attorney Dennis Traver, appellee herein, was appointed as the commissioner for Audrey. By report filed June 20, 2012, appellee recommended that Audrey take against the will. By judgment entry filed June 22, 2012, the trial court entered judgment exercising Audrey's right to take against the will. Audrey passed away on February 7, 2013.

{¶3} A status conference before a magistrate was held on June 3, 2013. By decision filed June 5, 2013, the magistrate recommended the removal of appellant Dianna Harmon as executrix and the appointment of appellee as administrator. The trial court approved and adopted the decision.

{¶4} On June 18, 2013, appellee filed a complaint to recover assets of the estate concealed, embezzled or conveyed away and for money judgment with penalty and interest pursuant to R.C. 2109.50 against appellant Dianna Harmon, her parents, Marvin and Janet Renner, and appellant Jon Harmon.

{¶5} Also on June 18, 2013, appellant Dianna Harmon filed objections to the magistrate's June 5, 2013 decision removing her as executrix. By judgment entry filed

July 2, 2013, the trial court ordered a re-hearing "to satisfy anyone's concerns of due process."

{¶6} A hearing before a magistrate was held on August 23, 2013. By decision filed September 18, 2013, the magistrate once again recommended the removal of appellant Dianna Harmon as executrix and the appointment of appellee as administrator. Appellant filed objections on October 2, 2013. By judgment entry filed October 18, 2013, the trial court denied the objections, removed appellant Dianna Harmon as executrix and appointed appellee as administrator, and stated appellee was free to reconsider whether to pursue the R.C. 2109.50 action. The trial court set a hearing on the R.C. 2109.50 action for January 3, 2014.

{¶7} By judgment entry filed December 19, 2013, the trial court continued the January hearing date and allowed summary judgment motions to be filed.

{¶8} On March 28, 2014, all parties filed motions for summary judgment save for appellant Dianna Harmon. By decision filed June 3, 2014, the magistrate granted appellee's motion for summary judgment in part, reserving two issues for trial involving appellants Dianna and Jon Harmon and a \$4,500.00 payment and appellants Dianna Harmon and Janet Renner and a payment of \$1,500.00. The magistrate denied appellants' motions for summary judgment. Appellants filed objections. By judgment entry filed June 26, 2014, the trial court denied the objections, approved and adopted the magistrate's decision with two date changes, and issued a judgment against appellants Dianna and Jon Harmon in the amount of \$68,750.90, a judgment against appellant Dianna Harmon in the amount of \$1,790.81, and a judgment against appellants Dianna Harmon and Marvin Renner in the amount of \$11,500.00. By order

filed July 7, 2014, the two aforementioned reserved issues were set for jury trial on October 9, 2014.

{¶9} On July 10, 2014, appellee filed a motion for leave to dismiss without prejudice the remaining two issues.

{¶10} On July 18, 2014, appellants filed a notice of appeal.

{¶11} By judgment entry filed July 22, 2014, the trial court granted appellee leave of court and cancelled the jury trial scheduled for October. On July 29, 2014, appellee filed a voluntary dismissal of the remaining two issues in the R.C. 2109.50 action pursuant to Civ.R. 41(A).

{¶12} This matter is now before this court for consideration. Assignments of error are as follows:

#### I

{¶13} "THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION AND THE CONCEALMENT COMPLAINT FILED JUNE 18, 2013, SHOULD BE DISMISSED, WITH PREJUDICE."

#### II

{¶14} "THE TRIAL COURT DENIED THE DEFENDANTS' DUE PROCESS RIGHTS BY FAILING TO CONDUCT A FULL AND FAIR JURY TRIAL PURSUANT TO R.C. 2109.52 AS DEMANDED BY EACH DEFENDANT."

#### III

{¶15} "DEFENDANT DIANNA HARMON, AS POWER OF ATTORNEY FOR AUDREY HARMON AND EXECUTRIX FOR PAUL HARMON'S ESTATE, HAD THE LEGAL AUTHORITY TO IMPROVE THE WEST 8TH STREET PROPERTY, AND

SUCH ACTION CANNOT BE CHARACTERIZED AS EMBEZZLING, CONCEALING, OR CONVEYING AWAY ASSETS PURSUANT TO R.C. 2109.50."

{¶16} On July 29, 2014, appellee filed a Civ.R. 41(A) voluntary dismissal of the remaining two issues pending before the trial court. As set forth in the trial court's June 26, 2014 judgment entry, the two issues were as follows:

5. There being genuine issues of material fact regarding the liability of Dianna Harmon, Jon Harmon and Janet Renner regarding the payment of \$4,500 to Jon Harmon on June 14, 2012 and \$1,500 to Janet Renner on July 3, 2012, such counts of the complaint are to be set for jury trial on the issues of fact.

{¶17} All three parties are appellants herein per the notice of appeal filed July 18, 2014. Appellants are appealing the trial court's June 26, 2014 judgment entry. The trial court did not include Civ.R. 54(B) language in said judgment entry. Although appellee filed a Civ.R. 41(A) voluntary dismissal of the remaining two issues after the filing of the notice of appeal, pursuant to the Supreme Court of Ohio in *Patterson v. W.W. Grainger, Inc.*, 120 Ohio St.3d 142, 142 (2008), a Civ.R. 41(A) dismissal does not create a final appealable order: "We hold today that when a plaintiff has asserted multiple claims against one defendant, and some of those claims have been ruled upon but not converted into a final order through Civ.R. 54(B), the plaintiff may not create a final order by voluntarily dismissing pursuant to Civ.R. 41(A) the remaining claims against the same defendant."

{¶18} The case is dismissed for lack of a final appealable order. This court will permit the re-filing of the appellate briefs in a subsequent appeal once a final order is granted.

By Farmer, J.

Hoffman, P.J. and

Wise, J. concur.

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