[Cite as *In re Estate of Harris v. Harris,* 2016-Ohio-2615.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE ESTATE OF: WILLIE GENE HARRIS RONALD WOODSON HARRIS Plaintiff-Appellant -vs- ANGELA L. HARRIS, ET AL. Defendants-Appellees	JUDGES: Hon. William B. Hoffman, P.J. Hon. John W. Wise, J. Hon. Craig R. Baldwin, J. Case No. 2015CA00101 O P I N I O N
CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Probate Division, Case No. 215102
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	April 18, 2016
APPEARANCES:	
For Plaintiff-Appellant TERRENCE L. SEEBERGER 3475 Ridgewood Road Akron, Ohio 44333 And MORGAN RICKETTS 540 El Dorado Street #202 Pasadena, CA 91101	For Defendants-Appellees DONALD P. WILEY ANTHONY E. BROWN BAKER, DUBLIKAR, BECK, WILEY & MATHEWS 400 S. Main St. N. Canton, Ohio 44720

Hoffman, P.J.

{¶1} Plaintiff-appellant Ronald Woodson Harris appeals the various judgment entries entered by the Stark County Court of Common Pleas, Probate Division, in favor of Defendant-appellee Angela Harris in relation to the probating of the 2005 Last Will and Testament of Willie Gene Harris.

STATEMENT OF THE FACTS AND CASE

{¶2} Willie Gene Harris ("Decedent") died on November 17, 2011, survived by his spouse, Angela Harris, seven adult children and two grandchildren. On January 11, 2012, the Decedent's Last Will and Testament, signed on June 2, 2005 ("2005 Will"), was admitted to probate. The 2005 Will bequeathed the entirety of Decedent's estate to Angela Harris and disinherited his children and grandchildren.

{¶3} The Decedent's previous will, executed on October 17, 1998 ("1998 Will") divided his assets among Angela Harris and Decedent's children. In addition, on October 17, 1998, Decedent and Harris executed an ante-nuptial agreement, in which Harris relinquished her right to her statutory share of Decedent's assets, and agreed not to challenge the 1998 Will.

{¶4} The 2005 Will contains four signatures in three sections. Decedent's signature appears on the last page, and his initials are on each page. The signatures of witnesses Thelma Burkes and Willie Lee Clark appear in a section labeled "Witnessed." The fourth signature is of the notary, Ernest Burkes, who also drafted the 2005 Will. The notary jurat reads,

> On June 2, 2005, before me appeared Willie Gene Harris, Testator, and Thelma Burkes and Willie Clark witnesses, who are personally known

by me to be the persons whose names is [sic] subscribed to the within instrument and acknowledged to me that he executed the same.

{¶5} The Notary signed his name and placed his seal above the typewritten phrase "Ernest Burkes, Notary Public. My Commission Expires, March 31, 2009."

{¶6} It is undisputed Willie Lee Clark was not present when Decedent signed the 2005 Will. Clark stated in his affidavit he never met Decedent, he never signed the 2005 Will and the signature appearing on the 2005 Will is not his signature. Ernest Burkes admitted in his deposition testimony he forged Willie Lee Clark's signature as a favor to Decedent. He further testified, he was unsure as to whether Thelma Burkes was present in the room at the time Decedent signed the 2005 Will, and he may have taken the will upstairs to her to sign while Decedent remained in the basement. It was undisputed for purposes of summary judgment Clark's signature was invalid, and Thelma Burkes' signature and the Notary of Ernest Burkes are valid signatures.

{¶7} Appellant filed a complaint to contest the 2005 Will on June 21, 2012. On December 11, 2014 Appellant moved for summary judgment. On December 31, 2014 Appellee filed a response. The trial court denied Appellant's motion for summary judgment via Judgment Entry of February 9, 2015.

{¶8} During the jury trial, Appellee moved the trial court for directed verdict on the undue influence claim, and the trial court granted the motion via Judgment Entry of May 5, 2015. Also, at the close of evidence at trial, Appellant moved the trial court for a directed verdict on all claims, and the trial court denied the motion.

{¶9} The jury found the 2005 Will to be the valid Last Will and Testament of Willie Gene Harris.

{¶10} Appellant made an oral motion for judgment notwithstanding the verdict, which the trial court denied. Appellant followed with a written motion for judgment notwithstanding the verdict. The trial court denied the motion via Judgment Entry of June 29, 2015.

{¶11} Appellant appeals, assigning as error:

{¶12} "I. THE TRIAL COURT ERRED BY DENYING THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, FILED DECEMBER 11, 2014, AND JUDGMENT ENTRY DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, DATED FEBRUARY 9, 2015.

{¶13} "II. THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY ON THE CORRECT REQUIREMENTS FOR THE VALID EXECUTION OF A WILL UNDER OHIO LAW.

{¶14} "III. THE TRIAL COURT ERRED BY INSTRUCTING THE JURY THAT THERE WAS A PRESUMPTION OF THE WILL'S VALIDITY CREATED BY ADMISSION TO PROBATE.

{¶15} "IV. THE TRIAL COURT ERRED BY DENYING THE PLAINTIFF'S MOTIONS FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT ON THE CLAIM OF IMPROPER EXECUTION."

I.

{¶16} In the first assignment of error, Appellant maintains the trial court erred in denying his motion for summary judgment because the will was legally invalid. Specifically, Appellant argues the additional signature as a notary public may not

substitute for the signature of a second witness, if the notary signs in his capacity as a notary rather than as a witness.

{¶17} Civ.R. 56(C) provides,

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. * * *.

{¶18} As an appellate court reviewing summary judgment issues, we must stand in the shoes of the trial court and conduct our review on the same standard and evidence as the trial court. *Porter v. Ward,* Richland App. No. 07 CA 33, 2007-Ohio-5301, 2007 WL 2874308, ¶ 34, citing *Smiddy v. Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 30 OBR 78, 506 N.E.2d 212. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the nonmoving party has no evidence to prove its case. The moving party must specifically point to some evidence that demonstrates

that the nonmoving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the nonmoving party to set forth specific facts demonstrating that there is a genuine issue of material fact for trial. *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, 674 N.E.2d 1164, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 662 N.E.2d 264. A fact is material when it affects the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App.3d 301, 304, 733 N.E.2d 1186.

{¶19} Ohio R.C. Section 2107.03 establishes the formal requirements for a valid will,

> Except oral wills, every will shall be in writing, but may be handwritten or typewritten. The will shall be signed at the end by the testator or by some other person in the testator's conscious presence and at the testator's express direction. The will shall be attested and subscribed in the conscious presence of the testator, by two or more competent witnesses, who saw the testator subscribe, or heard the testator acknowledge the testator's signature.
>
> For purposes of this section, "conscious presence" means within the range of any of the testator's senses, excluding the sense of sight or sound that is sensed by telephonic, electronic, or other distant communication.

{¶20} The trial court's May 26, 2015 Judgment Entry finds,

> "The signature of the Notary appears below the jurat, which specifically states: "ON June 2, 2005, before me appeared Willie Gene Harris, Testator, and Thelma Burkes and Willie Clark, witnesses, who are

personally known by me to be the persons whose name is [sic] subscribed to the within instrument and acknowledged to me that he executed the same." (Underlining added.) This language serves as an attestation that the Notary witnessed the Decedent sign the 2005 Will. Accordingly, Decedent's signature on the 2005 Will was witnessed by two witnesses, and was therefore validly executed.

{¶21} The trial court distinguished the Fourth District Court of Appeals' holding in *Timberlake v. Sayre*, 4th Dist. Scioto No. 09CA3269, 2009-Ohio 6005, which held:

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 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.

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.

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.

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.

{¶22} The trial court herein distinguished the facts sub judice from those in *Timberlake* finding the document in *Timberlake* appeared to be signed by a notary without a jurat indicating the notary signed the will in the conscious presence of the testator. We find the trial court correctly distinguished *Timberlake*.

{¶23} We note Appellee herein argues even if no witnesses had actually signed the will, R.C. 2107.24 allows the trial court to treat the 2005 Will as if validly executed if it is found the Decedent caused the document to be prepared intending the same to be his will, and two or more witnesses were consciously present when the Decedent signed the will.

{¶24} The statute reads,

> (A) If a document that is executed that purports to be a will is not executed in compliance with the requirements of section 2107.03 of the Revised Code, that document shall be treated as if it had been executed as a will in compliance with the requirements of that section if a probate court, *after holding a hearing*, finds that the proponent of the document as a purported will has established, by clear and convincing evidence, all of the following:
>
> (1) The decedent prepared the document or caused the document to be prepared.
>
> (2) The decedent signed the document and intended the document to constitute the decedent's will.
>
> (3) The decedent signed the document under division (A)(2) of this section in the conscious presence of two or more witnesses. As used in division (A)(3) of this section, “conscious presence” means within the range of any of the witnesses' senses, excluding the sense of sight or sound that is sensed by telephonic, electronic, or other distant communication. (Emphasis added.)

{¶25} Upon review of the record, we note Appellee did not raise and/or argue R.C. 2107.24 was applicable; therefore, the issue will not be addressed on appeal.

{¶26} The only issue raised on summary judgment was the question of whether a notary public's signature could constitute a valid witness signature. At deposition, Ernest Burkes testified as to his wife's signature as a witness, and the evidence demonstrates the signature was in fact Thelma Burkes'. Thelma Burkes has since passed away, and Ernest Burkes could not conclusively establish whether or not she witnessed the Decedent sign the 2005 Will. On summary judgment, Thelma Burkes' conscious presence at the time of execution was not an issue. Further, Ernest Burkes' notary jurat demonstrates Decedent acknowledged he executed the 2005 Will in Burkes' presence. Accordingly, the burden rests with Appellant to demonstrate the 2005 Will was not executed pursuant to the requirements of Ohio law. The trial court concluded Ernest Burkes' signature as a notary along with the jurat served as a valid second witness to the 2005 Will. Burkes testified he witnessed Decedent sign the will and the second signature was his wife's signature as the second witness.

{¶27} Accordingly, we find, the trial court did not err in denying summary judgment.

{¶28} The first assignment of error is overruled.

II. and III.

{¶29} In the second assignment of error, Appellant maintains the trial court erred in instructing the jury on the requirements as to the validity of a will and as to the creation of a rebuttable presumption of validity due to the probating of the will.

{¶30} Specifically, Appellant maintains the trial court committed plain error in failing to instruct the jury a witness must both subscribe and attest the will in the conscious presence of the testator, pursuant to R.C. 2107.03.

{¶31} The trial court provided the jury with the following instructions herein,

> Now there are certain legal requirements set forth in the Ohio Revised Code that must be met for a will to be valid.
>
> They are: One – or A, the person must be 18 years of age or older;
>
> B, the person must be of sound mind and memory, and;
>
> C, the person must not be under a restraint. And I'll talk about that a little bit later.
>
> For a will to be admitted to probate, it must be in writing; must be signed at the end by the testator in the presence of at least two witnesses, or signed at the end by the testator who acknowledged his signature to at least two witnesses.
>
> The order of probate is prima facia evidence of the attestation, execution, and validity of the will.
>
> ***The burden of proof rests upon the plaintiff to prove by a preponderance or greater weight of the evidence that the will was forged or not executed in compliance with Ohio law.
>
> ***
>
> Now, prima facia evidence may be sufficient, may be sufficient evidence to establish that a will was validly executed unless contradicted or explained away by other evidence of equal or greater value.

> You may consider prima facia evidence only to the extent that you find it credible.
>
> Tr. Vol. 5 at 747-750.

{¶32} Later, the jury herein inquired as to whether a notary could serve as a witness, and the trial court gave the following instruction,

> A notary public is not prohibited from serving as a witness to a will if you find that the notary public saw the testator sign the will and the notary public affixed the notary's signature to the will.

{¶33} Appellant maintains there was no evidence presented at trial Decedent observed the notary or Thelma Burkes sign the 2005 Will. Accordingly, the trial court should have given the jury the additional instruction the witnesses were required to observe the Decedent sign the 2005 Will or sign in the conscious presence of Decedent and the witnesses were to sign the will in the conscious presence of the testator.

{¶34} Appellant did not object to the instructions; rather, argues plain error. As noted by this Court in *Kell v. Russo,* 5th Dist. Stark No.2011 CA 00082, 2012–Ohio–1286 at paragraphs 30–31:

> In appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 679 N.E.2d 1099, at paragraph one of the syllabus.

> In *Goldfuss,* the Court explained that the doctrine shall only be applied in extremely unusual circumstances where the error complained of, if left uncorrected, would have a material adverse effect on the character of and public confidence in judicial proceedings. *Id.* at 121, 679 N.E.2d 1099. The Court concluded that the public's confidence is rarely upset merely by forcing civil litigants to live with the errors they themselves or the attorney chosen by them committed at trial. *Id.* at 121–122, 679 N.E.2d 1099.

{¶35} Here, Appellant has not demonstrated a complete absence of any reasonable possibility Willie Harris observed the notary of Earnest Burkes or the witnessing signature of Thelma Burkes. *Schade v. Carnegie Body Co.* (1982), 70 Ohio St.2d 207. Nor did Appellant demonstrate a complete absence of any reasonable possibility Decedent observed or in his conscious presence witnessed, the signing of the 2005 Will by Ernest or Thelma Burkes. Rather, the jurat demonstrates Decedent acknowledged the execution of the Will in Burkes' presence and it contains Burkes' signature.

{¶36} The Stark County Probate Court found,

> The court finds that the purported will of decedent (Willie Harris), either on its face or from testimony of the witnesses, complies with the applicable law, It is therefore admitted to probate, and ordered recorded.

{¶37} R.C. 2107.74 reads,

> On the trial of any will contest under section 2107.71 of the Revised Code, the order of probate is prima-facie evidence of the attestation,

execution, and validity of the will or codicil. The contesting party may call any witness to the will as upon cross examination.

{¶38} The statutory presumption of validity, being rebuttable, shifts the burden of persuasion upon the contestants in an action to contest a will that has been admitted to probate. *Krischbaum v. Dillon* (1991), 58 Ohio St3d 58. The order admitting a will to probate is prima facie evidence of the validity of the will. *Gannett v. Booher* (1983), 12 Ohio App.3d 49.

{¶39} It was not Appellee's burden to prove the validity of the will and the statutory presumption of validity of the will created a burden of proving otherwise on Appellant. Accordingly, the trial court did not commit plain error in instructing the jury. The trial court properly instructed the jury to consider prima facia evidence unless contradicted. Accordingly, we do not find plain error.

{¶40} The second and third assignments of error are overruled.

IV.

{¶41} In the fourth assignment of error, Appellant argues the trial court erred in denying Appellant's motion for directed verdict and JNOV.

{¶42} Civil Rule 50(B) governs motions for judgment notwithstanding the verdict. When ruling on a motion for JNOV, a trial court applies the same test as in reviewing a motion for a directed verdict. *Ronske v. Heil Co.,* 5th Dist. Stark No. 2006–CA–00168, 2007-Ohio-5417, 2007 WL 2937455; *Pariseau v. Wedge Products, Inc.,* 36 Ohio St.3d 124, 522 N.E.2d 511 (1988). In reviewing a motion for JNOV, courts do not consider the weight of the evidence or the witness credibility; rather, courts consider the much narrower legal question of whether sufficient evidence exists to support the verdict. *Texler*

v. D.O. Summers Cleaners & Shirt Laundry Co., 81 Ohio St.3d 677, 693 N.E.2d 271 (1998); *Wagner v. Roche Laboratories,* 77 Ohio St.3d 116, 671 N.E.2d 252 (1996). In other words, if there is evidence to support the nonmoving party's side so that reasonable minds could reach different conclusions, the court may not usurp the jury's function and the motion must be denied. *Osler v. City of Lorain,* 28 Ohio St.3d 345, 504 N.E.2d 19 (1986). Appellate review of a ruling on a motion for JNOV is de novo. *Midwest Energy Consultants, L.L.C. v. Utility Pipeline, Ltd.,* 5th Dist. Stark No. 2006CA00048, 2006-Ohio-6232, 2006 WL 3423410.

{¶43} Here, Appellant's motion for directed verdict and post-trial motion for JNOV assert the trial court should have entered judgment in Appellant's favor as the evidence does not demonstrate the witnesses herein subscribed and attested the 2005 Will in the "conscious presence" of Decedent pursuant to R.C. 2107.03. This issue was not specifically raised or addressed during trial; therefore, waived. Further, Appellant has the burden of demonstrating the will was invalidly executed, and has not demonstrated with reasonable probability the witnesses to the will did not sign in the conscious presence of Decedent and Decedent did not sign in the conscious presence of the witnesses. Accordingly, there is sufficient evidence to support the verdict herein, and the trial court did not error in denying Appellant's motion for directed verdict or JNOV.

{¶44} The fourth assignment of error is overruled.

{¶45} The judgment of the Stark County Court of Common Pleas, Probate Division is affirmed.

By: Hoffman, P.J.

Wise, J. and

Baldwin, J. concur