

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Dennis Smith

Court of Appeals No. L-10-1286

Appellee

Trial Court No. CVF-09-03751

v.

Margaret Bauknecht, et al.

DECISION AND JUDGMENT

Appellant

Decided: August 12, 2011

* * * * *

Kevin Kenney and Christopher Hensien, for appellee.

George Royer, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Margaret Bauknecht, appeals from a decision of the Toledo Municipal Court granting summary judgment to appellee, Dennis Smith, on his claim for reimbursement of funeral expenses. For the reasons that follow, we affirm.

{¶ 2} Marilyn Malkuian died on August 17, 2008. Her sister, appellant, was named executor of her estate. On December 17, 2008, appellee presented a claim as a creditor against the estate pursuant to R.C. 2117.06. Appellee sought \$2,185 which represented payments he made to Woodlawn cemetery for Malkuian's burial and money he spent for a headstone and funeral flowers. On February 2, 2009, his claim was rejected by appellant.

{¶ 3} On February 27, 2009, appellee filed a complaint against appellant in her capacity as executor of Marilyn Malkuian's estate, seeking to recover from the estate the money he expended for Malkuian's funeral and burial. On May 7, 2010, appellee filed a motion for summary judgment which was granted on September 16, 2010. Appellant now appeals setting forth the following assignments of error:

{¶ 4} "I. Summary judgment should not have been granted to plaintiff appellee.

{¶ 5} "II. Appellee's motion for summary judgment should have been denied by reason of the fact that the evidence did not comply with Civil Rule 56E."

{¶ 6} On review, appellate courts employ the same standard for summary judgment as trial courts. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129. The motion may be granted only when it is demonstrated: "* * * (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) 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, who is entitled to have the evidence construed most strongly

in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66; Civ.R. 56(C).

{¶ 7} In her first assignment of error, appellant contends that a genuine issue of material fact exists as to whether monies spent on flowers for Malkuian's casket and headstone constitute "funeral expenses."

{¶ 8} R.C. 2117.25 provides:

{¶ 9} "(A) Every executor or administrator shall proceed with diligence to pay the debts of the decedent and shall apply the assets in the following order:

{¶ 10} "* * *

{¶ 11} "(2) An amount, not exceeding four thousand dollars, for funeral expenses that are included in the bill of a funeral director, funeral expenses other than those in the bill of a funeral director that are approved by the probate court, and an amount, not exceeding three thousand dollars, for burial and cemetery expenses, including that portion of the funeral director's bill allocated to cemetery expenses that have been paid to the cemetery by the funeral director.

{¶ 12} "For purposes of this division, burial and cemetery expenses shall be limited to the following:

{¶ 13} "(a) The purchase of a right of interment;

{¶ 14} "(b) Monuments or other markers;

{¶ 15} "(c) The outer burial container;

{¶ 16} "(d) The cost of opening and closing the place of interment;

{¶ 17} "(e) The urn."

{¶ 18} "It has long been the law of Ohio that a person other than a surviving spouse who pays the deceased's funeral expenses, not as an officious volunteer or meddler but out of the necessity of the occasion, is entitled to reimbursement from the estate of the deceased, provided the bill is reasonable. *Texler v. Marquard* (M.C. 1939), 29 Ohio Law Abs. 186, 14 O.O. 381, 3 Ohio Supp. 226; *Markland v. Younker* (1957), 106 Ohio App. 224, 6 O.O.2d 468, 154 N.E.2d 22; 33 Ohio Jurisprudence 3d (1982), Decedents' Estates, Section 1455." *Osbourne v. Osbourne* (1996), 114 Ohio App.3d 412, 415.

{¶ 19} It is undisputed that appellee and Malkuian had lived together for fourteen years before she died of an aggressive form of cancer. Though not legally married, Malkuian often used appellee's surname as her own. The two also owned property together and appellee helped care for Malkuian during her final days. Based on this relationship, appellee cannot be called "an officious volunteer or meddler."

{¶ 20} Appellee sought reimbursement in the amount of \$100 for a headstone and \$100 for funeral flowers. Receipts submitted with the complaint show that appellee is not even asking for the entire amount spent on the headstone and the flowers. As aptly stated years ago in *Caswell v. Harry Miller Excavating Co.* (1969), 20 Ohio Misc. 46, "[W]hile the furnishing of flowers for a funeral and the purchase of a tombstone or marker are not absolute necessities, a reasonable expenditure for such items * * * is appropriate and in harmony with the feelings and sentiments of an enlightened humanity

and a reasonable sum expended therefore are to be considered necessary funeral expenses."

{¶ 21} Based on the foregoing, we conclude that there is no material issue of fact as to whether money spent on a headstone and funeral flowers are "funeral expenses" to which appellee is entitled to reimbursement from Malkuian's estate. Appellant's first assignment of error is found not well-taken.

{¶ 22} In her second assignment of error, appellant contends that appellee's motion for summary judgment should have been denied because it did not comply with Civ.R. 56(E) which provides:

{¶ 23} " E) Form of affidavits; further testimony; defense required

{¶ 24} "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse 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. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party."

{¶ 25} Contrary to appellant's interpretation of this rule, Civ.R. 56(E) does not require the parties to submit affidavits in support of their summary judgment motions. Rather, Civ.R. 56(E) provides guidelines for the submission of affidavits should affidavits be submitted in support of a summary judgment motion. In this case, appellee did not submit any affidavits in support of his motion, thus, Civ.R. 56(E) is inapplicable. Appellant's second assignment of error is found not well-taken.

{¶ 26} On consideration whereof, we find that substantial justice was done the party complaining and the judgment of the Toledo Municipal Court is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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