

IN THE SUPREME COURT OF OHIO

14-0165

RONALD BLAUSEY, et al.

Appellees,

v.

RICHARD VANNESS, et al.

Appellants.

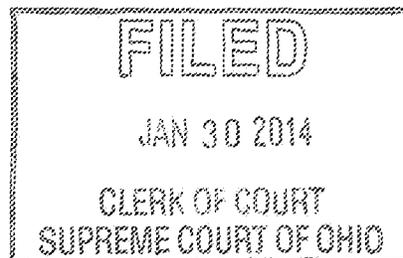
On Appeal from the Ottawa
County Court of Appeals, Sixth
District

Decision of December 20, 2013

Case No. 13-OT-011

MEMORANDUM IN SUPPORT OF JURISDICTION

Alan R. McKean (0031012)
Martin D. Carrigan (029477)
Attorneys for Appellants
McKEAN AND McKEAN
132 W. Water Street
Oak Harbor, Ohio 43449
Tel: (419) 898-3095
Fax: (419) 898-1352
Email: amckean@mckeanandmckean.com
Email: mdcarrigan@hotmail.com



Gary O. Sommer (#0006257)
Kevin A. Heban (#0029919)
R. Kent Murphree (#0065730)
Attorneys for Appellees
200 Dixie Hwy.
Rossford, Ohio 43460
Attorneys for Appellees

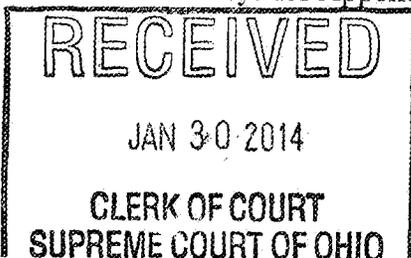


TABLE OF CONTENTS

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT PUBLIC INTEREST 1

STATEMENT OF THE CASE AND FACTS2 - 5

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW5 - 12

Proposition of Law No. 1: The 2001 TOD Deed was valid and the TOD Deed cannot be varied by the doctrine of constructive trust5 - 9

Proposition of Law No. 2: The Appellees never had any legal interest in the property and they cannot impose a constructive trust upon Appellants9 - 12

CONCLUSION 13

CERTIFICATE OF SERVICE 13

APPENDIX A 14

Decision of the Ottawa County Court of Appeals, Sixth Appellate District, Dated December 20, 2013 15 - 24

TABLE OF AUTHORITIES

<u>CASES</u>	Page(s)
<i>Alteno v. Alteno</i> , 11th Dist. Trumbull No. 2000-T-0078, 2002 Ohio 302 (Jan. 25, 2002).....	9
<i>Christe v. GMS Mgt. Co., Inc.</i> , 88 Ohio St.3d 376, 726 N.E.2d 497 (2000).....	11
<i>Ferguson v. Owens</i> , 9 Ohio St.3d 223, 459 N.E.2d 1293 (1984).....	9
<i>In re Estate of Scott</i> , 164 Ohio App.3d 464, 2005-Ohio-5917, 842 N.E.2d 1071 (2 nd Dist.).....	7, 8
<i>Larwill v. Farrelly</i> , 8 Ohio App. 356 (1918).....	5
<i>Long Beach Assn., Inc. v. Jones</i> , 82 Ohio.St.3d 574, 697 N.E.2d 209 (1998).....	5
<i>Mattia v. Hall</i> , 9 th Dist. Summit No. 23778, 2008-Ohio-180	8
<i>McCoy v. AFTI Properties, Inc.</i> , 10 th Dist. Franklin No. 07AP-713, 2008-Ohio-2304	5
<i>State of Ohio v. Lowe</i> , 112 Ohio St. 3d 507, 2007-Ohio-606, 861 N.E.2d 512 (2007).....	11
<i>State ex rel. Burrows v. Indus. Comm.</i> , 78 Ohio St. 3d 78, 676 N.E.2d 519 (1997).....	11
 <u>RULES AND STATUTES AND OTHER AUTHORITIES</u>	
76 American Jurisprudence 2d, Trusts, Section 221 at 446 (1975)	9
<i>Kuehnle & Levey</i> , Baldwin’s Ohio Practice, Ohio Real Estate Law Section 20:47 (3d Ed.2003).....	7
R.C. Chapter 5301	5, 11
R.C. Chapter 5302	1, 5
R.C. 5302.22.....	1, 3, 7, 8, 9, 11
R.C. 5302.22(A)	5, 8
R.C. 5302.23.....	3, 10
R.C. 5302.23(B)	6, 7, 10
R.C. 5302.22(G)	12

**EXPLANATION OF WHY THIS CASE IS ONE OF
PUBLIC OR GREAT PUBLIC INTEREST**

This is a case of first impression. May the Ohio "Transfer on Death" Deed statute (R.C. 5302) have an exception created by the doctrine of constructive trust when the statute is not ambiguous? Additionally, may the TOD Deed statute be vetoed simply by claiming a constructive trust should exist to nullify properly prepared, executed and recorded deeds?

The Sixth District Court of Appeals for Ottawa County Ohio, in its December 20, 2013 decision in this matter, created an exception in R.C. 5302.22 to generally accepted Ohio law that "an unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language." The Sixth District ruled that a properly prepared, executed and recorded transfer on death deed may be invalid based on the equitable doctrine of constructive trust theory.

The statute is not ambiguous and provides for no exceptions at all, let alone pursuant to a constructive trust theory. The statute provides that if a transfer on death deed is properly prepared, properly executed and properly recorded, it is valid. The statute is unambiguous. If the Sixth District's ruling is permitted to stand, the clear legislative intent and language of R.C. 5302.22 will be destroyed because any claim involving a constructive trust would plunge otherwise valid real estate transactions into protracted litigation.

STATEMENT OF THE CASE AND FACTS

Appellees Ronald and Jean Blausey filed a complaint alleging unjust enrichment and asking for the imposition of a constructive trust for real property transferred pursuant to a TOD Deed. They filed their complaint against Richard and Verna VanNess for the transfer to the VanNesses of real property in Ottawa County, Ohio pursuant to a Transfer on Death Deed. The decedent, Verna Blausey, died in 2008. She had the TOD Deed prepared to the VanNesses seven years earlier in 2001.

The Appellees claimed that they should have received the property since the decedent's estate plan was changed in 2004 to name them as sole heirs. The 2001 TOD deed in favor of the VanNesses, however, was never changed. Thus, the Appellees claimed a mistake had been made (failure to prepare a new TOD deed), that the VanNesses were unjustly enriched and that a constructive trust should be imposed on the real property.

The VanNesses argued in the trial court below that the clear language and intent of the Transfer on Death Deed statute contemplated such a situation. The trial court ruled in the VanNesses' favor.

This case has had a long litigation history. There have been two separate lawsuits filed and three appeals. In the most recent case, where the Appellees, the Blauseys, alleged unjust enrichment and constructive trust, the Ottawa County Court of Common Pleas, by judgment entry dated August 15, 2012, entered judgment in favor of the VanNesses and ordered the Complaint dismissed with prejudice. The trial court ruled that neither unjust enrichment nor constructive trust applied since the Appellees had conferred no benefit upon the VanNesses.

The Sixth District affirmed on the unjust enrichment claim but reversed on the constructive trust claim. The Appellate Court stated:

[I]t is conceivable that the transfer of title on death deed through which [VanNess] took title to the disputed property remained in effect at the time of decedent's death through oversight and mistake on the part of counsel for decedent.

Given these unique facts and circumstances of great relevance to the summary judgment ruling in favor of [VanNess] on the unjust enrichment and constructive trust claims, we first find that reasonable minds can only conclude that there is nothing in the record that could constitute [Blauseys] conferring a benefit upon [VanNess] in connection to this matter. As such, we find that portion of the summary judgment ruling finding in favor of appellees on the unjust enrichment claim to be proper. However, we further find that reasonable minds could differ as to whether given the very unique facts and circumstances of this case, in which the decedent had a significant falling out with appellees prior to her death so as to declare her intent to her counsel that the Blauseys "get everything" such that new estate documents were thereafter executed excluding appellees, and where there is compelling indicia in the record that appellees took title and legal rights and benefits to the Graytown acreage though an oversight by counsel for decedent in failing to prepare a new transfer of deed upon death in favor of the Blauseys on the Graytown acreage, appellees could be found to, in a way that is against equity and good conscience, hold and enjoy the legal right to the Graytown acreage. As such, we find that portion of summary judgment ruling finding in favor of appellees on the constructive trust claim to be improper.

[Decision, December 20, 2013, pp. 8 – 9]

The Sixth District's decision completely ignores the clear statutory language of R.C. 5302.22 and bypasses the application of the Transfer on Death Deed statute in favor of the equitable doctrine of constructive trust. By ruling as it did, the Sixth District creates an exception to the TOD deed statute – a constructive trust may be alleged to vary a proper TOD deed – despite clear statutory language to the contrary in R.C. 5302.22 and 5302.23.

Throughout the course of the various proceedings below, the attorney who was Ms. Blausey's estate attorney, Gary Kohli, testified. What Attorney Kohli testified to is that Ms. Blausey was very involved in her estate planning and that she was extremely knowledgeable about its structure and to whom her property would pass. Attorney Kohli testified that he was

the third estate planning attorney Ms. Blausey had contacted when he first talked to her in 2001.

In 2001, Ms. Blausey specifically instructed Attorney Kohli to prepare and record a “Transfer on Death Deed” (“TOD Deed”) which would transfer the premises to the VanNesses. Attorney Kohli testified that Ms. Verna Blausey, in 2001, was competent, knowledgeable and specific about having the TOD Deed prepared in favor of the VanNesses. Attorney Kohli prepared the deed and placed the names of Richard and Verna VanNess on it. It was prepared correctly, demonstrated Ms. Blausey’s intent, and was recorded with the Ottawa County Recorder’s office. The 2001 TOD Deed remains the only valid deed prepared or recorded as to the premises. Attorney Kohli testified that the 2001 TOD Deed did not have any mistake in it. The Appellees do not claim, now or ever, that the 2001 TOD Deed was improper in any manner.

Three years later, in 2004, Ms. Blausey contacted Mr. Kohli again. She wanted to change her estate plan. At the time she was in the hospital. Mr. Kohli visited Ms. Blausey in the hospital and prepared changes to her estate plan. Ms. Blausey did not specifically mention the Transfer on Death Deed. But she did say she wanted to change “everything” in her “estate plan.”¹ As a result, Mr. Kohli did not change the TOD Deed in favor of the VanNesses.

Ms. Blausey lived another 4 years and passed away in 2008. The real property passed to the VanNesses and the Blauseys instituted litigation.²

¹ As this matter was resolved on the VanNesses’ Motion for Summary Judgment, the admissibility of Attorney Kohli’s affidavit and notes was not ruled on by the trial court. The VanNesses claimed that such testimony was inadmissible hearsay as to what Ms. Verna Blausey allegedly stated in 2004.

² Richard VanNess testified that he and his now deceased wife did not know that Ms. Verna Blausey had prepared or recorded a TOD deed in their favor. They did not know about its existence until they were sued by the Appellees in the lower actions.

As a matter of law, the 2001 Transfer on Death deed to the VanNess' was valid. There is no dispute that the TOD deed to the VanNesses was correctly prepared. Attorney Kohli testified that it has no mistakes, that it was the intent of Ms. Blausey to have that TOD Deed prepared, and that it was validly recorded. Appellees make no claim that the 2001 TOD deed was invalid, nor did the Sixth District.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: The 2001 TOD Deed was valid and the TOD Deed cannot be varied by the doctrine of constructive trust.

"The construction of written contracts and instruments, including deeds, is a matter of law." *Long Beach Assn., Inc. v. Jones*, 82 Ohio.St.3d 574,576, 697 N.E.2d 209 (1998). "When construing a deed, a court must examine the language contained within the deed, the question being not what the parties meant to say, but the meaning of what they did say, as courts cannot put words into an instrument which the parties themselves failed to do." *McCoy v. AFTI Properties, Inc.*, 10th Dist. Franklin No. 07AP-713, 2008-Ohio-2304, citing *Larwill v. Farrelly*, 8 Ohio App. 356, 360 (1918).

There is no exception for a constructive trust to a valid deed. In this case, the 2001 TOD deed was the intent of Verna Blausey. That remained her intent for years. Not even Appellees argue that any constructive trust argument to the 2001 TOD deed can be raised when it was prepared in 2001. The 2001 TOD Deed was, and is, valid.

TOD deeds are exclusively governed by R.C. Chapters 5301 and 5302. Prior to December 28, 2009, R.C. 5302.22(A), provided, in pertinent part:

A deed conveying any interest in real property, and in substance following the form set forth in this division, when duly executed in accordance with Chapter 5301 of the Revised Code and recorded in the office of the county recorder, creates a present interest as sole owner or as a tenant in common

in the grantee and creates a transfer on death interest in the beneficiary or beneficiaries.

Upon the death of the grantee, the deed vests the interest of the decedent in the beneficiary or beneficiaries.

The statute was changed by the legislature in 2009, but such changes, while significant, do not affect this case.

R.C. 5302.23(B), unchanged by the 2009 revision, states:

(9) Any transfer on death of real property or of an interest in real property that results from a transfer on death designation affidavit designating a transfer on death beneficiary is not testamentary.

That transfer on death shall supersede any attempted testate or intestate transfer of that real property or interest in real property.

(10) The execution and recording of a transfer on death designation affidavit shall be effective to terminate the designation of a transfer on death beneficiary in a transfer on death deed involving the same real property or interest in real property and recorded prior to the effective date of this section.

R.C. §§ 5302.23(B)(9) and (10) were passed by the legislature in anticipation of exactly the situation before the court. A TOD deed that is prepared and recorded takes precedence over a will or estate plan that says otherwise. There is no exception for any constructive trust or unjust enrichment in the statute. If the TOD deed is correctly prepared and recorded (as is the case here), that is the end of the matter.

The statute does not permit any equitable theories such as unjust enrichment or constructive trusts to vary the TOD deed statute. Yet, that is exactly what the Appellees are attempting to do here with their allegation of a constructive trust. They claim that the will and the *unstated* intent of Ms. Blausey (which Appellees derive from Attorney Kohli's affidavit, inadmissible hearsay testimony) differs from the 2001 TOD Deed. As a matter of law, by the

clear statement of the statute on point, the TOD deed to the VanNesses was valid, effective and operated to transfer the property at the time of Ms. Blausey's death to Richard VanNess and his wife (then living) Verna VanNess. Because the Sixth District Appellate Court was convinced by the Blauseys' argument, it is now necessary to clear up this new and unprecedented exception by the Sixth District.

Two Ohio appellate district cases involving transfer on death deeds are helpful even if not dispositive on this issue. In a 2005 case, *In re Estate of Scott*, 164 Ohio App.3d 464, 2005-Ohio-5917, 842 N.E.2d 1071 (2nd Dist.), the decedent "executed but did not record a transfer-on-death deed", designating a single person as the transfer-on-death beneficiary. That person was also named in the will, but with three of her siblings as the residual beneficiaries. The *In re Estate of Scott* court held that, because the TOD deed was not properly recorded, even though it was prepared, it was *invalid* and that the person designated did not have sole benefit of the unrecorded deed, stating:

R.C. 5302.22 allows any person who owns real property, by executing *and recording* a transfer-on-death deed, to create in a transfer-on-death beneficiary an interest in the property that is transferable on the death of the property owner. The owner need not deliver the deed to the transfer-on-death beneficiary. "The deed effectively creates the designation [of a transfer-on-death beneficiary] upon the recording of the deed." *Kuehnle & Levey*, Baldwin's Ohio Practice, Ohio Real Estate Law (3d Ed.2003), Section 20:47. We note that the "designation of a transfer on death beneficiary can be revoked or changed at any time, without the consent of the beneficiary, by the owner's executing *and recording* a deed to one or more persons, including the owner, with or without the designation of another transfer on death beneficiary." (Emphasis sic.) *Id.*, citing R.C. 5302.23(B)(4).

The court emphasized that if a transfer on death deed was properly prepared, properly executed and properly recorded, it was valid. No hint of any differing equitable theory appears in *In re Estate of Scott*.

A subsequent case decided in 2008 followed the reasoning in the *In re Estate of Scott* case. In *Mattia v. Hall*, 9th Dist. Summit No. 23778, 2008-Ohio-180, the Court cited the *In re Estate of Scott* with approval and reached a similar conclusion.

As the TOD in the instant case was not recorded prior to Decedent's death, the trial court determined that "the grantor did not effectuate a present interest in himself and a transfer-on-death interest in [Morris]. As required by the express statutory law, the two part requirement of R.C. 5302.22, executing and recording, to create a present interest in the Decedent and a transfer on death interest in [Morris], was not complied with." We agree with the trial court's reasoning.

Our research reveals that case law interpreting the language of R.C. 5302.22 is scarce. The Second District Court of Appeals recently decided this issue in *In re Estate of Scott* [citation omitted]. In that case, the second district determined that R.C. 5302.22 required recordation prior to death. The court in *Scott*, acknowledging the lack of case law on this issue, resorted to scholarly secondary sources for guidance. It concluded that because "R.C. 5302.22 allows any person who owns real property, by executing *and recording* a transfer-on-death deed, to create in a transfer-on-death beneficiary an interest in the property that is transferable on the death of the property owner[.]" recordation must take place before death. (Emphasis sic.) *Id.* at ¶10.

R.C. 5302.22 clearly requires both execution *and* recordation. The language of the statute makes explicit that execution and recordation together create a "present interest as sole owner or as a tenant in common in the grantee and creates a transfer on death interest in the beneficiary or beneficiaries." R.C. 5302.22(A). Therefore, the interests in the property are not created until the grantor executes and records the deed.

Again, the *Mattia* court echoed the same sentiments as *In re Estate of Scott*: if a transfer on death deed was properly prepared, properly executed and properly recorded, it was valid. No hint of any differing equitable theory affects the TOD deed.

Ohio statutory and case law are in agreement and their application to the present situation should be confirmed to affirm the trial court's decision and to reverse the appellate court's decision involving a constructive trust.

The 2001 TOD Deed was validly prepared and recorded. When Ms. Blausey died in 2008, the 2001 TOD Deed transferred title to the premises to the VanNesses, as required by Ohio law. In order to create any interest for the Appellees, there had to be a different TOD or other deed actually prepared and recorded to cancel or revoke or change the 2001 TOD Deed.

The record in this case is clear. There was no TOD or other deed prepared for the Appellees. Therefore, the 2001 TOD Deed transferred title to the VanNesses. The Appellees have no interest in the property, whether by constructive trust theory or any other equitable theory. Since the transfer to the VanNesses was effective at the time of Verna Blausey's death, the Sixth District Court of Appeals decision creating an exception to R.C. 5302.22 should be reversed.

Proposition of Law No. 2: The Appellees never had any legal interest in the property and they cannot impose a constructive trust upon Appellants.

The Appellees argued to the Sixth District Appellate Court that the theory of "constructive trust" should apply here. 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. * * * (Alterations sic; footnote added.) *Ferguson v. Owens*, 9 Ohio St.3d 223, 225, 459 N.E.2d 1293 (1984) quoting 76 American Jurisprudence 2d, Trusts, Section 221 at 446 (1975).

A constructive trust is simply "a remedial device for the prevention of fraud and unjust enrichment." *Altano v. Altano*, 11th Dist. Trumbull No. 2000-T-0078, 2002 Ohio 302 (Jan. 25, 2002).

The Sixth District Court of Appeals was clearly troubled by the specific set of facts in this matter – it concluded (prematurely as the issue had not been decided in the trial court) that

Ms. Verna Blausey intended to change her estate plan in 2004 and that probably included changing the deed to her property. The Court surmised that since that was probably the case, that attorney Kohli committed a “mistake” by failing to prepare the deed. Yet, left out of this analysis is what the VanNesses did or did not do. They did absolutely nothing. They did not even know about the TOD deed until they were sued in this litigation.

As to the Blauseys, they never had any interest in the property. They claim they should have had an interest starting in 2004. That is three years after the TOD deed had been prepared and recorded. Verna Blausey’s estate plan had been changed – yet the clear application of R.C. 5302.23 demonstrates that an estate plan change is not enough.

R.C. 5302.23(B)(9) states:

(9) Any transfer on death of real property or of an interest in real property that results from a transfer on death designation affidavit designating a transfer on death beneficiary is not testamentary.

That transfer on death shall supersede any attempted testate or intestate transfer of that real property or interest in real property.

The argument that the Blauseys make is that a constructive trust should be imposed to nullify the Transfer on Death Deed. That argument would also expressly and specifically nullify and void R.C. 5302.23(B)(9). In effect, any lawsuit could exercise a veto over R.C. 5302.23(B)(9) simply by claiming a constructive trust should apply. Such was not the intent of the legislature. The Sixth District Appellate Court simply went too far and was swayed by a jury argument. It did not apply Ohio law.

There is no basis to impose a constructive trust theory upon the VanNesses in favor of the Blauseys, who never had any legal interest in the real property.

The statutory language is clear and unambiguous. Appellants request this Court to rule that constructive trust theory may not be used to vary a properly prepared, executed and recorded TOD deed.

“An unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language.” *State of Ohio v. Lowe*, 112 Ohio St. 3d 507, 2007-Ohio-606, 861 N.E.2d 512 (2007), *State ex rel. Burrows v. Indus. Comm.*, 78 Ohio St. 3d 78, 676 N.E.2d 519 (1997). Even if a statute is ambiguous, a court must still give effect to the intent of the legislature. *Christe v. GMS Mgt. Co., Inc.*, 88 Ohio St.3d 376, 726 N.E.2d 497 (2000).

R.C. 5302.22, in effect at the time of the filing of the complaint, stated:

(A) A deed conveying any interest in real property, * * * when duly executed in accordance with Chapter 5301 of the Revised Code and recorded in the office of the county recorder, creates a present interest as sole owner or as a tenant in common in the grantee and creates a transfer on death interest in the beneficiary or beneficiaries. Upon the death of the grantee, the deed vests the interest of the decedent in the beneficiary or beneficiaries.

(B) Any person who, under the Revised Code or the common law of this state, owns real property or any interest in real property * * * may create an interest in the real property transferable on death by executing and recording a deed as provided in this section conveying the person's entire, separate interest in the real property to one or more individuals, including the grantor, and designating one or more other persons, identified in the deed by name, as transfer on death beneficiaries.

A deed conveying an interest in real property that includes a transfer on death beneficiary designation need not be supported by consideration and need not be delivered to the transfer on death beneficiary to be effective.”

The 2001 TOD Deed to the VanNess’ was validly prepared and recorded. When Ms. Blausey died, the 2001 TOD Deed transferred title to the premises to them.

The VanNesses did not know about the TOD deed. They did not now know that Ms. Blausey had ever put them in her estate or that she had later on changed her estate plan to the Appellees. The VanNesses did not even know that when Ms. Blausey passed, they were entitled to the real property until the Appellees in this appeal filed the actions below. But Ms. Blausey had prepared the TOD deed in the VanNess' favor in 2001 and it was properly prepared, executed and recorded.

In order to eliminate that interest, the TOD deed had to be canceled, changed, or a new one prepared. That did not happen. As a result, there had to be a different TOD or other deed actually prepared and recorded to cancel or revoke or change the 2001 TOD Deed. The record in this case is clear. There was no TOD or other deed prepared for the Appellees. Therefore, the 2001 TOD Deed transferred title to the Appellants and the Appellees have no interest in the property.

Finally, the TOD deed statute gives us guidance whenever a TOD deed exists and is valid. The guidance is to transfer the property to the designated beneficiaries in the TOD deed. As stated by R.C. 5302.22(G):

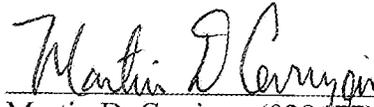
Subject to division (C) of this section, upon the death of any individual who owns real property or an interest in real property that is subject to a transfer on death beneficiary designation made under a transfer on death designation affidavit as provided in this section, that real property or interest in real property of the deceased owner ***shall be transferred only to the transfer on death beneficiary or beneficiaries who are identified*** in the affidavit by name and who survive the deceased owner or that are in existence on the date of death of the deceased owner. [emphasis added]

The legislative intent is clear. If a Transfer on Death Deed is properly prepared, executed and recorded, it is valid regardless of any ethical theories to the contrary.

CONCLUSION

This Court should exercise its jurisdiction to hear this issue of public and great general interest and it should reverse the decision of the Court of Appeals on the issue of constructive trust.

Respectfully submitted,



Martin D. Carrigan (029477)

An Attorney for Appellants

MCKEAN AND MCKEAN

132 W. Water Street

Oak Harbor, Ohio 43449

Tel: (419) 898-3095

Fax: (419) 898-1352

Email: mdcarrigan@hotmail.com

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been duly served by regular U.S. Mail, postage prepaid, upon Gary O. Sommer, Esq., Kevin A. Heban, Esq. and R. Kent Murphree, Esq., attorneys for Appellees, at their office address of 200 Dixie Highway, Rossford, Ohio 43460 on the 29th day of January, 2014.



Martin D. Carrigan

An Attorney for Appellants,

Richard VanNess, *et al.*

APPENDIX A

FILED
COURT OF APPEALS
DEC 20 2013
GARY A. KOHLI CLERK
OTTAWA COUNTY, OHIO

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

STATE OF OHIO, OTTAWA COUNTY
I hereby certify this to be a true copy of original on
file.
Subscribed to me this 20th day of
December 2013
Gary A. Kohli, Clerk of Courts
By:  deputy

Ronald Blausey, et al.

Court of Appeals No. OT-13-011

Appellants/Cross-Appellees

Trial Court No. 10-CV-279H

v.

Richard Van Ness, et al.

DECISION AND JUDGMENT

Appellees/Cross-Appellants

Decided:

DEC 20 2013

* * * * *

Gary O. Sommer, Kevin A. Heban, R. Kent Murphree and
John P. Lewandowski, for appellants/cross-appellees.

Alan R. McKean and Martin D. Carrigan, for appellees/cross-
appellants.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Ottawa County Court of Common Pleas, which granted summary judgment to appellees on the underlying unjust enrichment and constructive trust claims set forth in appellants' complaint. On cross-appeal, appellees/cross appellants restated their specific defenses against the complaint.

VOL 035 PG 535

1.

JOURNALIZED
COURT OF APPEALS

Although the summary judgment ruling was in their favor, the specific assertions underlying the cross-assignments of error were not referenced, incorporated or subsumed into the disputed summary judgment ruling. For the reasons set forth below, this court affirms the judgment, in part, reverses the judgment, in part, and denies the cross-appeal as not properly before this court.

{¶ 2} Appellants/cross-appellees, Ronald and Jean Blausey, set forth the following assignment of error:

No. 1. The Trial Court erred by granting appellees/cross-appellants' Motion for Summary Judgment.

{¶ 3} On cross-appeal, appellees/cross-appellants, Richard and Verna Van Ness, set forth the following six cross-assignments of error:

1. THE LOWER COURT ERRED BY NOT GRANTING APPELLEES/CROSS-APPELLANTS' MOTION FOR SUMMARY JUDGMENT ON THE GROUND OF RES JUDICATA.

2. THE LOWER COURT ERRED BY NOT GRANTING APPELLEES/CROSS-APPELLANTS' MOTION FOR SUMMARY JUDGMENT ON THE GROUND THAT THE STATUTE OF LIMITATIONS PRECLUDED THE APPELLANT'S CLAIMS.

3. THE LOWER COURT ERRED BY NOT GRANTING APPELLEES/CROSS-APPELLANTS' MOTION FOR SUMMARY JUDGMENT ON THE GROUND OF LACK OF FRAUD.

4. THE LOWER COURT ERRED BY NOT GRANTING APPELLEES/CROSS-APPELLANTS' MOTION FOR SUMMARY JUDGMENT ON THE GROUND OF LACK OF STANDING.

5. THE LOWER COURT ERRED BY NOT GRANTING APPELLEES/CROSS-APPELLANTS' MOTION FOR SUMMARY JUDGMENT ON THE GROUND OF PUBLIC NOTICE AND A LEGAL REMEDY EXISTED.

6. THE LOWER COURT ERRED BY NOT GRANTING APPELLEES/CROSS-APPELLANTS' MOTION FOR SUMMARY JUDGMENT ON THE GROUND OF CONTRACT CONSTRUCTION.

{¶ 4} We note at the outset that the underlying facts and circumstances surrounding this case are exceptionally voluminous given the protracted history of this case. Accordingly, we will confine our recitation of the facts in this matter to those that are most relevant in the context of the summary judgment ruling presently before us on appeal.

{¶ 5} This case stems from an ongoing dispute regarding the transfer of a valuable 80-acre parcel of real estate located in Graytown, Ohio, to appellees subsequent to the June 16, 2008 death of Verna Blausey. The disputed property transfer occurred pursuant to a 2001 transfer on death deed naming appellees as the parties to whom the parcel would automatically transfer upon the passing of the decedent. The crux of the underlying dispute arises from the unequivocal falling out that occurred between

decedent and appellees prior to her death. Decedent became convinced that appellees had been talking adversely about her behind her back and she was upset after appellees deposited a check of decedent without notifying decedent they had done so. These events triggered a falling out.

{¶ 6} Subsequent to the falling out, decedent decisively revoked her previously executed last will and testament and power of attorney estate documents in favor of appellees and executed a new last will and testament and power of attorney estate documents in favor of appellants, Ronald and Jean Blausey. Decedent later passed away with no surviving spouse and no children. Appellants are related to decedent by marriage. Appellees were neighbors and former friends of decedent.

{¶ 7} Despite the falling out with appellees prior to her death which prompted her to convey to her attorney during an in-person meeting, occurring while decedent was hospitalized pending surgery, that she wanted appellees removed from her will and other estate documents and that she wanted the Blauseys to, "get everything," (culminating in the execution of new estate documents removing appellees from the equation), a new transfer of deed on death document in favor of the Blauseys to supersede the existing transfer of deed on death in favor of appellees on the Graytown acreage was not prepared or executed. Accordingly, upon her death, decedent's 80-acre parcel in Graytown, the sole subject of the transfer of deed on death in favor of appellees, did culminate in title to the property being transferred from decedent directly to appellees.

{¶ 8} Whether or not the transfer of the Graytown acreage to appellees under the facts and circumstances of this case is subject to any compelling and legitimate legal basis through which that disputed property transfer could be modified or reversed represents the entire underlying basis that is driving the contentious, ongoing litigation between these parties.

{¶ 9} In 2009, appellants filed a complaint against appellees to quiet title to the Graytown acreage. On March 5, 2010, that complaint was dismissed due to a lack of standing. On April 12, 2010, appellants filed a second complaint against appellees. The 2010 complaint upon which this appeal is based set forth allegations of unjust enrichment and constructive trust against appellees with respect to their obtaining title and sole beneficial interest in the Graytown acreage.

{¶ 10} On May 10, 2010, appellees filed a Civ.R. 12(B)(6) motion to dismiss the complaint against them on res judicata grounds. It was granted. On September 16, 2011, this court reversed the disputed Civ.R. 12(B)(6) dismissal on the basis that res judicata was not a proper basis of the dismissal. The 2010 complaint was remanded to the trial court for further proceedings. *Blausey v. Van Ness*, 6th Dist. Ottawa No. OT-10-041, 2011-Ohio-4680.

{¶ 11} Upon remand to the trial court, the case did not proceed to trial. On December 15, 2011, appellees filed for summary judgment. On January 3, 2012, appellants filed a brief in opposition. On August 15, 2012, the trial court granted summary judgment to appellees determining in pertinent part that, "Plaintiffs cannot meet

the first element of unjust enrichment. Further, since the unjust enrichment claim fails, the claim for a constructive trust must also fail.” Although appellees argued the six defenses which constitute their current cross-assignments during summary judgment briefing, there is no indicia that the trial court incorporated or ruled upon those specific arguments in the course of reaching the disputed summary judgment decision. This appeal ensued.

{¶ 12} In their first assignment of error, appellants contend that the trial court erred in granting summary judgment to appellees on the unjust enrichment and constructive trust claims. Appellate review of summary judgment determinations is conducted on a de novo basis, applying the same standard as that utilized by the trial court. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 572 N.E.2d 198 (9th Dist.1989); *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment shall be granted when there remains no genuine issue of material fact and, when considering the evidence most strongly in favor of the non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

{¶ 13} Pending before this court on appeal is a disputed August 15, 2012 summary judgment ruling finding appellees entitled to judgment as a matter of law on appellants’ unjust enrichment and constructive trust claims regarding title to the Graytown acreage having been transferred to appellees upon decedent’s death despite decedent’s falling out with appellees and her execution of a new last will and testament and power of attorney

before passing away naming appellants in lieu of appellees. These confines establish the proper scope of review by this court.

{¶ 14} With respect to the unjust enrichment claim, it is well-established in Ohio that the elements of unjust enrichment require the showing of a benefit conferred by a plaintiff upon a defendant, knowledge by the defendant of the benefit, and retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment. *Hammill Mfg. Co. v. Park-Ohio Industries, Inc.*, 6th Dist. Lucas. No. L-12-1121, 2013-Ohio-1476.

{¶ 15} With respect to the constructive trust claim, it is well-established in Ohio that in order to determine whether a constructive trust should be deemed to exist it must be determined whether the party against whom the constructive trust is sought, “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.” *Est. of Cowling v. Est. of Cowling*, 109 Ohio St.3d 276, 2006-Ohio-2418, 847 N.E.2d 405, ¶ 18.

{¶ 16} We have carefully reviewed and considered this matter. The record clearly reflects pursuant to an affidavit submitted by counsel for the decedent conceding an oversight in his handling of the matter that the disputed deed transfer occurred in the context of several critical underlying facts. The record reflects that the decedent indicated to her attorney while she was hospitalized for surgery after her falling out with appellees that she wanted appellees out of her will and other estate documents and

wanted the Blauseys to “get everything.” The record reflects that in accordance with this directive from his client, counsel for the decedent prepared a new last will and testament and power of attorney removing appellees and substituting the Blauseys. However, the record further shows that a new transfer of deed upon death covering the Graytown acreage deleting appellees and naming the Blauseys was mistakenly not prepared and executed. Lastly, the record reflects no actions by appellees subsequent to their falling out with decedent demonstrating any intent by appellees to facilitate the disputed outcome in their favor regarding the Graytown acreage.

{¶ 17} All of the aforementioned events taken together demonstrate that it is conceivable that the transfer of title on death deed through which appellees took title to the disputed property remained in effect at the time of decedent’s death through oversight and mistake on the part of counsel for decedent rather than constituting a reflection that it somehow remained the intent of decedent for appellees to take title to the Graytown acreage on her death despite the falling out.

{¶ 18} Given these unique facts and circumstances of great relevance to the summary judgment ruling in favor of appellees on the unjust enrichment and constructive trust claims, we first find that reasonable minds can only conclude that there is nothing in the record that could constitute appellants conferring a benefit upon appellees in connection to this matter. As such, we find that portion of the summary judgment ruling finding in favor of appellees on the unjust enrichment claim to be proper. However, we further find that reasonable minds could differ as to whether given the very unique facts

and circumstances of this case, in which the decedent had a significant falling out with appellees prior to her death so as to declare her intent to her counsel that the Blauseys “get everything,” such that new estate documents were thereafter executed excluding appellees, and where there is accompanying compelling indicia in the record that appellees took title and legal rights and benefits to the Graytown acreage through an oversight by counsel for decedent in failing to prepare a new transfer of deed upon death in favor of the Blauseys on the Graytown acreage, appellees could be found to, in a way that is against equity and good conscience, hold and enjoy the legal rights to the Graytown acreage. As such, we find that portion of the summary judgment ruling finding in favor of appellees on the constructive trust claim to be improper.

{¶ 19} Based upon these findings, the summary judgment ruling is hereby affirmed, in part, and reversed, in part. As such, this case must be remanded to the trial court so that appellants’ remaining constructive trust claim against appellees may proceed before the trial court. Appellants’ sole assignment of error is found well-taken in part.

{¶ 20} With respect to appellees’ cross-assignments of error, we note that they track and are a recitation of the procedural defenses asserted by appellees in the course of this matter and argued by appellees in support of their summary judgment motion. Significantly, we note that the disputed summary judgment ruling that serves as the basis of the cross-assignments of error was granted in favor of appellees in its entirety. We further note that there is no indicia reflecting that any of the cross-assignment arguments were considered or ruled upon by the trial court in the course of the August 15, 2012

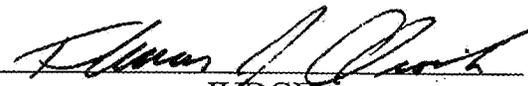
summary judgment ruling. Accordingly, upon remand to the trial court for litigation of the constructive trust claim, those additional arguments set forth as cross-assignments likewise remain pending before the trial court for potential determination in connection to the remaining constructive trust claim. We find the cross-assignments of error not properly before us in the instant matter and not well-taken.

{¶ 21} On consideration whereof, the judgment of the Ottawa County Court of Common Pleas is hereby affirmed in part, reversed in part, and remanded to the trial court for further proceedings consistent with this ruling. The cross-appeal is denied. Appellants and appellees are ordered to split the costs of this appeal equally pursuant to App.R. 24.

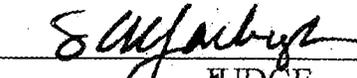
Judgment affirmed in part,
and reversed in part.

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

Thomas J. Osowik, J.


JUDGE

Stephen A. Yarbrough, J.


JUDGE

James D. Jensen, 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:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.