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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Honorable Alex B. Hyman, Circuit Court Judge

Appellate Case No. 2024-000599
Circuit Court Case No.: 2022-CP-26-03314

John Strasswimmer, David Vreeland King, and Claudia Treyer Miles, Respondents,

v.

Mary Michelle Miles, Appellant.

FINAL REPLY BRIEF OF APPELLANT
MARY MICHELLE MILES

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ARGUMENTS

I. STANDARD OF REVIEW

Respondent argues that Appellant (hereinafter referred to as “Michelle,” “Appellant,” or “Appellant Miles”) does not properly set forth the standard of review for each argument. While Respondent is correct that there is a subheading for the Appointment of a Guardian and Conservator and one for Breach of Fiduciary Duty, there is also a discussion about the standard of review for actions that sound in equity. All of the actions/findings by the lower Court sounded in equity, and all have the same standard of review. Therefore, there was no requirement to set forth the standard in each argument as the standard of review is the same in each: this Court has the ability to make its own findings in accordance with its own view of the facts. Therefore, Respondent’s statement that Appellant failed to comply with South Carolina Appellate Court Rules, Rule 208(1)(D) is misplaced since all of the lower court’s findings are subject to the same standard of review in equity.

II. THE HORRY COUNTY COURT OF COMMON PLEAS ERRED IN AFFIRMING THE HORRY COUNTY PROBATE COURT’S FINDINGS REGARDING MICHLLE MILES

Respondent argues that there is no basis to reverse the findings made by the lower Court. However, Appellant has cited numerous portions of the record that refute that there was any breach of fiduciary duty or personal gain to Appellant. Even if the Court disagreed with some of the decisions made by the Appellant, there is no evidence in the record that anything Appellant did she did for her own personal gain. There is no evidence in the record that Appellant benefited from anything she did. Further, she was at no time the Trustee or co-Trustee regarding her mother’s funds. At all times Respondent David V. King and Respondent John M. Strasswimmer were co-Trustees. At any given time, either or both could have stopped any funds from going out of the Trust, and there is no evidence that anyone ever took any steps to prevent funds from

being spent on the Dr. Claudia Troyer Miles. Appellant testified at trial about where the funds originated that she was able to obtain limited access over. (R. p. 0990). There simply was no breach of fiduciary duty by Appellant.

III. THE HORRY COUNTY PROBATE COURT ERRED IN FINDING THAT MICHELLE MILES, AS TEMPORARY GUARDIAN, WAS NOT AN APPROPRIATE TEMPORARY GUARDIAN FOR HER MOTHER AND WARD, CLAUDIA TROYER MILES.

The “selection of a guardian is a matter committed largely to the discretion of the appointing court, whose decision will only be interfered with on appeal in the case of an abuse of discretion.” 39 Am. Jur. 2d Guardian and Ward § 38 (2008). Removing Michelle as Temporary Guardian was a clear abuse of discretion. Michelle was appointed Temporary Guardian upon John Strasswimmer’s filing of a Summons and Petition for Finding of Incapacity and Appointment of Guardian seeking appointment of himself and/or Mary Michelle Miles as Emergency/Temporary and Permanent Guardian of Dr. Miles. Michelle had equal statutory priority to serve as her mother’s Temporary Guardian as Respondent King, since they were both appointed co-agents under her Health Care Power of Attorney. S.C. Code Ann. §62-5-311(B)(2) (formerly § 62-5-308(A)(3)). The Court used its discretion to determine that Michelle should serve as her mother’s Temporary Guardian, partially due to the co-agents’ inability to “maintain a unified medical plan.” (R. pp. 0004-0008).

Upon this Court’s review of the record, the inability to “maintain a unified medical plan” stemmed from Respondent King’s utter failure to provide or seek appropriate medical care for his wife, and his complete disregard and disrespect of her Health Care Power of Attorney, which made Respondent King and Michelle co-agents as “as demonstrated herein through repetitive failures to take his terminally ill wife to the emergency room, as she demonstrated new and/or worsening symptoms; removing her from Washington without

consulting with the family and/or her Co-Agent under the HCPOA; and failing to advise her doctors upon her return to South Carolina.” (R. pp. 0508-0522). The Probate Court could have chosen anyone – John Strasswimmer, Michelle, Respondent King, or a neutral party – to be appointed as Temporary Guardian, but the Court chose Michelle.

Michelle, in the short amount of time serving as her mother’s fiduciary, ensured her mother was taken to the emergency room when ill, arranged for her short-term placement in an assisted living facility, renovated her own home to become disability-friendly, turned down a job offer to dedicate all of her time to her mother, coordinated cancer treatments, and managed her mother’s estate. Certainly, Michelle acted with her mother’s best interests at heart to ensure her mother received the care she needed while being entrenched in a legal battle with Respondent King. Due to Respondent King’s repeated failures to provide his wife proper medical care, as well as his blatant disrespect for his wife’s own Health Care Power of Attorney, it is no surprise tensions were running high. Michelle acted as a zealous protector. Regardless, Respondent King had no legal decision making in Dr. Miles’ medical care after Michelle’s appointment as Temporary Guardian, and he had shown little-to-no interest in obtaining necessary medical care for her previously. It is not surprising the report of the Guardian ad Litem found that Michelle informed Dr. Miles’ medical team of Respondent King’s prior behavior (or really, the lack thereof).

Respondent King, in his Initial Brief, attempts to make an inference that Michelle was unfit as Temporary Guardian due to not seeking out financial advice; however, there is no such requirement for her to do so. Nor is there a legal requirement for a Guardian to consult with the Guardian ad Litem when making decisions regarding her ward, including in a decision to “establish the ward’s place of abode within or without this State.” S.C. Code Ann. § 62-5-

309(A)(1). Michelle had no duty to seek the Court's blessing to move her mother into her own home. Through her authority to establish such residence, Michelle determined it was in her mother's best interest to upfit her own home to become handicap-accessible. These home renovations and modifications were expensive, but were necessary for a resident in such ill health. Michelle herself is not handicapped, and making her home disability-complaint provided no personal gain to Michelle. Finally, Michelle hired professional caregivers and certified nursing assistants to provide her mother customized care from the comfort of her handicap-accessible home. As Guardian, Michelle had full authority to provide "any consents...or approvals necessary to enable the ward to receive...medical or other professional care, counsel, treatment, or service..." S.C. Code Ann. § 62-5-309(A)(5).

No party objected to the appointment of a neutral Guardian and/or Conservator. However, the Horry County Probate Court appointed the existing Guardian ad Litem as Permanent Guardian and Conservator – clearly, an individual who already held an interest in this case. A "guardian ad litem is a representative of the court appointed to assist it in properly protecting the interests of an incompetent person. " Shainwald v. Shainwald, 302 S.C. 453, 457, 395 S.E.2d 441, 444 (Ct. App. 1990). A "Guardian" is a person appointed by the Probate Court to serve as "Guardian," but excludes one who is a Guardian Ad Litem. S.C. Code Ann. § 62-5-101(9). These are two separate and distinct roles, and the Probate Court improperly appointed the Guardian Ad Litem in the role as Guardian without the appointment of independent counsel for Dr. Claudia Troyer Miles.

A review of the record evidences Michelle's dutiful service to her mother, then having the ability to serve stripped from her and placed with someone already involved in this case. As the appointment of a guardian is one of equity, Appellant Miles requests this Court make its

own findings regarding the appropriateness of her appointment as Temporary Guardian in accordance with its own view of the preponderance of the evidence.

IV. THE HORRY COUNTY PROBATE COURT ERRED IN FINDING THAT MICHELLE MILES, AS TEMPORARY GUARDIAN, BREACHED HER FIDUCIARY DUTIES TO HER MOTHER AND WARD, CLAUDIA TROYER MILES.

To establish a claim for breach of fiduciary duty, a plaintiff must prove (1) the existence of a fiduciary duty, (2) a breach of that duty, and (3) damages proximately resulting from the wrongful conduct of the defendant. Turpin v. Lowther, 404 S.C. 581, 589, 745 S.E.2d 401, 581 (Ct. App. 2013). South Carolina case law reflects that a breach of fiduciary duty generally involves a party in a fiduciary relationship to another using their position to their advantage, harming that of who they owe a duty to. Id. Michelle owed a fiduciary duty to her mother, Dr. Miles, as she was appointed Temporary Guardian on November 15, 2019; however, there was no breach of this duty nor resulting damages. Appellant Miles responds to Respondent King's brief in kind:

- a) Guardians have the right to "establish the ward's place of abode *within or without this State*." S.C. Code Ann. § 62-5-309(A)(1). Moving her mother out of South Carolina was not a breach of fiduciary duty.
- b) A review of the record and Appellant's Initial Brief clearly evidences that the expenditures made by Michelle as Temporary Guardian were only for the care, safety, comfort, and quality of life of her mother. Her Accounting, which was completed by a hired, professional accounting firm, reports disbursements in the amount of \$453,474.82, which encompassed allowable administration expenses, travel expenses, clothing expenses, entertainment expenses, medical expenses, and legal expenses. (R. pp. 3138-3191). Although the Court, in its Final Order, held that Michelle's professionally-

completed Accounting was insufficient, it did not make any findings that the reported expenditures were not made for Dr. Miles' support or care. In fact, statutory law gives guardians the power to "...apply the [ward's] money and property for support, care, and education of the ward..." S.C. Code Ann. § 62-5-309 (A)(6)(b). With little time left in Dr. Miles' life, it was both reasonable and prudent for Michelle to spend her mother's savings ensuring she lived out the last of her days comfortably and well-cared for. There was no harm to Dr. Miles. In fact, Michelle is a contingent beneficiary under her mother's Living Trust; if anything, she was spending what would eventually be part of her own inheritance. (R. pp. 2316-2341). Again, Michelle had no legal obligation or requirement to consult with a financial advisor, although Respondent King continues to claim this creates a breach of fiduciary duty.

- c) Michelle, as Guardian, had full legal authority to place her mother at the Franke Tobey Jones Facility pursuant to her right to consent "to enable the ward to receive...medical or other professional care...including institutional care. If...placement or care of the ward requires the execution of an admission agreement or other documents for the ward's placement in a facility, the guardian may execute such documents on behalf of the ward, *without incurring personal liability.*" S.C. Code Ann. § 62-5-309(A)(5). This decision was based upon recommendations Michelle received from medical professionals regarding her mother's healthcare, and did not require her to consult with the Guardian ad Litem. (R. pp. 2186-2187). Further, Respondent King provides no citation to his claim that this skilled nursing facility "provided no medical treatment."

- d) Michelle, as Guardian, has the duty of “maintaining custody of the ward” and was performing her fiduciary duty when protecting Dr. Miles from any perceived attempts of abduction of a vulnerable adult.” S.C. Code Ann. § 62-5-309(A)(1). Certainly, if a Guardian believes her Ward may be in danger, alerting the authorities is appropriate.

While a claim for breach of fiduciary duty may be either legal or equitable, the elements of the claim must still be established: (1) the existence of a fiduciary duty, (2) a breach of that duty, and (3) damages proximately resulting from the wrongful conduct. Respondent King’s Brief fails to argue how any of Michelle’s actions breached her fiduciary duty to her mother nor how these “breaches” benefitted Michelle; Respondent King enumerates her actions, but provides no legal argument nor authority supporting his idea that these actions constitute a breach of duty. Dr. Miles did not suffer any harm or damages from her daughter’s actions, and there is no evidence in the record, nor in Respondent’s Initial Brief, to support a finding that she suffered any harm or damages.

As the Guardian ad Litem and the Probate Court cited the equitable principals of restitution and disgorgement when requesting and issuing sanctions for breach of fiduciary duty, this Appellate Court may make its own findings in accordance with its own view of the preponderance of the evidence. Deborah Dereede Living Trust v. Karp, 427 S.C. 336, 340, 831 S.E.2d 435, 438 (S.C. Ct. App. 2019) citing Verenes v. Alvanos, 387 S.C. 11, 17, 690 S.E.2d 771, 773 (2010). Therefore, this Court may review the issue of breach of fiduciary duty and make its own finding based of the totality of the evidence within the record.

V. THE PROBATE COURT ERRED IN FINDING THE EXPENDITURES MADE BY MICHELE MILES TO RENNOVATE HER HOME WERE WASTEFUL

Appellant's Initial Brief goes into detail about everything Appellant did to her home and why, and Appellant stands by her arguments in her Initial Brief. Everything she did, she did for her mother's benefit. There was no evidence presented in the record that any of the renovations increased the value of Appellant's home. There was no evidence in the record that either co-Trustee took any measures to prevent funds from being used by the Dr. Claudia Troyer Miles' Trust. Michelle was not a co-Trustee. Since she was only appointed as Temporary Guardian and not as Conservator, the co-Trustees still had a duty to handle any assets in the Trust. If either co-Trustee at any time did not approve of the transactions, either could have cut off Appellant's access to the funds. There was no evidence ever presented that Respondent tried to stop or disapprove of transactions made by Appellant. There were no experts called to testify about what it should have cost to upfit a home to make it handicap accessible. The Probate Court did note that it could have found "some or most of the expenditures" on Michelle's home prudent and advisable if Michelle had remained as permanent Guardian and if Dr. Claudia Troyer Miles had remained there. (R. pp. 0052-0053).

Michelle could not have predicted that the Court would remove her mother from the home, which we argue was an abuse of discretion, and she also could not have predicted that her mother would not have remained in her home. The Court further goes onto discuss how Michelle was the manager of her mother's finances, but that is not in fact correct. She was never appointed as Conservator, so she was only allowed to take any actions related to her mother's funds because the co-Trustees authorized her to do so. Therefore, it was error for the Court to find any breach of fiduciary duty for something that Appellant was never appointed to do. Appellant's Initial Brief sets forth all the reasons why the expenses were appropriate, which this Court has the authority to review and make its own findings.

VI. THE PROBATE COURT ERRED IN FINDING THAT EXPENDITURES MADE BY MICHELLE MILES FOR THE RETENTION OF SYNERGY HOMES WERE IMPROPER

As previously set forth in Appellant's Initial Brief, all of these expenses were incurred solely for the Dr. Claudia Troyer Miles' benefit. There was no personal benefit to Appellant. The Probate Court seemed to place a requirement on a Court Appointed Guardian to provide all services for their ward. There simply is no such requirement that a Court Appointment Guardian be solely responsible for the 24/7 care of their ward. This finding was an abuse of discretion of the lower court, and it should be reversed. There Probate Court had no basis to find that these expenses should be paid by Appellant. There is no question in the record that the care was provided for the Dr. Claudia Troyer Miles. There is more than a preponderance of evidence to support the expenditures, and the lower Court's decision should be reversed.

VII. THE PROBATE COURT ERRED IN FINDING THAT THE PLACEMENT OF CLAUDIA MILES AT FRANKE TOBEY JONES WAS NOT MEDICALLY NECESSARY

As stated in Appellant's Initial Brief, the trial testimony and evidence presented did evidence that placement at Tobey Jones was necessary following discharge from Washington Medical Center. Even if the placement was not "medically necessary," the placement was done for the best interest and benefit of Dr. Claudia Troyer Miles. There was no evidence presented that there was any personal benefit to Appellant. The lower Court had no basis to require Appellant to repay these expenses to the Estate. Even Respondent admits that Dr. Claudia Troyer Miles required services in his Initial Brief. There is nothing unreasonable about a Guardian placing the individual they are responsible for in an assisted living facility or nursing home. There is no basis for the lower Court's finding that the Guardian should personally pay for the expenses for the care and living expenses of their ward, and this finding should be reversed.

VIII. THE PROBATE COURT ERRED IN APPLYING SC CODE ANN § 62-5-103 IN FINDING THAT THE TEMPORARY GUARDIAN MADE UNAUTHORIZED EXPENDITURES

While Appellant's Initial Brief addresses this argument, Appellant wants to reiterate that everything she did she did for her mother. The Probate Court never appointed a Conservator. Appellant did the best she could under the circumstances with what she was given to work with. Appellant was never a Trustee of her mother's Trust, but Respondent King and Respondent Strasswimmer were and still are the co-Trustees. Appellant could only access the funds because both Respondents allowed her to do so. Regardless of which statute is applied, everything Appellant did she did for the benefit of her mother. Since all of the lower court findings sounded in equity, this Court has the authority to review the facts and make its own findings.

IX. THE PROBATE COURT ERRED IN FINDING THAT THE TEMPORARY GUARDIAN MISAPPROPRIATED OR IMPROPERLY DISBURSED FUNDS

Appellant expended funds for the health, safety, and maintenance of her mother while balancing the size of her mother's Estate, her accustomed standard of living, lack of other available support, and her impending death. As previously set forth in Appellant's Initial Brief, everything Appellant did she did for her mother. She did not receive any personal benefit. Even if the Court upholds the finding that there was some benefit to Appellant for the renovations to her home, that only comprises \$70,000 of the amount she was ordered to repay. Since this action is in equity, this Court may make its own findings in accordance with the preponderance of the evidence and reverse the lower Court's ruling.

X. THE TRIAL COURT ERRED BY ALLOWING TESTIMONY FROM CLIFFORD TALL, ESQUIRE, AS TO CONVERSATIONS HE HAD WITH CLAUDIA MILES, AS SUCH STATEMENTS WERE PRIVILEGED, SURVIVED HER INCAPACITY, AND NOT WAIVED

Rule 1.6 of the South Carolina Rules of Professional Conduct states that a “lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent ...” This privilege belongs to the client, and this privilege survives death.

When Clifford Tall, Esquire was called to testify at trial, Attorney Angela Harrison objected to his testimony about information he obtained from Dr. Miles due to attorney client privilege. (R. pp. 1279-1283). Attorney Reese Boyd argued that Bess Lochocki as Guardian ad Litem could waive the privilege. (R. pp. 1280-1282). State v. Doster, 276 S.C. 647, 284 S.E. 2d 218 (1981). At that time, Bess Lochocki was the Guardian ad Litem and not a Guardian or Conservator. There is no statutory or case law allowing a Guardian Ad Litem to waive attorney client privilege. It was error for the trial Court to allow a Guardian Ad Litem to waive privilege for an incapacitated person and error to admit Cliff Tall’s testimony and Affidavit creating reversible error. Respondent argues that Bess Lochocki was later appointed as Guardian, but her appointment was made after the testimony of attorney Clifford Tall was improperly admitted. A Guardian cannot go back in time and retroactively waive a privilege to

The Probate Court never appointed an attorney for Dr. Miles to review this on her behalf, and in fact the Probate Court specifically denied the appointment of an attorney for Dr. Miles despite the requirement for appointment of an attorney and Guardian Ad Litem. S.C. Code Ann. § 62-5-303B requires appointment of counsel for alleged incapacitated prior to appointment of a Guardian, which was not done in this case. This is yet another reversible error made by the Probate Court. Had the Probate Court followed the statute and appointed an independent attorney for Dr. Claudia Troyer Miles, then maybe someone would have had authority to waive privilege.

To date no Personal Representative has been appointed in the Estate of Claudia Troyer Miles, and therefore, nobody would have authority to waive attorney client privilege. This Court has the authority to make its own findings of fact in this matter.

XI. THE PROBATE COURT ERRED IN DETERMINING APPELLANT ENGAGED IN EGREGIOUS, SANCTIONABLE CONDUCT

As previously stated in Appellant's Initial Brief, all expenditures made were for the benefit of Appellant's mother to provide for her health, safety, and welfare. While in hindsight there may be some things that Appellant would have done differently, this does not warrant a finding of egregious and sanctionable conduct. Just because one might do something differently in light of information they have after the fact does not warrant a finding of sanctionable, egregious conduct. The record is void of any egregious or sanctionable conduct.

The Probate Court Order was drafted in such a way that it seems to want to punish Appellant because Respondent was unhappy. The action was not about Respondent. It was about Dr. Claudia Troyer Miles, who is now deceased. There is absolutely no basis for Appellant to be responsible for Respondent's attorney's fees.

A review of the record will show there is no evidence that Appellant Michelle engaged in any sanctionable conduct. Every decision made as Guardian was for the best interest of her mother, within her rights and authorities as granted by the S.C. Probate Code, and provided no personal benefit to Michelle – a vital element of finding restitution or disgorgement. Further, it is unclear how there was “no benefit” conferred from this action upon Dr. Miles when the Court appointed a permanent Guardian and Conservator, an appointment that can only be made “if there is no less restrictive alternative.” *See* S.C. Code Ann. §§ 62-5-106(f), 62-5-303(B)(6), 62-5-403(B)(6). Respondent King's Brief accuses Dr. Miles' children of depriving his “companionship”; however, it was Respondent King's “companionship” that initiated the need

for this litigation in the first place. The record is replete with examples of Respondent King's utter lack of concern or action for his wife's health nearing her final days, including his refusal to take Dr. Miles to the ER, his failure to resume her medical treatment upon return to SC, his leaving her in Charleston causing the need for alternate transportation, and others. (R. pp. 0104-0107). Respondent King's "companionship" likely would have led to Dr. Miles' earlier demise. Regardless, this Court is tasked with reviewing the record and making its own findings.

CONCLUSION

Based on the arguments contained herein and in Appellant's Initial Brief, Appellant Michelle Miles respectfully requests this Court reverse the rulings of the Probate Court and Circuit Court, or, in the alternative, Appellant asks for a remand for further proceedings on those issues as this Court deems necessary.

Respectfully submitted,

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