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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.

APPELLANT'S FINAL BRIEF

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STATEMENT OF THE CASE

Introduction of The Parties

The Alleged Incapacitated Individual in this case is Dr. Claudia Troyer Miles ("Alleged Incapacitated Individual," "Ward," and "Dr. Miles"). She died at the age of 76 on August 16, 2019, following a one-year battle with glioblastoma brain cancer. At the time of her death, she was married to David Vreeland King ("Respondent King" and "David"), who she wed in 2018. Dr. Miles had two biological children from a previous relationship: Dr. John Michael Strasswimmer ("Petitioner" and "John") and Mary Michelle Miles ("Appellant" and "Michelle"). Dr. Miles executed estate planning documents including a Living Trust, Durable Power of Attorney, Health Care Power of Attorney ("HCPOA"), a Living Will ("DNR"), and a Last Will and Testament. (R. pp. 2312-2383). In her HCPOA, Dr. Miles nominated Michelle and David as her Co-Agents, and gave them discretion in making her healthcare decisions. (R. pp. 2378-2383). Per her DNR, Dr. Miles indicated her desire not to receive nutrition and hydration if her condition is terminal and could result in death with a reasonable short amount of time. (R. pp. 2381-2382). She appointed Michelle and David as Agents both with the power to revoke and enforce this document. (R. pp. 2378-2383).

Events Leading Up to This Matter

Dr. Miles, at age 76, had a medical history of diabetes, depression, allergies, ADHD. (R. p. 2842). In October 2018, Dr. Miles suffered several weeks of headaches, difficulty in communicating verbally, lethargy, daytime somnolence, a new onset of forgetfulness, a "fuzzy head," a new flat affect, and unsteadiness walking. (R. pp. 0044, 1821-1922). After her return from a trip to Spain, on October 14, 2018, Dr. Miles visited her primary care physician, Dr. Chad R. Huberty, who recommended she see a neurologist in the following weeks. (R. pp. 0481, 1819-1822). Dr. Miles called her son John, a board-certified dermatologist with a Ph.D. in molecular biology, seeking his recommendation on how to proceed in addressing her medical needs, as she was feeling unwell. (R. p. 0481). Due to Dr. Miles' recent travels, John suggested she visit an emergency room immediately to determine if there was something significantly wrong with her health, instead of waiting for her neurologist appointment scheduled for approximately three weeks later. (R. p. 0481). David was lackluster about John's recommendation, stating that "the specialists are not around," which was untrue. (R. p. 0498).

Dr. Miles' symptoms, along with encouragement from her phone conversation with John, caused Dr. Miles to visit Grand Strand Emergency Room in Myrtle Beach, South Carolina, which revealed a 6 x 3.5 cm heterogeneously enhancing mass in the left orbitofrontal region of her brain. (R. pp. 2842-2849, 0481, 0044, 1823). Shortly thereafter, on October 18, 2018, Dr. Miles underwent brain surgery and partial removal of the mass at Medical University of South Carolina ("MUSC") and pathology revealed glioblastoma multiforme in the left inferior frontal lobe of her brain, which was causing her neurological issues. (R. pp. 2842-2849, 0044, 1823).

Following Dr. Miles' surgery, her family held a meeting to determine how to best address this medical diagnosis. (R. p. 0492). In attendance at this family meeting were: Dr. Miles, David,

Michelle, and John. The family discussed Dr. Miles' options for treatment, including receiving treatment at Medical University of South Carolina ("MUSC"), Duke, and Florida. (R. pp. 0493, 0494, 0501). John discounted Florida, as the cancer treatment facility was very far from where he lived in Delray Beach. (R. p. 501). John was also concerned that the level of care Dr. Miles needed, including daily care at home, exceeded David's ability to provide such care, citing David's previous hesitation to evacuate Dr. Miles from the path of a hurricane, the poor condition of his vehicle, and his lack of motivation to take Dr. Miles to the emergency room initially. (R. pp. 0495-0498). To remedy this, Michelle, who lives in Washington, had free time as she was currently unemployed and offered to assist care for Dr. Miles if she were to choose treatment in Washington. (R. p. 0494). After familial discussions, Dr. Miles indicated she wished to receive treatment in Washington, knowing the medical care she required could have been provided by the MUSC and was substantially, if not identically, the same care she would receive at the University of Washington. (R. pp. 0493, 0494, 0501, 0927, 2481-2482).

Dr. Miles received her first treatment – a short course of radiation – at MUSC before continuing treatment at the University of Washington, Seattle Cancer Care Alliance, Fred Hutchinson Cancer Center. (R. p. 0500). The family dutifully worked together to move Dr. Miles from South Carolina to Washington – Michelle helped identify local apartments for her mother and David began the process of securing a lease in such apartment; Michelle took her mother's cat to the vet for updated vaccinations to allow for travel; David forwarded the couple's mail; the family bought flights for all parties, including the cat. (R. pp. 0501-0502, 0927). Dr. Miles and David arrived in Washington on or around November 1, 2018, and stayed in a hotel in Washington for approximately one week, exploring places to live, including applying for an apartment, and visiting the University of Washington. (R. pp. 0501-0502, 0930).

During this week, Michelle noticed Dr. Miles develop additional symptoms, twitching in a hand and dragging a foot, and John recommended his mother visit an emergency room, which was again met with David's reluctance. (R. pp. 0503-0504). Michelle took her mother to the local emergency room where she was diagnosed with hemiparesis and brain swelling, for which she was immediately treated for by a high dose of corticosteroids. (R. p. 0504). After this necessary emergency room visit, communication between John and Michele, and David and Dr. Miles became increasingly difficult, although Dr. Miles was taken to the emergency room two more times that same week. (R. p. 0510).

The second visit to the emergency room that week came after David reported to John, over the phone, that Dr. Miles was resting between 10:00 a.m. and 1:00 p.m. pacific time, and could not speak to John. (R. p. 0509). Again, over David's objection, John advised that Dr. Miles should go to the emergency room. (R. p. 0509). John's concern – and David's lack thereof – caused Michelle to visit her mother at the hotel, and ended up taking her to the emergency room for this second visit, where Dr. Miles was found to be disoriented, requiring hydration and an adjustment of her insulin. (R. p. 0511). Again, John and Michelle's concern for their mother proved valid, over another lackluster response from David. On Wednesday, Dr. Miles visited the emergency room for a third time for treatment of high blood sugar, requiring further hydration and insulin adjustment. (R. p. 0510). This third visit, which was again medically necessary, was also prompted by John, effectuated by Michelle, and disagreed with by David. (R. p. 0511). During this week, Dr. Miles met with the cancer team at the University of Washington, who planned to treat her with a Stupp Regimen, which is the simultaneous administration of radiation and chemotherapy, followed by a single-agent chemotherapy alone afterwards. (R. pp. 0507-0508). This is the same treatment program proposed by MUSC.

At this point, David became reluctant to assist or facilitate telephonic communication between Dr. Miles and her children, and began to lie about their whereabouts. (R. pp. 0514-0515). The last phone call John had with Dr. Miles during this time evidenced her paranoia, as she began accusing John, a dermatologist, of "wanting her money" and stating she "does not have to tell you anything." (R. p. 0516). Dr. Miles' strange behavior caused concern regarding her health, coupled with her partner's sudden refusal to communicate with her only children, one of whom is a medical professional himself. John called Michelle to report his worry – that David would not reveal their location and that Dr. Miles was "basically fresh out of brain surgery with glucose out of control, being dehydrated, hurting her medical status" with a possible infection to blame for her paranoia. (R. pp. 0516-0517). Michelle was also concerned with David's sudden failure to clearly communicate with her as Co-Agent under Dr. Miles' HCPOA. (R. pp. 0933-0936). Growing increasingly worried, Michelle called the hotel Dr. Miles and David were staying at to discover they had checked out of the hotel. (R. p. 0939). Oddly, a pile of the couple's belongings and the keys to the rental car were left at the hotel. (R. p. 0940). This caused Michelle distress, as she worried something had happened to her mother and David, especially as, up until this point, the family had been in close contact, and together every day. (R. pp. 0942-0943). Due to Dr. Miles' deteriorating medical condition and David's alienating behavior, Michelle called for a Silver Alert, which was not issued, and filed a police report, citing Dr. Miles' dire medical condition.(R. pp. 0517, 0944-0945, 0948, 2849). Apparently, David had suddenly returned Dr. Miles to South Carolina, without informing Michelle, who had been very involved in the care of Dr. Miles since her diagnoses and also her Co-Agent, nor John, who had also been very involved. (R. pp. 0508-0509, 2378-2383). In fact, John was not informed that his mother was returned to South Carolina until Friday (11/09/2018) that week, while he was preparing to fly to Washington to visit her. (R.

pp. 0508-0509, 0511-0512). John had to change flights the day-of the flight. (R. pp. 0511-0512). Regardless, the Horry County Probate Court callously called Michelle's precautions a "significant over-reaction by the children to their mother's unannounced return to her home in South Carolina." (R. p. 0047).

During his visit, John learned that David had not taken Dr. Miles to see a physician upon her return to South Carolina, nor even alerted her doctors that she had returned to the state. (R. p. 0518). David reported that he had not made *any* arrangements for Dr. Miles to resume care in Charleston, but that he would "send an email through the portal." (R. p. 0522). Dr. Miles did not contact her care team or schedule further appointments either, despite, curiously, on November 10, 2018, there was an email addressed from her to Dr. McGranahan, neuro-oncologist at the Alvord Brain Tumor Center at the University of Washington, reading:

> Thank you for your time and attention. Unfortunately, I have decided to return to my home in Myrtle Beach, South Carolina. I'm considering treatment at the Medical University of South Carolina, "MUSC", where I had appointments with their neuro-oncologists for treatment options prior to coming to you. Sincerely, Claudia T. Miles DO.
> (R. pp. 0523, 1971).

John testified that this well-worded email could not have been written by his mother on that date, due to her poor neurological state and hand tremors. (R. pp. 0524-0525). In fact, Dr. Miles could not operate her phone due to impaired fine motor coordination, and was not able to communicate in complex sentences. (R. p. 0525). Regardless, John had to take initiative – again – to ensure Dr. Miles received the medical care she required, by notifying Dr. Huberty of his mother's return to South Carolina, and scheduling an appointment for her two days later with her oncology team. (R. pp. 0518, 0521). On November 12, 2018, Dr. Miles was taken to see Dr. Cooper, the radiation oncologist, to reestablish care. (R. p. 0526). However, Dr. Miles' health condition was so poor, there could be no oncological evaluation and instead, she was sent directly

to the emergency room, where she was admitted for delirium and concern of subclinical active seizures. (R. p. 0526). She was hospitalized for 11 days, until November 23, 2018. (R.p. 0527).

During this hospitalization, tensions mounted between Dr. Miles' children and David. Although Michelle and David were appointed co-agents under Dr. Miles' HCPOA, David excluded Michelle by actively failing to consult with or even include her in necessary health care decision making processes. (R. p. 0536). David's actions also disrupted Dr. Miles' treatment plan – she would have received the Stupp Protocol at MUSC originally, and was set to begin it in Washington upon agreement of the family, but with David's sudden relocation of Dr. Miles, she was not eligible or not offered the Stupp Protocol again upon her return to MUSC. (R. p. 0537). Instead, she received a short course of radiation. (R. p. 0540). Dr. Miles' condition and moral were deteriorating. (R. pp. 0539-0540). She was frequently disorientated and refused to participate in her treatment. (R. pp. 0545, 1868-1892). Dr. Scott Lindhorst, a neuro-oncologist, noted "[c]onflict currently exists between the goals of the patient's husband, (and potentially the patient) which at present seemed to lean away from starting therapy, and the patient's children who at present prefer to move forward with therapy....[t]he patient at present cannot adequately participate in these goal of cares conversations. She was able to definitively express her desire for DNR status, however." (R. pp. 0691, 2481).

Filing of this Matter

Due to David's alienation of Dr. Miles from her family, blatant disregard and disrespect of Michelle as co-health-care-agent, disruption of Dr. Miles' treatment plan, and his overall inept care of Dr. Miles, on November 15, 2018, Dr. John Michael Strasswimmer, through counsel, filed 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. (R. pp. 0535-0536). John also filed a companion Summons and Petition for Protective Order and Appointment of Conservator and appointment of himself as Emergency/Temporary and Permanent Conservator of Dr. Miles[1]. The Petition included the following attached documents:

1. An Affidavit in Support of Emergency Guardianship by Petitioner and joined by Respondent Michelle, stating that the health of the alleged incapacitated individual had rapidly declined. In addition, the Co-Agents, Respondents Mary Michelle Miles and David Vreeland King, under a Healthcare Power of Attorney executed by Claudia Troyer Miles, were unable or unwilling to make decisions regarding the alleged incapacitated adult's health care, to which her Healthcare Power of Attorney then directs such "decisions to be made by a Guardian, by the Probate Court, or by a surrogate pursuant to the Adult Health Care Consent Act" and in accordance with the directions provided in the Healthcare Power of Attorney.
2. Letter dated November 14, 2018 from Dr. Kendall W. Headden at MUSC confirming Claudia Miles as a patient at the facility and stating that her children, Petitioner and Respondent Michelle, are required to be present for medical care decisions.
3. Letter dated November 9, 2018 from Dr. S. Lewis Cooper at MUSC, Department of Radiation Oncology as to Claudia Troyer Miles' diagnosis, procedure and treatment plan.
4. Letter dated November 9, 2018 from Dr. Yolanda Tseng at MUSC, Radiation Oncology, as to Claudia Troyer Miles diagnosis and the treatment plan reviewed.
5. Letter from Dr. Tresa McGrananhan, Alvord Brain Tumore Center in Washington State, as to the consultation and stating Claudia Troyer Miles condition at the appointment, with having difficulty understanding verbal information and was not able to understand complicated information such as a treatment plan.

After receipt of the pleadings, the Horry County Probate Court ("The Court" and "Probate Court") appointed Bess Lochocki, Esq. ("Lochocki" and "Guardian ad Litem") on November 20, 2018, to serve as Dr. Miles' Guardian ad Litem. Based on the pleadings and the other documents in the Court's file, Judge Carroll D. Padgett, Jr., Chief Associate Probate Judge, issued an Order of Appointment of Temporary Guardian on November 15, 2018, finding that Dr. Miles is an incapacitated individual and ordering that Mary Michelle Miles be immediately appointed her mother's Temporary Guardian. The Court did not appoint a Conservator at this time, but addressed

[1] Collectively referred to in this brief as "the Petition" and the "pleadings."

the Temporary Guardian's authorities, including that "Mary Michelle Miles, as Guardian, may receive money and tangible property deliverable to Claudia Troyer Miles and apply the money and property for the support, care, education of Claudia Troyer Miles, pursuant to S.C. Code Ann. §62-5-312(a)(4)(ii)."

On November 15, 2018, during her inpatient stay, Dr. Miles, on her own accord and ratified by Michelle as Temporary Guardian, initiated a Request for Privacy, asking hospital staff not to allow David to visit her. (R. pp. 0547-0548). Subsequently, on November 21, 2018, David, through counsel, filed a competing Summon and Petition for Appointment of Successor Guardian of Dr. Miles, seeking to appoint himself as her fiduciary. Lochocki filed Answers dated December 11, 2018, the same day John filed an Amended Petition for Protective Order and Appointment of Conservator.

Following a telephone conference between Judge Kathy G. Ward, Probate Judge for Horry County, and V. Lee Moore, Esq., counsel for Petitioner Strasswimmer, Davis Inabnit, Jr., Esq., counsel for Respondent King, and the Guardian ad Litem, Bess D. Lochocki, Esq, the Court issued a Modification of Order for Appointment of Temporary Guardian on December 21, 2018. This Order added a directive for the Temporary Guardian to "engage an elder care advocate for the purpose of facilitating communication between David Vreeland King as the spouse of Claudia Troyer Miles" and declared that contact and visitation between David and Dr. Miles "shall be supervised and monitored by the elder advocate and may be limited at the request of Claudia Troyer Miles' or at the direction of her medical providers." The Court later issued two additional orders regarding visitation in its Order Regarding Visitation of Claudia Troyer Miles by Respondent David V. King filed December 27, 2018, and the Order Regarding Continuing

Visitation of Claudia Troyer Miles by Respondent David V. King and Order to Mediate filed January 15, 2019, which ordered directives to facilitate visitation between David and Dr. Miles.

To continue her healthcare and honor her original choice of treatment location, Michelle and John prepared their mother to travel back to Washington to continue her care there – including consulting with her medical team for travel clearance and, at the direction of medical professionals, provided a high dose of corticosteroids to Dr. Miles for the flight. (R. p. 0551). Upon arrival in Washington, Dr. Miles was admitted to the hospital for psychosis, diabetes complications, and dehydration. (R. pp. 0551-0552). At this point, Dr. Miles was uncooperative with her care, which disrupted the family's plan to discharge her to Michelle's house. (R. p. 0553). Instead, she was discharged to the Franke Tobey Jones adult living center in Tacoma, Washington, for nursing-home level care, much to the Guardian ad Litem's dislike. (R. pp. 0554, 0620, 2991-2999). Dr. Miles resided at this facility for two months. (R. p. 0555). During her time at this facility, Dr. Miles fluctuated between cooperating with her treatment and refusing treatment, stating she did not like being at the facility. (R. pp. 0555, 0635, 0772). Tensions between the children and David continued to grow while Dr. Miles resided at Franke Tobey Jones, caused in-part by David's theft of Dr. Miles' identification documents. (R. p. 0981).

From Franke Tobey Jones, Dr. Miles was moved into Michelle's home, which she had upfitted for her disabled mother's care and comfort, including hiring a 24/7 certified nursing assistant and a private duty registered nurse to administer medication. (R. pp. 0556-0558). Unfortunately, despite excellent, professional care, Dr. Miles endured additional emergency room visits for early pneumonia and swelling in her legs cause by a deep vein thrombosis blood clot. (R. p. 0558). During a visit with Dr. Tresa McGranahan of the Alvord Brain Tumor Center, Dr. Miles asked for Michelle to be present in the room with her, but declined allowing David in. (R. pp.

0589, 2038). She indicated she did not want to discuss moving back to or visiting South Carolina with her provider. (R. p. 2038). Despite Dr. Miles' incapacity to make complex health care decisions, Michelle strove to provide her mother as much autonomy as possible by including Dr. Miles in conversations regarding her healthcare, attempting to ensure all of her medical questions were answered, and allowing her privacy during hospital visits. (R. pp. 0915-0917). After ensuring her mother was well-cared for by hired caregivers, including professional certified nursing assistants, Michelle even moved out of her own house and in with a partner.

The Guardian ad Litem filed her report on March 20, 2019, recommending the appointment of a neutral, third-party professional guardian and conservator, that Dr. Miles be removed from Michelle's home and placed in a neutral location, that David posed no threat to Dr. Miles' health for safety, among other findings. (R. pp. 2842-2849). John filed a Notice of Motion and Motion for Order Appointing Counsel for Respondent Dr. Claudia Troyer Miles and Extension of Temporary Guardian Appointment dated April 12, 2019. However, subsequently, the Guardian ad Litem filed an Emergency Motion dated April 17, 2019, citing concerns with Michelle's actions as Temporary Guardian.

Due to concerns raised by the Guardian ad Litem, the Court issued its Order for Continuance and Temporary Restraint on March 25, 2019, restraining the Temporary Guardian from initiating "any material change in the residency location, status, or other significant life decisions regarding Dr. Miles, except for those decisions necessary for Dr. Miles' daily health maintenance and well-being" or undertake "any financial transfer or transaction outside of those ordinary, reasonable and customary transactions necessary to pay the immediate needs and financial obligations of Dr. Claudia Troyer Miles. Transfers of funds between the accounts of Dr. Miles shall be avoided, except to the extent any such transfers are unequivocally necessary to

facilitate the payment of Dr. Miles' reasonable and customary, immediate needs and obligations." Michelle answered this motion by her Return to Guardian ad Litem's Emergency Motion dated April 18, 2019.

After a five-day bench trial, the Court issued its Interim Order dated April 26, 2019, received by Appellant on April 26, 2019, denying John's Petition, removing Michelle as Temporary Guardian, finding that Michelle breached her fiduciary duties, demanding an accounting from Michelle, and appointing Lochocki as Permanent Guardian and Conservator for Dr. Miles, among other findings. Michelle filed a Motion to Alter or Amend Interim Order on May 3, 2019, which was later denied by the Court. The Court issued a Final Order on May 7, 2019, confirming its Interim Order, which Michelle also unsuccessfully challenged.

Pursuant to the Court's Final Order, Michelle filed an Initial Accounting of Temporary Guardianship ("Accounting") on July 3, 2019, prepared by Arthur Unger, Managing Director of EisnerAmper LLP, one of the largest accounting, tax, and business advisory firms in the U.S. Subsequently, unsatisfied with Michelle's professionally-completed accounting, the Guardian ad Litem filed a Motion for Order of Sanctions Pursuant to the Final Order, which Michelle contested with her Return to the Guardian/Conservator's Motion. Lochocki, as Guardian, moved Dr. Miles from Washington back to South Carolina. Dr. Miles died on August 16, 2019.

Ultimately, more than two years later, the Horry County Probate Court issued its Order on Post-Trial Motions dated May 7, 2022, which was received by Appellant Michelle on May 13, 2022. On May 20, 2022, Michelle timely filed a Notice of Intent to Appeal to Circuit Court in the Horry County Probate Court and Court of Common Pleas for Horry County on the same date. It was properly served on the parties within ten (10) days of receipt of the Order pursuant to S.C. Code Ann. §62-1-308(a). Thereafter, Michelle filed a Statement of Issues on Appeal on August

10, 2022, after an Order of Continuance extended the deadline for such filing due to a delay in obtaining the complete trial transcript.

After the filing of all statutorily-required pleadings, this matter was heard before the Honorable Alex B. Hyman, Circuit Court Judge of the Horry Circuit Court on December 19, 2023. The Horry County Circuit Court by Order dated March 19, 2024, upheld the Horry County Probate Court's decisions in connection with the issues on appeal, with the sole exception of remanding the issue of attorney fees back to the Probate Court in order for that court to allocate the fees between the Appellants in this case.

Mary Michelle Miles respectfully comes now to request this Court hear this appeal of the Horry Circuit Court Order dated March 19, 2024, and the Horry County Probate Court's various orders in this case.

STANDARD OF REVIEW

In reviewing a matter that is appealed from the probate court, the appellate court must hear and determine the appeal according to the rules of law. Ulmer v. Ulmer, 369 S.C. 486, 632 S.E.2d 858 (2006); S.C. Code Ann. § 62-1-308(i). "[I]f the action is at law, the...court should uphold the findings of the probate court if there is any evidence to support them; if the action is equitable, the ...court may make findings in accordance with its own view of the preponderance of the evidence." Wellin v. Wellin, 427 S.C. 15, 22, 828 S.E.2d 767 (Ct. App. 2019). To make this determination, "the appellate court must look to the essential character of the cause of action alleged by the petitioners in the court below." Dean v. Kilgore, 313 S.C. 257, 259, 437 S.E.2d 154, 155 (Ct. App. 1993). If the essential nature of the cause of action is legal, the action is one at law. *See* Dean, 313 S.C. at 259, 437 S.E.2d at 155. Otherwise, if the essential character of the

petitioner's cause of action is grounded on equitable rights and equitable relief is sought, the case is regarded as equitable. Id.

Regarding Appointment of a Guardian and Conservator

"Persons of unsound mind... are under the special protection of the courts of equity with respect to their persons, property, and legal transactions." Shepard v. First Am. Mortgage Co., 289 S.C. 516, 518, 347 S.E.2d 118, 119 (Ct. App. 1986); Gaddy v. Douglass, 359 S.C. 329, 592 S.E.2d 12 (Ct. App. 2004) (recognizing an action to set aside a power of attorney and an instrument revoking a power of attorney on the ground of a lack of mental capacity sounds in equity); *see* Dean, 313 S.C. at 259, 437 S.E.2d at 155 (finding petition to remove personal representative is in equity). 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). South Carolina statutory law also provides for the appointing court's discretion. For example, S.C. Code Ann. §§ 62-5-308 and 62-5-408 indicate the court has discretion in appointing a guardian and conservator by determining the person it considers best qualified to serve from those who have statuary priority but may, by acting in the best interest of the alleged incapacitated individual, decline to appoint a person having higher priority and appoint a person having lesser priority or no priority. In an unpublished opinion, the South Carolina Court of Appeals held that the standard of review of the appointment of a guardian and conservator is one of equity. O'Keefe v. Muckenfuss, 2010 SC Unpub. LEXIS 395, 3-4 (S.C. App. 2010). Therefore, this Court may make its own findings in accordance with its own view of the preponderance of the evidence within this present case regarding the appropriateness of appointing Michelle Miles as Temporary Guardian over her mother.

Regarding Breach of Fiduciary Duty

To establish a claim for breach of fiduciary duty, the 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, 745 S.E.2d 397 (Ct. App. 2013). A claim of breach of fiduciary duty can be legal or equitable. Deborah Dereede Living Trust v. Karp, 427 S.C. 336, 340, 831 S.E.2d 435, 437 (S.C. Ct. App. 2019) citing Verenes v. Alvanos, 387 S.C. 11, 17, 690 S.E.2d 771, 773 (2010) (stating "an action alleging a breach of fiduciary duty is an action at law," but also that "a breach of fiduciary duty may sound in equity if the relief sought is equitable"). Characterization of an action as equitable or legal depends on the main purpose in bringing the action." Verenes, 387 S.C. at 16, 690 S.E.2d at 773. The holding in *Verenes* rested on a conclusion that the main purpose of a damages action against a trustee was equitable, as it sought the classic equitable remedies of restitution and disgorgement. *See* Verenes, 387 S.C. at 17, 690 S.E.2d at 773. In this action, the Horry County Probate Court issued sanctions against the Temporary Guardian "pursuant to South Carolina law and the equitable principals of restitution and disgorgement" as requested by the Guardian ad Litem. (R. pp. 0059-0083, 0299-0308). Similarly, the Court cited its ability to award costs and expenses "as justice and equity may require in an action for guardianship." Therefore, the Probate Court's finding of a breach of fiduciary duty sounded in equity, allowing this court to make findings in accordance with its own view of the preponderance of the evidence. The Circuit Court's affirmation of the Probate Court's findings without any explanations allows this Court to make its own findings of fact.

ARGUMENTS

I. THE HORRY COUNTY COURT OF COMMON PLEAS ERRED IN AFFIRMING THE HORRY COUNTY PROBATE COURT'S FINDINGS REGARDING MICHELLE MILES, INCLUDING ITS DETERMINATION THAT MICHELLE MILES IS RESPONSIBLE FOR RESPONDENT KING'S ATTORNEY FEES.

The Horry County Court of Common Please erred in affirming the Horry County Probate Court's findings of breach of fiduciary duty and award of attorney fees. "[I]f the action is at law, the...court should uphold the findings of the probate court if there is any evidence to support them; if the action is equitable, the ...court may make findings in accordance with its own view of the preponderance of the evidence." Wellin v. Wellin, 427 S.C. at 22, 828 S.E.2d at 770-771. The Probate Court action was one in equity; therefore this Court has the ability to make its own findings of fact in accordance with a preponderance of the evidence. The Circuit Court Order dated March 19, 2024, simply affirmed the Probate Court rulings without applying the proper standard of review. The Circuit Court made no findings of fact of its own and blanketly affirmed the Probate Court Orders and findings of fact that were not supported by the evidence or Record on Appeal. The Circuit Court did not address any of the inadequacies of the Probate Court Orders in failing to provide any findings of incapacity of Dr. Miles as required by the Probate Code, or the failure to appoint independent counsel for her in the Probate Court proceedings as required by the Probate Code. The Probate Court also erroneously admitted testimony and evidence that was subject to the attorney client privilege. The Circuit Court did not address that there was nobody appointed as Temporary Conservator to handle Dr. Miles' finances, which left Michelle as Temporary Guardian to do the best she could with the what she had to work with. The Circuit Court also erred in awarding attorney fees to Respondent King.

Appellant Michelle Miles incorporates and reiterates all of the below arguments for the overturning of the Horry County Probate Court's Orders, and seeks the overturning of the Horry

County Circuit Court's affirmation of said Probate Court Orders. She respectfully requests this Appellate Court carefully review this matter in its entirety, applying the appropriate standard of review and ensuring justice is properly served since both the Probate Court and Circuit Court have not applied the proper standards.

II. 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 Horry County Probate Court appointed Michelle as her mother's Temporary Guardian based on John's Affidavit in Support of Emergency Guardianship and supporting letters from several of Dr. Miles' treating physicians. Michelle had equal statutory priority to serve as her mother's Temporary Guardian as David, since they were both appointed co-agents under her HCPOA. S.C. Code Ann §62-5-311(B)(2). However, 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).

Although the Court seemingly recants its original determination of what was in Dr. Miles' best interests, the record is full of support for this finding – primarily, David's inability to properly obtain healthcare for his ailing wife. As this case continued, the Court seemingly began to pity David while becoming hostile towards Michelle. For example, the Court, unprompted by any party's formal ask, found that Michelle had a "significant over-reaction" in response to David's abrupt return of Dr. Miles to South Carolina, despite Michelle being one of Dr. Miles co-agents. (R. p. 0047).

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, and did not pursue

employment opportunities in order to dedicate all of her time to her mother, coordinated cancer treatments, and managed her mother's estate. Despite this dedication, the Court lamented that David would have been a more appropriate temporary guardian, although it gave no specific reasoning for this finding. (R. p. 0057). Instead of relying on the facts of the case, the Court chose to speculate from the testimony and evidence as to conclusions, thoughts, or feelings Dr. Miles may have made or had when she was not present at the hearing and the evidence did support such findings. Dr. Miles' obviously wanted Michelle involved in making her healthcare decisions, as she named Michelle as her co-agent under her HCPOA of Attorney and Do Not Resuscitate, giving Michelle the same authority her husband had in making these decisions.

Despite the Court's determination to paint Michelle in poor light, she diligently served as her mother's Temporary Guardian and had John's full support throughout this entire case, including the expenditures of Dr. Miles' funds. It is almost as if the Probate Court wanted Michelle to fail in her role as Temporary Guardian – as the Court found Michelle's handicap accessible renovations of her home and the hiring of professional caregivers "extremely wasteful," and ruled her Accounting unacceptable, despite being prepared by a hired, professional accounting firm. The Court expected Michelle to serve as a professional care giver and professional finance manager, and anything short of those roles was found by the lower Court to be insufficient. As the Court began to hyper-focus on Michelle, its efforts were almost entirely dedicated to micro-analyzing her appointment and failed to make several required rulings, such as:

1. Failing to rule on the John's Petition requesting that he be appointed co-guardian for Respondent Claudia Troyer Miles;
2. Failing to appoint an attorney to represent the legal interests of Dr. Miles;
3. Failing to rule on Respondent David Vreeland King's cross petitions.

However, to add insult to injury, the Probate Court held that Michelle "is not entitled to and shall not be compensated for her services as Temporary Guardian" although serving in this role for almost half a year, and did not pursue other employment opportunities in order to care for her mother. (R. p. 0058).

A review of the record evidences Michelle's dutiful service to her mother. As the appointment of a guardian is one of equity, Appellant Michelle requests this Court make its own findings regarding the appropriateness of her appointment as Temporary Guardian and the reasonableness of her expenditures on behalf of her mother, in accordance with its own view of the preponderance of the evidence.

III. 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 AND FAILED TO SUBMIT A PROPER ACCOUNTING TO THE COURT.

To establish a claim for breach of fiduciary duty, the 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, 404 S.C. at 589, 745 S.E.2d at 401. 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. For example, in *Turpin*, the Court found a personal representative breached his fiduciary duty to the estate's beneficiaries by failing to disclose to them that he was negotiating with third parties to sell properties belonging to the estate while simultaneously negotiating with the beneficiaries to purchase from them those same properties. Id. In this matter, Michelle Miles owed a duty to her mother, Dr. Miles, as she was appointed Temporary Guardian on November 15, 2018, and she was granted the ability to "receive money and tangible property deliverable to Claudia Troyer Miles and apply the money and property for the support, care, education of Claudia Troyer

Miles, pursuant to S.C. Code Ann. §62-5-312(a)(4)(ii)" by the Court. (R. pp. 0004-0008). Michelle diligently exercised this role for the benefit, and only for the benefit, of Dr. Miles.

Expenses Paid by Temporary Guardian

A review of the record 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 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). A large portion of the funds spent ($64,764.12) were paid to Bandido Solutions LLC for the renovations of Michelle's home to make it safe and comfortable for Dr. Miles. (R. pp. 3138-3191). The renovations were necessary for the health and safety of Dr. Miles and were made to specifically meet her needs; the Court's finding that these expenses were imprudent and "extremely wasteful" is unfounded and without merit. Another large portion of the funds ($179,971.99) were paid to Synergy Homecare, ensuring Dr. Miles received the professional level of care she required. (R. pp. 3138-3191). Synergy Homecare was employed at Franke Toney Jones to attend Dr. Miles as she was deemed a high fall risk. (R. p. 0070).

Legal fees were paid on behalf of Dr. Miles in the amount of $62,912.75. (R. pp. 3138-3191). All expenses made by Michelle were for Dr. Miles' benefit, from the time Michelle was appointed until she was removed on April 26, 2019. While the Guardian ad Litem expressed concern in her report over the rate at which Michelle was spending Dr. Miles' funds, she stated "[m]ost of these seem acceptable expenditures on their face." (R. p. 2998). Michelle went to great lengths to ensure her mother's final days were lived to the fullest possible, considering her prognosis, and the evidence clearly shows that Michelle's first priority was her mother's care and comfort.

Inadequate Accounting

Bess Lochocki, Esq., as Guardian ad Litem, asserted that Michelle's July 3, 2019, Accounting was not a complete and accurate accounting of all monies received or monies spent by her, based on the fact that all underlying documents referred to in the Accounting were not submitted with the Accounting. The Court agreed. (R. p. 0069). However, Black's Law Dictionary, Fifth Edition, defines "account" in pertinent part as, "[a] statement in writing, of debits and credits, or of receipts and payments; a list of items of debits and credits, with their respective dates." There is no independent definition of "accounting" in the South Carolina Probate Code. Accordingly, Michelle submitted a complete Accounting to the Court that was prepared by Arthur Unger, Managing Director of EisnerAmper LLP, one of the largest accounting, tax, and business advisory firms in the United States. Lochocki did not indicate which underlying documents and receipts she wished to review until she filed the Document entitled "Disbursement Requiring Review of Receipts" on August 22, 2019. The Court did not request any further documentation from Michelle, yet chastised her for not producing such documentation. (R. pp. 0069-0070). Michelle served as Dr. Miles' Temporary Guardian for approximately five months, generating a multitude of financial records. As the Probate Court is one of equity, if it demanded a certain format for an accounting, it should have offered Michelle the opportunity to revise her Accounting to meet the Court's desires, instead of punishing her for being unable to read the Court's mind. Certainly, filing a purchased, professionally-prepared Accounting was a reasonable attempt to meet the Court's original demand for such documentation. (R. pp. 0069-0070).

Comingling of Funds

Lochocki also accused Michelle of commingling her funds with those of Dr. Miles. Commingling of funds is defined as "the act of a fiduciary in mingling funds of his beneficiary,

client, employer or ward with his own funds." Black's Law Dictionary, Fifth Edition, 1979. Michelle testified at trial that she opened a bank account with USAA under her own name but entitled "The Mom Account," at the direction of USAA to navigate their policies regarding fiduciaries. (R. pp. 1008, 2408-2410). To fund this account quickly, and avoid USAA's timely process of creating a "transfer account," Michelle transferred $5,000.00 from Dr. Miles personal checking account into her own personal checking account, and then directly into the Mom Account. (R. pp. 1009-1010, 2408-2410). This transfer was perfectly traceable, and at no point caused Dr. Miles' funds to mix with Michelle's own. In fact, it was Michelle's navigation of the USAA policies that enabled her to make Dr. Miles' funds more immediately accessible for her care and maintenance. It is important to remember that the Probate Court never appointed a Temporary Conservator; therefore, Michelle could not have opened up a Conservatorship account as no such appointment was made by the Probate Court.

Provision of Healthcare for Dr. Miles

In the Order on Post-Trial Motions dated May 7, 2022, the Probate Court attempted to paint Michelle's provision of "leaving [Dr. Miles] under the complete control of hired caregivers and professional certified nursing assistants who resided in Ms. Miles' Tacoma home" in a negative light. (R. p. 0070). The Court went on to say "[i]t is now apparent that Ms. Miles had hired Synergy Homecare to fulfill her role as Guardian, as Ms. Miles moved out of the home and permitted employees of Synergy Homecare to reside with [Dr. Miles]....[t]hese expenses by Ms. Miles to Synergy Homecare were to fulfill an obligation of Ms. Miles herself, which, if properly fulfilled by Ms. Miles, would not have been properly chargeable to [Dr. Miles]." (R. p. 0071). This statement is *completely* absurd. It appears the Court believed that Michelle, someone with no medical experience, could provide her terminally-ill mother the same level of care that professional

certified nursing assistants could. Arguably, using common sense, Michelle was *overly-diligent* in obtaining professional health care providers for her mother in her role as Temporary Guardian. Yes, Michelle used "her mother's funds to retain outside parties to move into her renovated home to care for her mother" to ensure she had the best care, while retaining what autonomy she could. (R. p. 0071). Despite the Court's notion that Michelle abandoned her mother in her upfitted home, Michelle moved out of this residence to allow her privacy and autonomy, as Dr. Miles had previously indicated that she desired to live alone. (R. pp. 0331-0338). In fact, Michelle ensured she spent time with her mother by eating every meal together, and continued to manage the hired caregivers and professional certified nursing assistants to assure her mother's continuity of care; she continued to manage her mother's health care by coordinating medical appointments, attending medical appointments, and participating in any required training and monitoring of her mother's condition on a daily basis. (R. pp. 0331-0417). S.C. Code Ann. § 62-5-312(1)-(2) authorizes guardians to "establish the ward's place of abode" and "make provision for the care, comfort, and maintenance of [her] ward and, whenever appropriate." Michelle, using due diligence, upfitted her own home and invited home health care professionals to reside there with her mother after determining that was in her mother's best interest. It is unclear why the Court seemingly imposed a requirement that the Guardian reside with her ward. Setting a precedent for a Temporary Guardian to serve as their Ward's medical provider is absurd, illogical, and unjust.

Again, to establish a claim for breach of fiduciary duty, there must be (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 at 581. Michelle was the Temporary Guardian for her mother. A review of the record by this Court will reveal no breach of fiduciary duty – only a daughter acting in the best interest of her dying mother. The Court's inability to fathom the cost of providing the

best care for an elderly cancer patient does not equate to a finding of damages caused by the individual appointed by the very same court. Dr. Miles did not suffer any harm or damages from her daughter's actions, and there is no evidence in the record 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. Therefore, Appellant Michelle requests this Court review the issue of breach of fiduciary duty and make its own finding based of the totality of the evidence within the record. Even if this Appellate Court were to determine this is an issue of law, the Appellant posits this Court will find *no* evidence of a breach of fiduciary duty, necessitating the reversal of the lower court's order in this regard. Regardless of which standard is used, the lower Court's decision was erroneous and not supported by the evidence and should be reversed.

IV. THE HORRY COUNTY PROBATE COURT ERRED IN FINDING THAT THE EXPENDITURES MADE BY MICHELLE MILES, AS TEMPORARY GUARDIAN, TO RENOVATE HER PERSONAL HOME TO MEET THE NEEDS OF HER MOTHER AND WARD, CLAUDIA TROYER MILES, WERE "EXTREMELY WASTEFUL AND REPRESENT A SIGNIFICANT AND COMPLETELY UNNECESSARY DELETION OF DR. MILES' FINANCIAL RESOURCES", AND THAT THESE EXPENSES SHOULD BE REPAID PERSONALLY BY MICHELLE MILES TO THE ESTATE OF CLAUDIA TROYER MILES.

A review of the record 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, as allowed under S.C. Code Ann. §62-5-312(a)(4)(ii). A total of $64,764.12 was paid to Bandido Solutions LLC to upfit Michelle's own home in Tacoma Washington to make it safe and comfortable for Dr. Miles. (R. pp. 3138-3191). In addition, the renovations were necessary to

comply with the Guardian ad Litem's urgent and repeated request to have Dr. Miles released from Franke Tobey Jones. This cost included all services, materials, labor, tools, and equipment needed for the renovations. Invoice number 1019 from Bandido Solutions itemized some of these renovations, (and included some proposed renovations that were never completed) including: modification/widening of doors; reconfiguration of space for handicap access; pocket door to accommodate wheelchair access; assistance bars placed in the bathroom; application of heated bathroom floor; and installation of accessible toilet. (R. pp. 2463-2468). Dr. Miles even selected the new countertop materials herself, and told the Guardian ad Litem she was "perfectly content" in Michelle's home. (R. pp. 0331-0417, 3004-3005). A letter from Bandido's was included in the filing entitled Respondent Mary Michelle Miles' Return to Guardian/Conservator's Motion for Order on Sanctions Pursuant to Final Order. The Court's finding that these expenses were imprudent and "extremely wasteful" is erroneous and without merit, and should be reversed by this appellate court; Michelle was acting as a reasonable, prudent, fiduciary by ensuring her home was upfitted for her mother's needs.

Despite Michelle's dedication to renovating her home for her mother and hiring professional caregivers, the Guardian ad Litem recommended that Dr. Miles should be "immediately (or as soon as practicable) moved from Michelle Miles' home to a neutral location in the Seattle/Tacoma area" without stating her reason for this finding. (R. pp. 2844-2845). The number one "neutral location" recommended by the Guardian ad Litem was an Airbnb condo, that was in no way upfitted for a disabled individual. (R. pp. 3019-3072). Presumably, the neutral location was recommended to placate David, although he had been unproductive at best in obtaining care for Dr. Miles before this action began. In fact, as Michelle was not even residing in her own home at this time, it is unclear why setting a visitation schedule with David would not

remedy this situation, as opposed to the drastic recommendation of the removal of an elderly, terminal, alleged incapacitated individual from her daughter's upfitted home. It is further unclear how placement of Dr. Miles in a rental condo was more financially prudent than allowing Dr. Miles live with Michelle once the one-time-cost renovations were completed. With Dr. Miles' poor health condition, professional healthcare workers would still have to be paid to reside with her. It is unclear why the Guardian Ad Litem was acting as an advocate for David rather than an advocate for Dr. Miles and why the Horry County Probate Court endorsed this misplaced advocacy.

Not only were the expenses used to upfit Michelle's home necessary, but they were made by the only party appointed by the Probate Court with the explicit authority to "receive money and tangible property deliverable to Claudia Troyer Miles and apply the money and property for the support, care, education of Claudia Troyer Miles, pursuant to S.C. Code Ann. §62-5-312(a)(4)(ii)" by the Court. (R. pp. 0004-0008). The Court appointed Michelle on an emergency/temporary basis to ensure her mother was cared for, and that is what she did. There was no malice, no ill-intent, and no personal gain. In fact, Michelle is a contingent beneficiary under her mother's Living Trust – if anything, she was spending what would eventually be partly her own inheritance. (R. pp. 2316-2339). However, as of October 10, 2018, Dr. Miles only had an estimated 21% change of living another 12 months – with such little time left to live, it was both reasonable and prudent for Michelle to spend her mother's savings ensuring she lived out the last of her days comfortably. Dr. Miles earned that. Accordingly, Michelle should bear no personal burden of repaying these expenses to her mother's estate.

When ordering Michelle to repay the expenses used to upfit her home for her mother, the Court cited its ability to award costs and expenses "as justice and equity may require." Therefore,

it is clear that this issue sounded in equity, and should be reviewed by this Appellate Court in accordance with its own view of the preponderance of the evidence. Since there is more than a preponderance of the evidence to support that Michelle's actions were in the best interest of her mother, the lower Court decision should be reversed.

V. THE HORRY COUNTY PROBATE COURT ERRED IN FINDING THAT THE EXPENDITURES MADE BY MICHELLE MILES, AS TEMPORARY GUARDIAN, TO EMPLOY SYNERGY HOMECARE TO PROVIDE CLAUDIA TROYER MILES PROFESSIONAL HOME-HEALTH CARE WERE IMPROPER, AND SHOULD BE REPAID PERSONALLY BY MICHELLE MILES TO THE ESTATE OF CLAUDIA TROYER MILES.

Synergy Home Care was employed by Michelle to attend Dr. Miles during her tenancy at Franke Tobey Jones because she was deemed a high fall risk due to her gait problems. (R. pp. 2189, 0070). Likewise, Dr. Miles continued to be a fall risk upon her discharge to Michelle's residence, and professional health care providers were certainly more fit to provide such care to Dr. Miles. Guardians are explicitly granted the ability to "make provision for the care, comfort, and maintenance of [her] ward." S.C. Code Ann. § 62-5-312(2). Approximately $179,971.99 was paid to Synergy Homecare to ensure Dr. Miles received the professional level of care she required. Considering Dr. Miles poor health condition, it was reasonable for Michelle to retain the services of Synergy Home Care to assist her take care of her mother, but in no way made Synergy Home Care Dr. Miles' primary care giver. While Michelle moved from her home where Dr. Miles resided, she, in no way, reduced her involvement and control of Dr. Miles care. The expenditures for Synergy Health Care were made directly for Respondent Claudia Miles' care, safety and comfort and could not be substituted by someone without medical training. Again, there was no malice, no ill-intent, and no personal gain. Accordingly, Michelle should bear no personal burden of repaying these expenses to her mother's estate. It is clear and evident from Michelle's actions and decisions that her mother's best interests were her number

one priority. The Probate Court had no basis to find that engaging home healthcare for a dying woman was improper.

When ordering Michelle to repay the expenses used to hire Synergy Home Care, the Court cited its ability to award costs and expenses "as justice and equity may require." Therefore, it is clear that the issue sounded in equity, and should be reviewed by this Appellate Court in accordance with its own view of the preponderance of the evidence. Since there is more than a preponderance of the evidence to support these expenditures, the lower Court decision should be reversed.

VI. THE HORRY COUNTY PROBATE COURT ERRED IN FINDING THAT THE PLACEMENT OF CLAUDIA MILES AT THE FRANKE TOBEY JONES ("FTJ") FACILITY WAS NOT MEDICALLY NECESSARY, AND NOT IN HER BEST INTERESTS.

The evidence and testimony presented showed that Dr. Miles was discharged from the University of Washington Medical Center November 29, 2018, and transferred to the Franke Tobey Jones facility. This decision was based upon recommendations Michelle received from medical professionals regarding her mother's healthcare. (R. pp. 2186-2187). While hospitalized, Dr. Miles was often sabotaging her own care - the likely the reason for the recommendation for a facility. For example, the notes from the University of Washington Medical Center indicate that, at discharge, Dr. Miles refused to leave the hospital, refused to allow her IV to be removed and refused to move to the stretcher. (R. pp. 2011-2012). As a result, she had to have temporary hand restraints so that her IV could be removed. (R. pp. 2011-2012). The American Medical Association defines a medical necessity as:

> Health care services or products that a *prudent physician* would provide to a patient for the purpose of preventing, diagnosing or treating an illness, injury, disease or its symptoms in a manner that is: (a) in accordance with generally accepted standards of medical practice; (b) clinically appropriate in terms of type, frequency, extent, site, duration; and (c) not primarily for the economic benefit of the health plans and purchasers or for the convenience

> of the patient, treating physician, or other health care provider. National Academies of Sciences, Engineering, and Medicine. 2012. Essential Health Benefits: Balancing Coverage and Cost. https://doi.org/10.17226/13234, citing American Medical Association (2005).

Clearly, Michelle is not a physician. She was a layperson appointed as Temporary Guardian of her dying mother, who made informed decisions as to what she believed was in her mother's best interest while navigating the emotions of grief. As a layperson, her decision to place her mother in a care facility temporarily, especially with her mother's dangerous behavior, was reasonable and prudent. It is unfair to hold an individual Guardian to the same standards as medically trained and licensed physician. Appellant Miles relied on the opinions and recommendations of medical professionals in incurring the expense at Franke Tobey Jones for her mother's best interest, and it cannot in hindsight be categorized as "unnecessary". It is reasonable for a nonmedical Guardian to rely on medical advice when making medical decisions.

Upon her admission to Franke Tobey Jones, a plan of treatment stating Dr. Miles' goals to meet for discharge from Franke Tobey Jones was formulated by Franke Tobey Jones' staff and physicians. (R. pp. 2186-2193).This plan stated a target date of discharge for February 28, 2019. (R. pp. 2186-2193). Her stay was never meant to be long-term. Dr. Miles was temporarily housed at Franke Tobey Jones because she was unable to live alone, and her daughter's house was not ready for her to live there safely and comfortably. Dr. Miles fluctuated between cooperating with her treatment and refusing treatment, stating she did not like being at the facility. (R. pp. 0553-0555, 0635-0637, 0772). Assuredly, Dr. Miles' wellbeing takes precedent over her dislike of the facility. Once the house was ready and Dr. Miles was cleared, Dr. Miles immediately transitioned into Michelle's home where there was a set up conducive to Dr. Miles' wellbeing. It was certainly reasonable for Michelle to accept the recommendation of Franke Tobey Jones as to the level of

care and placement of Dr. Miles, especially in light of her behavior upon discharge from Washington University Medical Center.

The Probate Court's finding that placement of Dr. Miles at the Franke Tobey Jones facility was not medically necessary, and not in her best interests, sounds in equity. Therefore, Appellant Michelle requests this Appellate Court review the record in light of her mother's best interest, and issue its own findings based on the preponderance of the evidence that the placement was medically necessary.

VII. THE HORRY COUNTY PROBATE COURT ERRED IN APPLYING S.C. CODE ANN. § 62-5-103 TO FIND THAT THE EXPENDITURES MADE BY MICHELLE MILES, AS TEMPORARY GUARDIAN, WERE IN EXCESS OF HER AUTHORITY TO HANDLE HER WARD'S FINANCES? SPECIFICALLY, § 62-5-103 SETS A MONETARY LIMIT ON GUARDIANS RECEIVING FUNDS IN EXCESS OF $15,000.00 OWED TO THE WARD, BUT NOT ANY MONETARY LIMIT ON THE GUARDIAN'S AUTHORITY TO SPEND FUNDS IN EXCESS OF $15,000.00 FOR THE BENEFIT OF THE WARD.

In its Order on Post-Trial Motions, the Probate Court incorrectly stated that S.C. Code Ann. § 62-5-103, 1976, as amended, expressly limits a guardian fiduciary to "handling" more than $15,000.00 for their ward. (R. pp. 0059-0075). However, a review of this statute titled "Facility of Payment or Delivery" clearly reveals that the South Carolina legislature has set a monetary limit on guardians *receiving* funds in excess of $15,000.00 owed to their Ward, but not any monetary limit on the guardian's authority to *spend* funds in excess of $15,000.00 for the benefit of the Ward. *See* S.C. Code Ann. § 62-5-103. This statue assists "[a] person under a duty to pay or deliver money or personal property to a[n]...incapacitated individual" identify who to whom they may transfer these assets. If a Guardian receives their Ward's asset, they must apply the money for the benefit of their Ward with due regard to (1) the size of the Ward's estate and the likelihood that they, at some future time, may be able to manage their own affairs, (2) the Ward's accustomed standard of living, and (3) other funds or resources used or available

for the support or any obligation to provide support for Ward. S.C. Code Ann. § 62-5-103. The Probate Court did not, in any order issued, consider or apply these express statutory elements for due application of a Ward's assets to Michelle's expenditures as Temporary Guardian.

In its Order Appointing Temporary Guardian, the Probate Court declined to appoint a Temporary Conservator for Dr. Miles and did not require the posting of a bond. Instead, the Probate Court explicitly addressed the Temporary Guardian's authorities over her Ward's assets, without mention of a limit on application of Dr. Miles' funds for her support, care, and maintenance:

> IT IS FURTHER ORDERED that no Conservator has been appointed, under S.C. Code §62-5-312(2)(4), as amended, the Guardian have the right to receive money and tangible property of Claudia Troyer Miles, if so directed. Therefore; this Court directs that Mary Michelle Miles, as Guardian, may research and receive information regarding Claudia Troyer Miles' financial status in order to properly plan for her health and continued care; and to apply for any government benefits on behalf of Claudia Troyer Miles. Mary Michelle Miles, as Guardian, may obtain copies of any information that will provide a record of an asset or cash owned by Claudia Troyer Miles, to include obtaining an account balance, copies of monthly or quarterly statements, copies of checks written, copies of mortgage or property information, copies of taxes owed on property, copies of monthly statements showing income received by Claudia Troyer Miles, and copies of records from the South Carolina Department of Motor Vehicles. Said information may be obtained from any government agency, financial entity, insurance entity that holds an account, policy or other benefit for Claudia Troyer Miles, or that provides income to Claudia Troyer Miles. The term entity includes, but is not limited to bank, insurance companies, credit card companies, annuity companies, financial institutions holding mortgages, 401(k) policies, stocks, bonds, burial policies or other financial information. Mary Michelle Miles, as Guardian, may receive money and tangible property deliverable to Claudia Troyer Miles and apply the money and property for the support, care, education of Claudia Troyer Miles, pursuant to S.C. Code Ann. §62-5-312(a)(4)(ii).

S.C. Code Ann. §62-5-312(a) – (a)(4)(ii) reads that "a guardian has the following powers and duties, *except as modified by order of the court*" including the ability to:

> [R]eceive money and tangible property deliverable to the ward and apply the money and property for support, care, and education of the ward; but, he may not use funds from his ward's estate for room and board or services which he, his spouse, parent, or child have furnished the ward unless a charge for the services and/or room and board is approved by order of the court made upon notice to at least one of the next of kin of the ward, if

notice is possible. He must exercise care to conserve any excess for the ward's needs [emphasis added].

Clearly, the Court had statutory authority to place an express monetary limit on Michelle's authority to apply Dr. Miles' funds, but did not do so when appointing her as temporary guardian. 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. Finally, the Court was aware of Michelle's rate of making expenditures for her mother as of March 20, 2018, as mentioned in the Guardian ad Litem Report: "[m]ost of these seem acceptable expenditures on their face – but I am concerned about how much money Michelle is spending when she is merely the Temporary Guardian." (R. p. 2998). If Michelle was violating a fiduciary authority, it is unclear why the Court continued to allow her to make such expenditures until her removal on April 23, 2019.

This issue stems from an alleged breach of authority of a fiduciary, where the main purpose of the action was equitable, as it sought the classic equitable remedies of restitution and disgorgement. Therefore, this reviewing Court may make findings in accordance with its own view of the preponderance of the evidence and reverse the lower Court's ruling.

VIII. THE HORRY COUNTY PROBATE COURT ERRED IN FINDING THAT MICHELLE MILES, AS TEMPORARY GUARDIAN, MISAPPROPRIATED OR IMPROPERLY DISBURSED HER MOTHER'S ASSETS...ALTERNATIVELY, THE HORRY COUNTY PROBATE COURT ERRED IN CALCULATING THE AMOUNT OF MISAPPROPRIATED OR IMPROPERLY DISBURSED ASSETS.

Again, Michelle made expenditures of her mother's funds only for her health, safety, and maintenance with due regard to the size of Dr. Miles' estate, her impending death, her accustomed standard of living, and the lack of other available for her support. Regardless, the Court ordered that Michelle refund her mother's estate for (1) the home improvements (including Remodel, Lowes, Lumber Liquidator, Home Depot, ADT System, Furnishings) made to allow

Dr. Miles to reside in Michelle's home, (2) the funds paid to hire Synergy Homecare, which provided professional in-home medical care to Dr. Miles, and (3) "all expenditures by Ms. Miles dated after April 23, 2019" for a total of $251,931.87. (R. pp. 0059-0075).

The home improvements were clearly a proper disbursement by Michelle, as she applied these funds for the care of her mother per S.C. Code Ann. §62-5-312(a)(2), ensuring a safe place for her mother to live out the last months of her life. Michelle is not disabled herself, and therefore did not personally benefit from these handicap accessible renovations. If anything, the repairs would diminish the value of Michelle's home because she took out the only bath tub in the house. The Court must also take notice that such renovations more expensive in Washington State than in South Carolina.

The funds paid to hire Synergy Homecare were also a proper use of Dr. Miles' funds, as Dr. Miles required a professional level of healthcare that Michelle could not personally provide, so she hired help as allowed under the probate code. Additionally, Dr. Miles' estate was too large for her to qualify for state-sponsored home health care.

Finally, the Court cited no disbursements actually made by Michelle after April 23, 2019, the date the trial concluded. (R. pp. 0059-0075). Consequently, a review by this Appellate Court of Michelle's expenditures as Temporary Guardian will reveal no misappropriation nor improperly disbursed funds, and this Court should reverse this finding accordingly.

This issue stems from an alleged breach of authority of a fiduciary, where the main purpose of the action was equitable, as it sought the classic equitable remedies of restitution and disgorgement. Therefore, this reviewing Court may make findings in accordance with its own view of the preponderance of the evidence and reverse the lower Court's ruling.

IX. THE HORRY COUNTY PROBATE COURT ERRED IN GRANTING THE GUARDIAN AD LITEM'S MOTION FOR SANCTIONS AGAINST MICHELLE MILES.

The Probate Court granted the Guardian ad Litem's Motion for Sanctions Pursuant to the Final Order and As Matter of Equity against Michelle for three reasons: (1) the Court's finding that the expenditures made by Michelle were not in her mother's best interests, (2) the Court's findings that Michelle's Accounting was incomplete, and (3) the Court's findings that, somehow, Michelle hired "caregivers and professional certified nursing assistants" to fulfill her role as Guardian. (R. pp. 0059-0075). It also granted sanctions against John for his support of Michelle throughout the matter. None of these findings were proper in the first place, and the Court relying on them to grant sanctions against Michelle was a miscarriage of justice, disguised by the Court as an exercise not of law but of the equitable principals of restitution and disgorgement. (R. pp. 0059-0075). Disgorgement is "the act of giving up something (such as profits illegally obtained) on demand or by legal compulsion." Black's Law Dictionary (10th ed. 2014: Bryan A. Garner, ed.) p. 568.

As argued previously, the expenditures made by Michelle as Temporary Guardian were only for the benefit of Dr. Miles – to provide for her health, safety, and welfare – and Michelle did not benefit personally from her mother's funds whatsoever. A review of the record will clearly support that. To say that it was not in Dr. Miles' best interests for Michelle to renovate her personal residence to be accessible and safe for an elderly, terminally ill woman is a ridiculous inference. Further, and again, it is completely unfair to have found Michelle's purchased, professionally-completed accounting insufficient, as there is no independent definition of "accounting" in the South Carolina Probate Code, nor did the Court express what requirements it demanded from an accounting. Michelle's Accounting satisfied the Black's Law Dictionary definition of accounting.

Finally, the finding that Michelle hired Synergy Home Care to replace her as Dr. Miles' Guardian is absurd. Michelle continued to be engaged in her mother's care while receiving professional assistance; in fact, Michele would have been negligent not to hire professional caregiving services for her mother, as her care needs exceeded a non-healthcare professional's ability.

In addition to being unfounded, the Guardian ad Litem's Motion for Sanctions Pursuant to the Final Order and As Matter of Equity is entirely hypocritical as Bess Lochocki, Esq., as Successor Conservator, failed to file *any* accounting of her actions and transactions with Dr. Miles' funds – before or after Dr. Miles' death. It is a miscarriage of justice to sanction Michelle for filing a professionally-provided accounting, while simultaneously allowing the Successor Conservator – an attorney – to proceed without filing any sort of accounting documentation.

Appellant posits that, upon this Appellate Court's review of the record, the findings used as the basis to grant sanctions against Michelle will be determined unfounded and should be overturned by this Court, which may issue its own findings in accordance with its own view of the preponderance of the evidence, in turn causing the Probate Court's sanctions to be rescinded as well.

X. THE HORRY COUNTY PROBATE COURT ERRED BY ALLOWING TESTIMONY FROM CLIFFORD TALL, ESQUIRE, AS TO CONVERSATIONS HE HAD WITH CLAUDIA TROYER MILES, AS SUCH STATEMENTS WERE PRIVILLEDGED, SURVIVED HER INCACACITY, AND NOT WAIVED

Rule 1.6 of the South Carolina Rules of Professional Conduct, Rule 407 SCACR, 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 the client's death. State v. Doster, 276 S.C. 647, 284 S.E. 2d 218 (1981).

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). At that time, Bess Lochocki was the Guardian ad Litem and not the Guardian or Conservator for Dr. Miles. It was an error for the trial court to allow a Guardian Ad Litem to waive privilege for an incapacitated person and an error to admit attorney Clifford Tall's testimony and Affidavit creating reversible error. The Probate Court never appointed an attorney for Dr. Miles to represent her interests, 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 in the Probate Code. South Carolina Code Section 62-5-303B requires appointment of counsel for alleged incapacitated prior to appointment of a Guardian, which was not done in this case. This was yet another reversible error made by the Probate Court.

XI. THE HORRY COUNTY PROBATE COURT ERRED IN ORDERING MICHELLE MILES, AS TEMPORARY GUARDIAN, JOINTLY RESPONSIBLE IN PAYING DAVID V. KING'S ATTORNEY'S FEES AND THE HORRY COUNTY CIRCUIT COURT ERRED IN MAINTAINING THIS ORDER, AND NEEDLESSLY REMANDED ALLOCATION OF THESE FEES TO THE HORRY COUNTY PROBATE COURT.

In awarding attorney's fees, courts typically look to the following factors: (1) the nature, extent, and difficulty of the legal services rendered; (2) the time and labor devoted to the case; (3) the professional standing of counsel; (4) contingency of compensation; (5) the fee customarily charged in this locality for similar services; and (6) the beneficial results obtained, if any. Deborah Dereede Living Trust v. Karp, 427 S.C. 336, 346, 831 S.E.2d 435, 441 (S.C. Ct. App. 2019). This Court may consider other factors "as justice and equity may require," including the ability of each party to pay, and enjoys broad latitude to award attorney's fees, in the interest of equity, to any party. *See* S.C. Code Ann. § 62-5-105. In its Order on Post-Trial Motions, the Horry County Probate Court notes "[o]f the several factors that the Dereede case outlines for our consideration,

perhaps the most important is the final element, the 'beneficial results obtained." (R. p. 0064). Essentially, the probate court decided that Michelle and John were liable for David's attorney's fees because: 1) John is a practicing dermatologist so, presumably, he has expendable finances to pay David's attorneys' fees, 2) there was no beneficial result from the filing of this matter, 3) this matter was not in Dr. Miles' best interest. (R. p. 0073).

This matter was filed by John, a board-certified dermatologist with a Ph.D. in Cancer Molecular Biology, due to his concern regarding his elderly, terminally-ill mother's healthcare. The Probate Court, in its final Order, continued to lament that John failed to prove a "prima facia case that an emergency existed and attempted to mislead the court with unfounded allegations that Mr. King was not qualified to be his wife's Conservator and Guardian." However, again, it was this Probate Court that issued its Order of Appointment of Temporary Guardian on November 15, 2019, finding John *had* proven good cause existed to appoint a temporary Guardian for his mother, and that it was in her best interest for Michelle to be appointed. Michelle acted as a concerned daughter and a reasonably prudent person in her actions as Temporary Guardian. Due to this argument and its predecessors, taken in totality, the principals of equity and justice demand this reviewing Court to reverse the Probate Court's Order causing Michelle and John to be jointly responsible in paying David's attorney's fees. A Temporary Guardian and later permanent Guardian were in fact appointed by the Probate Court; therefore, the filing of this action did bring about a benefit for Claudia Troyer Miles. The fact that Respondent King did not like the result is not a reason for his attorney fees to be paid. Respondent King has tried to make this matter about harm he alleged suffered as a result of the original actions, which is irrelevant. This case was never about harm to Respondent King, and this should not have been a factor considered in any decisions

made. There is no reasonable justification for necessitating a remand on the issue of attorney fees to the Horry County Probate Court.

CONCLUSION

Based upon the arguments contained herein, Mary Michelle Miles respectfully requests this Court review the record created in the Guardianship of Claudia Troyer Miles regarding her appointment and subsequent removal as Temporary Guardian, identify the errors of law and equity made by the Horry County Probate Court and the Horry County Circuit Court, and provide proper remedy to a mourning daughter. Appellant dutifully cared for her deteriorating mother and only sought to provide the best end-of-life care. Any Court ruling to the contrary is in error. Accordingly, Appellant is entitled to a reversal of the erroneous and unfounded rulings of the Horry County Probate Court and of the Horry County Circuit Court.

Respectfully submitted,

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