



### **ADMISSIONS BY DEFAULT**

By virtue of the entry of default, Birch has admitted the well-pleaded allegations of the amended complaint and second amended complaint. Nonetheless, findings of fact are necessary to establish the damages sustained by Aryanna as a result of the causes of action asserted against Birch.

### **FINDINGS OF FACT**

Based on the documents of record, the exhibits, and the testimony, I determine the following findings of fact have been established by a preponderance of the evidence. These findings are made after my careful and deliberate consideration of the testimony, credibility of the witnesses, weight of the testimony, and the exhibits presented. I have carefully observed each witness, and I noticed such things as their tone of voice, gesture, hesitation or readiness to answer questions, their sincerity and mannerisms, all of which assisted in my evaluation of their credibility.

1. The parties are both residents of Beaufort County.
2. Aryanna is 18 years old, having reached her age of majority on January 5, 2021.
3. Defendant Birch is Aryanna's biological father.
4. In 2011, Aryanna was seriously injured in a vehicle accident which required lengthy hospitalization.
5. On March 11, 2011, a judge in Florida granted custody of Aryanna, who was then eight (8) years old, to Birch.
6. Birch retained the late Louis Dore, then a practicing lawyer in Beaufort, to represent Aryanna's interests arising from the vehicle accident.

7. By order of this Court dated December 12, 2012, Birch was named guardian *ad litem* for Aryanna for purposes of pursuing civil actions to recover funds to compensate Aryanna for the damages she sustained in the collision.
8. Birch, through counsel Louis Dore, settled Aryanna's claims for damages from two sources. Because she was a minor, both settlements were approved by this Court.
9. By order dated December 27, 2012, this court approved the first part of the settlement for Aryanna and ordered that a conservatorship be established to ensure the proper use of Aryanna's funds. That settlement netted Aryanna funds in the amount of \$109,230.55. Birch took possession and control of these funds, but he did not establish a conservatorship for Aryanna.
10. By order dated March 24, 2014, this Court approved the second part of a settlement for Aryanna, but did not order the appointment of a conservator for those funds. The net proceeds from the 2014 settlement in the amount of \$14,983.19 were paid to Birch and have not been located.
11. Birch deposited \$109,011.00 of the full \$109,230.55 in an investment account managed by LPL Financial in Mt. Pleasant, and owned by American Funds Service Company. The account was a "College America" account entitled "Shaun Birch fbo Aryanna Lucas." The whereabouts of the difference in funds between disbursement of \$109,230.55 and the deposit for the College America account of \$109,011.00, a difference of \$219.55, is unknown. However, the documentation establishes that Birch took possession of \$109,230.55 of Aryanna's funds, not merely \$109,011.00.
12. The Beaufort County probate court has searched its records and found no evidence that a conservatorship was established for Aryanna. Aryanna introduced into evidence a

letter dated June 1, 2021 from Associate Probate Judge Heather R. Galvin to establish that no conservatorship was sought or obtained.

13. Steve Storey was an agent for the investment account into which Birch deposited Aryanna's net proceeds from the 2012 settlement, and he dealt with Birch several times after the account was established in 2012 and until Storey retired.
14. Storey tried to prevent Birch from taking money from Aryanna's account on several occasions, but Birch took funds from the account regularly for his own use.
15. Records from American Funds Service Company establish that all funds paid from the account during the life of the account were paid to Birch as the owner of the account. The total paid to Birch during the life of the account was \$99,942.58.
16. On one occasion Birch told Storey he was planning to buy a dump truck with the funds he was withdrawing from the account, so he considered the use of the funds legitimate because he had to pay child support for Aryanna.
17. After she turned 18, Aryanna located the College America fund managed by LPL Financial and learned the balance of the account was slightly more than \$11,000. This Court's order of April 9, 2021 allowed Aryanna to receive those funds.
18. Aryanna received no money from either settlement, other than the final distribution of approximately \$11,000.00 she received as a result of this Court's April 2021 order.
19. Birch misappropriated both settlements of Aryanna's funds to himself for his personal use, depriving Aryanna of the use of her funds, which required and led to this action to recover damages against Birch.
20. Birch was specifically ordered to establish a conservatorship for the settlement, which netted \$109,230.55 for Aryanna, which funds should have been preserved and

invested for her benefit until she reached the age of 18. The Court's order approving settlement dated January 22, 2013, was issued following a petition by Birch for approval of the settlement, and he was therefore expressly aware of the Court's directive in that order that ". . . the appointment of a Conservator is required."

21. As admitted by Birch's default in this action,<sup>1</sup> and as further established by the evidence and testimony presented, the Court finds that Birch's misappropriation of Aryanna's funds was intentional and reckless.
22. As a direct and proximate result of the intentional and reckless actions of Birch as set forth herein, Aryanna is entitled to judgment in her favor as a matter of law of the funds Birch misappropriated. Those funds total one hundred twenty-four thousand, two hundred and thirteen dollars and seventy-four cents (\$124,214.74), which is the total of the net proceeds of both settlements which Birch misappropriated to his own use.
23. Public records in Beaufort County reflect Birch is the owner of at least two parcels of real estate, one of which includes a home, one vehicle, and one mobile home. Since Birch is in default, no discovery was undertaken to determine his ability to respond to an award of punitive damages, which are sought in the complaint.
24. Aryanna's counsel stated, as an officer of the Court, that Birch had called her by telephone on two occasions after the filing of this action, acknowledged the pendency of this action and his intent not to participate in these proceedings. In responding to counsel's question regarding his assets, Birch responded that his assets are for all of

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<sup>1</sup> Paragraphs 8 and 9 of the Second Amended complaint dated February 22, 2021 expressly allege that Birch's misappropriation of Aryanna's funds was "intentional" and was "a violation of a court order," was "reckless," and was "in complete contravention of his fiduciary obligations to her." Birch's default constitutes an admission to these facts, but the testimony and evidence independently establish these facts as well.

his children, not just Aryanna. He also refused to assist in executing paperwork (which counsel mailed to him) to transfer the small balance in the College America account to Aryanna, necessitating the Court's intervention by its order filed April 9, 2021.

### CONCLUSIONS OF LAW

1. Birch was named guardian *ad litem* for Aryanna by this Court in connection with damage she sustained in an automobile accident in 2011 when she was a minor.
2. While acting as Aryanna's guardian *ad litem*, Birch became Aryanna's fiduciary. As her fiduciary, Birch owed Aryanna a fiduciary obligation to place her interests above his, to act in her best interests, and to take all reasonable steps to protect her funds from loss and to maximize their growth until Aryanna became an adult. *RFT Management Co., LLC v. Tinsey & Adams LLP*, 399 S.C. 22, 732 S.E.2d 166 (2012).
3. In order to recover for breach of fiduciary duty, a Plaintiff must show "(1) the existence of a fiduciary duty; (2) a breach of that duty owed to the plaintiff by the defendant and (3) damages proximately resulting from the wrongful conduct of the defendant." *Id.* 732 S.E.2d at 173.
4. Honorable Marvin H. Dukes III, Special Circuit Court Judge ordered Birch to petition the probate court for appointment of a conservator to insure the protection of Aryanna's funds.
5. With full knowledge that he was violating his fiduciary duty to Aryanna as well as the directives of this Court, Birch intentionally misappropriated Aryanna's funds for his own use, proximately resulting in actual and consequential damages to Aryanna.

6. Aryanna was entitled to have her funds protected, invested and maximized during her minority under the guidance of the probate court and a conservator. Birch's acts and omissions constituted a breach of his fiduciary duty to Aryanna.
7. Birch's acts and omissions in breaching his fiduciary duty to Aryanna were intentional, wrongful, reckless, and undertaken in complete contravention of his fiduciary obligations to her.
8. Aryanna has sustained actual and consequential damages as a direct and proximate result of Birch's acts and omissions as set forth herein, including loss of her funds, loss of income and investment of her funds, and absence of growth of her funds that should have been accomplished had the order of the trial court been complied with and had Birch properly discharged his fiduciary duties to Aryanna.
9. Birch became authorized to accept the net settlement proceeds in the amount of \$109,250.55 solely in his capacity as Aryanna's guardian *ad litem* by order dated December 27, 2012. Aryanna has been deprived of the sum of \$109,250.55 since that date.
10. Birch became authorized to accept the net settlement proceeds in the amount of \$14,983.19 solely in his capacity as Aryanna's guardian *ad litem* by order dated March 24, 2014.
11. Aryanna prays for prejudgment interest on the funds converted by Birch from the date of the conversion. When the amount of the funds converted is ascertainable at the time of the loss, S.C. Code Section 34-31-20 permits prejudgment interest to be awarded by the Court on misappropriated funds.

12. Aryanna is entitled to an award of prejudgment interest at the statutory rate of 8 3/4% per annum in accordance with Section 34-31-20, on the amount of \$109,250.55, beginning on December 27, 2012, to the present, which interest totals \$111,884.34 through the date of trial, June 14, 2021. The total damages due from Birch to Aryanna from his breach of fiduciary duty as to the 2012 settlement, including statutory prejudgment interest, is \$221,114.89.
13. Aryanna is entitled to an award of prejudgment interest at the statutory rate of 8 3/4% per annum in accordance with Section 34-31-20, on the amount of \$14,983.19 beginning on March 24, 2014, to the present, which interest totals \$12,512.69 through the date of trial, June 14, 2021. The total damages due from Birch to Aryanna from the 2014 settlement, with prejudgment interest is \$27,495.88 through the date of trial, June 14, 2021.
14. The total amount of judgment for actual and consequential damages which the clerk of court shall enter in favor of Aryanna against Birch is \$248,610.77, which represents the total net proceeds from both settlements, with prejudgment interest at the statutory rate from the date Birch took possession of the funds as Aryanna's guardian *ad litem*.
15. Aryanna requests an order from the Court declaring that the amount awarded to her in this action is not dischargeable in bankruptcy. However, any assessment of whether the judgments can be discharged in bankruptcy must be made at a later time should a bankruptcy discharge be issued to Birch. *Ducker v. Standard Supply Co., Inc.*, 280 S.C. 157, 311 S.E.2d 728 (1984). The Court does note that the evidence of Birch's intentional misconduct is overwhelming, as there is no doubt that his

misappropriation of Aryanna's funds was knowing, intentional, and the result of repeated acts in derogation of Aryanna's rights.

16. Aryanna specifically waived her cause of action against Birch for conversion, eliminating the obligation of the Court to address that issue.
17. Aryanna further requests an award of punitive damages against Birch as a result of the knowing and intentional misconduct in which he engaged in misappropriating her funds and failing to cooperate in assisting her to recover the small balance of what remained in the College America account. She asserts she has established sufficient evidence to support an award of punitive damages by clear and convincing evidence.
18. "The purposes of punitive damages are to punish the wrongdoer and deter the wrongdoer and others from engaging in similar reckless, willful, wanton or malicious conduct in the future. [citations omitted.] Punitive damages also serve to vindicate a private right of the injured party by requiring the wrongdoer to pay money to the injured party." *Solanki v. Wal-Mart Store*, 410 S.C. 229, 236, 763 S.E.2d 615 (Ct.App. 2014).
19. Aryanna has established by clear and convincing evidence that Birch's misappropriation of her funds was "willful, wanton or in reckless disregard of the plaintiff's rights." *Id.* This is especially true under the facts presented here, where Storey repeatedly told Birch not to withdraw funds for his own use out of the College America account, which was established solely for the benefit of Aryanna. Storey had no ability to stop Birch from withdrawing money from the College America account, because Birch was the owner of the account.

20. The Court concludes that Aryanna has established by clear and convincing evidence that Birch's conduct warrants an award of punitive damages. Based on the entire record, which is admittedly one-sided since Birch is in default, this Court concludes that an award of punitive damages in the amount of \$100,000 should be included in the judgment to be entered by the clerk of court in favor of Aryanna against Birch.
21. It is unclear specifically under what circumstances the Court is required to conduct a *Gamble*<sup>2</sup> review of the award of punitive damages when the damages are awarded by default judgment. However, since the award of punitive damages made here was not made by a jury, but by the Court, the *Gamble* elements serve a different purpose, which is to determine whether the award of punitive damages violates the defendant's due process rights. *S.C. Farm Bureau Mutual Insurance Company v. Love Chevrolet*, 324 S.C. 149, 154, 478 S.E.2d 57, 59 (1996), cited in *Solanki v. Wal-Mart Store*, *supra*.
22. To the extent that this Court is able to do a *Gamble* review with the defendant in default, Aryanna has established that Birch owns multiple pieces of real estate in Beaufort County and also has other assets. It is also undisputed that Birch was expressly aware of this lawsuit and told Plaintiff's counsel he would not participate. Lastly, Birch failed to cooperate in transferring the small balance of the College America account to Aryanna when asked to do so by Aryanna's counsel. Therefore, the record does contain evidence that Birch was given every opportunity to participate in these proceedings and to assist Aryanna, and expressly refused to do so. It is this Court's opinion that Birch's due process rights have been fully protected as so

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<sup>2</sup> *Gamble v. Stevenson*, 305 S.C. 104, 111-112, 406 S.E.2d 350, 354 (1991).

evidenced by his admission to counsel of his knowledge of these proceedings and his refusal to assist Aryanna, even after knowing an action had been brought to try to make her whole.

WHEREFORE, having fully considered the evidence, testimony, exhibits and applicable law, and as a result of the findings of fact and conclusions of law forth above, the Court directs the clerk of court to enter judgment in favor of Plaintiff Aryanna Lucas against Defendant Shaun Birch for actual and consequential damages in the amount of two hundred forty-eight thousand, six hundred and ten dollars and seventy-seven cents (\$248,610.77), plus punitive damages in the amount of \$100,000 for a total judgment against Birch in the amount of \$ 348,610.77.

**IT IS SO ORDERED.**

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Jennifer McCoy  
Circuit Court Judge

June \_\_, 2021







Beaufort Common Pleas

**Case Caption:** Aryanna Lucas VS Shaun L Birch

**Case Number:** 2021CP0700110

**Type:** Order/Judgment and Form 4

So Ordered

s/Jennifer B. McCoy #2764