MINNESOTA STATE LAW LIBRARY

CASE NO. A10-716
STATE OF MINNESOTA
IN COURT OF APPEALS

Peggy Greer,

Appellant,

v.

Professional Fiduciary, Inc.; Wells Fargo Bank, N.A.; Wells Fargo Investments, L.L.C. d/b/a Wells Fargo Private Bank Elder Services; and Ruth Ostrom,

Respondents.

APPELLANT'S BRIEF IN REPLY TO AMICI CURIAE PROBATE AND TRUST LAW SECTION OF THE MINNESOTA STATE BAR ASSOCIATION AND MINNESOTA ASSOCIATION OF GUARDIANSHIP AND CONSERVATORSHIP

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INTRODUCTION

Appellant Peggy Greer respectfully submits this Reply to the Joint Brief of Amici Curiae The Probate And Trust Law Section Of The Minnesota State Bar Association And Minnesota Association Of Guardianship And Conservatorship[1] (collectively, the "amici curiae") in the above-referenced matter. The amici curiae submitted their brief in support of Respondent Professional Fiduciary, Inc. ("PFI"), and Respondents Wells Fargo Bank, N.A. and Wells Fargo Investments, L.L.C. (collectively, "the Wells Fargo Respondents").

ARGUMENTS

I. THE AMICI CURIAE RESTATE ARGUMENTS BY THE WELLS FARGO RESPONDENTS WITH REGARD TO DISCHARGE OF A CONSERVATOR'S LIABILITY.

The amici curiae color their arguments regarding whether a conservator is relieved from liability to a ward upon "discharge" by the probate court as a discussion of statutory interpretation. These arguments, however, parrot many of the *res judicata* arguments made by the Wells Fargo Respondents. *See* (Wells Fargo Respondents' Br. at 22-27.) While the amici curiae sufficiently summarize the history and content of the legislative code with regard to guardianships and conservatorships, they take some liberties with the statutory interpretations of particular sections. In doing so, the amici curiae seek to persuade the Court toward adopting a statutory interpretation more favorable to conservators than to wards, and eschew the plain meaning of the statutes.

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[1] For the Court's convenience, Ms. Greer is filing separate reply briefs to address arguments raised by the three respondents and the amici curiae in this appeal. The combined word count of Ms. Greer's reply briefs is less than the total word count allowed for in a single reply brief under Minn. R. Civ. App. P. 132.01 Subd. 3 (2010).

The question before this Court is whether the District Court erred in determining that Ms. Greer's Complaint against Respondents failed to state a claim. The standard of review is "whether the complaint sets forth a legally sufficient claim for relief." *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2005). *See* (Appellant's Opening Br. at 7.) Furthermore, this Court must "accept the factual allegations in the pleading under attack [...] as true and [...] liberally construe the complaint and draw all inferences and assumptions in favor of the nonmoving party." *Hoffman v. Northern States Power Co.,* 764 N.W.2d 34, 45 (Minn. 2009).

Notably, the amici curiae make no attempt to address whether Ms. Greer's complaint sufficiently sets forth a claim for relief; rather, they submit that—in their opinion—the Wells Fargo Respondents adequately fulfilled their requirements as a conservator. (Amici Curiae Br. at 9.) This issue is not before the Court, and the brief of the amici curiae should be disregarded in its entirety as a thinly veiled attempt to encourage this Court to apply an erroneous standard of review. This is not a proper role for amici curiae.

Interestingly, one facet of the guardianship and conservatorship proceedings the amici curiae focus on is the hearing process. (Amici Curiae Br. at 7.) They note that "[t]he hearing provides an opportunity for all interested parties, ***including the incapacitated person***, to object to the activities disclosed in the conservator's report." (Amici Curiae Br. at 7.) (emphasis added). Yet, one of the allegations included in Ms. Greer's complaint is the fact that a hearing was held without Ms. Greer, despite her inability to attend the hearing and her objections to representation by counsel. (App. 3-4,

8.) Thus, to that allegation, the amici curiae's arguments would suggest that Ms. Greer was not "afforded a full hearing to air [her] grievances." (Amici Curiae Br. at 7.)

Further, the amici curiae focus particularly on the allowance of a conservator's intermediate report that "adjudicates liabilities concerning the matters adequately disclosed in the accounting," and the allowance of a conservator's final report that "adjudicates all previously unsettled liabilities relating to the conservatorship." (Amici Curiae Br. at 7-8.) These reports, and the allowances of these reports, have no bearing on Ms. Greer's instant claims.

Accountings in guardianship and conservatorship proceedings merely "state or contain a listing of the assets of the estate under the conservator's control and a listing of the receipts, disbursements, and distributions during the reporting period." Minn. Stat. § 524.5-420 (b) (2009). *See* (Appellant's Opening Br. at 14.) Because Ms. Greer does not challenge the matters disclosed in the accountings, the allowances of the Wells Fargo Respondents' intermediate reports did not adjudicate the breaches of fiduciary duties, negligence, and intentional and negligent infliction of emotional distress alleged by Ms. Greer.

Additionally, while an order "allowing a final report adjudicates all previously unsettled liabilities ***relating to the conservatorship***," it does not adjudicate the liabilities of the conservator. Minn. Stat. 524.5-420 (a) (2009) (emphasis added). The plain meaning of the statute is directed at the liabilities of the conservatorship; in other words, the final report provides resolution regarding the ward's assets, receipts, disbursements, and distributions that are subject to the conservatorship. *Id.* It is not directed at the

liabilities of a conservator and its liability for breach of fiduciary duties, negligence, and intentional and negligent infliction of emotional distress, particularly where such allegations are not disclosed in the accountings. The statutes further indicate that "[t]ermination of the conservatorship does not affect a conservator's liability for previous acts [...]." Minn. Stat. § 524.5-431 (2009). Therefore, even after the final report is allowed and the probate court issues an order terminating the conservatorship, a conservator is still liable for its prior acts. *Id.*

Finally, the amici curiae rely on the same edition of Black's Law Dictionary as the Wells Fargo Respondents for their assertion that the plain meaning of "discharge" within the statutory language is to "extinguish an obligation." (Amici Curiae Br. at 8.) *See* (Wells Fargo Respondents' Br. at 32.) A dictionary from 1979, however, seems an odd choice for establishing the plain meaning of a statutory regime that was adopted in 2003. *See* (Amici Curiae Br. at 3.) Considering this chronology, a more relevant definition for "discharge" can be found in the 2001 edition of Black's Law Dictionary, which defines the word, *inter alia*, as simply "[t]he dismissal of a case." *Black's Law Dictionary*, 206 (2d pocket ed. 2001). Under this definition, which comports more closely to the plain meaning of a statute adopted in 2003 than a definition from 1979, a "discharge" under Minn. Stat. § 524.5-431 is merely the end of the guardianship and conservatorship proceedings. It does not, therefore, relieve a conservator or guardian from any liabilities that arose out of conduct during the guardianship and conservatorship proceedings, particularly since conservators and guardians are not defined as parties to such proceedings. (Appellant's Opening Br., at 11-12.) *See* Minn. Stat. § 524.5-113 (2009).

As a result, Ms. Greer's claims are entirely consistent with the statutes governing guardianships and conservatorships. This Court should thus reverse the District Court's decision and remand for further proceedings.

II. THE AMICI CURIAE IMPROPERLY RAISE THE ISSUE OF GUARDIAN IMMUNITY, AND GUARDIANS ARE NOT IMMUNE FROM PERSONAL LIABILITY.

The amici curiae also assert that the statutes governing guardianships and conservatorships provide an immunity for guardians. Notably, although PFI asserted such immunity in the District Court proceedings, PFI did not assert statutory immunity in its appellate brief as a reason why Ms. Greer's Complaint fails to state a claim. By failing to raise an issue or defense on appeal, the party waives that issue or defense. *Pautz v. American Ins. Co.*, 128 N.W.2d 731, 738 (Minn. 1964). Once waived, the issue cannot thereafter be asserted by an amici curiae that has no interest of any kind in the litigation. Thus, the immunity argument put forth by the amici curiae should not be considered by this Court.

Regardless of whether the amici curiae improperly raised the issue of a statutory immunity for guardians, however, the law is clear: any immunity that a guardian may enjoy is specifically limited to the provisions of Minn. Stat. § 524.5-313 (c) (2). That clause establishes a guardian's "duty to provide for the ward's care, comfort, and maintenance needs," and indicates that "[f]ailure to satisfy the needs and requirements ***of this clause*** shall be grounds for removal of a private guardian, but the guardian shall have no personal or monetary liability." Minn. Stat. § 524.5-313 (c) (2) (2009) (emphasis added). Therefore, the plain meaning of the statutory language does not provide the

"blanket protection of personal liability of guardians" as asserted by the amici curiae. (Amici Curiae Br. at 10.) Rather, the statute specifically limits any immunity to the duties outlined in that clause. It does not impact other powers and duties of the guardian listed outside that clause, including those related a ward's place of abode, medical treatment, her civil rights, her personal freedoms, and a guardian's conduct with regard to its conflicts of interest. *See* Minn. Stat. §§ 524.5-313 (c) (1), (4), and (6) (2009). *See also* (App. 6-10.)

Furthermore, the amici curiae insist that PFI should have no liability for making "extravagant provision[s]" to satisfy Ms. Greer's needs. This argument, too, fails to meet the standard this Court must apply when considering whether Ms. Greer's Complaint states a claim against PFI, and should be ignored for the same reasons as set forth above.

And yet, this assertion is also in direct conflict with the statutes relied on by the amici curiae. These statutes provide that a guardian has "the power to give any necessary consent to enable the ward to receive ***necessary*** medical or other professional care, counsel, treatment, or service [...]." Minn. Stat. § 524.5-313 (c) (4) (i) (2009). Additionally, a guardian has "the duty and power to exercise supervisory authority over the ward in a manner which limits civil rights and restricts personal freedom ***only to the extent necessary*** to provide ***needed*** care and services." Minn. Stat. § 524.5-313 (c) (6) (2009). The fact that the amici curiae concede that PFI provided "extravagant" services to Ms. Greer actually supports Ms. Greer's allegations that PFI provided unnecessary treatment and unnecessarily limited Ms. Greer's civil rights and personal freedoms. (App. 6-8.)

As such, any statutory immunity for guardians does not apply in this case, and the Court should reverse the District Court's order and remand for further proceedings.

III. PUBLIC POLICY SUPPORTS PROVIDING A FORMER WARD THE OPPORTUNITY TO LITIGATE RIGHTFUL CLAIMS FOR RELIEF.

In making arguments regarding public policy considerations in this case, the amici curiae focus exclusively on the impact to guardians and conservators. But any such policy considerations must take into account the needs of the ward first. The ward, as a person adjudged incapable of managing her own affairs, is the reason that protective procedures for guardianships and conservatorships exist. If those procedures fail, and a guardian or conservator inadequately defend a ward's rights or breach their fiduciary obligations to the ward, that ward must have recourse in a court of her own choosing.

In this case, for Ms. Greer to adhere to the amici curiae's statutory interpretations, she would have had to remain under the guardianship and conservatorship while suing her guardian and conservator for breaches of fiduciary duties, negligence, and intentional and negligent infliction of emotional distress. But Ms. Greer had no right to sue while a ward under the guardianship and conservatorship.[2] So how exactly was Ms. Greer supposed to accomplish this task when her conservator, the Wells Fargo Respondents, had the exclusive right to sue on her behalf? The "solution" set forth by amici curiae is a legal impossibility under Minnesota law, and must therefore be disregarded.

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[2] The duties of a conservator include the duty to "institute suit on behalf of the protected person and represent the protected person in any court proceedings." Minn. Stat. § 524.5-417 (2009). This duty was specifically set forth in the Order of March 5, 2007 creating the conservatorship. (App. 202.)

This case is not about protecting guardians and conservators from liability. It is about protecting vulnerable people from abuse, and providing them their rightful opportunity to seek recourse for wrongs enacted upon them. For this reason, this Court should reverse the District Court's order and remand for further proceedings.

CONCLUSION

For all the foregoing reasons, Ms. Greer respectfully asks this Court to strike the brief of the amici curiae, and to reverse the District Court's dismissal of her claims against Wells Fargo, Wells Fargo Elder Services, PFI, and Ms. Ostrom, and remand for further proceedings.

DATED: August 9, 2010

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that Appellant's Brief In Reply To Amici Curiae Probate And Trust Law Section Of The Minnesota State Bar Association And Minnesota Association Of Guardianship And Conservatorship conforms to the requirements of Minn. R. Civ. App. P. 132.01, Subds. 1 and 3, for briefs produced with a proportional font. The length of this brief is 2,041 words. For the Court's convenience, Appellant has filed separate reply briefs to address arguments raised by the three respondents and the amici curiae in this Appeal. The combined length of these briefs is 6,678 words, which conforms with the total word count allowed for in a single reply brief under Minn. R. Civ. App. P. 132.01 Subd. 3. This brief was prepared using Microsoft Office Word Professional Edition 2003.

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