NO. A11-1695

State of Minnesota

In Court of Appeals

Elizabeth Sietsema,

Appellant,

v.

In the Matter of the Estate of Darlene J. Neuman, Deceased,

and

In the Matter of the Estate of Lois Jeannette Wiggs, Deceased,

Respondents.

REPLY BRIEF OF APPELLANT ELIZABETH SIETSEMA

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INTRODUCTION

Appellant Elizabeth Sietsema ("Sietsema") submits this reply brief in support of her appeal of the probate court's Order Adjusting Accounts; Surcharging Personal Representatives; and Order for Judgment dated July 29, 2011 ("July 29 Order"). Respondents the Estate of Darlene J. Neuman (the "Neuman Estate") and the Estate of Lois Jeannette Wiggs (the "Wiggs Estate") (collectively, "Respondents")[1] either misunderstand or misstate Sietsema's argument on appeal. Sietsema does not maintain that her employment relationship with Kelvin Miller ("Miller") and Primarius Promotions ("Primarius") extinguished her fiduciary duties under Minnesota law. Rather, Sietsema contends that the probate court erred when, in applying the reasonably prudent person standard in determining whether Sietsema breached her fiduciary duties, it failed to account for the unequal relationship between Sietsema and Miller, her supervisor and co-fiduciary. Furthermore, Sietsema maintains that the probate court erred in finding that she is jointly and severally liable, with Miller, for repayment of $5,000 when Sietsema did not owe any duties to the Neuman Estate. Accordingly, Sietsema respectfully requests that this Court reverse the probate court's July 29 Order and remand this case for further proceedings.

CLARIFICATION OF FACTS

At the outset, Respondents' brief contains a number of statements that are unsupported by the evidentiary record. Accordingly, in addition to relying on the facts

[1] Although they are not direct parties to the appeal, beneficiaries Friends of Animal Adoptions, Inc., d/b/a Animal Ark ("Animal Ark") and the University of Minnesota Foundation have joined Respondents in filing their brief.

set forth in her initial brief, Sietsema is compelled to clarify the record as set forth herein. First, Respondents assert that Sietsema "knew the market rate for these types of services was $20 per hour based on her experience retaining such services for her mother," and that Sietsema failed to object to Primarius's bills "even though she knew them to be well above rates for professional service providers." (Respondents' Br. 12, 16.) Sietsema, however, testified that she did not actually have such knowledge:

> Q: And if I told you today that professional personal representatives charged substantially less than $125 an hour, would you have reason to disagree with that statement?
> A: I do not feel qualified to quote prices outside of our office. I would have no idea.
> Q: That's just outside your realm of knowledge?
> A: Exactly. I'm not qualified.

(Tr. 265-66.)[2] Sietsema further testified that her experience retaining in-home services for her mother occurred in Iowa. (Tr. 221, 267.) This one-time, out-of-state experience hardly equates to knowledge of the market rate for professional service providers.

Second, Respondents allege that Sietsema had "clear conflicts of interest" in handling the Wiggs Estate. (Respondents' Br. 17, 26, 32, 38, 41, 43, 47.) Specifically, they complain that she (and Miller) should not have retained Primarius to perform work for Wiggs and the Wiggs Estate.[3] (*Id.* at 26.) Respondents argue that Sietsema had a

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[2] Notably, Respondents elicited testimony from Sietsema that she did not obtain "competitive bids" for "the services that were provided by Primarius in connection with the Wiggs estate." (Tr. 265.) Now, however, in their brief, they attempt to impute such knowledge to her. Respondents cannot have it both ways.

[3] In the July 29 Order, the probate court stated that Miller and Sietsema "engaged in self-dealing and other actions creating conflicts of interest." (July 29 Order, ¶ 23(b), A.Add. 4.) Significantly, however, the only specific conflict of interest cited by the probate court with respect to Sietsema is Sietsema's retention of Primarius. (*Id.*, ¶ 30, A.Add. 6.)

financial stake in Primarius because, as a Primarius employee, she billed her time and was paid based upon the hours she billed.[4] (*Id.* at 32; *see also* Tr. 305.) Their argument fails, however, in light of the fact that McCool – the "professional" personal representative who succeeded Miller and Sietsema – is compensated the same way as Sietsema.[5] He, like Sietsema, is paid for providing services to estates – in this case, the Neuman and Wiggs Estates. Thus, like Sietsema, he arguably has an incentive to, as described by Respondents' counsel at trial, "bill more rather than less." (Tr. 305.) How, then, is Sietsema any more conflicted than McCool?[6]

Third, Respondents claim that Miller and Sietsema "acknowledged" that they were paid "additional fiduciary fees for no additional work performed...." (Respondents' Br. 18 (citing Tr. 30, 274-75).) The testimony Respondents cite, however, contains no such admission by Miller or Sietsema. (Tr. 30, 274-75.) To the contrary, Miller testified that the personal representative fees were "for time above and beyond the care of [Wiggs]. Things we didn't charge for along the way." (Tr. 111.) Respondents' claim is therefore without merit and, at best, a misrepresentation of the record.

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[4] Miller, as the owner of Primarius, is in a different position than Sietsema with respect to this issue.

[5] Notably, McCool is the CEO of Advocative Services, Inc., a Minnesota corporation. See Advocative Services, Inc.'s Minnesota Secretary of State filing, available at http://mblsportal.sos.state.mn.us/Business/SearchDetails/8A-421?status=Active&itemType=Business%20Corporation%20(Domestic). This Court may take judicial notice of this publicly available record. *Smisek v. Comm'r of Pub. Safety*, 400 N.W.2d 766, 768 (Minn. App. 1987) ("An appellate court may take judicial notice of a fact for the first time on appeal"); *Eagan Econ. Dev. Auth. v. U-Haul Co. of Minn.*, 787 N.W.2d 523, 530 (Minn. 2010) (taking judicial notice of public records).

[6] In their brief, Respondents assert that McCool "has not put himself in a conflict of interest situation in his 25 years of acting as a court-appointed fiduciary...." (Respondents' Br. 35.) This assessment undercuts their claim concerning Sietsema.

Fourth, Respondents contend that Sietsema "intentionally" concealed information from the beneficiaries. (Respondents' Br. 18, 30.) There is no support whatsoever for this claim. Respondents purportedly rely on the testimony of Marlene Foote – Animal Ark's founder and president – to support this claim. (*Id.*) Yet nothing in Foote's testimony suggests that Sietsema intentionally or willfully hid information from Animal Ark (or the other beneficiaries). (Tr. 183-190.) Moreover, this argument is undercut by the fact that Sietsema made partial distributions to the beneficiaries. (Tr. 238-241; Tr. Exs. 51, 52, A.App. 85-85.) If, as Respondents claim, Sietsema's goal was to conceal information from the beneficiaries, why would she make substantial distributions to them?

ARGUMENT

Respondents appear to misunderstand Sietsema's argument on appeal. Sietsema does not contend that her employer-employee relationship with Miller "extinguished" her fiduciary duties. (Respondents' Br. 21, 39-45.) To the contrary, Sietsema admitted that she owed the Wiggs Estate fiduciary duties as a co-personal representative. (Tr. 269.) Rather, Sietsema contends that the probate court erred when it failed to account for this relationship in applying the reasonably prudent person standard. As a result, the probate court improperly lumped Sietsema and Miller together without regard for Miller's complete authority and control over Sietsema. In addition, Respondents have failed to rebut Sietsema's argument that there is no legal basis for holding her jointly and severally liable for repayment of the $5,000 she received from the Neuman Estate. Sietsema addresses these arguments in turn.

I. There is no basis for holding Sietsema liable for repayment of the $5,000 payment she received from Miller and the Neuman Estate.

Without citing any authority, Respondents argue that the probate court was "well within its discretion to determine Sietsema must compensate the Estates for the additional $5,000 she received as a fee or gift from the Neuman Estate." (Respondents' Br. 36.) Yet Respondents continue to ignore two key facts: first, that Sietsema was not a personal representative/fiduciary of the Neuman Estate,[7] and, second, that she neither authorized nor made the payment at issue.[8] Minnesota law is clear on this point. It is the fiduciary – in this case, Miller – who is responsible for reimbursement of improper payments to an estate. Minn. Stat. § 524.3-712.

In an attempt to circumvent these clear-cut facts and law, Respondents offer a convoluted theory as to why Sietsema should be held liable. They suggest that, because Sietsema was a fiduciary of the Wiggs Estate at the time she received this payment, she somehow acquired fiduciary duties to the Neuman Estate as well. (Respondents' Br. 36, 37.) They cite no legal authority for this proposition. Nor can they. In Minnesota, "[t]he duties and powers of a personal representative commence upon appointment." Minn.

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[7] Respondents concede that Sietsema was not a fiduciary of the Neuman Estate in their brief. (Respondents' Br. 18-19.)

[8] In their brief, Respondents allege that Sietsema "does not dispute the District Court's findings that she did no work for the $5,000...." (Respondents' Br. 36; *see also id.* at 37 ("While admitting she did not earn this payment...").) Contrary to their claim, Sietsema does, in fact, dispute that "she did no work" for this payment. As described in Sietsema's initial brief, she received this payment for her work "assist[ing] [Wiggs] with work on behalf of [Neuman]." (Tr. 29, 260.) Wiggs herself told Sietsema that she would receive something for such work. (Tr. 260-261.) Respondents have not, and cannot, dispute this evidence.

Stat. § 524.3-701. Since Sietsema was never appointed personal representative of the Neuman Estate, she never became a fiduciary to the estate.

Respondents next argue that, because administration of the Neuman Estate was commingled with that of the Wiggs Estate, Sietsema somehow owed fiduciary duties to the Neuman Estate. (Respondents' Br. 36-37.) Here, too, Respondents fail to cite any legal authority to support their claim. Moreover, while the probate court did find that administration of the two estates was commingled, it also acknowledged that there were separate personal representatives for each estate. (July 29 Order, ¶ 42, A.Add. 8 ("The Neuman Estate and the Wiggs Estate were essentially administered by their respective personal representatives as a single estate") (emphasis added).) Thus, Respondents' argument lacks both legal and factual support.

Curiously, Respondents believe that Sietsema's "fallback argument" is that she is a good-faith purchaser pursuant to Minnesota Statute §§ 524.3-713 and 524.3-714. (Respondents' Br. 38.) Sietsema has not advanced, and does not advance, such an argument in this appeal. As described in her initial brief and above, Sietsema's argument is that Miller, as the fiduciary, is responsible for any improper payments made by the Neuman Estate.

Finally, Respondents suggest that Sietsema is liable under the theory of unjust enrichment.[9] (Respondents' Br. 38-39.) Respondents did not allege or litigate such a

[9] In connection with this argument, Respondents insinuate that Sietsema knew that she was going to receive the $5,000 payment because she and Miller "talked about everything." (Respondents' Br. 38.) The testimony they purport to rely upon, however, is taken out of context. Miller testified that he and Sietsema "talked about everything,"

claim against Sietsema at trial, and the July 29 Order contains no findings regarding unjust enrichment. Consequently, this Court should disregard this argument entirely. *See Antonson v. Ekvall*, 186 N.W.2d 187, 189 (Minn. 1971) (declining to review claim that was not pleaded or litigated in the court below; "[a]n appellate court can generally consider only such issues as were raised by the pleadings or litigated by consent in the trial court below").

Respondents' tortured argument that Sietsema's status as a fiduciary of the Wiggs Estate created fiduciary duties to the Neuman Estate lacks any support and is, in a word, absurd. Minnesota law clearly provides that fiduciary obligations arise upon one's appointment as a personal representative. Respondents have not cited, and cannot cite, any authority that holds otherwise. To the extent that the $5,000 payment by the Neuman Estate to Sietsema was improper, it is Miller, and not Sietsema, who is responsible for its repayment.

II. Sietsema's status as a Primarius employee and as Miller's subordinate is central to the analysis of whether she breached her fiduciary duties to the Wiggs Estate.

As noted above, Sietsema does not contend that her employment with Primarius absolved her of her fiduciary duties to Wiggs or the Wiggs Estate. Rather, Sietsema's position is that, when applying the reasonably prudent person standard to her conduct, her

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including personal representative fees, in connection with the Wiggs Estate. (Tr. 29-30, 111-12.) He did not, as Respondents suggest, offer such testimony in connection with the Neuman Estate. (*Id.*) Indeed, as the sole personal representative of the Neuman Estate, he had no reason to discuss estate matters with Sietsema.

status as an employee and subordinate must be taken into account. As a result, this Court should vacate the July 29 Order and remand this case for further proceedings.

Minnesota law requires that a fiduciary "observe the standards of care in dealing with the estate assets that would be observed by a prudent person dealing with the property of another." Minn. Stat. § 524.3-703(a). Reasonable care is "that degree of care that a reasonably prudent person would exercise under the same or similar circumstances." *Hartmon v. Nat'l Heater Co.*, 60 N.W.2d 804, 810 (Minn. 1953) (emphasis added). *See also* Black's Law Dictionary 204 (7th ed. 1999) defining "reasonable care" as "the degree of care that a prudent and competent person engaged in the same line of business or endeavor would exercise under similar circumstances"). In applying such a standard in this case, the probate court should have considered Sietsema's circumstances: namely, her subordinate employment relationship to her co-personal representative.[10]

Significantly, Respondents do not dispute, and cannot dispute, the following evidence introduced at trial:

- Miller was solely responsible for establishing and/or modifying Primarius's billing rates (Tr. 28, 75, 140, 206, 207);

[10] Contrary to Respondents' belief, Sietsema does not contend that the probate court erred in considering McCool's testimony at trial. (Respondents' Br. 34-35.) Rather, Sietsema believes that McCool's testimony should have been discounted to the extent that he is not, and has never been, in the same or similar circumstances as Sietsema.

- Miller was responsible for reviewing Primarius's client invoices – including all invoices sent to the Wiggs Estate – and only he could adjust hours and/or rates on the invoices (Tr. 39-40, 107-108, 174-175); and
- Primarius invoices paid by the Wiggs Estate were paid by Sietsema at Miller's direction (Tr. 107-108).

Instead, Respondents argue that Sietsema should have objected to these invoices and payments. (Respondents' Br. 29-30.) As Respondents concede, however, Sietsema believed that doing so "would put her job in jeopardy." (*Id.* at 17.) The probate court failed to account for this factor in deciding whether Sietsema breached her fiduciary duties to the Wiggs Estate. It simply lumped Sietsema and Miller together without regard to Sietsema's lack of authority or ability to address such issues. (*See, e.g.,* July 29 Order, ¶ 22, A.Add. 4.)

As noted in Sietsema's initial brief, Minnesota and other courts have distinguished between the conduct of co-fiduciaries. *S. Sur. Co. v. Tessum*, 228 N.W. 326, 328-331 (Minn. 1929) (reversing finding of liability against co-guardian Oluf Tessum where his brother and co-guardian Miller Tessum used trust fund as his own and lost the sum stated); *In re Estate of Witherill*, 828 N.Y.S. 2d 722 (N.Y. App. Div. 2007) (refusing to hold co-executor jointly and severally liable for co-executor's surcharge where co-executor served a passive, subservient role in handling estate assets).[11] Here, the probate court should have done the same.

[11] In their brief, Respondents attempt to distinguish *Witherill*, asserting that the trial court in *Witherill* "chose not to surcharge the administrative assistant, finding no proof that the

Calling it the "most apt Minnesota case," Respondents rely on *White v. Martin*, 286 F. Supp. 2d 1029 (D. Minn. 2003). (Respondents' Br. 48.) *White*, however, actually supports Sietsema's argument in this case. *White* involved alleged ERISA violations by a wife/co-trustee of the company retirement plan. 286 F. Supp. 2d at 1032. In addition to alleging that she breached her own fiduciary duties, the plaintiff sought to hold the wife liable, as a co-fiduciary, for her husband/co-trustee's misconduct. *Id.* at 1041-1042. The court found her liable, as a co-fiduciary, on two of three grounds. *Id.* at 1042-1043. It refused to do so, however, where "[n]either party present[ed] much evidence of Lyn Martin's involvement in this apparent breach by Bob Martin."[12] *Id.* at 1043. Thus, like

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administrative assistant was aware of or participated in the lawyer's malfeasance." (Respondents' Br. 44.) In fact, the *Witherill* court did impose a surcharge on Ritchie, the assistant. 828 N.Y.S.2d at 726 ("Given Ritchie's passive, subservient role in handling estate assets and the assessment of surcharges against her in proportion to her conduct, we cannot say the court abused its discretion....") (emphasis added). *See also id.* at 724 ("After a nonjury trial, Surrogate's Court imposed surcharges on the coexecutors..."). Thus, unlike the probate court in this case, the surrogate's court in *Witherill* made separate findings against co-executors Barker (the attorney) and Ritchie (his former assistant) based upon their own conduct.

Moreover, Respondents' claim that the *Witherill* court characterized the lower court's decision as an "anomaly" (Respondents' Br. 45) is not at all supported by the court's opinion. Nowhere does the *Witherill* court describe the lower court's decision as anomalous; it merely notes that the lower court "acknowledged the cofiduciary liability rule" and "declined to apply it." 828 N.Y.S.2d at 726.

[12] In contrast, the court found that Lyn Martin was an active participant in one improper transaction and had advance notice of the other improper transaction, such that she could have prevented it. *White*, 286 F. Supp. 2d at 1042 ("Lyn Martin signed Bob Martin's name on the guarantees. When she did so, she knew or should have known that the guarantees would permit money to be taken from the Plan and put into the accounts of Bob Martin or [Bob Martin Trucking]"), 1043 (when Bob Martin asked Lyn Martin to withdraw $100,000 from the plan, she refused, telling him to do it himself; "Lyn Martin knew of this breach but did nothing to prevent or remedy it..."). The same cannot be said of Sietsema in this case. She was not an active participant in the decisions of Miller

the court in *Witherill*, the *White* court distinguished between conduct that was attributable to a single fiduciary and conduct that was attributable to both fiduciaries. In this case, the probate court should have done the same. Unfortunately, it did not; the July 29 Order is unclear as to what conduct is solely attributable to Miller, what conduct is solely attributable to Sietsema, and what conduct, if any, is attributable to both.

This case is not about whether Sietsema owed fiduciary duties to the Wiggs Estate. Sietsema concedes that she acquired such duties when she was appointed a co-personal representative. Instead, this case is about the reasonably prudent person standard, and whether the probate court should have considered Sietsema's subordinate role to Miller, her employer, in applying that standard. Despite Respondents' attempt to distinguish it, the *Witherill* case is most on point to such an analysis. A passive, subservient co-fiduciary should not be held liable for the misconduct of her co-fiduciary.

CONCLUSION

Respondents have failed to provide a basis, and cannot provide a basis, for finding that Sietsema is jointly and severally liable for repayment of Miller's $5,000 payment to her from the Neuman Estate. Furthermore, the probate court erred in failing to account for the unequal relationship between Sietsema and Miller – a relationship that is supported by undisputed evidence in the record – in deciding whether Sietsema breached her fiduciary duties to the Wiggs Estate. This Court should follow the reasoning and result of *Witherill*: because Sietsema played a passive, subservient role in administering

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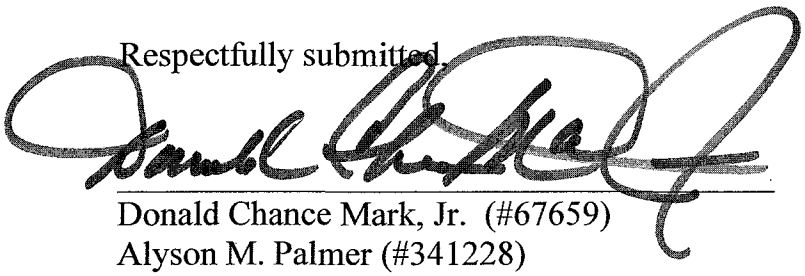
regarding Primarius's bills and payments, and she did not discover Miller's improper loans from the Neuman and Wiggs Estates until after the fact.

the Wiggs Estate, she cannot be held jointly and severally liable for Miller's misconduct. Accordingly, Sietsema respectfully requests that this Court vacate the July 29 Order (as it relates to Sietsema) and remand this case for further proceedings consistent with *Witherill*.

Respectfully submitted,



Dated: February 21, 2012

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FORM AND LENGTH CERTIFICATION

This brief was drafted using Word 2003. The font is Times New Roman, proportional 13-point font, which includes serifs. The word count of this brief is 3,269.

Dated: February 21, 2012

Donald Chance Mark, Jr.