

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1906-20

IN THE MATTER OF
THE ESTATE OF E.L.,
an incapacitated person,
now deceased.

Argued November 1, 2022 – Decided November 21, 2022

Before Judges Rose and Gummer.

On appeal from the Superior Court of New Jersey,
Chancery Division, Morris County, Docket No.
P-002459-18.

M.L., appellant, argued the cause pro se.

Michael S. Miller argued the cause for respondent E.L.
(Miller and Miller, attorneys; Michael S. Miller, on the
brief).

Matthew R. Petracca, respondent pro se, joins in the
brief of respondent E.L.

Porzio, Bromberg & Newman, PC, attorneys for
respondent David P. Nelson (Rahil Darbar, of counsel
and on the brief; David P. Nelson, on the brief).

PER CURIAM

In this guardianship matter concerning E.L. (Emma), an incapacitated person who is now deceased, Emma's mother, M.L. (Melanie), appeals pro se from a February 7, 2021 Probate Part order awarding: \$26,667.98 in counsel fees and costs to Michael S. Miller, Esq., as administrator of Emma's estate; and \$31,795.82 in fees and costs to Matthew R. Petracca, Esq., as Emma's guardian ad litem.¹ Melanie contends Miller and Petracca engaged in "negligence and malpractice" and, as such, they were not entitled to their fees.² We reject these contentions and affirm.

I.

To lend context to the issues raised, we summarize the procedural history from the motion record. Born in May 1989 to Melanie and D.L. (Daniel), Emma was diagnosed with multiple disabilities. Following her eighteenth birthday, in October 2007, Emma was declared incapacitated, and her parents were

¹ Certain records in this matter are excluded from public access pursuant to Rules 1:38-3(e) and 4:86-1(b). We use initials and pseudonyms to protect the confidentiality of the parties.

² Melanie is not appealing from the portion of the February 4, 2021 order that awarded fees and costs to her daughter, C.L. (Cathy), or another February 4, 2021 order that appointed David Nelson, Esq. as the administrator of Emma's estate.

appointed as her plenary guardians. Around the same time, a special needs trust was created for Emma, with Melanie and Daniel serving as trustees.

In October 2018, the Department of Human Services, Adult Protective Services Unit (APS), received an anonymous complaint alleging Daniel had sexually abused Emma and that she "was a vulnerable adult in need of protective services" under N.J.S.A. 52:27D-407. Emma disclosed "unwanted nighttime visits" from Daniel. Emma asserted she had reported the abuse to her mother, but Melanie responded: "[D]on't put me in the hot seat again." Melanie "offered no assistance" to her daughter. Emma's sister, Cathy, also reported that Daniel had abused her when she was a child.

Based on Emma's allegations, APS filed for an emergent protective order. Thereafter, the Probate Part appointed Petracca to serve as Emma's temporary legal guardian, and Miller to serve as her attorney.

On November 2, 2018, the Morris County assignment judge conducted a hearing. Petracca reported Emma's fear and advised the judge that Emma "d[id] not wish to see her mother or father." At the conclusion of the hearing, the judge denied Melanie's alternate applications for the return of Emma to her care or parenting time. Melanie was represented by counsel at the hearing; she did not appeal from the judge's order.

During the next hearing on December 21, 2018, Petracca disclosed that he had permitted "one temporary visit," but "it negatively . . . impacted [Emma]." The assignment judge denied parenting time. Melanie was represented by the same lawyer at the hearing and did not appeal from the judge's order.

Sometime in December 2018, Petracca filed a verified complaint on behalf of Emma seeking to remove Daniel and Melanie as her legal guardians.³ Petracca alleged Daniel and Melanie misused \$325,000 – that Emma inherited from a relative in 2010 – to pay their mortgage. Daniel and Melanie executed a promissory note to Emma's special needs trust, but the note provided for no interest and was not due and payable until both parents died.

In July 2019, the parties signed a consent judgment: relieving Petracca as Emma's temporary guardian; appointing Cathy as plenary guardian and establishing "the [E.L.] Self-Settled Special Needs Trust." Daniel and Melanie agreed to sell their home and reimburse Emma's trust.

Emma died in October 2020, survived by Melanie, Daniel, and Cathy. At the time of Emma's death, several issues pertaining to the guardianship proceedings remained unresolved. Miller held about \$350,000 in his attorney trust account.

³ The complaint was not provided on appeal.

On December 3, 2020, Miller moved for payment of his outstanding fees, Petracca's outstanding fees, and reimbursement of Cathy's expenses. Originally scheduled for December 14, 2020, the return date for the motion was carried for two weeks to permit Melanie's counsel to file opposition.

At some point, the motion hearing was rescheduled for January 28, 2021. Around 5:00 p.m. on January 27, Melanie's attorney filed opposition, contending – for the first time during the guardianship proceedings – Miller and Petracca were negligent or had committed malpractice.

Following oral argument, the motion judge reserved decision. The judge thereafter granted the motion, issuing a cogent statement of reasons that accompanied the February 4, 2021 order under review. Pertinent to this appeal, the judge found the fees incurred by Miller and Petracca pursuant to their court-appointed roles were "reasonable and appropriate." Addressing Melanie's response to the motion, the judge stated:

Opposition to the motion was filed at 5 p.m. the day before oral argument, almost two months after the motion was filed and after an adjournment to file timely opposition. Despite [M.L.]'s eleventh[-]hour opposition and allegations that Mr. Miller and Mr. Petracca acted negligently and inappropriately toward her in the course of their representation of [Emma], these allegations were not raised in the several years of ongoing litigation, are raised only now in opposition to the motion for fees, and there was never any indication

to this [c]ourt of misconduct on the part of Mr. Miller and Mr. Petracca. Mr. Miller and Mr. Petracca owed no independent duty to [M.L.], who was and remains represented by counsel and could have raised these issues throughout the course of the litigation. [M.L.]'s unhappiness with the outcome of the guardianship proceedings is no basis to deny the fees incurred by attorneys appointed by this [c]ourt.

This appeal followed.

On appeal, Melanie seeks: the appointment of a guardianship expert "to review this case in its entirety"; "legal sanctions" against Miller and Petracca "to prevent them from representing another individual with disabilities or child in matters of guardianship or parental custody"; and the clearing of her "name and reputation of all libel and slander by false and erroneous statements made without facts or justifiable proof or reason and without evaluations, assessments[,] or investigations."

Melanie raises the following points for our consideration:

[POINT I]⁴

The [c]ourt erred in allowing the rights of an individual with disabilities to be violated without facts or justifiable proof of reason and without evaluations, assessments or investigations.

⁴ Melanie's point headings fail to comply with Rule 2:6-2(a)(6), which mandates the inclusion of "the place in the record where the opinion or ruling in question is located or, if the issue was not raised below, a statement indicating that the issue was not raised below." We nevertheless have considered her arguments.

[POINT II]

The [c]ourt erred in approving payment to Matthew Petracca and Michael Miller in their negligence and malpractice and without question, accountability, supervision, or oversight.

[POINT III]

The [c]ourt erred in upholding the separation of mother and child/daughter, and not allowing any contact whatsoever except for one brief visit, without facts or justifiable proof of reason and without evaluations, assessments or investigations.

[POINT IV]

The court erred in allowing the rights of an individual with disabilities to be violated in the negligent and fraudulent representation by Michael Miller as Emma's court appointed attorney.

[POINT V]

The court erred in allowing prejudice and bias to prevail. Life changing decisions were made without evaluations, assessments and investigations.

[POINT VI]

The [c]ourt erred in failing to conduct evaluations, assessments and investigations.

[POINT VII]

The [c]ourt erred in demanding termination of an innocent mother as guardian, and relinquished the process of reunification that was an integral component

promised in [s]ettlement, without facts or justifiable proof of reason and without evaluations, assessments or investigations.

[POINT VIII]

On Jan[uary,] 28, 2021[,], the court erred in neglecting to acknowledge and address any of the previous errors of the [c]ourt as stated in my [c]ertification and referenced in this [b]rief.

In her reply brief, Melanie raises additional contentions under five separate headings entitled: (1) "Michael Miller's Notice of Motion for Fees Incurred by Him in This Appeal"; (2) "Abuse of Guardianship Power and Authority"; (3) "Morris County Court Records"; (4) "Administrator of [Emma]'s Estate";⁵ and (5) "Michael Miller's Brief."

Having considered Melanie's contentions in view of the applicable legal principles, we conclude they lack sufficient merit to warrant extended discussion in a written opinion, R. 2:11-3(e)(1)(E). We add only the following remarks.

As a preliminary matter, the contentions raised in points I, and III through VI, are procedurally barred. Melanie was represented by counsel throughout the

⁵ For the first time in her reply brief, Melanie challenges Nelson's appointment as the Estate's administrator. We will not consider the issue because an issue not addressed in a party's initial merits brief is deemed waived. See Drinker Biddle & Reath LLP v. N.J. Dept. of Law & Pub. Safety, 421 N.J. Super. 489, 496 n.5 (App. Div. 2011).

guardianship proceedings and did not appeal from the 2018 orders. Our review of a trial court's decision is strictly circumscribed by the notice of appeal (NOA). See R. 2:5-1(f)(2)(ii); see also Kornbleuth v. Westover, 241 N.J. 289, 298-99 (2020). Here, the only order Melanie identified in her NOA is the motion judge's February 4, 2021 order, granting Miller's motion. We therefore decline to consider Melanie's arguments concerning the 2018 orders.

Further, while represented by counsel, Melanie signed the consent judgment that resolved the guardianship proceedings. Ordinarily, an order entered with the consent of all parties is not directly appealable "for the purpose of challenging its substantive provisions." Pressler & Verniero, Current N.J. Court Rules, cmt. 2.2.3 on R. 2:2-3 (2023); see also N.J. Sch. Constr. Corp. v. Lopez, 412 N.J. Super. 298, 308-09 (App. Div. 2010) (orders entered by consent are not appealable "because [Rule 2:2-3] allowing an appeal as of right from a final judgment contemplates a judgment entered involuntarily against the losing party"). Instead, the proper recourse is to move before the trial court for relief from judgment under Rule 4:50-1. See, e.g., Cnty. Realty Mgmt. v. Harris, 155 N.J. 212, 237 (1998); Jersey City v. Roosevelt Stadium Marina, 210 N.J. Super. 315, 326, 332 (App. Div. 1986). Here, Melanie sought no such relief in the trial court.

As to the contentions raised in point II, we note Melanie does not challenge the reasonableness of the fees awarded to Miller and Petracca. At oral argument before us, Melanie confirmed she opposes the fee award based on the conduct of Miller and Petracca, not the amount of the fees charged. Issues not briefed are waived. See In re Bloomingdale Convalescent Ctr., 233 N.J. Super. 46, 48-49 n.1 (App. Div. 1989); Pressler & Verniero, Current N.J. Court Rules, cmt. 5 on R. 2:6-2 (2023).

Further, Melanie did not file a motion or complaint challenging the conduct of Miller or Petracca during the guardianship proceedings. We consider Melanie's claims in view of well-established principles.

New Jersey follows the so-called American Rule as to counsel fees. In re Est. of Folcher, 224 N.J. 496, 506-07 (2016). Litigants are responsible for their own counsel fees absent a statutory, court rule, contractual, or court-sanctioned basis for the award of fees to a prevailing party. Ibid. (citing R. 4:42-9(a)). One such exception pertains to guardianship actions. Pertinent to this appeal, "the court may allow a fee in accordance with [Rule] 4:86-4(e) to . . . counsel appointed to represent the alleged incapacitated person" R. 4:42-9(a)(3). In turn, Rule 4:86-4(e) permits the court to fix appointed counsel's fee and order that it "be paid out of the estate of the alleged incapacitated person or in such

other manner as the court shall direct." Similarly, those rules permit payment to the guardian ad litem.

When, as in this case, counsel fees are permitted, "a reviewing court will disturb a trial court's award of counsel fees 'only on the rarest of occasions, and then only because of a clear abuse of discretion.'" Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 386 (2009) (quoting Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001)).

The elements of a negligence cause of action are well-settled. "To sustain a cause of action for negligence, a plaintiff must establish four elements: '(1) a duty of care, (2) a breach of that duty, (3) proximate cause, and (4) actual damages.'" Townsend v. Pierre, 221 N.J. 36, 51 (2015) (quoting Polzo v. Cnty. of Essex, 196 N.J. 569, 584 (2008)). A plaintiff bears the burden of proving negligence, which is never presumed. Khan v. Singh, 200 N.J. 82, 91 (2009).

Legal malpractice suits are grounded in negligence law and require three elements: "(1) the existence of an attorney-client relationship creating a duty of care by the defendant attorney, (2) the breach of that duty by the defendant, and (3) proximate causation of the damages claimed by the plaintiff." McGrogan v. Till, 167 N.J. 414, 425 (2001); see also Jerista v. Murray, 185 N.J. 175, 190-91 (2005). In "exceedingly narrow" circumstances, a third-party "may pursue a

malpractice claim against an attorney with whom there was no attorney-client relationship." Green v. Morgan Props., 215 N.J. 431, 458 (2013); LoBiondo v. Schwartz, 199 N.J. 62, 102, 116 (2009) (recognizing an attorney's duty to a non-client "has been applied rather sparingly," only in "carefully circumscribed" holdings).

Having reviewed the record in view of Melanie's "eleventh-hour" allegations against Miller and Petracca, we affirm the February 7, 2021 order substantially for the reasons articulated by the motion judge, to which we defer. Litton Indus., Inc., 200 N.J. at 386. Melanie was represented by the same attorney throughout the pendency of the guardianship action, executed a consent order resolving that action, and failed to raise any allegations of impropriety against Miller and Petracca until her late response to Miller's motion for fees. Those circumstances do not establish the imposition of any duty from Miller or Petracca to Melanie.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION