

CAUSE NO. 479,995

IN THE ESTATE OF NATALIA
VELASQUEZ,

DECEASED

§
§
§
§
§

IN THE PROBATE COURT

NUMBER THREE

HARRIS COUNTY, TEXAS

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

TO THE HONORABLE JUDGE COX:

COMES NOW FRANCES VILLANEUVA, VICTOR VELASQUEZ, AND RUBEN VELASQUEZ (“MOVANTS”), Interested parties and heirs of the Estate of Natalia Velasquez, and files this Motion for Judgment notwithstanding the verdict in the above-referenced matter. MOVANTS are entitled to judgment as a matter of law by (A) res judicata, (B) the prohibition on gifting found in Judge Rory Olsen’s July 27, 2017, Court Order, and (C) the May 7, 2018, Agreed Judgment based upon the Parties October 31, 2017, Mediated Settlement Agreement Cause No. 459593. In support of said Motion for judgment notwithstanding the verdict, MOVANTS allege as follows:

RULE 201: JUDICIAL NOTICE

Pursuant to Texas Rule of Civil Procedure 201, MOVANTS request that the Court take judicial notice of adjudicated facts, court orders, pleadings, and other documents / evidence filed in the following related cases: Cause Number 459593 (Guardianship proceeding of Natalia Velasquez, an incapacitated person), Cause Number 459593-401 (Motion for Enforcement of Agreed Judgment and Suit for fraud and breach of contract against Velma Buzo), Cause Number 479995 (probate and will contest of the estate of Natalia Velasquez, deceased), and Cause Number 2019-32770; *Natalia Velasquez and Velma Velasquez Buzo vs. William Velasquez, et al., In the 157th Judicial District Court of Harris County, Texas.*

JUDGMENT NOTWITHSTANDING THE VERDICT

MOVANTS are entitled to judgment notwithstanding the verdict because they are entitled to judgment as a matter of law based upon the principle of res judicata and Judge Olsen's Court order prohibiting gifting dated July 27, 2017. *Whitney Nat. Bank vs. Baker*, 122 S.W.3d 204, 207 (Tex. 2003); *Phar-Mor, Inc. vs. Chavira*, 853 S.W.2d 710, 713 (Tex. 1993). A motion for judgment notwithstanding the verdict should be granted when the evidence is conclusive, and one party is entitled to recover as a matter of law. *Phar-Mor, Inc. v. Chavira*, 853 S.W.2d 710, 713 (Tex.App.-Houston [1st Dist.] 1993, writ denied). *Whitney Nat. Bank v. Baker*, 122 S.W.3d 204, 207 (Tex. App. 2003). The granting or denial of a Motion for judgment notwithstanding the verdict is reviewed under a legal sufficiency standard by appellate courts. *See Moore v. Bank Midwest, N.A.*, 39 S.W.3d 395, 400 (Tex.App.-Houston [1st Dist.] 2001, pet. denied). When, as here, an affirmative defense was not submitted to the jury, we review the record to determine whether the issue was disputed or whether the defense was conclusively established by the evidence. *See T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 222-23 (Tex. 1992) (stating, "Only disputed issues must be submitted to the jury.")

FACTS AND PROCEDURAL HISTORY

1. NATALIA VELASQUEZ is the decedent who was previously adjudicated to be an incapacitated person May 7, 2018, by an Agreed Order of the Court approving an October 31, 2017, Mediated Settlement Agreement involving an alternative to guardianship for her incapacity. *The Agreed Judgment and Mediated Settlement Agreement is attached and incorporated by reference.* Cause Number 459593 (Guardianship proceeding of Natalia Velasquez, an incapacitated person).

2. Natalia Velasquez was born November 29, 1929, and suffered from late-stage Parkinson's disease (diagnosed 2008), with prior stroke, CVA, and mild cognitive impairment, in addition to a long list of severe health problems at the time the guardianship proceeding was filed in July of 2017. She had six children: Patsy Jeude (deceased), Velma Buzo, William Velasquez, Ruben Velasquez, Victor Velasquez, and Frances Villaneuva.

3. On June 3, 2017, Velma Buzo's attorney, Alex Lieber-Alessie, executed three legal documents with Natalia Velasquez¹:

a. Medical Power of Attorney designating Velma Buzo

b. Durable Power of Attorney designating Velma Buzo with William Velasquez as first alternate agent in fact

c. Last Will and Testament of Natalia Velasquez, bequeathing her entire estate in equal portions to her six children. Velma Buzo was designated independent executor in the June 3, 2017, Will. *See attached.*

4. On July 21, 2017, Patsy Jeude filed an application for guardianship of Natalia Velasquez, attesting to her incapacity and stating that over \$90,000 was missing from Natalia's account.

5. On July 26, 2017, Velma Buzo filed a cross application for permanent guardianship of the person and estate of Natalia Velasquez attesting to her mother's inability to do the following things without substantial assistance: make doctor's appointments, attend doctor's appointments and seek medical treatment when necessary, bathing and personal hygiene, dressing, picking up and ensuring proper medications are taken, shopping, house maintenance, church attendance. By virtue of the medical and durable power of attorney Velma had her attorney execute in her favor on June 3, 2017, she had already admitted and was estopped from denying that her mother needed

¹ Alex-Lieber Alessie notarized all documents with his two close relatives serving as alleged disinterested witnesses.

assistance managing her personal and financial affairs almost completely. She admits in her application that she had had to be her mother's caretaker since 2014 and has overseen her financial affairs. She sought a termination of her right to vote, decide her residence, manage her financial affairs, drive and admitted Natalia needed daily assistance with almost every activity of daily living, which is a judicial admission of total incapacity which she is estopped to deny under the doctrines of equitable and judicial estoppel. *See Cross Application for Appointment as Permanent Guardian of the Person and Estate of Natalia Velasquez, an incapacitated person.*

6. Based on the allegations in the applicant and cross-applicant's petitions for permanent guardianship of the estate and person of Natalia Velasquez, the Court Ordered the following on July 27, 2017, after conducting an evidentiary hearing:

a. Dr. Troyan or Dr. Norris (Natalia's neurologist) or current treating physician to provide medical records sufficient for the proposed ward's assessment for capacity by August 1, 2017

b. **No withdrawals from any and all of the proposed ward's accounts from any financial institution other than basic living expenses not in excess of approximately \$1350 per month, other than air conditioner repair**

c. Statements from all of the proposed ward's accounts shall be made available to all attorneys of record.

d. All attorneys shall exchange any account information at least five (5) days prior to any reset dates, that are available. *See July 27, 2017, Order of Judge Amy Parsons, attached hereto.*

7. Without telling the court, Velma and her attorney, Alex Lieber-Alessie, took Natalia from her home to Wells Fargo bank the day before and withdrew \$45,000 (to pay Lieber-Alessie) the day before the hearing.

8. On July 28, 2017, William's attorney demanded the return of the \$45,000 intended to pay Lieber-Alessie's legal fees, of which \$5000 was never returned.

9. On July 28, 2017, Velma Buzo took Natalia from her home and all of her belongings with no notice to the court, GAL, AAL or siblings. A missing person's report was filed based upon this reprehensible conduct. Natalia was never permanently moved back to her home but only permitted to stay there three days per week when her children would alternate taking care of her.

10. When the attorney ad litem, Michelle Goldberg, learned of Alex Lieber-Alessie's misconduct, she moved for sanctions and disqualification of Lieber-Alessie.

11. On July 31, 2017, Dr. John Norris, treating neurologist of Natalia Velasquez, executed a certified medical examination report for the court, concluding that Natalia was "incapacitated" according to the legal definition of Section 1002.017 of the Texas Estates Code. Section 1002.017 defines "incapacitated person" as an adult, because of physical or mental condition, is substantially unable to: (a) provide food, clothing or shelter for himself or herself, (b) care for the person's own physical health, or (c) manage the person's own financial affairs.

12. Dr. Norris specifically stated that Natalia was partially incapacitated with Parkinson's disease, mild cognitive impairment, mild cerebrovascular changes, progressive physical disability, mild cognitive difficulty in the last few years, and concluded that her prognosis will worsen her cognitive decline in the later stages of Parkinson's disease. He indicated that improvement in her physical condition and mental functioning was not possible. *See Certified CME dated July 31, 2017.* Her medical records further indicate that she suffered from a constant untreatable urinary tract infection, malnutrition, dehydration, and other ailments which would have placed her in a constant state of mental decline, if not delirium (transient dementia-like condition).

13. Based on the CME, the parties entered into a preliminary agreement which was later made legally binding by the mediated settlement agreement executed by all parties and approved by the court.

14. On August 2, 2017, the Court held a hearing in which Natalia Velasquez and all interested persons attended. The purpose of the hearing was for the Judge to examine the ward, review the CME, and order mediation based upon the terms of the preliminary July 31, 2017, agreement attached as exhibit A. *See Transcript attached hereto*, MSA and attached exhibit A.

15. Natalia's guardian ad litem, Howard Reiner concluded that a guardianship was necessary due to financial exploitation and Natalia's substantial physical and personal needs and disability, leaving her incapable of living alone or managing her financial affairs. See pg. 5. In fact, the only reason a temporary guardianship pending contest was not recommended was due to the urgency of Natalia's needs, both physically and financially. Reiner noted that if an agreement couldn't be reached in 45 days, Natalia would have to be placed in a nursing home and have her home sold. P. 6.

16. After this hearing, Natalia's children and their attorneys, Natalia's guardian ad litem, and attorney ad litem attended mediation and entered into a binding mediated settlement agreement in which they agreed that William Velasquez would have the exclusive durable power of attorney (with Velma resigning as durable power of attorney), Velma Buzo would continue to serve as medical power of attorney subject to specific notice requirements to her siblings regarding Natalia's medical condition and all medical appointments, treatments and emergencies. The siblings also agreed on a specific visitation schedule and defined any shared rights the siblings would share. *See attached mediated settlement agreement and Exhibit A, the preliminary*

agreement to mediation signed July 31, 2017. Under Texas law, a mediated settlement agreement is binding and irrevocable.

17. Moreover, all parties and ad litem necessarily agreed that Natalia was incapacitated, or they would have had no authority to sign the MSA, nor would the court have had any authority to approve it—without Natalia’s signature which was missing.

18. On March 7, 2018, the Honorable Rory Olsen signed an agreed judgment approving the Mediated Settlement Agreement based upon Dr. Norris’ CME which concluded that Natalia was “incapacitated” within the meaning of the Texas Estates Code. *See Order approving mediated settlement agreement and mediated settlement agreement.*

19. On April 19, 2018, Velma informed the siblings that her mother would no longer be returned to her home.

20. From April to November, Velma sometimes notified the siblings of Natalia’s medical appointments, emergencies and care, but remained in violation of the MSA by refusing to return Natalia to her home so that the siblings could enjoy the agreed upon visitation schedule.

21. Without a restoration of capacity, a void revocation of William’s power of attorney was executed by Natalia Velasquez May 18, 2018. See attached.

22. Natalia was hospitalized consistently during 2018 with each record noting a persistent untreatable urinary tract infection, known to cause delirium and cognitive impairment in the elderly. She was also diagnosed with malnutrition, dehydration, and a long list of health problems including a broken femur.

23. On October 25, 2018, Alex Lieber-Alessie appears on the scene once again and has Natalia Velasquez execute a Gift Deed of her home to Velma Buzo, a second Last Will and Testament naming Velma Buzo as sole heir and beneficiary to her entire estate. No medical report was

provided prior to the execution of these legal documents indicating that Natalia had the capacity to execute them.

24. In fact, it was not until November 16, 2018, three days after Natalia was released from the hospital for treatment for a UTI, that Lieber-Alessie had his chosen physician, Dr. Rafael Valenzuela, M.D. execute an inadmissible report stating that “based upon [Natalia’s] clinical history, physical examination and cognitive assessment, the patient is capable of making independent personal and healthcare decisions due to the cognitive assessment being within normal limits.” The report failed to satisfy the reliability requirements of Texas Rule of Evidence 702, failed to identify the required capacities of a certified medical report under Section 1002 of the Texas Estates Code, and never said that Natalia had the capacity to execute a legal document, deed, will, or manage her finances. *See Report of Dr. Valenzuela attached.* This doctor was hand-picked by Lieber-Alessie, the same attorney involved in the financial exploitation of Natalia Velasquez on July 26, 2017, the same attorney who represented Velma in her divorce and drafted the first will, choosing to notarize it too and have his relatives witness it. He had significant conflicts of interest and was involved in fraud, bad faith, and exploitation of Natalia in the middle of the guardianship proceedings. Nothing he did was trustworthy or ethical and the siblings were not informed that Natalia had this secret medical evaluation by a doctor who was a stranger to Natalia, but not Alex Lieber-Alessie.

25. On April 5, 2019, based upon Velma’s unethical exploitation of Natalia, William Velasquez sued Velma Buzo for enforcement of the agreed judgment, fraud and breach of contract. *Cause No. 459593-401; Probate court 3.* The lawsuit was not pursued by his attorney—apparently due to Velma’s reactionary lawsuit for trespass to try title against William Velasquez on May 10, 2019. Notably, Natalia lacked the capacity to sue William and Velma lacked legal authority to sue

William because William had exclusive durable power of attorney which was not removed by any court.

26. In fact, Velma's attorney did not prepare the revocation of William's durable power of attorney until approximately 8 days after the lawsuit against William was filed, rendering the entire proceeding void as a matter of law for lack of standing. Natalia lacked the capacity to revoke a durable power of attorney. An incapacitated person may only revoke a medical power of attorney, according to the Texas Health and Safety Code Section 155.166.

27. Although a Temporary Restraining order and Temporary Injunction was signed against William Velasquez, no court had revoked his durable power of attorney, rendering the orders void. As a consequence, William could not possibly have violated the injunction by moving money to protect his mother from Velma Buzo. Thus, the contempt order is void and he should not have been fined for transferring her property for his mother's protection either.

28. Instead, Velma Buzo was the party in contempt of the Guardianship court's May 7, 2018, Order approving the parties' mediated settlement agreement, and the July 27, 2017, Order issued by Judge Amy Parsons prohibiting removal of funds by any person in excess of \$1350. Velma Buzo was the person who financially exploited her mother with void documents.

29. Due to Natalia Velasquez's adjudication as "incapacitated" in a prior guardianship proceeding in which alternatives to guardianship were granted by the Court, which could not have been granted unless she was incapacitated and the fact that her capacity was never restored or even acknowledged prior to the execution of the gift deed to Velma Buzo and October 25, 2018 Last Will and Testament, gifting her entire estate to Velma Buzo, both of the foregoing documents are void as a matter of law and MOVANTS are entitled to judgment reflecting this fact. The court is

bound by Rule 201 to take judicial notice of adjudicated facts—namely, that Natalia Velasquez was an incapacitated person who was incapable of executing a deed or will after May 7, 2018.

30. The Court should rule as a matter of law that the October 25, 2018, Gift Deed and Last Will and testament, as well as the May 18, 2018, revocation of William Velasquez’s Durable power of attorney are void under principles of res judicata.

RES JUDICATA

31. The latin phrase “res judicata” means that the matter has been adjudged; a thing judicially determined, or a matter settled by judgment. The principle of res judicata is an old one founded upon public policy. Its function is to expedite justice by putting an end to litigation and to preserve the sanctity of judgments. An existing final judgment rendered upon the merits by a court of competent jurisdiction upon a matter within its jurisdiction is conclusive of the rights of the parties in all other actions on the points at issue and adjudicated in the first suit. *Permian Oil Co. v. Smith*, 129 Tex. 413, 107 S.W.2d 564 (1937); 2 *Freeman on Judgments* (5th ed.) 1322.

32. Further, the rule of res judicata in Texas bars litigation of all issues connected with a cause of action or defense which, with the use of diligence, might have been tried in a former action as well as those which were actually tried. *Ogletree v. Crates*, 363 S.W.2d 431 (Tex. 1963); *Restatement of Judgments* 159, *Introductory Notes to Section 41*. Stated differently, a party cannot relitigate matters which he might have interposed, but failed to do so, in an action between the same parties or their privies in reference to the same subject matter. *Freeman vs. McAninch*, 27 S.W. 97 (Tex. 1894).

33. Clearly, the matter of Natalia Velasquez’s incapacity was litigated and settled by judgment by order of Judge Rory Olsen on May 7, 2018. Without a restoration of capacity proceeding,

Natalia remained incapacitated within the meaning of the Texas Estates Code through the time of her death. A person's capacity cannot be restored once they are dead.

34. In conclusion, MOVANTS are entitled to judgment as a matter of law that the October 25, 2018, Gift Deed to Velma Buzo and October 25, 2018, Last Will and Testament are void, leaving the only valid document concerning the estate of Natalia Velasquez the June 3, 2017, Last Will and Testament of Natalia Velasquez, attached hereto and incorporated by reference.

UNREASONABLE AND UNNECESSARY ATTORNEYS' FEES

35. Given that all of the foregoing litigation was unreasonable, unauthorized and unnecessary after the May 7, 2018, Guardianship Order of Judge Rory Olsen, the \$250,000 in attorneys' fees incurred by Deborah Newman and \$180,000 incurred by Jason Klein are unreasonable and unnecessary as a matter of law and should be denied, despite the jury's verdict.

36. Even though the Texas Estates Code authorizes attorneys' fees to applicants and cross-applicants in will contest, fees may not be granted from an estate unless a party acts in good faith. In this matter, with the level of malfeasance and gross negligence in terms of the results obtained, neither counsel can satisfy their burden that their fees are necessary or reasonable. After all of this litigation, the June 3, 2017, still has to be probated, making the whole process begin anew. The level of expertise of counsel involved proves this could not have been due to oversight, but either bad faith or gross neglect.

37. In *Tam Trust*, the Texas Supreme Court cited *Farrar v. Hobby*, 506 U.S. 103, 114, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992), which held that "'the degree of the plaintiff's overall success goes to the reasonableness' of a fee award" and "'the most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained.'" *Tam Trust*, 296 S.W.3d at 548 (quoting *Farrar*, 506 U.S. at 114 (citations omitted)). Although the amount of the fees requested

by Ware was reflected on time sheets and affidavits, the trial court determined the amount requested was unnecessary in view of the circumstances of the case, and unreasonable . *See Tam Trust*, 296 S.W.3d at 548.

38. An appellate court reviews a trial court's award of attorney fees for abuse of discretion. *See Bocquet v. Herring*, 972 S.W.2d 19, 20-21 (Tex. 1998). An appellate court may conclude a trial court abuses its discretion if a trial court's decision is arbitrary, unreasonable , and without reference to guiding principles, or if the court rules without supporting evidence. *Unifund CCR Partners v. Villa*, 299 S.W.3d 92, 97 (Tex. 2009). A trial court's determination that claimed hours or fees are excessive, duplicative, or unreasonable is given considerable deference. *See generally El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 758-64 (Tex. 2012). *Ware v. United Fire Lloyds*, No. 09-12-00061-CV, at *6-7 (Tex. App. May 9, 2013).

39. MOVANTS attach the fee bill of Jason Klein for the court's review and the fee bill of Deborah Newman has been provided to the court.

40. MOVANTS request the foregoing relief based upon the facts and law stated in this Motion. MOVANTS' inheritance is threatened by the unethical, unlawful actions of Velma Buzo and the attorneys in this case and the court should not permit this injustice to continue given the unclean hands involved.

Respectfully submitted,

Candice Schwager

Candice Leonard Schwager

Schwager Law Firm

SBN 24005603

16807 Pinemoor Way

Houston, Texas 77058

Tel: 832-857-7173

candiceschwager@outlook.com

ATTORNEY FOR FRANCES

**VILLANEUVA, VICTOR VELASQUEZ
& RUBEN VELASQUEZ**

CERTIFICATE OF SERVICE

I Candice Leonard Schwager hereby certify that all counsel of record were served with the foregoing this 2nd day of May 2022 via Texas e-file.

Candice Schwager
Candice Leonard Schwager