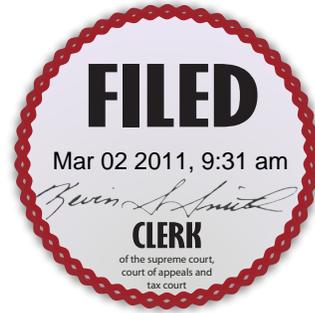


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JONI K. SHAW,)
)
Appellant-Plaintiff,)
)
vs.)
)
COVENANT CARE WALDRON HOME, LLC)
d/b/a WALDRON HEALTH & REHAB CENTER,)
)
Appellee-Defendant.)

No. 73A04-1005-SC-317

APPEAL FROM THE SHELBY SUPERIOR COURT
The Honorable Russell J. Sanders, Judge
Cause No. 73D02-0911-SC-1719

March 2, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Joni K. Shaw appeals a small-claims judgment in favor of Covenant Care Waldron Home, LLC d/b/a Waldron Health & Rehab Center (Waldron Health) in an action for the payment of fees incurred while Shaw's mother was a resident at Waldron Health. Shaw presents the following restated issue for review: Did the small-claims court err in rendering judgment in favor of Waldron Health?

We affirm.

The facts favorable to the judgment are that Waldron Health is a nursing home facility located in Waldron, Indiana. Shaw admitted her mother, Janice McDaniel, into Waldron Health for two separate stays. The first was in February 2009 and the second was from April 1 - May 12, 2009. Prior to this, on April 26, 2006, McDaniel signed a medical power of attorney naming Shaw as her attorney-in-fact. This power of attorney authorized Shaw to arrange for McDaniel's hospitalization or convalescent care and to pay physicians and other medical professionals for services rendered on behalf of McDaniel. It also authorized Shaw to transact business on behalf of McDaniel and to write checks for her mother. Upon admitting McDaniel into Waldron Health on April 1, Shaw signed an Admission Agreement. On the Admission Agreement, Shaw signed her name and indicated her relationship to McDaniel as "Daughter/POA" on the line labeled "Signature of Patient or Responsible Party." *Appellee's Appendix* at 6. The Admission Agreement stated, in pertinent part: "I, or we, agree to be responsible and to pay for, where due, all sums due and owing to the facility for the above named Patient [McDaniel], in accordance with all the terms and conditions fully set forth in the admission agreement hereof which I, or we, agree to abide." *Id.*

During McDaniel's second stay at Waldron Health, in April 2009, Shaw obtained, completed, and submitted a Medicaid application on McDaniel's behalf seeking assistance from Medicaid in paying Waldron Health's charges. On June 4, 2009, the Indiana Family and Social Services Administration sent a notice addressed to McDaniel indicating that her application for Medicaid had been denied for the following reasons:

- FAILURE TO COMPLETE AND SIGN THE REQUIRED APPLICATION. THE [sic] PART 3 OF THE APPLICATION FOR ASSISTANCE WAS NOT RETURNED DURING THE APPLICATION PROCESS.

- FAILURE TO COOPERATE IN VERIFYING THE VALUE OF RESOURCES.

Id. at 8. Shaw learned that the application was denied because McDaniel had a Monumental Insurance life insurance policy with cash value that had to be exhausted in order for McDaniel to qualify for Medicaid benefits. Shaw, who was not a beneficiary under the policy, refused to cash-in the policy. Ultimately, Medicaid never approved McDaniel's application for benefits.

Shaw had two personal checking accounts at Fifth Third Bank, one of which is relevant here. We shall refer to this as Shaw Account 1. At some point in mid-2009, Shaw opened a personal checking account for McDaniel at Fifth Third. The account was entitled, "Janice L. McDaniel by Joni K. Shaw" (the McDaniel/Shaw account). *Id.* at 10. On June 12, 2009, Shaw received, on behalf of her mother, a payment of \$5,000 from Monumental Insurance under a cancer policy. Shaw was not a beneficiary under this policy. A letter accompanying the payment stated that the money was "to cover" McDaniel. *Id.* at 36. Shaw deposited the \$5,000 payment from Monumental Insurance for her mother directly into Shaw

Account 1.

McDaniel died on June 19, 2009. Three days later, on June 22, Shaw withdrew \$400 from the McDaniel/Shaw Account. On June 25, 2009, Shaw electronically transferred \$500 from the McDaniel/Shaw Account into Shaw Account 1. She made a similar transfer of \$60 three days later. Shaw also had another personal bank account with National City Bank (Shaw Account 2). On October 26, 2009, Shaw deposited \$8,000 into Shaw Account 2. The money was given to her by her brother who, as a beneficiary under McDaniel's Monumental Insurance life insurance policy, had received \$24,000 or \$25,000. The money he paid to Shaw came from those proceeds.

As of August 31, 2009, McDaniel owed \$5,709.40 to Waldron Health for services provided to her from April 1 – May 12, 2009. Shaw refused to pay that amount on behalf of McDaniel. On November 9, 2009, Waldron Health filed suit against Shaw seeking to recover the amount of McDaniel's unpaid debt, alleging breach of contract, constructive fraud, and breach of fiduciary duty. A bench trial was held on February 10, 2009, at the conclusion of which the trial court took the matter under advisement and instructed both parties to file a brief setting out their legal argument and accompanying authority. Both parties complied. On April 9, 2010, the court entered judgment in favor of Waldron Health and against Shaw in the amount of \$5709.40, plus court costs, for a total judgment of \$5798.40. Shaw appeals.

This case was tried before the bench in small-claims court. In such cases, we review for clear error. *McKeighen v. Daviess County Fair Bd.*, 918 N.E.2d 717 (Ind. Ct. App. 2009). Although we are particularly deferential to the trial court in small-claims actions with

respect to factual determinations and conclusions flowing from those facts, we owe no deference to a small-claims court's legal conclusions regarding questions of law, which we review de novo. *Olympus Props., LLC v. Plotzker*, 888 N.E.2d 334 (Ind. Ct. App. 2008). We will affirm a judgment in favor of a party having the burden of proof if the evidence was such that a reasonable trier of fact could conclude that the elements of the claim were established by a preponderance of the evidence. *Lowery v. Housing Auth. of City of Terre Haute*, 826 N.E.2d 685 (Ind. Ct. App. 2005). We presume the trial court correctly applied the law and give due regard to the trial court's opportunity to judge the credibility of the witnesses. *Id.* We will not reweigh the evidence and we will consider only the evidence and reasonable inferences therefrom that support the trial court's judgment. *Id.*

We note that the judgment rendered in favor of Waldron Health was a general judgment in that it was unaccompanied by findings and conclusions. A general judgment will be affirmed upon any legal theory consistent with the evidence. *Clark v. Hunter*, 861 N.E.2d 1202 (Ind. Ct. App. 2007). As noted above, Waldron Health offered three theories of recovery and the trial court need only have found in Waldron Health's favor with respect to one in order to enter judgment for Waldron Health. Thus, we may affirm if we conclude that Shaw was liable on any single theory. We conclude that the trial court's judgment was proper under the theory of breach of fiduciary duty.

We are mindful at the outset of our analysis that "where the exercise of an attorney-in-fact's powers are brought into question, the burden of proof is on the party asserting breach of fiduciary duty[.]" *Hamilton v. Hamilton*, 858 N.E.2d 1032, 1036 (Ind. Ct. App. 2006),

trans. denied. “A claim for breach of fiduciary duty requires proof of three elements: (1) the existence of a fiduciary relationship; (2) a breach of the duty owed by the fiduciary to the beneficiary; and (3) harm to the beneficiary.” *Farmers Elevator Co. of Oakville, Inc. v. Hamilton*, 926 N.E.2d 68, 79 (Ind. Ct. App. 2010), *trans. denied.* In this case, Shaw’s fiduciary relationship to McDaniel arose by virtue of the fact that McDaniel had executed a power of attorney designating Shaw as her attorney-in-fact. *See In re Estate of Compton*, 919 N.E.2d 1181 (Ind. Ct. App. 2010) (a power of attorney creates a fiduciary relationship between a principal and his agent, or attorney-in-fact), *trans. denied.*

Pursuant to Ind. Code Ann. § 30-5-6-2 (West, Westlaw through 2010 2nd Regular Sess.), an attorney-in-fact must use due care to act for the benefit of the principal under the terms of the power of attorney. As of July 1, 2005, newly enacted I.C. § 35-50-5-2 (West, Westlaw through 2010 2nd Regular Sess.) abrogated the Indiana presumption of fraud that attached to transactions entered into during the existence of a fiduciary relationship, regardless of whether the fiduciary actually used his fiduciary powers to complete the transactions. With the enactment of this provision, the presumption of undue influence is now conditioned upon the attorney-in-fact’s actual use of the power of attorney to effect the questioned transaction for his or her benefit. *See In re Estate of Compton*, 919 N.E.2d 1181.

Shaw signed in her capacity as McDaniel’s attorney-in-fact when she (Shaw) executed the Admission Agreement at Waldron Health. Pursuant to that document, Shaw agreed, on McDaniel’s behalf, to pay all costs incurred as a result of McDaniel’s care and medical treatment at Waldron Health. As McDaniel’s attorney-in-fact, Shaw completed and

submitted paperwork soliciting Medicaid benefits. Shaw also opened a checking account for McDaniel (the McDaniel/Shaw account) in her capacity as attorney-in-fact. Shaw made an ATM withdrawal of \$400 from that account on one occasion. On two other occasions, Shaw transferred a total of \$560 from the McDaniel/Shaw account into Shaw's own personal checking account. Also at about this time, Shaw received, on behalf of Daniels, a \$5000 check from a cancer insurance policy for previous treatment unrelated to McDaniel's stay at Waldron Health. Shaw placed the funds directly into her own personal account. Shaw testified that the aforementioned funds were ultimately used for McDaniel's benefit to pay things such as McDaniel's personal caregiver and funeral expenses. Nevertheless, Shaw could not explain at trial why she transferred or placed those funds in her own account and then drew from those funds to pay McDaniel's expenses, rather than simply pay directly from the McDaniel/Shaw account. Moreover, Shaw acknowledged at trial that she understood she should not co-mingle McDaniel's funds with her own or transfer money from the McDaniel/Shaw account into Shaw's own personal account.

Setting aside for the moment the foregoing banking activities, there is still the matter of McDaniel's life insurance policy. At the time Shaw sought Medicaid benefits, McDaniel owned a life insurance policy with a cash surrender value of approximately \$10,000. She refused to cash-in the policy in order to render McDaniel eligible for benefits that presumably would have been applied toward McDaniel's bills at Waldron Health. Later, Shaw received \$8000 from the proceeds of that policy after McDaniel died. We are aware that Shaw was not a beneficiary of the life insurance policy in question and that the money

was paid to her by her brother, who *was* a beneficiary. Nevertheless, it is apparent that Shaw ultimately profited from her refusal to cash-in McDaniel's policy and thus render McDaniel eligible for Medicaid. Moreover, we are not persuaded that Shaw's gain was entirely serendipitous. The evidence showed that Shaw refused to cash-in a life insurance policy that's sole beneficiary was her brother, who then paid Shaw \$8000 from the proceeds of that policy upon McDaniel's death. At a minimum, these circumstances permit a reasonable inference that, in refusing to cash-in the life insurance policy and render McDaniel eligible for Medicaid benefits, Shaw was acting in her own self-interest, notwithstanding the resultant detriment to McDaniel. Moreover, as set out above, on several occasions Shaw transferred money from McDaniel's bank to Shaw's personal bank accounts. This evidence also supports a reasonable inference that Shaw acted in her own self-interest, to McDaniel's detriment. Such is sufficient to prove that Shaw breached her fiduciary duty to McDaniel.

In its appellate brief, Waldron Health offers argument in support of the remedy fashioned by the small claims court upon concluding that Shaw breached her duties as an agent-in-fact. That is, Waldron Health contends that an agent-in-fact who breaches a duty to the principal is liable to third parties as though he were the principal, not an agent. Waldron Health also contends that "a constructive trust is the proper mechanism to address Shaw's fraudulent conduct." *Brief of Appellant* at 9. We need not address these matters because Shaw challenged only the determination that she breached her duty to McDaniel. She does not offer any argument against the remedy fashioned by the trial court upon finding that she breached her duty to McDaniel.

Judgment affirmed.

MAY, J., and MATHIAS, J., concur.