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Although it is posted on the internet, this opinion is binding only on the  
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-5400-15T1

IN THE MATTER OF THE  
ESTATE OF IRENE HALPECKA,  
a/k/a RENEE HALPECKA.

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Submitted December 7, 2017 – Decided January 10, 2018

Before Judges Simonelli and Rothstadt.

On appeal from Superior Court of New Jersey,  
Chancery Division, Probate Part, Burlington  
County, Docket No. P-2005-0758.

Anthony Scordo, III, attorney for appellants  
Rosemary and John Walsh.

Respondent, Estate of Irene Halpecka, a/k/a  
Renee Halpecka, has not filed a brief.

PER CURIAM

Defendants Rosemary Walsh (Walsh) and John Walsh (John)<sup>1</sup>  
appeal from the July 1, 2016 Chancery Division order, which denied  
their motion pursuant to Rule 4:50-1(f) to vacate that part of the  
judgment entered on February 18, 2010 requiring them to pay counsel

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<sup>1</sup> We shall sometimes refer to John and Walsh collectively as  
defendants.

fees incurred by plaintiffs Brenda Hedrick and Andrea Price in the underlying action. We affirm.

Plaintiffs and Walsh were named as residuary beneficiaries under the Last Will and Testament of Irene Halpecka. Halpecka named Walsh as executrix under the Will, and also named Walsh as her attorney-in-fact under a Power of Attorney. Plaintiffs filed a complaint against Walsh, individually, in her capacity as attorney-in-fact for Halpecka and as executrix of Halpecka's estate, alleging fraud, conversion, breach of fiduciary duty, undue influence, and unjust enrichment. Plaintiffs included Walsh's husband, John, as a defendant, alleging complicity in Walsh's actions resulting in his unjust enrichment.

The trial court granted partial summary judgment to plaintiffs, finding Walsh had a confidential relationship with Halpecka. Following a bench trial, the court found that immediately after Halpecka executed the Power of Attorney, Walsh undertook a convoluted series of financial transactions and transferred Halpecka's assets to herself, reducing Halpecka's probate estate by hundreds of thousands of dollars and leaving minimal assets for distribution to the beneficiaries. The court also found that Walsh continued to transfer several thousand dollars to herself while Halpecka was on her deathbed.

The court determined that Walsh exercised undue influence over Halpecka and violated her fiduciary duties both as attorney-in-fact and executrix of the estate. The court concluded that "Walsh used the trust reposed in her by [] Halpecka to substantially deplete [Halpecka's] probate estate for the effect of defeating [] Halpecka's testamentary intent, as embodied in [Halpecka's] Wills[,]" and Walsh's self-dealing and breaches of fiduciary duties continued after Halpecka's death.

As to John, the court found he was aware of Walsh's activities and the substantial sums of money that she transferred into their joint accounts bearing his name and used for their mutual benefit. The court concluded that John was complicit in, and unjustly enriched by, Walsh's undue influence over Halpecka.

The court imposed a constructive trust on all assets Walsh transferred to herself and John, totaling \$580,442.59, which the court found rightfully belonged to the estate. The court also ordered defendants' disgorgement of sufficient funds to provide plaintiffs with their rightful entitlement under the Will. The court found that Walsh's breaches of fiduciary duty were not separate and discrete torts, but rather, breaches of a fundamental obligation incorporated within the statutory responsibilities of one holding a Power of Attorney or serving as an executrix under a Will. The court permitted plaintiffs' counsel to apply for

counsel fees, and directed counsel to address the right to an award related to the recovery of non-probate assets that became non-probate as a result of Walsh's undue influence.

Plaintiffs sought counsel fees totaling \$142,294.50. Defendants did not dispute that amount. Rather, they argued that the exception to the American Rule recognized in In re Niles, 176 N.J. 282 (2003), which allows counsel fees to be assessed against an executor or trustee who commits undue influence, did not apply because plaintiffs were not representatives of the estate but merely third party beneficiaries, and the allegation here was not that Walsh exercised undue influence or fraud in becoming a fiduciary but instead that she misused her fiduciary status. The court disagreed, reasoning as follows:

The facts of the case reflect that [] Walsh exercised undue influence upon [] Halpecka in facilitating the removal of control of nearly all of [] Halpecka's assets. While [] Walsh testified on numerous occasions that nearly all the financial transactions were done at [] Halpecka's direction, it was clear from the evidence that [] Halpecka did not understand that nullifying effect the transactions orchestrated by [] Walsh had on her estate plan. It was through undue influence that [] Walsh[] suppressed [] Halpecka's independent will. [] Walsh egregiously expanded her interest in [] Halpecka's estate. The fact that [] Walsh took the money through the front door of a power of attorney exercising undue influence is no different than if she had removed the money through the back door by exercising

undue influence on the execution of a will by [] Halpecka. The result is the same, and Niles principles equally apply.

The court found that seventy-five percent of the amount of counsel fees plaintiffs sought were reasonably attributable to prosecuting Walsh's undue influence on Halpecka, and twenty-five percent was attributable to prosecuting Walsh's breach of fiduciary duty as executrix. The court reduced the amount to \$135,741.40, and required defendants to pay \$101,806.

Defendants appealed, challenging, in part, the court's finding of John's responsibility for Walsh's undue influence over Halpecka and the award of counsel fees to plaintiffs. Defendants raised the same arguments they raised before the trial court, and added that that In re Estate of Stockdale, 196 N.J. 275 (2008) precluded an expansion of the Niles exception.

We affirmed, finding there was clear and convincing evidence of undue influence amounting to fraud. Hedrick v. Walsh (In re Estate of Halpecka), No. A-0752-10 (App. Div. July 31, 2013) (slip op. at 5-6). We rejected defendants' counsel fees argument, finding the counsel fees award fell squarely within the holding in Niles that "when . . . an executor or trustee reaps a substantial economic or financial benefit from undue influence, the fiduciary may be assessed counsel fees incurred by plaintiffs . . . in litigation to restore the estate's assets to what they would have

been had the undue influence not occurred." Id. at 8 (quoting Niles, 176 N.J. at 286).

Defendants filed a petition for certification. Among other things, defendant's asked the Court to address:

Whether the common law exception to the American Rule [in Niles] . . . permits reimbursement of fees incurred by third party will beneficiaries challenging decedent's inter vivos transfers to fiduciaries, where the documents creating the fiduciary relationship themselves are not challenged.

Defendants argued:

In affirming the trial court's ruling that [plaintiffs], as putative third party beneficiaries of [Halpecka's] estate, were entitled to reimbursement of fees expended to recover assets transferred during [Halpecka's] lifetime, allegedly as the result of fraud or undue influence, the Appellate Division erroneously gave precedential value to what was essentially dicta of this [C]ourt in the opinion of . . . [Niles], later limited by this [C]ourt in . . . [Stockdale].

As a reason for granting certification, defendants posited:

[Defendants] maintain that, first, certification must be granted because this Court has, respectfully, failed to provide proper guidance to intermediate level and lower courts delineating the parameters to the Niles exception to the American [R]ule generally prohibiting fee shifting. . . . The Niles exception is said to apply 'when an executor or trustee commits the pernicious tort of undue influence.' . . . Yet, recognizing the danger of 'opening the floodgates', this [C]ourt cautioned in Niles that the exception is limited to matters where

'an executor's undue influence results in the development or modification of estate documents that create or expand the fiduciary's beneficial interest in the estate.' . . . However, here, third party beneficiaries to a will not acting on behalf of the estate, challenged inter vivos transfers to [defendants] but never challenged the documents creating the fiduciary relationship, namely a power of attorney and later several wills.

. . . .

Here, [defendants] maintained, both at the trial level and on appeal, that the Niles exception was inapplicable . . . because [plaintiffs] were not representatives of the estate but were mere third party beneficiaries. The allegation here was not that [Walsh] exercised undue influence of fraud in becoming a fiduciary but instead that she misused her fiduciary status.

The Appellate Division here relied upon what can only be deemed dicta in the Niles opinion where this Court stated a fiduciary may be assessed counsel fees incurred by third parties to restore the estate's assets. Niles did not involve a third party beneficiary and it is [defendants'] position that the relied upon statement has no precedential effect, especially when read in conjunction with the later decision of . . . [Stockdale]. Stockdale was decided five years after Niles, and presumably because of lower courts' varying interpretations of the Niles exception in the interim, this [C]ourt again in dicta . . . set forth several factors to be utilized in assessing the applicability of the exception. This Court distinguished claims by 'putative beneficiaries' from those on behalf of the estate implying that only the latter were entitled to fee[s]. . . .

. . . .

Given the clear confusion in this area of law among members of the Bar and lower [c]ourts, this matter presents an opportunity for this Court to advise lower courts as to the circumstances where Niles is applicable, particularly in the context of third parties seeking reimbursement of their fees as opposed to estate representatives.

The Court denied certification, Hedrick v. Walsh (In re Estate of Halpecka), 217 N.J. 53 (2014). On March 27, 2014, the Court denied defendants' request for reconsideration. The Court's denial of the petition for certification, the last appeal permitted by the Rules of Court, constituted the final disposition of this matter. See State v. Reyes, 140 N.J. 344, 352 (1994) (noting that the denial of a petition for certification effectively ends a direct appeal). Consequently, it is settled that Walsh committed undue influence and fraud and breached her fiduciary duties as Halpecka's attorney-in-fact and executrix of Halpecka's estate, and John was complicit in and unjustly enriched by her conduct.

Nearly six years after entry of the February 18, 2010 judgment, on June 7, 2016, defendants filed a motion pursuant to Rule 4:50-1(f) to vacate that part requiring them to pay counsel fees. Defendants argued they were entitled to relief because In re Folcher, 224 N.J. 496 (2016), decided April 26, 2016, supported the interpretation and application of the Niles exception they had

argued in their prior appeal and petition for certification. According to defendants, Folcher clarified that the American Rule applies in all circumstances except the narrow circumstance in Niles, and the Niles exception must be strictly limited to situations where an estate's assets were depleted by one with a fiduciary obligation to estate beneficiaries, not simply the decedent. Defendants posited that because Walsh's fiduciary obligations under the Power of Attorney were only to Halpecka, plaintiffs could not recover fees for work performed to recover inter vivos transfers.

Judge Paula T. Dow issued a written opinion denying the motion. The judge found that defendants' six-year delay in filing the motion was unreasonable, and the prior appeal resolved the counsel fees issue. The judge determined that a change in the law or in the judicial view of an established rule of law did not constitute extraordinary circumstances as to justify relief from a final judgment. The judge also found that vacating the counsel fee award would unduly burden plaintiffs, who had reasonably relied on the trial court's decision for six years. The judge concluded that defendants had their day in court and had exhausted their appellate remedies.

On appeal, defendants reiterate the arguments made before Judge Dow. We have considered these arguments in light of the

record and applicable legal principles and conclude they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We affirm substantially for the reasons expressed in Judge Dow's written opinion. However, we make the following comments.

"Rule 4:50-1 provides for extraordinary relief and may be invoked only upon a showing of exceptional circumstances." Baumann v. Marinaro, 95 N.J. 380, 393 (1984). However,

a 'change in the law or in the judicial view of an established rule of law is not such an extraordinary circumstance' as to justify relief from a final judgment where the time to appeal has expired. This is unquestionably the general rule and rests principally upon the important policy that litigation must have an end.

[Hartford Ins. Co. v. Allstate Ins. Co., 68 N.J. 430, 434 (1975) (citations omitted).]

See also A.B. v. S.E.W., 175 N.J. 588, 593-94 (2003) (order denying parental visitation was not subject to reconsideration based on a new rule of law concerning visitation rights of domestic partners); Zuccarelli v. State Dept. of Env'tl. Prot., 326 N.J. Super. 372, 379-81 (App. Div. 1999) (rejecting motion to vacate settlement based on subsequent change of law), certif. denied, 163 N.J. 394 (2000); Wausau Ins. Co. v. Prudential Prop. and Cas. Ins. Co., 312 N.J. Super. 516, 518-19 (App. Div. 1998) (denying reconsideration based on clarification of law concerning uninsured motorist

coverage); Smid v. N.J. Highway Auth., 268 N.J. Super. 306, 308-09 (App. Div. 1993) (denying reconsideration based on new Supreme Court decision rendered following denial of certification), certif. denied, 135 N.J. 467 (1994). Accordingly, Folcher's alleged clarification of the law did not entitle defendant to Rule 4:50-1 relief.

Nevertheless, the Court did not apply the holding in Folcher retroactively, and the facts are distinguishable. There, the defendant was not an attorney-in-fact to the decedent or executrix of the decedent's estate. Thus, she owed no fiduciary duty to decedent, the estate, or the estate's beneficiaries. Folcher, 224 N.J. at 511.

Here, Walsh was Halpecka's attorney-in-fact and executrix of Halpecka's estate. Walsh, thus, owed a fiduciary duty to Halpecka, the estate, and the estate's beneficiaries, and breached that duty. During the time Walsh was Halpecka's attorney-in-fact and prior to Halpecka's death, she knew of her executrix appointment and the beneficiary dispositions under Halpecka's Will. Knowing that Halpecka designated plaintiffs as one-third beneficiaries of her estate, Walsh used her power of attorney to make inter vivos transfers to herself and John that depleted the estate, nullified Halpecka's testamentary intent, and deprived plaintiffs of their rightful bequests. Under the egregious circumstances of this

case, plaintiffs were entitled to an award of counsel fees against defendants under the Niles exception.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION