IN THE MATTER OF HARRY SABLE

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION
SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3743-06T23743-06T2

IN THE MATTER OF HARRY SABLE,

AN INCAPACITATED PERSON,

MICHAEL SABLE,

Plaintiff-Respondent,

v.

BARRY SABLE,

Defendant-Appellant.

Submitted May 19, 2008 - Decided
Before Judges Stern, A. A. Rodriguez and Collester.

On appeal from Superior Court of New Jersey,
Chancery Division, Camden County, CP-03-05.

Fox Rothschild, attorneys for appellant
(Jeffrey M. Pollock, of counsel; Mr. Pollock and Mukti N. Patel, on the brief).
Flaster Greenberg, attorneys for respondent
(Kenneth S. Goodkind and Vincent J. Nolan, III, on the brief).

PER CURIAM

This appeal pits brother against brother over control of the personal estate and estate plan of their incapacitated octogenarian father.

Harry and Jean Sable were married for many years and resided at their condominium in Cherry Hill. They were the parents of three adult sons, plaintiff Michael Sable,

defendant Barry Sable and Don, the middle son. Harry and two partners owned the LeGar building in Philadelphia where Harry conducted his jewelry business, advertising himself as the "King of Wedding Bands."

Harry and Jean had wills prepared by John Lolio, Esq., their personal attorney, to provide for each other and their three sons. Lolio prepared wills for Harry in 1994 and in 1998, with similar provisions. Harry left his entire estate to Jean if she survived him. If she did not survive him, Michael was to inherit the condominium and Harry's interest in the LeGar building; Barry was to receive property at 735 Sansom Street in Philadelphia, held in his name and Harry's name; and Don was to inherit the inventory of Harry Sable, Inc. Stocks and bonds were to be divided equally among the three brothers.

In addition to the wills, Lolio prepared in 1999 a financial power of attorney (POA) for Harry which named Barry as successor to Jean. In December 1999, Lolio prepared a health care POA for Harry which named Michael as successor to Jean. Jean also had a health care POA and, in 1999, she substituted Michael for Harry because of Harry's diminished capacity.

In 1999, the family started to notice Harry exhibiting symptoms of dementia. Although he still worked until late 1999, he became more confused and forgetful. In 2000, Harry was diagnosed with Alzheimer's by Dr. Cook at Pennsylvania Hospital and placed on medication. On February 26, 2001, Dr. Raphael, Harry's primary care doctor, said that Harry was not fully coherent and unable to care for himself or run his business. In July 2001, Dr. Barry Rovner examined Harry for memory problems and hallucinations, and he scored eighteen on the mini-mental exam, a widely used screening tool for assessing cognitive impairment. Harry was examined by Rovner again in July 2002 and scored fourteen on the mini-mental. After Harry's dementia became apparent, Jean handled the family finances until she suffered a severe stroke in June 2002. At this time, Barry lived in Marlton, Don in Elkins Park, Pennsylvania, and Michael in Los Angeles, California. The following month, the three brothers met with Earl Morgenstern, their parents' accountant, and Lolio, the attorney, to determine how to pay for their parents' care. In the course of that meeting Morgenstern, the co-executor of the parents' estates, discussed estate plans with the brothers. In August 2002, Lolio sent the brothers a letter enclosing copies of the parents' wills and stating:

At the request of Harry Sable, Don Sable and Michael Sable, (the children of Harry Sable) and after receiving the medical evaluations of each parent, I am faxing a copy of your father's and mother's respective Wills dated February 4, 1998. It is my understanding that Earl Morganstern, CPA, who is the substitute Executor of each Will has already discussed the provisions and terms of the Will with each of you at a separate meeting held shortly after our initial meeting. Based on the medical evaluation of each parent, it is apparent that no changes can be made to their wills due to their mental impairments.

Barry and Don met with caregivers, as well as other attorneys and accountants regarding their parents' care, estate and financial planning. Don said neither Jean nor Harry were consulted because the brothers knew their parents "were unquestionably mentally incompetent, my father due to his Alzheimer's and to the degree to which it had progressed and my mother due to the dementia caused by her stroke."

On November 19, 2002, Harry was examined by a neurologist, Dr. Brad J. Tinkelman, who found him disoriented and suffering from dementia, which he suspected was due to Alzheimer's. In March 2003 Harry was again examined by Dr. Rovner. This time he scored a nine on the mini-mental.

Things came to a head in August 2003, when Harry and Jean were at the New Jersey shore with two caretakers and Harry attacked Jean and a caregiver. The police were called and Harry was briefly jailed and involuntarily committed to the Carrier Clinic. Dr. Franco, the treating psychiatrist, said Harry was at times incoherent and dependent on others for basic needs. On September 3, 2003, he was examined by Dr. Ehab Tuppo at the Center for Aging of UMDNJ and was diagnosed with severe dementia. Dr. Tuppo reported Harry scored three on the mini-mental, but he was capable of eating and walking independently.

Meanwhile, also in September 2003, Jean was admitted to Cooper Hospital. Upon her discharge, Michael arranged for her placement at the Jewish Geriatric Home, a nursing home in Cherry Hill, where she remained until her death on January 21, 2005. Both Harry and Barry were upset at Jean's placement at the nursing home. Barry was angry he was not consulted, and Harry wanted Jean to come home. On two occasions Barry attempted to take Jean out of the nursing home, and the police were called.

A geriatric psychiatrist examined Harry on October 1, 2003, found him disoriented as to time and place and lacking understanding as to why Jean was in the nursing home.

Both Harry and Barry continued to press for Jean's discharge from the nursing home despite Michael's claim that she wished to remain. Finally, in October 2003 suit was filed by Michael Kouvatas, Esq., on behalf of Barry and Harry as co-plaintiffs against Michael and the nursing home to compel Jean's release and for appointment of Harry as Jean's guardian. The lawsuit was subsequently dismissed after Jean's death.

Also in October 2003, Barry took his father to Lolio's office for the purpose of changing Harry's will. After meeting with Harry alone, Lolio said Harry was not competent, and he refused to change the will. Lolio later testified that:

[Harry] was not competent to understand what I was saying, he didn't know where he was, didn't know the day of the week, didn't know the month, didn't know who the President was, just didn't have a general understanding of anything at that point in time. So I basically refused to continue

. . . preparing any new documents for Harry because I felt and believed that he wasn't competent enough to understand what he was doing.

Five days later on October 8, 2003, Harry was examined at his home by Dr. Murray H. Moliken, a doctor of geriatric medicine. The examination was videotaped, and the transcript indicates that Harry had difficulty answering, without assistance, many of Moliken's questions. Dr. Moliken did not review Harry's prior medical records, stating that he did not want other opinions to influence him. He was also not aware that Harry had been involuntarily admitted to Carrier Clinic in August 2003, or that Harry had been diagnosed with Alzheimer's.

Dr. Moliken said his questions to Harry were based on information obtained from Barry, Harry's caregiver, and attorney Kouvatas. He said he did not believe that Harry was capable of providing the necessary information for the examination. Dr. Moliken believed it was rational for Harry to be upset that Jean was in the nursing home. He concluded that Harry was mentally impaired to some extent but that he understood what he wanted for his wife and how his assets should be distributed. Dr. Moliken later testified to his opinion that Harry had testamentary capacity when he examined him in October 2003.

After Dr. Moliken's examination, Barry called Kouvatas and told him that Harry wanted to draft estate planning documents. On October 24, 2003, Harry revoked his health care POA naming Michael, and signed a new health care POA naming Barry with no alternate. Kouvatas also prepared a new will for Harry which made no disposition for Jean, although she was still living at that time, and left the entire estate to Barry. After Harry expressed some concern over the dispositions, Kouvatas prepared another will in November 2003 which provided that Harry's entire estate should go to Jean in trust if she survived him, and the remainder to Barry. The will also provided that if Jean predeceased Harry, the estate was to be divided with Barry receiving seventy-five percent and Don the remaining twenty-five percent. There was no disposition for Michael. Harry signed the will, witnessed by two attorneys, and executed another financial POA in favor of Barry granting him even broader powers over Harry's finances than the prior POA.

In January 2005, Michael filed a complaint, later amended, to have Harry declared incapacitated, to remove Barry as Harry's guardian, to appoint a new guardian, to void POAs and any will executed by Harry after October 1, 2003, due to Harry's incapacity and Barry's undue influence, and for costs and attorney fees. Barry filed an answer and counterclaim to be named guardian of Harry's person and property. On March 21, 2005, Judge Vogelson held a pretrial hearing following which he determined that Harry was incapacitated, and appointed a temporary guardian for his person. Subsequently, on March 20, 2006, the court granted Michael's motion and appointed a permanent care manager for Harry after removing Barry as guardian over Harry's property on grounds he had mismanaged the accounts and used Harry's assets for personal gain. Martin

Abo, CPA, was appointed as a temporary guardian over Harry's property, and he directed Barry to provide him with financial records to review transactions of Harry's assets after October 1, 2003.

The trial began in May 2006 and continued over several trial days. Since there was no dispute that Harry was incapacitated, the central issue was whether he was incapacitated and lacked testamentary capacity when he executed the will and other documents in October and November 2003.

Michael presented the testimony of Dr. Jeffrey M. Kargman, who was qualified as an expert in geriatric psychiatry. Dr. Kargman reviewed reports of various physicians who had examined Harry dating back to 2001, all of which stated Harry suffered from dementia. He conducted a clinical interview of Harry, reviewed the discovery and discussed the matter with doctors at Carrier Clinic as well as Dr. Moliken. He concluded that Harry suffered from dementia, Alzheimer's type, since at least 2001 and opined that, as of October 1, 2003, Harry did not have the capacity to execute a will and related documents. He found that Harry did not understand his own financial status at that time and did not have the capacity to understand concepts necessary to knowingly execute a will such as a trust. Moreover, he found that Harry was very susceptible to Barry's influence.

Don Sable testified that Barry restricted Harry's access to his other sons and instructed his caregiver not to permit Harry to meet with them alone. Other witnesses testified to examples of Barry bullying Harry and pressuring him to speak in accordance with Barry's instructions.

Evidence was also presented of Barry's misapplication and misappropriation of Harry's assets. Barry was also unable to document how he had spent significant amounts of his father's money. He conceded that he had borrowed $78,000 without any documentation showing that it was paid back as he claimed. He moved all the inventory from his father's store to his own business, claming it was for reasons of security. He also removed jewelry and cash worth about $30,000 from a safe deposit box, most of which he never returned. In August 2004, he used his POA to deed 735 Sansom Street, which had been held in his name and Harry's, to himself alone, claiming Harry's name was only on the deed because Harry had originally lent him the down payment, which he repaid. He said he paid $254,176 in legal bills on behalf of his father but could only document about $60,000. Moreover, he lost a check for $35,000, and that created a cash flow problem that he solved by withdrawing $30,000 of Harry's IRA assets, resulting in an unnecessary tax liability.

On December 14, 2006 after testimony had concluded, Judge Vogelson issued a lengthy oral opinion setting forth his findings and legal conclusions. He found the testimony of Michael's witnesses to be credible. He accepted Dr. Kargman's opinion that Harry suffered from dementia Alzheimer's type dating back to at least 2000, that his cognitive

dysfunction worsened over succeeding years so that he did not have the mental capacity in 2003 to execute a last will and testament or power of attorney, and that could be easily controlled or manipulated by Barry. He found that attorney Lolio and CPA Morgenstern were credible in their judgments that both Jean and Harry were so mentally incapacitated that they could not modify their wills or execute other estate planning documents. He further found credible Lolio's recollection of the incident when Barry brought Harry to his office for the purpose of changing his will and Lolio's refusal to do so after meeting alone with Harry and determining that Harry lacked the mental and legal capacity to do so. Judge Vogelman noted that Barry denied ever taking Harry to Lolio's office to change his will and found that to be "incredible" and unworthy of belief.

In contrast, Judge Vogelson found that Barry and his witnesses lacked credibility. With respect to Dr. Moliken's testimony and similar testimony from his associate Dr. Monzo that Harry was competent to execute the new will and accompanying documents prepared by attorney Kouvatas, Judge Vogelson faulted the testimony since neither doctor considered Harry's medical history and the reports of the numerous physicians who noted Harry's dementia. Moreover, after reviewing the videotaped interview between Dr. Moliken and Harry, the judge stated that Dr. Moliken's opinion totally lacked merit, at one point describing it as "just fantastic testimony."

The judge further rejected the testimony of attorney Kouvatas, noting that he represented both Barry and Harry and later acknowledged that "Barry is running the show," confirming that Harry did not have independent counsel when he signed the will and other documents. The judge described the circumstances surrounding the preparation and execution of the wills and documents prepared by Kouvatas as "unusual and suspicious." Finally, he found Barry's testimony lacked credibility as to all major issues.

Judge Vogelson found that a confidential relationship existed between Harry and Barry and that Barry exercised undue influence on his father, controlling and manipulating him at a time when he did not have the strength of mind to resist. He accepted the testimony of Don Sable and other witnesses that Barry kept his father away from the other brothers in order to exercise greater power over his father and rejected Barry's denials as not credible. The judge added:

There is no question in the Court's mind and I so find that Harry was had enfeeble [sic] mind caused by the Alzheimer's to such an extent that it was easily subject to the undue influence of Barry Sable and those associated with him. . . . Harry, the Court finds, would not in any circumstances have disinherited his wife or his son, Michael absent undue influence. He wouldn't have partially disinherited his son, Don, and that he relied totally on Barry and trusted Barry, that Barry was at all times acting in a fiduciary capacity in relationship with his father under various durable financial powers of attorney, and I find further that at all relevant times, Barry was in a confidential

relationship with Harry as his son and as the person primarily responsible for taking care and as agent under his power of attorney.

On December 19, 2006, Judge Vogelson set forth his factual findings and legal conclusions in a written summary as follows:

The Court finds as fact that Harry Sable lacked the mental capacity as of October 1, 2003, and continually thereafter to the present date, to execute a will or any other document, to act as a plaintiff in this lawsuit, to act as a guardian for any other person, and to govern himself and manage his own affairs; that all three of his sons were aware of his level of incapacity and acted in accordance therewith in excluding Harry Sable from all decision making as to health care and finances regarding not only himself, but his wife also. Further, the Court finds Harry Sable's long time estate planning attorney, John Lolio, Esquire, who was fully familiar with Jean and Harry Sable, recognized in 2002, in part from medical records supplied to him by the three sons, that both Harry Sable and Jean Sable were so incapacitated that their wills could not be altered and that the three sons obtained copies of their parents wills and powers of attorney only after convincing John Lolio, Esquire and Earl Morganstern, C.P.A. that Jean and Harry Sable were so mentally incapacitated as to be forever unable to modify their wills and other estate planning documents. The Court further finds that John Lolio, Esquire, met with Barry Sable and Harry Sable on October 3, 2003 and again determined that Harry Sable was so incapacitated that he could not validly execute a new will and therefore refused the demands of Barry Sable he prepare a new will for Harry Sable. The Court also determines that the opinions of Dr. Moliken, Dr. Monzo, Michael Kouvatas, Esquire, Philip Fuoco, Esquire and Joseph Osefchen, Esquire, were not credible, in light of their failure to obtain and consider abundant medical information to the contrary that was readily available and that the opinions of Dr. Kargman, Michael's expert and the numerous treating physicians upon whom Dr. Kargman had relied and who had seen and treated Harry Sable from 1999 through 2003, who commented on Harry Sable's level of incapacity, are credible, accurate and persuasive.

The Court therefore concludes that any and all documents executed by Harry Sable on or after October 1, 2003, are null and void and of no legal force or effect whatsoever as a result of Harry Sable's mental incapacity at that time. Further, the Court concludes that Michael Sable has proven by clear and convincing evidence that Harry Sable lacked the mental capacity to execute a will or any other legal documents on or after October 1, 2003, so that his request for relief seeking to void all such documents is granted, together with counsel fees and costs.

It is the further opinion of the Court that while I have determined Harry Sable lacked testamentary capacity, even if he had had such capacity, at all relevant times in this matter a confidential relationship existed between Barry and Harry and Barry was primarily responsible for taking care of his father and his finances. As a result, there has been established a rebuttable presumption of undue influence against Barry, causing

the burden of proof to shift to Barry, requiring him to prove by clear and convincing evidence that undue influence did not exist. He has failed to provide such proofs. Accordingly, Barry unduly influenced his father, to the extent, if at all, that Harry had capacity to execute any documents on or after October 1, 2003 to the present substituting his will for his father's, thereby rendering null and void any and all documents executed by Harry Sable on or after October 1, 2003.

The application by Barry to be reinstated by this Court as his father's healthcare and financial agent is denied as not being in Harry's best interest and is dismissed. The Court takes notice of Michael Sable's arguments in his successful motion and proceedings for removal of Barry as healthcare and financial agent of his father and the Order entered on March 20, 2006, in addition to considering the evidence adduced at the trial in this matter.

As a result of the foregoing, the Court determines that Barry Sable is liable of counsel fees and costs in this litigation and the Jean Sable litigation and counsel may submit affidavits of services and costs in support of such request, serving copies on Harry Chandless, Esq.

On January 11, 2007, Judge Vogelson heard oral argument on the amount of damages incurred as a result of Barry's

breach of his fiduciary duty. He entered final judgment on January 31, 2007 removing defendant as Harry's guardian, invalidating all documents executed by Harry after October 1, 2003, and ordering defendant to pay Harry's estate $254,176 unnecessarily expended on litigation involving Jean, as well as surcharges for money unaccounted for by defendant in the amount of $162,222.93. Attorney fees and costs were also awarded in the amount of $298,641.

On appeal, Barry argues Judge Vogelson erred as follows: (1) by admitting and accepting the expert opinion of Dr. Kargman; (2) by improperly finding undue influence through application of an incorrect burden of proof to rebut the presumption; (3) by improperly invalidating Harry's 2003 will when he was still alive; (4) by improperly assessed counsel fees and costs; and (5) by incorrectly finding that Barry breached a fiduciary duty.

Barry asserts the opinion of Dr. Kargman that Harry was incompetent as of October 1, 2003 was inadmissible as a net opinion and was improperly relied on by Judge Vogelson in reaching his conclusion. We disagree. Under our rules of evidence an expert's opinion may be based upon facts or data of the type reasonably relied on by experts in that field. While an expert medical opinion must conform to general medical standards and not standards personal to the witness, Fernandez v. Baruch, 52 N.J. 127, 130-31 (1968), personal observation is a fact that can form the basis for an opinion. Buckelew v. Grossbard, 87 N.J. 512, 530 (1981); Savoia v. F. W. Woolworth Co., 88 N.J. Super.

153, 163 (App. Div. 1965). However, bare conclusions, unsupported by factual evidence, are inadmissible as a net opinion. State v. Townsend, 186 N.J. 473, 493 (2006). "In essence, the net opinion rule requires an expert witness to give the why and wherefore of his expert opinion, not just a mere conclusion." Vitrano by Vitrano v. Schiffman, 305 N.J. Super. 572, 575 (App. Div. 1997).

Barry argues that Dr. Kargman relied upon the mini-mental exam scores or medical reports that contradicted his own findings as well as reports from doctors not qualified to render an opinion as to Harry's capacity and that therefore his opinion was a net opinion "based on unfounded speculation or mere possibilities." Kaplan v. Skoloff & Wolfe, P.C., 339 N.J. Super. 97, 103 (App. Div. 2001); Constantou v. Ventriglia, 324 N.J. Super. 437, 451 (App. Div. 1999), certif. denied, 163 N.J. 10 (2000). Specifically, Barry argues Dr. Kargman relied on mini-mental examination results that he ultimately agreed were inaccurate because the numerical scores of 14 in July, 2002, 9 in March 2003, 3 in September 2003, and 9 in January 2003 were inconsistent since Alzheimer's is a progressive disease. Barry's contention that when an expert bases his or her opinion on a particular fact being true and the fact later turns out to be untrue, the court cannot rely on that expert's opinion. See Todd v. Sheridan, 268 N.J. Super. 387 (App. Div. 1993). However, in Todd the factual assumption of the expert was a make-or-break factual issue on which the opinion was grounded. Such is not the case at bar. Barry argues to the contrary that Dr. Kargman relied almost entirely on the mini-mental exam scores but later admitted that the scores did not comport with the usual progression of Alzheimer's. Barry argues that the mini-mental exam scores contradict Dr. Kargman's findings and that, therefore, the whole foundation of Dr. Kargman's testimony was faulty and inadmissible.

We do not agree with Barry's characterization of Dr. Kargman's testimony. Dr. Kargman acknowledged that the scores were irregular and the September 2003 score might have been inaccurate, but he did not discount the validity of mini-mental exams. Rather, Dr. Kargman stated that the test itself is a screening test, and that many other factors are taken into account in determining mental incapacity including cognitive function, behavior, and the impression of others who have contact with the patient. In fact, in preparation for his report, Dr. Kargman reviewed Harry's medical files and the reports of many other physicians including the physicians who treated Harry at the Carrier Clinic and even Dr. Moliken. He stated that Harry's behavior as observed by others in September 2003 indicated that, while the score of three that Harry received at that time might not have been accurate, the assessment that Harry was incompetent at that time was supported by other facts. While Dr. Kargman did not invalidate the mini-mental exams, he did not rely on them to the exclusion of the other data.

Barry further argues that Dr. Kargman improperly relied on reports by doctors who were not experts in psychiatry and did not render opinion as to Harry's capacity, including a gastroenterologist, a urologist, and an oncologist. There is no merit to the arguments because although the physicians were not experts in psychiatry, their

observations of Harry's behavior were relevant. Moreover, those impressions from other physicians were only part of the data that Dr. Kargman relied upon in forming his expert opinion. Dr. Kargman's opinion included his own examination of Harry, his interviews with other doctors including Dr. Moliken, his review of Harry's medical records, and his own experience in the field. Based on all of this data, Dr. Kargman formed an expert opinion that was not a net opinion and properly considered by Judge Vogelson.

Barry next poses the legal argument that the trial court improperly determined the validity of a will when the testator was still living. This legal argument was not made before Judge Vogelson, and an issue not properly raised below may not be raised on appeal unless it concerns jurisdiction or a matter of "great public interest." Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). Similarly, an error which is not brought to the attention of the trial court is not ground for reversal by the appellate court unless there is a showing of plain error, i.e., error "clearly capable of producing an unjust result." R. 2:10-2. Nonetheless, we offer the following comments.

Ordinarily, a will is "ambulatory and speaks only as of the death of the testator." Matter of Will of Reilly, 201 N.J. Super. 306, 311 (App. Div. 1985). Barry argues that because Harry is still living, the court had no power to invalidate his October 2003 estate planning documents or his November 2003 will because they could not be challenged until after Harry's death.

In response, Michael cites In re Niles, 176 N.J. 282, 289-90 (2003), to support the claim that the court was within its power to nullify the will while Harry was still living.

In Niles, Laura Niles, an elderly woman with substantial assets, was influenced to change her testamentary plan to benefit her new sister-in-law's family. While Laura was still living, her former trustee filed a complaint to appoint a guardian on the ground that Laura had been unduly influenced to change her will and trust agreements. A trial was conducted and Laura was adjudicated to have been mentally incompetent to have executed a will or any other document. The new will was declared null and void because it was the result of undue influence. The trial court re-instated the original will and trust agreements and awarded attorney fees.

At no point in Niles was it indicated that it was impermissible to determine whether the will was the result of undue influence because the testator was still living. On the contrary, by implication Niles stands as authority for the proposition that when a live testator is adjudicated incompetent as of a particular date, any documents executed subsequent to that date may be invalidated.

Similarly, in In re Cohen, 335 N.J. Super. 13, 32-33 (App. Div. 2000), certif. denied, 167 N.J. 632 (2001), the issue was whether a testamentary plan could be changed for tax purposes if it was in conformity with the wishes of the mentally incompetent testator

who was still living. The court ultimately determined that the proposed change to the testator's will was not in accordance with her testamentary plan while she was still competent. Again, by implication Cohen is authority for the proposition that a will may be invalidated during the lifetime of a testator. In fact, the court cited N.J.S.A. 3B:12-49, -50, and -62, which allow the court to transfer assets, make gifts, and change beneficiaries under life insurance policies on behalf of the incapacitated testator so long as such changes are in keeping with the original estate plan. In re Cohen, supra, 335 N.J. Super. at 29-32.

Barry points to the last sentence of Cohen which states, "[w]e agree with the Chancery Division judge's ruling that it would be premature for any party to contest Henrietta's will and trust while she is alive." Id. at 33. Barry contends this language establishes that Harry's will can not be contested while he is still alive. However, in Cohen the action was brought to challenge the will while here the action was instituted to adjudicate Harry incompetent and to invalidate all the documents that he signed in October and November 2003. The same proofs were necessary to show incapacity to execute the POAs as would have been required to invalidate the will. There is no need for an additional trial to invalidate the will since the same result would be reached given the court's determination that Harry was mentally incapacitated as of October 1, 2003.

Barry cites N.J.S.A. 3B:12-27 for the proposition that a person who has previously been adjudicated incompetent may return to competency, at which point a court could adjudicate him or her competent to write a new will. After a court has adjudicated a person mentally incompetent according to N.J.S.A. 3B:12-25, the person may bring an action to determine that he or she has returned to competency. N.J.S.A. 3B:12-28. If so, the court may adjudicate the person fully or partially competent and restore his or her rights as of the time of the return to competency. N.J.S.A. 3B:12-28. Given that the court determined Harry to be incompetent as of October 1, 2003, if Harry did return to competency and the court so adjudicated him, he would be entitled to execute a new will. N.J.S.A. 3B:12-28. But there is no suggestion that Harry has returned to competency and more to the point, this would not affect the validity of the November 2003 will which the court determined was executed by Harry while mentally incapacitated. In this regard, Barry relies on the testimony of Dr. Moliken, who when asked whether Harry was oriented to time and place, said he was about "50/50" and added that a person with dementia could "have a good day" and "have a bad day." However, even accepting this testimony, there is no proof that the November 2003 will was executed during a "good day" or during a moment of lucidity, and Judge Vogelson found to the contrary.

We conclude therefore that after Harry was adjudicated incompetent as of October 1, 2003, all documents after that date, including the will, were properly invalidated.

Addressing Judge Vogelson's determination of undue influence, Barry contends it was error to require him to rebut the presumption of undue influence by clear and convincing proof as opposed to a preponderance of the evidence.

In Haynes v. First National Bank of New Jersey, 87 N.J. 163, 175-76 (1981), our Supreme Court set forth the standard for determining the correct burden of proof for rebutting a presumption of undue influence. There, the testatrix, Ms. Dutrow, had two children, Dorcas and Betty, and her will divided the estate evenly between them. After Betty's death, Ms. Dutrow moved into Dorcas' home and became dependent on Dorcas for care and companionship. Dorcas substituted her attorney for Ms. Dutrow's long-time attorney, and he drew up a new will signed by Ms. Dutrow that substantially disinherited Betty's children. The Court pointed out the two necessary factors for proof of undue influence: the first is a confidential relationship which can be proved by the testator's dependence and reliance on the proponent of the will for companionship, care and support. Id. at 175-76. The second element is "suspicious circumstances," which do not need to be substantial. When these two elements exist, a presumption of undue influence arises, and the proponent of the will must overcome the presumption by a preponderance of the evidence. Id. at 177-78. However, in some cases, such as when an attorney who drafts the will also benefits from it, a higher standard of proof is required to rebut the presumption. In Haynes the Court held that because the attorney who prepared the will represented both testator and proponent of the new will and because there was no proof the attorney disclosed the conflict of interest to the testator, "clear and convincing" proof was necessary to overcome the presumption of undue influence. Id. at 184-85.

Here, the facts are remarkably similar in that Kouvatas represented both Barry and Harry in the Jean lawsuit and Barry conceded that he told Kouvatas what changes needed to be made to Harry's estate plan. Moreover, Kouvatas' billing reflects numerous conversations with Barry and almost none with Harry in October and November 2003. And nothing in the record indicates that Kouvatas ever disclosed to Harry that there was a conflict of interest in his representing both Harry and Barry. Accordingly, Judge Vogelson held that there was a rebuttable presumption of undue influence and Barry had the burden to prove by clear and convincing evidence that undue influence did not exist.

Barry contends that if the correct standard of proof of "preponderance of the evidence" had been applied, there was sufficient evidence to rebut the presumption of undue influence because Dr. Moliken, Kouvatas, and the two attorney witnesses to the execution of the will testified that Harry wanted to change his will and understood what he was doing. However, Judge Vogelson specifically found that the opinions of Dr. Moliken, Kouvatas and the other witnesses that Harry had testamentary capacity were not credible, "especially in light of their failure to obtain and consider abundant medical information" available to them. There is abundant credible evidence in the record to sustain this finding by the judge.

We agree with Judge Vogelson that there was a conflict of interest resulting from Kouvatas representing both Harry and Barry so that the higher standard of clear and convincing evidence was required to rebut the presumption of undue influence. Moreover, in light of Judge Vogelson's credibility findings Barry did not satisfy the burden under the preponderance of evidence standard so that he failed to rebut the presumption of undue influence under either standard of proof.

Barry next asserts that Judge Vogelson erred in finding he breached his fiduciary duty because Harry suffered no provable damages. Judge Vogelson concluded that Barry breached his fiduciary duty under the POA given by Harry and caused damage to the estate. He directed Barry to repay $254,176 in unnecessary litigation costs, as well as a surcharge of $162,223 for losses incurred as a result of mismanagement of Harry's assets.

There is sufficient credible proof in the record to uphold Judge Vogelson's findings that Barry breached his fiduciary duty to properly manage Harry's finances. Barry lost a check so that he withdrew Harry's IRA assets prematurely. He took loans that were never documented and he never accounted for money he took from a safe deposit box. For this mismanagement, the court awarded the surcharge of $162,222 which included Abo's fee in the amount of $90,000. Furthermore, the judge found Barry expended estate funds to litigate both the Jean lawsuit and this matter, actions which the court determined were not in Harry's but in Barry's interest and resulted in unnecessary attorney fees of $254,176 on behalf of the estate. Barry was thus held liable to the estate for these litigation expenses, under N.J.S.A. 3B:14-35, which provides: "If the exercise of power concerning the estate is improper, the fiduciary is liable to interested persons for damage or loss resulting from breach of his fiduciary duty...."

Barry argues he cannot be required to pay sums that were already paid, but there is an inadequate specification of which he claims were already paid. Abo, the accountant, described the difficulty of getting Barry or his accountant to substantiate the expenses made on behalf of Harry. Therefore, we find that Judge Vogelson correctly held that Barry breached his fiduciary duty, that Harry's estate suffered a loss because of that breach, and that Barry is liable to the estate for damages.

Lastly Barry argues that the court improperly assessed costs and attorney fees against him. Judge Vogelson awarded costs and attorney fees in the amount of $298,641, stating that the amounts expended by Michael were fair, reasonable and necessary and that if not for the litigation pursued by Michael, the misuse of Harry's property and defalcations by Barry would never have been discovered.

In a proper case the award of counsel fees is discretionary with the court and will not be reversed "absent a demonstration of manifest abuse of discretion." In re Probate of Alleged Will of Landsman, 319 N.J. Super. 252, 271 (App. Div.), certif. denied, 161 N.J. 335 (1999). New Jersey abides by the American Rule that parties are responsible for

their own attorney fees. But Rule 4:42-9 specifies actions in which an award of attorney fees is allowable. The rule provides for fees in certain types of probate and guardianship proceedings, R. 4:42-9 (a)(3); it does not provide for fees when a fiduciary duty is breached. However, the court rule does not preclude a counsel fee allowance "if the incurring thereof is a traditional element of damages in a particular cause of action." Pressler, Current N.J. Court Rules, comment 2.9 on Rule 4:42-9 at 1602-03 (2009); Gerhardt v. Continental Ins. Co., 48 N.J. 291 (1966); see also Restatement (second) of Torts, section 914 (1979).

In Niles, supra, 176 N.J. at 298, the Supreme Court allowed as an exception to the American rule all reasonable counsel fees against a fiduciary who profited from the "pernitious tort of undue influence" on a testator or trust settlor. The Court stated the exception applied to cases "in which an executor's or a trustee's undue influence results in the development or modification of estate documents that create or expand the fiduciary's beneficial interest in the estate." Id. at 299. The Court explained that there was a special status in cases where undue influence is proved for "undue influence represents such an egregious intentional tort that it establishes a basis for punitive damages in a common law cause of action." Id. at 300.

The Niles court balanced the adherence to the American Rule with the need to make the victims of perfidious behavior whole, stating that in situations "when important public policy concerns are involved," the Court may carve out additional exceptions to the rule. Id. at 299. The Court compared the case to one involving attorney malpractice where attorney fees are awarded because the responsibility of the court is to make the victim whole. Because the fiduciary relationship and the attorney-client relationship are both premised on "utmost trust," and because an attorney and a trustee both act as officers of the court when acting on behalf of clients and beneficiaries, the Court extended the existing exception to the American Rule in attorney malpractice cases to include actions to establish a fiduciary's liability, holding that when an executor or trustee commits the pernicious tort of undue influence it should result in an award of all reasonable counsel fees and costs. Id. at 298-99.

Barry argues that there is no authority for the award of counsel fees against him because this case does not fit the exceptions enumerated in Rule 4:42-9, and he was not an executor of the estate or a trustee as was the defendant in Niles. We disagree. Even though defendant was not an executor or a trustee as was the case in Niles, he controlled Harry's estate under the POA, and based on the findings of Judge Vogelson, he influenced Harry to change the estate plan to benefit himself. The rationale for the award of attorney fees in Niles was that the estate should be made whole when "undue influence results in the development or modification of estate documents that create or expand the fiduciary's beneficial interest in the estate." Id. at 299. This is exactly what occurred in the instant case. Under principles of law and public policy set forth in Niles, Judge Vogelman properly awarded counsel fees and other related costs.

Affirmed.