Circuit Court for Howard County
Case Nos. C-13-FM-21347 and
C-13-FM-21348

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

CONSOLIDATED CASE NOS.

Nos. 560 & 634

September Term, 2021

CONSOLIDATED CASES

IN RE: S.M.

AND

IN RE: B.M.

Wells, CJ,
Reed,
Zarnoch, Robert A.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: November 7, 2022

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

These consolidated appeals have their genesis in two "amended" petitions to appoint a conservator filed in the Circuit Court for Howard County by Grady Management, Inc. ("Grady"), Autumn Crest, LLC ("Autumn Crest"), and Steadfast Insurance Company, Appellants. In the amended petitions, Appellants sought the appointment of a conservator of judgment proceeds, specifically future medical expenses, that were awarded to two minor children, B.M. and S.M. (collectively, "children"), after a jury trial in October 2018.[1] In written orders filed on April 22, 2021, the circuit court dismissed both amended petitions. Appellants filed motions for reconsideration, which were denied, and these timely appeals, which we have consolidated, followed.

QUESTIONS PRESENTED

Appellants present two questions for our consideration[2], both of which challenge the circuit court's decision to dismiss the amended petitions. For the reasons set forth below, we shall affirm.

[1] The amended petition pertaining to the proceeds from the judgment entered in favor of S.M. was filed in Case No. C-13-FM-21-348. The amended petition pertaining to the proceeds from the judgment entered in favor of B.M. was filed in Case No. C-13-FM-21-347. According to Appellants, B.M.'s date of birth was February 17, 2006 and S.M.'s date of birth was August 23, 2008. The assertions in both amended petitions were identical.

[2] The questions presented by Appellants are as follows:

> I. Did the Court err, while conducting a hearing a separate, non-consolidated action, in deciding to *sua sponte* dismiss two separate actions seeking the appointment of trustees and conservators to, *inter alia*, protect Appellants' reversionary interests in future medical expense awards, particularly when no notice, meaningful opportunity to be heard, present evidence or other due process protections were provided?

FACTUAL BACKGROUND

Appellants' amended petitions seeking the appointment of a conservator relate to judgments obtained by the children in a tort action that they, by their mother and next friend, Rediet Birru ("Ms. Birru"), filed in the Circuit Court for Howard County, Case No. 13-C-17-111552, against Grady and Autumn Crest ("the Tort case").[3] In the Tort case, the children and their mother asserted various claims for injuries suffered when they were exposed to mold in their rented apartment, which was owned and operated by Grady and Autumn Crest.[4] The jury found in favor of the children and awarded each child damages for future medical expenses in the amount of $100,000 for B.M. and $20,000 for S.M.

Grady and Autumn Crest filed a motion for judgment notwithstanding the verdict (JNOV), which was denied. Ms. Birru filed a motion for new trial on damages which was also denied. Thereafter, the trial court awarded $53,659.10 in attorney's fees and reimbursement expenses as sanctions arising from discovery violations by Grady and Autumn Crest. This Court affirmed the award of attorney's fees and the denial of Ms.

> II. Did the Circuit Court err in *sua sponte* terminating two separate Petition actions before the Court, seeking the appointment of proper Trustees and Conservators, with no notice, opportunity to oppose, hearing, or other due process, in violation of the Rules governing such Petitions, with a hearing just two weeks away, and which eradicated Defendants' and their insurer's rights to seek protection of their reversionary interests (as the awards at issue were solely for future medical expenses and thus subject to Md. Cts. & Jud. Proc. 11-109)?

[3] We take judicial notice of the filings and judgments entered in the Tort case.

[4] At trial, the children proceeded through their mother and next friend, Ms. Birru. Ms. Birru. also asserted her own claims against Grady and Autumn Crest, but the jury found that she was contributorily negligent.

Birru's motion for a new trial.[5] Appellants did not pay the judgments. On March 18, 2021, the children, by and through their mother and next friend, filed in the Tort case a motion to enforce the judgments with post-judgment interest.

Seventeen days before the motion to enforce the judgments was filed in the Tort case, Appellants filed separate actions in the circuit court seeking guardianships for each of the children. Both petitions were denied. The day after the motion to enforce the judgments was filed in the Tort case, Appellants filed "amended" petitions seeking the appointment of a conservator for the award of future medical expenses for each of the children. For ease of reference, we shall refer to Appellants' amended petitions collectively as "the Fiduciary cases."[6] The Fiduciary cases are the subject of this appeal.

In the Fiduciary cases, Appellants sought a conservator pursuant to § 11-109 of the Courts and Judicial Proceedings Article ("CJ")[7] to "protect the dedicated funds for medical

[5] *Grady Mgmt., Inc. v. Birru*, No. 3162, Sept. Term 2018 (filed August 28, 2020), *cert. denied*, 471 Md. 527 (2020).

[6] Steadfast Insurance Company was not a party to the Tort case, but is one of Grady and/or Autumn Crest's insurers. Steadfast was a party in the Fiduciary cases and is an appellant in these consolidated appeals.

[7] Section 11-109 of the Courts and Judicial Proceedings Article addresses economic damages for personal injury or wrongful death. Subsection (c), which governs the payment of future economic damages, provides:

> (c)(1) The court or the health claims arbitration panel may order that all or part of the future economic damages portion of the award be paid in the form of annuities or other appropriate financial instruments, or that it be paid in periodic or other payments consistent with the needs of the plaintiff, funded in full by the defendant or the defendant's insurer and equal when paid to the amount of the future economic damages award.

expenses only" and establish a "reversionary medical trust." Appellants explained that the conservator would

> ensure that the funds are only used for alleged 'mold' related medical expenses, and implement the reversionary protections provided therein, without risk of [Ms. Birru] or those acting on her behalf avoiding her obligation to pay for the medical expenses until the age of majority, accessing the funds after age of majority (the award was for alleged life-team [sic] treatment needs), and/or otherwise depleting the fund for any purpose other than alleged 'mold' related treatment.

In each of the Fiduciary cases, the children filed a motion to dismiss and, thereafter, a supplemental motion to dismiss on the ground that Appellants lacked standing to seek the appointment of a guardian of the judgment proceeds because they were neither trustees nor interested persons. The children maintained that their recovery in tort was governed by Md. Code, Estates and Trusts Article ("ET"), § 13-403(a) and (b), which provide:

> (a) Unless a court appoints a guardian of the property of a minor under subsection (c) of this section, if a minor or any other person in whose name a claim in tort is made or judgment in tort obtained on behalf of a minor recovers a net sum of $5,000 or more, the person responsible for the payment of the money shall make payment by check made to the order of "(name of trustee), trustee under Title 13 of the Estates and Trusts Article, Annotated Code of Maryland, for (name of minor)."

> (2) In the event that the court or panel shall order that the award for future economic damages be paid in a form other than a lump sum, the court or panel shall order that the defendant or the defendant's insurer provide adequate security for the payment of all future economic damages.
>
> (3) The court or panel may appoint a conservator under this subsection for the plaintiff, upon such terms as the court or panel may impose, who shall have the full and final authority to resolve any dispute between the plaintiff and the defendant or the defendant's insurer regarding the need or cost of expenses for the plaintiff's medical, surgical, custodial, or other care or treatment.

(b) No other act is necessary to constitute the person named as a trustee.

The children, who were represented by counsel, pointed to the definition of the term "net sum" as the "net amount due the minor or to any person acting for the minor after the deduction of the fee of the attorney and expenses[.]" ET § 13-401(c). The children's counsel also pointed to the definition of "[t]he person responsible for the payment of money" as "[t]he attorney, if the minor or any person acting for the minor is represented by an attorney[.]" ET § 13-401(d). Based on those provisions, the children argued that the tortfeasors had no role to play in the constitution of a trustee.

The children also argued that the petitions seeking the appointment of a conservator under CJ § 11-109 were untimely and barred by the doctrine of res judicata. The children maintained that the trial court had entered a lump sum judgment in their favor and that Appellants had failed to request annuitization, periodic payments, or the appointment of a conservator within ten days after the entry of judgment on the verdict in 2018. The children acknowledged that Grady and Autumn Crest had filed in the Tort case a JNOV, but argued that they never requested a conservatorship, annuitization, or periodic payments, and did not mention CJ § 11-109.

Moreover, neither Grady nor Autumn Crest appealed the denial of their JNOV and the judgment in the Tort case was final. Because the judgment in the Tort case was final and conclusive as to all matters decided, and all matters which could have been litigated in it, the children maintained that the Fiduciary cases were barred by the doctrine of res judicata. The children opposed Appellants' attempt to include in a conservatorship for

future medical expenses the attorney's fees and expenses awarded as a sanction for discovery misconduct. The children also advised the court that Appellants had "refused to even acknowledge that post-judgment interest applies" and that the issue of post-judgment interest had been raised in the motion to enforce the judgment that was pending in the Tort case.

The circuit court set a hearing on the motions to dismiss for May 5, 2021. That hearing never occurred, however, because on April 21, 2021, the court in the Tort case entered an order appointing a trustee on behalf of the minor children. In light of that decision, on April 22, 2021, the circuit court entered orders dismissing the Fiduciary cases as moot. Appellants filed motions for reconsideration which were denied. These timely appeals, which have been consolidated, followed.[8]

STANDARD OF REVIEW

Appellants contend that the circuit court erred in dismissing the Fiduciary cases as moot. We review the trial court's grant of a motion to dismiss to determine "whether the trial court was legally correct." *Davis v. Frostburg Facility Operations, LLC*, 457 Md. 275, 284 (2018). In determining whether the decision of the circuit court was legally correct, we give no deference to the trial court's findings. *Lamson v. Montgomery Cnty.*, 460 Md. 349, 360 (2018). We will affirm the circuit court's judgment on any ground adequately shown

[8] Appellants Grady and Autumn Crest also appealed from the decision of the circuit court in the Tort case appointing a trustee and ordering post-judgment interest. That appeal, *Grady Management, Inc. et al v. Rediet Birru, parent and next friend of B.M. and S.M.*, No. 561, September Term 2021, is currently pending before this Court.

by the record, even one upon which the circuit court has not relied or one that the parties have not raised. *D.L. v. Sheppard Pratt Health Sys., Inc.*, 465 Md. 339, 350 (2019).

DISCUSSION

Underlying Appellants' argument that the circuit court erred in dismissing their amended petitions for the appointment of a conservator is the assertion that they had a reversionary interest in the judgment proceeds and that the "money awarded was not for the children to use, and definitely not for Ms. Birru to access, prior to the age of majority (at least not without some Court protection or intervention . . .)." Appellants argue that their "attempts to create the fiduciary estate necessary to protect their interests, which will also protect the minors, has been wrongfully destroyed, without a shred of due process nor Rule compliance." They ask that we "vacate and/or reverse" the circuit court's orders and remand the action to allow for the appointment of a conservator to proceed.

More specifically, Appellants argue that they were entitled to a hearing on the Fiduciary cases pursuant to Md. Rule 10-304(a), which provides:

> (a) **Hearing Required**. Before ruling on a petition for guardianship of the property, the court shall hold a hearing and give notice of the time and place of the hearing to all interested persons . . .

Appellants assert that they were deprived of the opportunity to conduct discovery and denied due process rights. They also maintain that the court order in the Tort case appointing the trustee failed to include certain information required by Md. Rule 10-108(a)(1).[9] We are not persuaded.

[9] Maryland Rule 10-108(a), which applies to orders appointing a guardian, provides:

A. Mootness

Generally, an issue is moot if "there is no longer an existing controversy between the parties, so that there is no longer any effective remedy which the court can provide." *Powell v. Md. Dep't of Health*, 455 Md. 520, 539-40 (2017) (quoting *Mercy Hosp. Inc. v. Jackson*, 306 Md. 556, 561 (1986)). In the case at bar, the issue of whether a guardian or conservator should be appointed became moot when the court in the Tort case appointed a trustee to hold, review, and approve the distribution of the judgment proceeds for B.M. and S.M. Once the trustee was appointed, there was no longer an existing controversy regarding

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> (a) **Order appointing guardian.** (1) Generally. An order appointing a guardian shall:
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> (A) state whether the guardianship is of the property, the person, or both;
> (B) state the name, sex, and date of birth of the minor or disabled person;
> (C) state the name, address, telephone number, and e-mail address, if available, of the guardian;
> (D) state whether the appointment of a guardian is solely due to a physical disability, and if not, the reason for the guardianship;
> (E) state (i) the amount of the guardian's bond or that a bond is waived and (ii) the date by which proof of any bond shall be filed with the court;
> (F) state the date by which any annual report of the guardian shall be filed; and
> (G) state the specific powers and duties of the guardian and any limitations on those powers or duties either expressly or by referring to the specific sections or subsections of an applicable statute containing those powers and duties; and
> (H) except as to a public guardian, unless the guardian has already satisfied the requirement or the court orders otherwise, direct the guardian to complete an orientation program and training in conformance with the applicable *Guidelines for Court-Appointed Guardians* attached as an Appendix to the Rules in this Title.

how the judgment proceeds would be handled and the court in the Fiduciary cases could no longer grant the remedy sought by Appellants.

Even assuming, *arguendo*, that the Fiduciary cases were not rendered moot by the appointment of the trustee in the Tort case, Appellants would fare no better. As we explain, *infra*, Appellants did not have a reversionary interest in the lump sum judgment awarded to the children, they did not have standing to pursue a guardianship, and they did not have standing to request a conservatorship because they failed to file a timely motion for new trial or remittitur in the Tort case.

B. Reversionary Interest

The record before us does not support Appellants' contention that they had a reversionary interest in the judgment proceeds of the minor children. As we discuss in more detail, *infra*, there is no evidence before us that the court in the Tort case granted a remittitur or that the judgments were ordered to be paid in the form of annuities, other financial instruments, or by periodic payments to protect any interest of Appellants. Rather, the judgments entered in the Tort case were lump sum judgments in favor of each minor child for future medical expenses.

C. Guardianship

Appellants' reliance on Title 10 of the Maryland Rules is misplaced. The Committee Note to Md. Rule 10-101 makes clear that the rules in Title 10 do not apply to "a trustee of a recovery by a minor in tort ([Md.] Code, Estates and Trusts Article, § 13-401 *et seq.*)[.]" As the underlying case involved the recovery in tort by two minor children, Title 13, subtitle 4 of the Estates and Trust Article provided the applicable procedure for payment

to a trustee on behalf of the minors. The appointment of a trustee may be made by the issuance of a check payable as set forth in ET § 13-403(a). Provisions for the appointment of a guardian of the property of a minor are included in ET § 13-403(c), "Appointment of guardian of the property of a minor[,]" which provides:

> (c)(1) In accordance with the procedures for the appointment of a guardian under Subtitle 2 of this title, the court may appoint a guardian of the property of a minor on whose behalf a recovery in tort is sought or has been obtained if the court determines that the appointment would be in the minor's best interest.
>
> (2) The petition for guardianship may be made by an interested person or a trustee under this subtitle.

Id.

An "interested person" is defined as follows:

> (k)(1) "Interested person" means the guardian, the heirs of the minor or disabled person, any governmental agency paying benefits to the minor or disabled person, or any person or agency eligible to serve as guardian of the disabled person under § 13-707 of this title.
>
> (2) If an interested person is also a minor or a disabled person, "interested person" also includes a judicially appointed guardian, committee, conservator, or trustee for that person, or, if none, the parent or other person having assumed responsibility for that person.

ET § 13-101(k).

There is no evidence in the record to show that Appellants were interested persons or trustees. They did not allege or establish that they were guardians, the heirs of the minor children, governmental agencies paying benefits to the minor children, or persons or agencies "eligible to serve as guardian of the disabled person" under ET § 13-707. As a result, Appellants did not have standing to petition for guardianship.

D. Conservatorship

As for appellant's petition for the appointment of a conservator, CJ § 11-109 does not provide an independent action for the appointment of a conservator. Rather, it applies to those cases in which a court or health claims arbitration panel orders that all or part of an award for future economic damages "be paid in the form of annuities or other appropriate financial instruments, or that it be paid in periodic or other payments consistent with the needs of the plaintiff, funded in full by the defendant or the defendant's insurer and equal when paid to the amount of the future economic damages award." CJ § 11-109(c)(1). The statute provides that the court "shall order that the defendant or the defendant's insurer provide adequate security for the payment of all future economic damages" when the award for future economic damages is "in a form other than a lump sum[.]" CJ § 11-109(c)(2).

In *Goldberg v. Boone*, 167 Md. App. 410 (2006), we recognized, in dicta, that "the appointment of a conservator constitutes a statutorily authorized remittitur." 167 Md. App. at 443. In that case, the plaintiff, Boone, was awarded damages in a medical malpractice action against his treating physician. *Id.* at 414-15. The physician filed two post-trial motions including a motion for judgment notwithstanding the verdict, or, in the alternative, for new trial and a motion for new trial concerning Boone's future medical damages and for appointment of a conservator. *Id.* at 416.

In his motion for new trial requesting the appointment of a conservator, the physician sought a conservatorship under CJ § 11-109(c) in order "to make periodic

payments consistent with the future medical needs of" Boone. *Id.* at 440. The physician explained the basis for his request as follows:

> It makes ample sense for the Court to appoint a conservator to administer payments to the Plaintiff in this case. The conservatorship will safeguard the $355,000 to ensure that the Plaintiff actually receives the funds necessary for future medical treatment. The conservator under this subsection for the Plaintiff will also have the full or final authority to resolve any dispute between the Plaintiff and the Defendants regarding the need or cost of expenses for the Plaintiff's medical, custodial or other care or treatment. Md. C.J.P. § 11-109(c)(3). Moreover, a conservator would also ensure that the jury award will be properly utilized for the Plaintiff's medical care rather than any non-medical related expense. If the Plaintiff actually chooses to treat with specialists and hires a live-in aide, the conservator would properly make those payments. If the Plaintiff chooses not to treat or hire an aide, that amount will remain in the fund set up by the Court. In the event that the Plaintiff dies before his life expectancy, the unpaid balance of the jury award for future medical damages shall revert to the Defendant or their insurer. *See* Md. C.J.P. § 11-109(d).

Id. at 440.

Boone opposed the request to appoint a conservator on the ground that it was neither factually nor legally justified, would impose a "managed care nightmare" on him, and would provide "a wholly undeserved windfall" to the physician and the physician's insurance company if he was to die before the $355,000 judgment was used up. *Id.* at 441.

Although both motions were denied by the trial court, on appeal, this Court ordered a new trial on the issue of damages and offered "comments" in the hope they would be of assistance to the court and counsel. *Id.* at 438-39. Those comments included our recognition that the appointment of a conservator constitutes a statutorily authorized remittitur. We stated:

> The General Assembly has provided that "a party filing a motion for a new trial may object to the damages as excessive on the ground that the claimant

> has been or will be paid, reimbursed, or indemnified to the extent and subject to the limits stated in § 3-2A-05(h) of this subtitle," [addressing modifications or corrections or health claims arbitration awards] and that if such an objection has been filed, "[t]he court shall hold a hearing a hearing and receive evidence on the objection." Maryland Code, Courts and Judicial Proceedings § 3-2A-06(f). This statute creates exceptions to the rules that when a judgment is entered on a jury verdict that awarded money damages to the plaintiff, although the court has discretion to control the methods by which that judgment is satisfied, (1) the plaintiff is entitled by law to be paid interest on the uncollected portion of the judgment, and (2) the plaintiff's estate is entitled to whatever portion of the judgment, and interest thereon, remain uncollected as of the date of the plaintiff's death. For these reasons, the appointment of a conservator constitutes a statutorily authorized remittitur.

Id. at 442-43.

After recognizing that the decision to appoint a conservator rests in the sound discretion of the circuit court and that an evidentiary hearing is not a condition precedent to ruling on a motion to appoint a conservator, we noted:

> According to [the physician], the motion for appointment of a conservator cannot be denied until the circuit court has made factual findings on the availability of collateral sources, as well as on "[Boone's] life expectancy and his likelihood of survival to require that care." We are persuaded that the court cannot appoint a conservator without making factual findings sufficient to permit appellate review of the *de facto* remittitur that is the operative effect of an appointment. On the other hand, when – as is the situation in the case at bar – the jury has awarded the 'present value' of the plaintiff's future expenses, the court may exercise its sound discretion to deny the motion for a conservator without announcing an on-the-record response to every reason advanced in support of the motion.

Id. at 443.

Issues of remittitur are raised through the filing of a motion for new trial. *Davis v. Bd. of Educ. for Prince George's Cnty.*, 222 Md. App. 246, 275-76 (2015) (remittitur cannot be granted in the absence of a motion for new trial). In *Battista v. Savings Bank of*

Baltimore, 67 Md. App. 257 (1986), this Court considered a claim by a bank that the jury verdict was excessive. 67 Md. App. at 273. The bank filed a motion for judgment notwithstanding the verdict, but did not file a motion for new trial. *Id.* We held that the bank was precluded from arguing that the verdict was excessive. *Id.* We explained:

> A motion for [JNOV] is not the way to get at excessive damages; that is the office of a motion for a new trial which can be denied conditioned on the plaintiff's acceptance of a *remittitur*. *Cheek v. J.B.G. Properties, Inc.*, 28 Md. App. 29, 43, 344 A.2d 180 (1975) (judgment n.o.v. cannot be used to amend, reduce, or alter jury's verdict). That *Cheek* is still good law is demonstrated by Rule 2-532(e) which provides that when a jury verdict has been returned, and when a motion for [JNOV] is not joined with a motion for new trial, the court may deny or grant the motion for judgment. If it does the latter, it may only "set aside any judgment entered and direct the entry of a new judgment."

Id.

In the instant case, Appellants did not allege that they had filed in the Tort case motions for new trial or remittitur seeking to control the manner in which the judgments were satisfied, and we take judicial notice of the fact that no such motions were filed. Instead, in their petitions for the appointment of a conservator, Appellants stated that the trial judge was aware of a jury note "expressly indicating that the award be placed in trust to protect the minors" and noted that the judgments were entered "in favor of each minor only, and not in favor" of their mother and next friend, Ms. Birru. Those assertions were insufficient to support a petition for the appointment of a conservator under CJ § 11-109. In order to obtain the appointment of a conservator under CJ § 11-109, a motion for new trial or remittitur should have been filed within ten days of the judgment entered in the Tort case. Because no such motion was filed, Appellants' lacked standing to petition for the appointment of a conservator in the Fiduciary cases.

E. Conclusion

For the reasons set forth above, we conclude that the Fiduciary cases became moot when the court in the Tort case appointed a trustee thereby ending any controversy about how the children's judgment proceeds would be handled. In addition, dismissal of the Fiduciary cases was appropriate because Appellants, who were the tortfeasors and their insurer, did not have a reversionary interest in the judgments entered in favor of the children in the Tort case and did not have standing to petition for a guardianship or conservatorship.

IN CASE NOS. 560 AND 634, SEPTEMBER TERM 2021, JUDGMENTS OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED; APPELLANTS TO PAY THE COSTS IN BOTH CASES.