IN THE CIRCUIT COURT FOR SEMINOLE COUNTY, FLORIDA
PROBATE DIVISION

IN RE: GUARDIANSHIP OF
JAN GARWOOD **Case Number 2017-GA-1200**

_____/

MOTION FOR ENTRY OF ORDER OF RESTORATION WITHOUT HEARING

COMES NOW, JAN GARWOOD ("Jan"), and hereby files this Motion for Entry of Order of Restoration without Hearing ("Motion") pursuant to Fla. Stat. Sec. 744.464(3) and Fla. Prob. R. Rule 5.041 and in support thereof states as follows:

1. On or about June 17, 2020, Jan through her attorney, filed a Suggestion of Capacity ("Suggestion").

2. After filing the Suggestion, Jan did not receive any objection, and the Court appointed Doctor Junias Desamour, MD on August 10, 2020, to perform a comprehensive examination of Jan.

3. On August 14, 2020, Dr. Desamour examined Jan at the Palms of Longwood to perform a full examination of her capacity. A copy of Dr. Desamour's Report dated August 16, 2020 is hereby attached as "Exhibit A."

4. Dr. Desamour states "In conclusion, in my expert medical opinion and with a reasonable degree of medical certainty, I conclude that Janice Garwood is not incapacitated at this time. She is fully capable of handling and executing her own personal, medical and financial day affairs with only occasional minimal assistance from financial experts for highly complex financial decisions and such experts are readily available to her."

5. Since filing the suggestion of capacity on June 17, 2020, there has been no objections to the suggestion of capacity.

6. Furthermore, since the Judges Order of August 10, 2020, there have been no objections filed.

7. *Fla. Stat. 744.464(3)(a)* states "if no objections are filed, and the court is satisfied with the medical examination, the court shall enter an order of restoration of capacity, restoring all or some of the rights which were removed from the Ward." (*emphasis* added)

8. Based on Fla. Stat. 744.464(3)(a) the Court has a duty to enter an order restoring all rights of a Ward when an examination committee member determined that the Ward is capable of exercising all of the rights that had been removed from her. *McJunkin v. McJunkin*, 896 So. 2d 962 (Fla. 2d DCA 2005).

9. Furthermore, if the medical testimony indicates that the ward currently possesses "the requisite level of capacity for full restoration," it is error for the court to restore only some rights. *In re Maynes-Turner*, 746 So.2d 564 (Fla. 3d DCA 1999).

10. Based on the Report, attached hereto, *Fla. Stat.* 744.464, and precedence established in *McJunkin* and *Maynes-Turner*, this Court must enter an Order of Restoration. Failure to do so would be error of the Court and clear violation of Jan's rights.

Wherefore, Jane Garwood, hereby moves this Honorable Court for:

A. Entry of an Order Restoring all of Jan's Rights;

B. Entry of an order immediately discharging the Guardian of the Person;

C. Entering an Order directing the Guardian of the property to promptly file a Final Report and Accounting and Petition for Discharge;

D. Any further relief the Court deems just and proper.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via the electronic portal system to all parties on this 23rd day of August, 2020.

s/ Leslie Federigos, Esq.
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In short, Mount Sinai operated a special service for its patients and their companions and undertook special duties to them. Mount Sinai undertook to find the safest place to discharge their passengers and to escort them safely to the curb. They failed to do either for Mrs. Szklaver and violated their own standards.

The hospital's undertaking of this special duty distinguishes this case from *Cecil* and *Sheir*. A jury could properly find the defendants liable because they created a foreseeable zone of risk that posed a threat of harm to Mrs. Szklaver. *See Kaisner v. Kolb*, 543 So.2d 732, 735 (Fla. 1989); *McCain v. Florida Power Corp.*, 593 So.2d 500 (Fla.1992). Once the defendants undertook that special duty, they had a duty not to increase the danger to those within the zone of risk. *See Henderson v. Bowden*, 737 So.2d 532 (Fla. 1999). *See also Feldotto v. St. Louis Public Serv. Co.*, 285 S.W.2d 30, 32 (Mo.Co. App.1955) (holding that part of bus driver's duty in transporting passengers is to take care "to put them off at a reasonable safe place."); *Tulsa Yellow Cab, Taxi, & Baggage Co. v. Salomon*, 181 Okla. 519, 75 P.2d 197 (1938) (holding that whether driver of taxicab owed duty to assist a departing passenger in alighting was question for jury under proper instructions). *See generally*, Jay M. Zitter, Annotation, *Liability of Motorbus Carrier or Driver for Death of, or Injury to, Discharged Passenger Struck by Other Vehicle*, 16 A.L.R. 5th 1 (1993).

[3] This opinion should not be read to impose a duty of care on all bus drivers to discharge their passengers at the safest possible location, or to require all bus drivers to escort their passengers safely to the curb. The general rule announced in *Cecil* and *Sheir* still holds true: a bus driver and owner do not owe a duty to a passenger once that passenger safely disembarks from the bus, attempts to cross the road, and is struck by a car. Nor does this opinion absolve passengers from their duty to exercise due care when alighting from a bus and then attempting to cross the road. The jury clearly understood that principle when it assigned 25% of the fault for the accident to Mrs. Szklaver.

However, once Mount Sinai undertook to provide a curb-to-curb transportation service for its patients and their companions; required its drivers to choose the safest location to discharge those passengers, namely on the same side of the street as their residence; and required its drivers to assist the passengers from the bus to the curbside, a breach of those duties created a basis for a jury's finding of negligence.

AFFIRMED.

In re Emmanuelle MAYNES–TURNER, Ward, Appellant.

No. 98–2732.

District Court of Appeal of Florida, Third District.

Dec. 15, 1999.

After being declared incompetent following serious injury, ward filed suggestion of capacity. The Circuit Court, Dade County, Sidney B. Shapiro, J., partially restored ward's rights. Ward appealed. The District Court of Appeal held that ward was entitled to restoration to full capacity.

Reversed and remanded.

Mental Health ⇐19

Injured ward was entitled to restoration of full competency, even though her physician was concerned that she might make some future harmful decisions, where physician found that ward pos-

sessed the requisite level of capacity for full restoration.

Ferdie & Gouz and Ainslee Ferdie, Miami, for appellant.

Appellee precluded from oral argument.

Before JORGENSON, LEVY, and GREEN, JJ.

PER CURIAM.

On November 21, 1996, due to a serious injury, Emmanuelle Maynes–Turner was declared incompetent, and her adult son and daughter were named as guardians. Approximately a year and a half later, she filed a Suggestion of Capacity. The trial court followed the examining doctor's recommendations and only partially restored her rights. We reverse and direct the trial court on remand to restore Ms. Turner to full competency.

The examining doctor reported objective findings consistent with full competency. He indicated that Ms. Turner was aware and knowledgeable during his examination. Additionally, the record reflects that Ms. Turner was aware of the proceedings and knew the state of her affairs. However, the doctor and the trial court both expressed paternalistic feelings about the possibility that she might make future harmful decisions.[1] "In our present day paternalistic society we must take care that in our zeal for protecting those who cannot protect themselves we do not unnecessarily deprive them of some rather precious individual rights." *In re McDonnell*, 266 So.2d 87, 88 (Fla. 4th DCA 1972). Absent his paternalistic notion that she might make decisions that could harm her, the doctor found Ms. Turner possessed the requisite level of capacity for full restoration. It was error, therefore, for the trial court to do otherwise, and Ms. Turner should be restored to competency.

For the above reasons, we reverse the trial court's partial restoration of competency and direct the court to enter an order for full restoration of her rights.

REVERSED AND REMANDED.

1. The doctor observed that: "Cognitively she does reasonably well. She would seem to possess the necessary knowledge that would be required for restoration, however, I do not know that she could make effective decisions and might pose significant risks for herself on the basis of those decisions that she would make." The trial court adopted the doctor's recommendations.

Emanuel EDELSTEIN, Joseph Kracauer and Two Twenty Alhambra, L.C., Petitioners,

v.

George ALEXANDER and The City of Coral Gables, a municipality under the laws of Florida, Respondents.

No. 99–2944.

District Court of Appeal of Florida, Third District.

Dec. 15, 1999.

A Writ of Certiorari to the Circuit Court for Dade County, Jon I. Gordon, Judge.

H. Hugh McConnell, Coral Gables, for petitioners.

Elizabeth M. Hernandez, City Attorney, for City of Coral Gables; Manuel Arthur Mesa for George Alexander; Robert A. Ginsburg, County Attorney and Hugo Benitez, Assistant County Attorney, for Miami–Dade County.

Before SCHWARTZ, C.J., and JORGENSON and FLETCHER, JJ.

J. Morgan McJUNKIN, Ward, Appellant,

v.

J. Neville McJUNKIN and Marshall L. McJunkin, Appellees.

No. 2D04–1523.

District Court of Appeal of Florida, Second District.

March 30, 2005.

Background: Ward, who was declared to be incapacitated, filed suggestion of capacity. Following a hearing, the Circuit Court, Highlands County, J. David Langford, J., partially restored ward's rights. Ward appealed.

Holding: The District Court of Appeal, Kelly, J., held that ward was entitled to restoration of full capacity.

Reversed and remanded.

1. Mental Health ⚿171

Ward was entitled to restoration of full capacity; court-appointed doctor stated that ward was capable of exercising all of the rights that had been removed from him, and witnesses stated that ward was capable of managing his own affairs and was completely competent. F.S.1987, § 744.331(1); F.S.2003, § 744.102(10).

2. Mental Health ⚿3.1, 331

Before depriving an individual of all their civil and legal rights by declaring individual an incapacitated person, the individual must be incapable of exercising his rights at all, whether wisely or otherwise. West's F.S.A. § 744.1012; F.S.2003, § 744.102(10); F.S.1987, § 744.331(1).

Robert L. Trohn and Monterey Campbell of Gray Robinson, P.A., Lakeland, for Appellant.

James V. Lobozzo, Jr., of McClure & Lobozzo, and Robert E. Livingston of Livingston & Livingston, Sebring, for Appellees.

KELLY, Judge.

In March 2001, at the age of seventy-nine, J. Morgan McJunkin was deprived of his right to contract, to gift or dispose of property, to sue and defend lawsuits, to manage property, and to apply for government benefits when he was declared to be incapacitated. In October 2003, through counsel, he filed a Suggestion of Capacity. After an evidentiary hearing, the trial court only partially restored Mr. McJunkin's rights. We reverse and direct the trial court on remand to enter an order of restoration of capacity which fully restores Mr. McJunkin's rights.

The doctor the court appointed to examine Mr. McJunkin testified that Mr. McJunkin was capable of exercising all of the rights that had been removed from him and opined that, not only should Mr. McJunkin be restored to capacity, but it was doubtful that he was ever incapacitated. A clinical psychologist who examined Mr. McJunkin testified that the examination of Mr. McJunkin in 2001 was flawed, that Mr. McJunkin met the criteria for competency in all categories, and that his capacity should be restored. A number of lay witnesses also testified variously that the original deprivation of Mr. McJunkin's rights was a "travesty of justice" or "stupid," that he was capable of managing his own affairs, and that he was "completely competent." Mr. McJunkin's depositions, one videotaped, and his trial testimony are consistent with the picture painted of him by the testimony of witnesses. The only witness offered in opposition to Mr. McJunkin's suggestion of capacity was, ironically, his former attorney ad litem who offered no opinion as to Mr. McJun-

kin's capacity except to say that he did not see any change since the guardianship proceedings were initiated.[1] Remarkably, in the face of the uncontradicted evidence that Mr. McJunkin should be restored to full capacity, the trial court declined to do so. The trial court apparently relied on testimony that Mr. McJunkin had agreed to, and would benefit from, having professional assistance managing some of his property, presumably to guard against making the type of imprudent investments that prompted his sons to have him declared incapacitated.

[1, 2] Section 744.102(10), Florida Statutes (2003), defines an "incapacitated person" as "a person who has been judicially determined to lack the capacity to manage at least some of the property ... of such person." Florida Statutes do not define "capacity." They do however provide a clue as to what it is not. Before being amended in 1989, chapter 744, Florida Statutes, contained language to describe an "incompetent" person as one "likely to dissipate or lose his property." § 744.331(1), Fla. Stat. (1987). After the statute was amended, "incompetent" became "incapacitated" and the reference to losing or dissipating property disappeared. *See* Ch. 89–96, §§ 1–112, at 173–224, Laws of Fla. It is evident that under the current version of the statute, before depriving an individual of "all their civil and legal rights," the individual must be incapable of exercising his rights at all, whether wisely or otherwise. *See* § 744.1012.

This case is similar to *In re Maynes–Turner*, 746 So.2d 564 (Fla. 3d DCA 1999). There, as here, the examining doctor reported objective findings consistent with full competency but both he and the trial court "expressed paternalistic feelings about the possibility that [Mayes–Turner] might make future harmful decisions." *Id.* at 565. We repeat the caution stated in *Maynes–Turner* that "[i]n our present day paternalistic society we must take care that in our zeal for protecting those who cannot protect themselves we do not unnecessarily deprive them of some rather precious individual rights." *Id.* (quoting *In re McDonnell*, 266 So.2d 87, 88 (Fla. 4th DCA 1972)). As was the case in *Maynes–Turner*, absent some paternalistic notion that Mr. McJunkin might make some decisions that could harm him, the doctors that examined him found that he should be restored to full capacity. Accordingly, it was error for the trial court to do otherwise.

Reversed and remanded.

FULMER and WHATLEY, JJ., Concur.

Diane TEMPLETON, Appellant,

v.

Anne FIERRO et al., Appellee.

No. 4D04–2043.

District Court of Appeal of Florida, Fourth District.

March 30, 2005.

Appeal of a non-final order from the Circuit Court for the Seventeenth Judicial

1. We note that the order of incapacity was not appealed, and of course, it is not properly before us in this appeal. Nevertheless, we are troubled by the apparent lack of due process that was afforded to Mr. McJunkin in that proceeding, including the failure of the trial court to advise him of the right to choose his own attorney and the apparent failure of his attorney ad litem to act as an advocate for him in those proceedings or during the guardianship.