In the

Supreme Court of Virginia

At Richmond

Record No. 150587

KENIA L. LOPEZ-ROSARIO,

Appellant,

– v. –

CHRISTINE HABIB, M.D. and
VIRGINIA SURGERY ASSOCIATES, P.C.,

Appellees.

BRIEF OF APPELLEES

PAUL T. WALKINSHAW, VSB #66049
BYRON J. MITCHELL, VSB #39790
RAWLS MCNELIS + MITCHELL
11325 Random Hills Road, Suite 340
Fairfax, Virginia 22030
T: (703) 268-5856
F: (703) 272-3603
pwalkinshaw@rawlsmcnelis.com
bmitchell@rawlsmcnelis.com

Counsel for Appellees

COUNSEL PRESS • VA – (800) 275-0668

SCV: Submitted on 11-30-2015 14:42:40 EST for filing on 11-30-2015

TABLE OF CONTENTS

Preliminary Statement.....1

Statement of the Case and Facts.....1

Argument.....3

Conclusion.....8

Certificate 9

TABLE OF AUTHORITIES

Cases

Buchanan v. Buchanan,
14 Va. App. 53 (1992) 7

Cook v. Radford Community Hosp.,
260 Va. 443 (2000) 1, 6, 8

Temple v. Mary Wash. Hosp., Inc.,
288 Va. 134 (2014) 3

Rules, Statutes, and Other Authorities

Va. Code § 24.2-101 5

Va. Code § 37-149 6

Va. Code § 37.1-141 6

Va. Code § 37.2-1000 1

Va. Code § 64.2-2000 5

Va. Code § 64.2-2025 ..... 1, 6, 7

Va. Const. Art. II § 1 1

PRELIMINARY STATEMENT

Plaintiff argues the trial court should be reversed because the guardianship order was limited to "medical decisions only." Appellant's Brief at 2. But the guardianship order contained no such limiting language. The order made Kenia Lopez-Rosario's parents "responsible for [her] personal affairs" after finding she was permanently incapacitated and "unable to care for her person and estate." App. at 25-26. With guardians appointed to manage all of her personal affairs, Ms. Lopez-Rosario could not file a lawsuit in her own name according to Code § 64.2-2025 and *Cook v. Radford Community Hosp.*, 260 Va. 443 (2000). Thus, the trial court correctly dismissed the action, and its decision should be affirmed.

STATEMENT OF THE CASE AND FACTS

Although the impetus for the guardianship petition may have been Ms. Lopez-Rosario's May 29, 2010 foot surgery, the petition did not ask the court to limit the guardians' powers to medical decision-making. And the guardianship order—which was entered *after* the foot surgery had already occurred—set no such limitations.

The guardianship petition stated that Ms. Lopez-Rosario "is an incapacitated individual as defined by Virginia Code Ann. § 37.2-1000 [now § 64.2-1000] and Article II Section 1 of the Constitution of Virginia." App. at

18. Although she was 29 years old at the time the petition was filed, Ms. Lopez Rosario's reading-comprehension and problem-solving skills were equivalent to those of a first or second grade student. App. at 19. A psychologist's report filed with the guardianship petition also addressed her cognitive functioning: "[O]verall, Kenia functions cognitively at about the level of a six year old child. Estimated intellectual functioning is in the range of mild mental retardation. She cannot understand spoken speech, but can understand and communicate in ASL, though at a level of a young child." App. at 23. The psychologist determined that "[h]er [cognitive] condition is permanent and expected to remain stable." App. at 24.

In light of the evidence submitted with the guardianship petition, the trial court's order appointing her parents as guardians found that "Kenia L. Lopez-Rosario is incapacitated and that the duration of her incapacity is permanent." It further found that Ms. Lopez-Rosario's "best interests shall be met by appointing co-guardians for her *personal decisions, including* decisions relating to her health, safety, treatment and care." (Emphasis added). The court held that Ms. Lopez-Rosario was "incapacitated and *unable to care for her person and estate*" and that her co-guardians "*shall be responsible for [her] personal affairs*." App. at 25-26 (emphasis added).

The guardianship order was entered on July 28, 2010; it contained no limitation on its duration.

Ms. Lopez-Rosario filed the instant action in her own name, without any indication she was under a guardianship, in March 2014. After discovery revealed Ms. Lopez-Rosario had guardians, we filed a Plea in Bar/Motion to Dismiss. The trial court granted that motion and dismissed the action on January 23, 2015.

ARGUMENT

Plaintiff argues that the "Guardianship Order in the instant case was *intended* to be a limited guardianship for medical purposes." Appellant's Brief at 6 (emphasis added). Whether it was *intended* to be a limited guardianship is irrelevant. Because a trial court speaks only through its written orders, what matters is not the order's intent but what it says. *Temple v. Mary Wash. Hosp., Inc.*, 288 Va. 134, 141 (2014). Tellingly, plaintiff cites no language from the order that limits the guardians' powers to medical decision-making. Instead, she cites the psychologist's report describing why the petition was filed and the fact that Children's Hospital National Medical Center (NCMC) paid for the costs associated with the proceeding. Appellant's Brief at 7, 8. But how the proceeding was paid for

and why it was begun do not shed light on the guardians' powers. For those, we must turn to the order, relevant statutes, and caselaw.[1]

The guardianship order specifically appointed Ms. Lopez-Rosario's parents to handle her "personal affairs" and to make her "personal decisions." The order states those personal affairs and decisions *include* "decisions relating to her health, safety, treatment and care"—but it does not limit the guardians' responsibilities to *only* those matters. Nor should it have. The court found that Ms. Lopez-Rosario was "unable to care for her person and estate" due to permanent incapacity.

By statutory definition, a person who is adjudicated permanently incapacitated is:

> incapable of receiving and evaluating information effectively or responding to people, events, or environments to such an extent that the individual lacks the capacity to (i) meet the essential requirements for his health, care, safety, or therapeutic needs without the assistance or protection of a guardian or (ii) manage property or financial affairs or provide for his support or for the support of his legal dependents without the assistance or protection of a conservator.

[1] Because these are issues of law and legal interpretation, we agree the standard of review is *de novo*.

Code § 64.2-2000. A finding of incapacity also renders the person, by statutory command, mentally incompetent:

> A finding that a person is incapacitated shall be construed as a finding that the person is "mentally incompetent" as that term is used in Article II, Section 1 of the Constitution of Virginia and Title 24.2 unless the court order entered pursuant to this chapter specifically provides otherwise.

Id. The guardianship order here did not "specifically provide otherwise," which means Ms. Lopez-Rosario was rendered both incapacitated and mentally incompetent. And by statutory definition, a mentally incompetent and incapacitated individual lacks the capacity to meet essential requirements for her health, manage her property and financial affairs, and vote.[2]

The plaintiff in *Cook* tried to use the difference between mental incompetency and incapacity to her advantage, but this Court rejected the argument as irrelevant. It held that regardless of the person's disability, the statutory scheme requires a fiduciary to prosecute an action for his ward:

> First, she argues that the difference between a declaration of incapacity and of incompetency is a 'major and material' difference which requires a different outcome in this case. We agree that incapacity and incompetency represent different disabilities, but that difference is not material for the

[2] A person who has been adjudicated as incapacitated is not a "qualified voter." Code § 24.2-101.

> purposes of this suit. The statute at issue in this case does not distinguish between the types of disabilities, but applies when any fiduciary has been appointed for a ward, regardless of the particular disability suffered by the ward. Therefore, whether the disability is incompetency or incapacity, the issue remains the same if a fiduciary has been appointed.

Cook, 260 Va. at 448-449.

The legal rationale behind *Cook* had been established as a "rule" since at least 1934: "This rule was premised on the policy that an insane person, whether plaintiff or defendant, cannot appear in these judicial proceedings alone and unprotected; he must sue or defend by guardian, guardian ad litem, or committee." *Id*. at 448 (internal citations and quotations omitted). That rule was elevated to statutory command in 1950, when the General Assembly directed in Code § 37-149 (now § 64.2-2025) "that actions or suits to which a ward is a party 'shall' be prosecuted or defended by the fiduciary once one has qualified." *Id*. *Cook* held that both the previous rule and the current statute were not permissive but rather mandatory, and concluded: "if a fiduciary has been appointed for a ward, Code § 37.1-141 [now Code § 64.2-2025] requires that the fiduciary prosecute any suit to which the ward is a party." *Id*. at 451.

Here, fiduciaries (Ms. Lopez-Rosario's parents) were appointed for a ward (Ms. Lopez-Rosario), so Code § 64.2-2025 requires that the parents prosecute any suit on behalf of their daughter.

In an attempt to defeat *Cook's* clear holding and Code § 64.2-2025, plaintiff argues that the guardianship order did not "strip her of legal rights to take action concerning her person and property" because it does not specify her "legal disabilities."[3] Appellant's brief at 8-9. To the contrary, the order states Ms. Lopez-Rosario is "unable to care for her person and estate," and it clearly defines her legal disability—i.e., permanent incapacity. App. at 25-26. As a permanently incapacitated person, Ms. Lopez-Rosario is also deemed mentally incompetent. She cannot vote, cannot be held liable for entering into legal arrangements, and likely could not stand trial on any criminal charges. If she cannot perform these legal acts, she cannot be responsible for filing a lawsuit.

[3] Plaintiff also claims that the guardianship order here "does not contain language often seen in general guardianship orders." Appellant's Brief at 9. But this claim is unsupported by any citation to the record or authority, and it therefore cannot be considered here. "Statements unsupported by argument, authority, or citations to the record do not merit appellate consideration." *Buchanan v. Buchanan*, 14 Va. App. 53, 56 (1992).

CONCLUSION

The parents, who were appointed to handle her "personal decisions" and "personal affairs," were the proper parties to file a lawsuit on Ms. Lopez-Rosario's behalf. Since they did not file the lawsuit on her behalf, the trial court properly dismissed it because "the ward does not have standing to sue in his or her own name." *Cook*, 260 Va. at 451. This Court should affirm that dismissal.

Respectfully submitted,

/s/ Paul T. Walkinshaw

Paul T. Walkinshaw, Esq., VSB #66049
Byron J. Mitchell, VSB #39790
RAWLS MCNELIS + MITCHELL, P.C.
11325 Random Hills Road, Suite 340
Fairfax, Virginia 22030
T: (703) 268-5856
F: (703) 272-3603
pwalkinshaw@rawlsmcnelis.com
bmitchell@rawlsmcnelis.com
Counsel for Appellees

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 30, 2015, the foregoing Brief of Appellees was filed electronically via the VACES system with the Supreme Court of Virginia and that ten copies of the same were hand delivered to the clerk's office. This same date, a copy of the Brief of Appellees was sent via email to all counsel of record, at the email address below:

Jacob Alvin Kamerow
Kamerow Law Firm
5001 Seminary Rd.
Ste. 110
Alexandria, VA 22311
T: (703) 370-8088
F: (703) 370-1714
jkamerow@kamerowlaw.com
Counsel for Appellant

/s/ Paul T. Walkinshaw