

2015 WL 5886150 (Nev.Dist.Ct.) (Trial Motion, Memorandum and Affidavit)  
District Court of Nevada.  
Clark County

ESTATE OF WAVENEY NEDD, by and through Special Administrator Carlus K. Nedd; Carlus K.  
Nedd a/k/a Carlos K. Nedd, individually and as heir of the Estate of Waveney Nedd, Plaintiffs,

v.

April PARKS, individually; Does I through X; and Roe Corporations I through X, inclusive, Defendants.

No. 14A709939.  
March 11, 2015.

Dept. No.: V

**Motion to Dismiss or in the Alternative for Summary Judgment Pursuant to NRCP 12(b)(5)**

Mot, [Lee A. Drizin](#), Esq., Nevada Bar Number 4971, [Lester A. Berman](#), Esq., Nevada Bar No. 0149, [Lee A. Drizin](#), CHID, 2460 Professional Court, Suite 110, Las Vegas. NV 89128, 702.798.4955, 702.798.5955 (facsimile), lesberman @leedrizin.com, for defendant.

Defendant, April L. Parks, by and through her attorneys, Lester A. Berman, Esq. and Lee A. Drizin, Chtd., hereby moves the court, pursuant to [NRCP 12\(b\)\(5\)](#) for an order dismissing the complaint of the Plaintiff on file herein that it fails to state a claim upon which relief can be granted. Alternatively, as matters outside the pleading are presented to this court as part of this motion, Defendant alternatively moves for a summary judgment pursuant to [NRCP 56\(b\)](#).

This motion is based upon the files, pleadings and papers on file herein together with the memorandum of points and authorities and exhibits attached hereto.

DATED this 11 day of March, 2015.

LEE A. DRIZIN, CHTD.

By:

LESTER A. BERMAN, ESQ.

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*Attorney for Defendant*

### NOTICE OF MOTION

PLEASE TAKE NOTICE that the undersigned will bring the above-captioned Motion to Dismiss or in the Alternative for Summary Judgment Pursuant to [NRC 12\(b\)\(5\)](#) on for hearing at 9:00am a.m. / p.m. on the 17 day of April, 2015, before the Honorable Carolyn Ellsworth, Department V, Eighth Judicial District Court, Clark County, Nevada, at the Regional Justice Center, 200 Lewis Avenue, Las Vegas, Nevada 89155.

DATED this 11 day of March, 2015.

LEE A. DRIZIN, CHTD.

By:

LESTER A. BERMAN, ESQ.

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Attorney for Defendant

### POINTS AND AUTHORITIES

Plaintiff, Carlos K. Nedd is the Special Administrator of the Estate of Waveney Nedd and Carlos K. Nedd, individually as the heir of the Estate of Waveney Nedd, has brought a complaint against Defendant, April L. Parks arising out of Parks' activities while she functioned as the Temporary Guardian of the Person and Estate of Waveney Nedd, an adult ward. Parks, as such Temporary Guardian, performed her duties between the date of her appointment on September 19, 2012 and the date of the death of Waveney Nedd on November 18, 2012. As will be set forth below, the guardianship was administered through the District Court, Family Division of Clark County, Nevada and an Order for Final Discharge of April Parks was entered in that case on January 14, 2014. (Case No. G-12-037779-A).

The Complaint of the Plaintiffs alleges claims for relief against Parks for negligence, breach of fiduciary duty, conversion, unjust enrichment and **elder abuse** pursuant to [NRS 41.1395](#). As all of the legal issues and factual allegations raised by the Plaintiffs in their Complaint were addressed in the guardianship proceedings, all of their claims should be dismissed pursuant

to [NRCP 12\(b\)\(5\)](#) on the basis that all of those claims have already been addressed by the guardianship court and dismissal is warranted under the doctrines of claim preclusion and/or issue preclusion. Alternatively, the court should treat this motion as a Motion for Summary Judgment under [NRCP 56\(b\)](#) as the filed documents in the guardianship proceeding are not referenced in the Plaintiffs Complaint.

### I. STANDARDS ON MOTIONS UNDER [NRCP 12\(b\)\(5\)](#) AND [56\(b\)](#)

On a Motion to Dismiss pursuant to [NRCP 12\(b\)\(5\)](#), the court must construe the pleadings liberally and draw every fair inference in favor of the non-moving party. [Simpson v. Mars, Inc.](#), 113 Nev. 188, 929 P.2d 966 (1997). The dispositive resolution of questions of fact are not part of a Motion to Dismiss on the pleadings. [Breliant v. Preferred Equities Corp.](#), 112 Nev. 663, 918 P.2d 314 (1996). However, the factual allegations made by the Plaintiffs in their Complaint have already been adjudicated in the Matter of the Guardianship of the Person and Estate of Waveney Nedd, District Court Case No. G-12-037779-A. Defendant is attaching exhibits from those proceedings which are conclusive and which negate the factual allegations contained within the Plaintiffs Complaint. Where a motion for dismissal for failure to state a claim is supported by a number of documents which were outside the pleadings, the District Court should treat the motion as one for summary judgment. See, [Lumbermen's Underwriting Alliance v. RCR Plumbing, Inc.](#), 114 Nev. 1231, 969 P.2d 301 (1998).

Summary Judgment is appropriate only when the moving parties are entitled to judgment as a matter of law and no genuine issue remains for trial. [Shephard v. Harrison](#), 100 Nev. 178, 678 P.2d 670 (1994); [Posadas v. City of Reno](#), 109 Nev. 448, 851 P.2<sup>nd</sup> 438 (1993). In opposing a motion for summary judgment, the non-moving party must set forth specific facts and not merely general allegations and conclusions. [Bird v. Casa Royalew](#), 97 Nev. 67, 624 P.2d 17 (1981).

Because of the claim preclusion and issue preclusion defenses in this case, Plaintiffs cannot create any genuine issues of material fact that would justify not granting a motion for summary judgment.

### II. THE GUARDIANSHIP PROCEEDINGS

For the purposes of this motion, Defendant will accept the allegations contained within the Plaintiffs' Complaint in paragraphs 1 through 30 as being true. Defendant Parks was appointed as Temporary Guardian of the Person and Estate of Waveney Nedd on September 19, 2012. The remaining allegations contained in paragraphs 31 through 104 of the Plaintiffs Complaint deal with actions taken by Defendant Parks at the time of her appointment and through the time of Waveney Nedd's death on November 18, 2012. The remaining paragraphs of Plaintiffs' Complaint, paragraphs 105 through 138, deal with the legal allegations made against Parks based upon the alleged factual scenario set forth in paragraphs 1 through 104 of the Complaint.

On March 5, 2013, Parks filed with the Guardianship Court her First and Final Account and Report of Guardian, Petition for Termination of Guardianship, For Approval of Fees and Costs and for Entry of Judgment for Fees and Costs and Order to Successor Trustee to Pay Administrative Fees (hereinafter, First and Final Account). Carlos Nedd had previously been served with a Citation prior to the establishment of the Temporary Guardianship pursuant to [NRS 159.047](#). Carlos retained counsel at the law firm of Hutchinson & Stephens, particularly Michael K. Wall and Russel J. Geist. The First and Final Account filed by Parks on March 5, 2013 was served on counsel for Carlos Nedd pursuant to [NRS 159.115](#). (A copy of the First and Final Account is attached hereto as Exhibit "A").

On or about April 15, 2013, Carlos Nedd had his attorneys file an Objection to the First and Final Account and Report of Guardian and Petition Termination of Guardianship, For Approval of Fees and Costs and For Entry of Judgment for Fees and Costs and Order to Successor Trustee to Pay Administrative Fees (hereinafter, "Objection"). (A copy of this Objection is attached hereto as Exhibit "B"). In that Objection, as will be more fully set forth below, the court can see that all of the factual issues being raised by Plaintiffs in their Complaint were raised in the attached Objection.

On April 16, 2013, counsel for Defendant Parks filed a Reply To Objection To First And Final Account And Report Of Guardian And Request For Additional Fees to such Objection (hereinafter "Reply"). (A copy of such Reply is attached hereto as Exhibit "C"). This Reply sought to refute all of the allegations made by counsel for Carlos Nedd in his Objection.

The matter came before the Guardianship Commissioner for hearing on April 17, 2013 at 9:00 a.m. This hearing took place pursuant to [NRS 159.181](#). At that time, the Guardianship Commissioner, John Norheim, made specific factual findings which dealt with all the issues set forth in the First and Final Account, the Objection thereto and made the Reply and specific recommendations which included a recommendation that April Parks be discharged from any further liability as guardian of Waveney Nedd. A copy of the Report and Recommendations was filed on May 13, 2013 and served upon counsel for Carlos Nedd, Russel Geist. (A copy of the Report and Recommendations is attached hereto as Exhibit "D").

Counsel for Carlos Nedd then had the opportunity to object to the Guardianship Commissioner's Report and Recommendations and place the matter before the District Court Judge. However, counsel did not object and an Order Approving the Guardianship Commissioner's Report and Recommendations was entered by the court on June 11, 2013. (A copy of the Order Approving Guardianship Commissioner's Report and Recommendations is attached hereto as Exhibit "E"). Notice of Entry of that Order was sent to counsel for Carlos Nedd on June 13, 2013. (A copy of the Notice of Entry of Order is attached hereto as Exhibit "F").

Subsequently, on January 14, 2014, an Order for Final Discharge was entered by the court. (A copy of such Order for Final Discharge is attached hereto as Exhibit "G"). This Order was entered pursuant to [NRS 159.199](#) and released April Parks from any liability for her actions as guardian of the Person and Estate of Waveney Nedd. No appeal or written petition has been taken from either the Order Approving the Guardianship Commissioner's Report and Recommendations or the Order for Final Discharge.

### **III. COMPARING THE COMPLAINT AND THE GUARDIANSHIP COURT'S REPORT AND RECOMMENDATIONS AND ORDER FOR FINAL DISCHARGE.**

Commencing with paragraphs 31 through 34 of the Plaintiffs Complaint, Plaintiffs make charges against Parks about using the appointment of guardianship to have access to all of the ward's assets. This subject was also dealt with in the Objection to the First and Final Account filed by Carlos' attorney in paragraphs 15 and 23.

In paragraphs 35 through 41 of the Plaintiffs Complaint, charges are made against Parks pertaining to the ward's bank accounts and social security funds. These same issues were raised in paragraphs 13, 19 and 24 of the Objection. All of these issues were addressed by the Guardianship Commissioner in paragraphs 6 and 9 of his Report and Recommendations which also found no fault in the actions taken by Parks.

Paragraphs 42 through 61 of the Plaintiffs' Complaint make allegations about improper conduct of Parks pertaining to the ward's medical care and related issues. Paragraphs 10, 11, 12, 29 and 30 of the Objection to the First and Final Account also deal with these same issues. Paragraph 10 of the Report and Recommendations states that there was no evidence that the Guardian failed to secure proper medical care for the ward.

Paragraph 62 through 71 of the Plaintiffs' Complaint makes allegations about improper use of the ward's fund by Defendant Parks and claim that she stole the ward's social security money and other money for her own monetary gain. The same allegations were raised in paragraphs 26, 27, 28 and 30 of the Objection to the First and Final Account. All of these issues were addressed by the Guardianship Commissioner in his Report and Recommendations in paragraphs 7, 8 and 9 of that Report and found no fault of any kind on the part of the guardian in relation to those allegations.

Paragraph 72 through 76 of the Plaintiffs' Complaint make additional allegations of **abuse** against Defendant Parks relating to the disappearance of some clothes and toiletries that the Plaintiff had brought for the ward. These issues are again covered in paragraphs 28 and 30 of the Objection to the First and Final Accounting and were also disposed of by the Guardianship

Commissioner in paragraphs 8 and 9 of the Report and Recommendations. The factual allegations contained in the Plaintiffs' Complaint in paragraph 77 through 83 regarding Parks refusal to sign a HIPPA release does not form a basis of any legal allegations made in any of the five causes of actions asserted in the Complaint.

The allegations contained in paragraphs 84 through 88 of the Plaintiffs' Complaint were also raised in paragraphs 10 and 11 of the Objection to the First and Final Account and are again disposed of by the Guardianship Commissioner in paragraph 10 of the Report and Recommendations.

In paragraphs 89 through 104 of the Plaintiffs' Complaint, these allegations again deal with the same claims that Parks somehow harmed the ward both medically and financially. These allegations are also dealt with in paragraph 18 of the Objection and disposed of in paragraphs 5 and 10 of the Report and Recommendations.

First Claim for Relief for Negligence contained in paragraphs 105 through 113 of the Complaint were discussed in the Objection to the First and Final Account in paragraphs 29 through 35 and disposed of by the Guardianship Commissioner in paragraph 10 of the Report and Recommendations.

The Second Claim for Relief for Breach of Fiduciary Duty contained in paragraphs 114 through 119 of the Complaint are again disposed of by the Report and Recommendations of the Guardianship Commissioner in paragraphs 6, 7, 8 and 9.

The Third Claim for Relief for Conversion set forth in paragraph 120 through 124 of the Plaintiffs' Complaint is disposed of by the Guardianship Commissioner's Report and Recommendations in paragraphs 4 through 9 as are the allegations contained in the Fourth Claim for Relief for Unjust Enrichment contained in paragraphs 125 through 129 of the Plaintiffs' Complaint.

The Fifth Cause of Action for **Elder Abuse** under [NRS 41.1395](#) as set forth in paragraphs 130 through 138 of the Plaintiffs' Complaint are also addressed in paragraphs 29 through 35 of the Objection to the First and Final Account and are also disposed of by the Guardianship Commissioner in paragraphs 4 through 10 of the Report and Recommendations.

To summarize, the Plaintiffs make allegations against the Guardian based on negligence relating to her care and that Parks also breached her obligations for the care of the physical needs of the ward as constituting **elder abuse**. The Guardianship Commissioner found that there was no evidence that the Guardian failed to secure proper medical care for the ward. The Plaintiffs next accuses the Guardian of breach of fiduciary duty and that, motivated by a desire for self gain, the Guardian caused damages to the Plaintiffs by converting the ward's assets and using them for her monetary gain. This is the essence of the Second, Third and Fourth Claims for relief for breach of fiduciary duty, conversion and unjust enrichment. The Guardianship Commissioner, in paragraphs 5, 6, 7, 8 and 9, found there were no financial improprieties on the part of the Guardian. Furthermore, the Guardianship Commissioner recommended approval of the First and Final Account, approved Fees of the Guardian and Guardian's counsel and recommended that Parks be discharged from any further liability as Guardian of Waveney Nedd. No objection was made to this Report and Recommendations of the Guardianship Commissioner and it become the Order of the court on June 11, 2013.

#### IV. APPLICABLE GUARDIANSHIP STATUTES

Carlos was served with a citation in the guardianship matter pursuant to [NRS 159.047\(2\)](#) which directs that a citation issued under [NRS 159.047\(1\)](#) must be served on all of the relatives of the proposed ward who are fourteen years of age or older and within the second degree of consanguinity. Carlos Nedd then obtained counsel and properly submitted himself to the court as an interested person by filing an Objection to the Guardian's First and Final Account. Furthermore, proper notice was given to Carlos Nedd pursuant to [NRS 159.115](#) of the Petition for Approval of the First and Final Account.

On April 17, 2013, the hearing on the First and Final Account took place pursuant to [NRS 159.181](#). [NRS 159.181\(3\)](#) provides:

“Except as otherwise provided in this subsection, the order settling and allowing the account is a final order and is conclusive against all persons interested in the Guardianship proceeding, including, without limitation, heirs and assigns. The order is not final against a ward who requests an examination of any account after the ward's legal disability is removed.”

Thus, the order of the court approving the Commissioner's Report and Recommendations, such order being entered on June 11, 2013, is conclusive as to the Plaintiffs.

Pursuant to [NRS 159.191](#), upon Waveney Nedd's death, the guardianship of the person and estate was terminated subject to the provisions of [NRS 159.193](#) for the winding up of the affairs of the ward's estate. The Guardian then took the appropriate steps to wind up the affairs of the Guardianship under [NRS 159.193\(2\)](#) by filing the First and Final Account and the accompanying Petition for Termination of the Guardianship and Approval of Fees. The order approving the Report and Recommendations was mailed to counsel for Carlos Nedd on June 13, 2013.

After payment of all of the expenses authorized by the court's Order Approving the Report and Recommendation, the court entered an order for Final Discharge on January 14, 2014 which provided that the Guardian, April Parks, fully and faithfully discharged the duties of her trust and that she is wholly and absolutely discharged from all further duties and responsibilities of Guardian and that any assets in her possession which were the property of Waveney Nedd have been fully and finally distributed and that she is released from any liability to be hereafter incurred. [NRS 159.199](#) provides as follows:

“1. Upon the filing of receipts and vouchers showing compliance with the orders of the court and winding up the affairs of the guardianship, the court shall enter an order discharging the Guardian and exonerating the bond of the Guardian.

2. A Guardian is not relieved of liability for his or her term as guardian until an order of discharge is entered and filed with the court.”

Thus, Defendant Parks has been discharged of liability for her term as the guardian of the person and estate of Waveney Nedd. Pursuant to [NRS 159.325](#), Plaintiff then had thirty (30) days to appeal from this order. Plaintiff did not do so.

## V. LEGAL ARGUMENT

The above cited statutes from NRS Chapter 159 indicate that the court's order in this matter approving the First and Final Account of the Guardian is conclusive and directly impacts the Plaintiffs' right to bring this matter before the court. [NRS 159.181\(3\)](#) is clear and unambiguous and indicates that Plaintiffs are bound by the Order Approving Guardianship Commissioner's Report and Recommendations filed on June 13, 2013. That Order adopted a recommendation discharging Parks from any further liability as Guardian of Waveney Nedd's person and estate. Plaintiffs herein did not object to the Report and Recommendations, did not appeal from the entry of that Order, or bring any further proceedings in the Family Division of the District Court in the Nedd guardianship matter. The Order for Final Discharge similarly released Parks from any liability relating to her activities as Guardian which is further supported by [NRS 159.199](#). The question then becomes is what effect those orders in the guardianship proceeding have on the ability of the Plaintiffs to bring this action before the court. It is clear that Carlos Nedd was an interested party in the guardianship proceedings and litigated the very issues pertaining to the approval of the First and Final Account which are currently before the court. The Nevada Supreme Court held in [In Re Guardianship of Walker, 74 Nev. 230, 327 P.2d 344 \(1958\)](#):

“To the extent that a dispute between interested parties was before the court below and was determined it may well be that the order was final and would constitute res judicata as to the matters in dispute. It would, then, constitute final judgment upon such matters and would be appealable as a final judgment.”

Certainly, the litigation of the Objection to the First and Final Account of Parks was between interested parties and the order which evolved from those proceedings would have been res judicata as such doctrine was interpreted by the Nevada courts

in 1958. The court's order in the guardianship case was, in fact, a final judgment and was an appealable order from which Plaintiffs did not appeal.

Since 1958, the Nevada Supreme Court has had the occasion to clarify the doctrines of res judicata and collateral estoppel and has re-labeled those doctrines as claim preclusion and issue preclusion. The doctrines, and the elements thereof, are set forth in [Five Star Capital Corporation v. Ruby](#), 124 Nev. 1048, 194 P.3<sup>rd</sup> 709 (2008).

Initially, it is clear that the order approving the Guardianship Commissioner's Report and Recommendations and the Order for Final Discharge are to be treated as final judgments. [NRS 159.325](#) certainly indicates that the Order Approving the Final Account and discharging Parks from further liability as the guardian of Waveney Nedd is an appealable Order. Therefore, for the purposes of claim preclusion and issue preclusion the court should treat these Orders as constituting final judgment.

Secondly, the Plaintiffs in the case before the court were interested parties in the guardianship proceedings. Even though the Estate of Waveney Nedd was obviously not a party to the guardianship proceedings, Carlos Nedd is the Special Administrator of that estate and had a unity of interest with his capacity as an individual and heir of Waveney Nedd's estate.

Thirdly, the Complaint before the court deals with the same set of common facts which were before the Guardianship Commissioner in the guardianship case relating to the alleged misuse of funds and power by Parks and her alleged mistreatment of Waveney Nedd.

Finally, it is clear that the issues which are sought to be litigated in this action are the same issues which were represented and decided by the Guardianship Commissioner and Judge in the guardianship case. The comparison of the Objection to the Guardian's First and Final Account with the allegations set forth in the Complaint reveal the same set of facts and issues.

The court in [Five Star Capital Corporation v. Ruby](#) states as follows:

“We begin by setting forth the three-part test for determining whether claim preclusion should apply: (1) the parties or their privies are the same, (2) final judgment is valid, [footnote omitted] and (3) subsequent action is based upon the same claims or any part of them that were or could have been brought in the first case. [[University of Nevada v. Tarkanian](#), 110 Nev. 581, 600, 879 P.2<sup>nd</sup> 1180, 1191 (1994); [Executive Mgmt. v. Tigor Title Ins. Co.](#), 114 Nev. 823, 835, 963 P.2d 465, 473 (1998).”

124 Nev. 1054, 194 P.3<sup>rd</sup> 713. In this case, the parties or their privies are the same. There is no logical reason to not find that Carlos Nedd, an heir of Waveney Nedd, who is bound by the exclusive effect of the court's order in the guardianship proceedings and who was legally determined to be an interested party in those proceedings and filed an Objection to Parks First and Final Account, is not the same as the parties in the present case. It is clear that the final judgment is valid as it has not been challenged and is not appealable at this point in time. Finally, this action is based upon the same claims or any part of them that were or could have been brought in the guardianship case. The Objection to the First and Final Account deals with exactly the same facts and claims made by Carlos Nedd regarding the alleged mistreatment of Waveney Nedd and the alleged financial improprieties.

The court in [Five Star Capital](#), supra, further stated:

“...claim preclusion applies to all grounds of recovery that were or could have been brought in the first case.”

[124 Nev. at 1055](#), 194 P.3<sup>rd</sup> 713. [Also citing [Tarkanian](#) supra and [Executive Mgmt](#), supra.] There is nothing in Plaintiffs' Complaint which wasn't raised in the Objection or could have been raised in the Objection. In comparing the reasoning of the court in [Walker](#), supra, with the facts of this case and the elements of claim preclusion set forth in [Five Star Capital](#), supra, the court should conclude that the doctrine of claim preclusion is applicable to the Plaintiffs' case and that it should be dismissed.

Alternatively, the doctrine of issue preclusion also requires dismissal of the Plaintiffs' Complaint. The First Star Capital case held that the following factors are necessary for issue preclusion:

“... (1) the issue decided in the prior litigation must be identical to the issue presented in the current litigation; (2) the initial ruling must have been on the merits and have become final;... (3) the party against whom the judgment is asserted must have been a party or in privity with the party to the prior litigation; [citing Tarkanian, supra] and (4) the issue was actually and necessarily litigated.”

[124 Nev. at 1055, 194 P.3d at 713](#). The issues asserted by Carlos Nedd in the Complaint herein are identical to those issues asserted by him in the Objection to the First and Final Account of the Guardian [mistreatment of Waveney Nedd, taking her money failing to protect her assets, etc.]. The ruling in the guardianship case pertaining to this activity was on the merits and has become final by way of the Order Approving the Guardianship Commissioner's Report and Recommendations and the Order for Final Discharge. Carlos Nedd is before this court in an individual capacity and in the capacity of a Special Administrator. He was before the guardianship court as an interested party and an heir to the ward. In the guardianship proceeding he had the opportunity to assert any and all legal remedies to which he felt that he was entitled pertaining the administration of the guardianship of his mother. An order was entered denying his claims and he did not appeal from that order. Defendant submits that the parties between the two actions are identical. Finally, the issue raised in the Complaint herein was actually and necessarily litigated in the contested proceedings before the Guardianship Commissioner which resulted in the Commissioner's Report and Recommendations which was approved by the court. The above discussion then leads to the question as to the whether or not the claim and issue preclusion doctrines should be applied to guardianship proceedings to bar the Plaintiffs from bringing the civil action herein. Based upon the case law to be cited below, the court should conclude that the Plaintiffs' claims are barred by the preclusion doctrines cited above and that all of their claims for relief should be either dismissed or that the Defendant is entitled to Summary Judgment in its favor.

Oregon has a statute similar to [NRS 159.181](#). ORS 125.480 provides in pertinent part:

“An order, made upon notice of hearing, allowing a final accounting is final as to all previously unsettled liabilities of the conservator to the protected person or successors relating to the conservatorship.”

In [Fuentes v. Tillett, 326 P.3d 1263 \(Or. App. 2014\)](#), the court held that the preclusive effect of the statutory provision that governs the approval of an accounting in a conservatorship proceeding is akin to an issue preclusion in that it prevents parties from raising matters that have already been litigated, as opposed to matters that could have been raised but were not. The conservatee and a successor conservator were precluded from litigating the same facts and from seeking the same relief against a prior conservator in a civil case in the Circuit Court where the same cause was pending between the same parties in the Probate Court.

in [Davis v. Rudnick, 95 N.Y.S. 2d 240 \(App. Div. 2014\)](#), the New York Court of Appeals held that the doctrine of res judicata precluded an attorney from re-litigating this claim for an alleged unpaid balance of attorney's fees from his representation of a client in a guardianship proceeding where the Guardianship Court entered an order that set an amount of reasonable compensation for the attorney's legal services, the client properly paid such amount, the attorney participated in the fee determination process, and the attorney could have moved for reconsideration or appealed the amount of the award. The above two cases clearly indicate that issue and claim preclusion apply in the guardianship proceedings to prevent the re-litigation of the same facts. In [In re Guardianship of Rudonick, 456 P.2d 96 \(Wash. 1969\)](#), the court held that where a Guardian Ad Litem had been given notice and appeared in a hearing to determine whether corporate shares of a minor ward could be pledged as collateral on a loan to the guardian and her husband, the result of that hearing had res judicata effect and that the allowance of the Guardian Ad Litem's fee was res judicata and, absent of showing of fraud and could not be collaterally attacked.

In [In re Estate and Guardianship of Naccarato, 15 Cal. Rptr. 261, \(Cal. App. 2. Dist., 1961\)](#), the court found that the claimed use of sums for improper purposes by a guardian of minors was settled by the court's approval of account filed by the guardian. In [Baker v. Carver, 301 P.2d 307\(Cal. App. 2. Dist., 1956\)](#), the court found that where any of the frauds alleged in a plaintiff's



civil complaint for recovery of property allegedly never accounted for in her guardianship could have been relieved by the court when the Plaintiff objected to the final account filed upon termination of her guardianship, and in fact were submitted to the court in such proceedings and decided adversely to the Plaintiff after presentation by her of all her case, she could not re-litigate the claimed frauds upon which she unsuccessfully relied in the guardianship proceedings, notwithstanding the fact that two of the defendants in the action were not parties to the guardianship proceeding.

In *Hornaday v. Hornaday*, 213 P.2<sup>nd</sup> 91 (Cal. App. 2 Dist. 1949) the court found that where a guardian had not taken any money or property from the ward and his final account was approved by the Probate Court, the guardian status with respect to the guardianship was settled and the order settling the guardian's final account became *res judicata*. See also, with consistent findings, *Ryder v. Ryder*, 79 N.E.2<sup>nd</sup> 17 (Mass. 1948) and *Haudenschilt v. Haudenschilt*, 39 S.E.2<sup>nd</sup> 328 (W.Va. 1946). In a case involving more serious allegations of fraud, in *Guardianship of Freida*, 680 N.E. 2d 949 (Mass. App. 1997), a party desired to object to an item of account and had to file the objection within thirty (30) days after of the filing of the accounting. The ward did not claim lack of notice of the filing of the account as is the case herein. The ward in that case did not file a written objection nor did she file an appeal when the court ruled against her. The court held:

“In view of this, and her failure to preserve any objection to the account, we will not hear her argument that the guardian's time records are fraudulent.”

680 N.E.2d 951.

In *McLean v. Little River Bank & Trust Co.*, 183 So.2d 273 (Fla. App. 1966), an independent civil action was brought to complain about a probate judge's order approving expenses of a guardian. The relatives of the ward complained that the guardian had committed waste of the estate. Each of the items complained of in the Circuit Court as constituting waste or mismanagement was the subject matter of a petition and order of the Probate Court and any interested party had a statutory right to complain. The court found that:

“The appellants, plaintiffs in the trial court, did not avail themselves of this statutory right and will not be heard to complain, in an independent chancery suit in the Circuit Court, of the discretionary rulings of the Probate Judge approving the expenditures by the guardian.”

183 So.2d 274. In that case, the complaint had been dismissed for failure to state a cause of action.

There is wide spread agreement amongst the state courts ruling on the issue that a former ward, or one authorized to sue on the former ward's behalf, who brings suit against the former guardian for alleged improprieties in the management of the ward's affairs during the course of the guardianship, that Judgment of the proper court upon the guardian's final account rendered in the guardian's final account or settlement proceedings is *res judicata* in a subsequent suit concerning matters comprised in the guardian-ward relationship and thus is subject to attack only upon such proof of fraud as would justify opening any other judgment. See, *Boozer v. Higdon*, 252 Ga. 276, 313 S.E.2d 100 (on remand 170 Ga. App. 836, 319 S.E.2d 910 (1984)), (holding that prior proceedings for an accounting for which the issues of the mismanagement of the estate funds had been litigated would provide a defense *res judicata* or collateral estoppel in a different proceeding); *Adams v. Martin*, 3 Cal. 2d 446, 44 P.2d 572 (1935), (final account of a guardian, when settled and approved, and not attacked by appeal or other proper proceeding, is *res judicata* and will be conclusive against the ward); *Moxley v. Indiana Nat. Bank*, 443 N.E.2<sup>nd</sup> 374 (Ind. App. 1982) (approval of the guardian's final accounting and discharge held to be *res judicata* barring tort action by former ward for the guardian's alleged mismanagement of the ward's person and property. The ward claimed that his complaint was not estopped by the judgment due to the existence of matters not included in the accounting proceedings. The court noted that the ward had presented eighty one objections to the accounting proceedings and that the matters alleged in the tort complaint could have been presented in the accounting proceedings. The court declared that it was well established that *res judicata* includes all matters which were or might have been an issue pointing out that a party is not allowed to split a cause of action pursuing it in a piecemeal fashion and subjecting defendant to needless multiple suits. The court noted that the former ward could either appeal

the final settlement or file a direct suit to reopen the final accounting within the statute of limitations. The court likewise held that it was not necessary for the parties to have been in the identical plaintiff-defendant posture in both cases so long as they had a similar antagonistic relationship); [Taylor v. Bennett](#), 260 Ga. 20, 389 S.E.2d 242 (1990) (former ward's action against former guardians for accounting barred by res judicata where parties had previously litigated same issues in Superior Court action that ended in settlement wherein Probate Court entered an order approving accounting rendered by guardians); [Boozer v. Higdon](#), supra (guardian's accounting and objections thereto were fully litigated by parties and decided in guardian's favor by court of competent jurisdiction and were therefore res judicata despite allegations of fraud and mismanagement); [Bolhssen v. Bolhssen](#), 56 S.W.2d 913 (Tex. Civ. App. 1932) (affirming dismissal of a collateral attack in District Court of a judgment rendered on guardian's final accounting in Probate Court where the court declared that even clear allegations of fraud and obtaining judgment would not support such an attack in a court other than that which rendered the original judgment which is only subject to a direct attack for a motion for new trial, appeal therefrom, or a bill of review [writ] brought in the court in which the judgment was rendered. The court concluded that the rule was necessary to preserve the sanctity of judgments of courts of competent jurisdiction to finally determine all questions involved in the suit in which the judgment was rendered).

It is clear that the entry of the order in the guardianship proceedings pertaining to Waveney Need is a final order/judgment which has either claim preclusion or issue preclusion effect against the claims brought by the Plaintiffs herein. All of the matters which are contained in the Plaintiffs' Complaint were addressed in the Guardianship Court or could have been addressed in the Guardianship Court. The Plaintiffs failed to object to the findings of the Guardianship Commissioner, failed to seek a rehearing, failed to seek an order from the court vacating its order under [NRCPC 60](#) and failed to appeal from the order which conclusively absolves Defendant April Parks from any liability pertaining to her actions during the two month existence of the Guardianship of the Person and Estate of Waveney Need.

Finally, Plaintiffs have also asserted a claim against Defendant April Parks for **elder abuse** pursuant to [NRS 41.1395](#). As a private professional guardian as defined in [NRS 159.024](#), Parks takes these allegations very seriously as such allegations are part of the public record and could potentially damage her reputation. Allegations such as are contained in the Fifth Claim for Relief, even if unproven, have the potential of causing severe damage to Parks livelihood as well as her reputation. Defendant notes that the Complaint has not been verified by Carlos Nedd and that the signature on the Complaint of counsel constitutes a certification under [NRCPC 11](#) that the Fifth Claim for Relief is not being presented for any improper purpose, that the claims are warranted by existing law or the nonfrivolous argument for the extension, modification, or reversal of existing law and that the allegations contained in the Fifth Claim for Relief are likely to have evidentiary support. Based upon the order of the Guardianship Court and the Guardianship Commissioner's Report and Recommendations and the preclusive effect of those findings and order, the allegations contained in the Fifth Claim for Relief are of a frivolous nature. The Plaintiffs and their counsel have claimed that Parks breached her legal responsibility for caring for Waveney Nedd, being responsible for making medical decisions in her best interests and to oversee her finances. They claim that Parks breached that legal responsibility, damaged Nedd by such breach, and that Parks' conduct was intentional, willful, wanton, oppressive and malicious with a conscience disregard to the rights of the Plaintiffs, who therefore seek punitive damages against Parks. The cause of action does not claim a loss of money or property by exploitation but claims, directly below the identification of its Fifth Claim for Relief, that there was **elder abuse**. [NRS 41.1395](#) defines **abuse** for the purpose of bringing an action under that statute as follows:

“4. For the purposes of this section:

(a) “**abuse**” means willful and unjustified:

(1) infliction of pain, injury or mental anguish; or

(2) deprivation of food, shelter, clothing or services which are necessary to maintain the physical or mental health of an older person or a vulnerable person.”

The Guardianship Commissioner found that there was no evidence that Parks had failed to secure proper medical care for the ward. A District Court Judge entered an order approving that finding.

In paragraph 135 of their Complaint, Plaintiffs charged that Parks is liable for the neglect of Ms. Nedd. [NRS 41.1395\(4\)\(c\)](#) defines neglect as:

“Neglect means the failure of a person who has assumed legal responsibility or a contractual obligation for caring for an older person or a vulnerable person, or has voluntarily assumed responsibility for such a person's care, to provide food, shelter, clothing or services within the scope of the person's responsibility or obligation, which are necessary to maintain the physical or mental health of the older person or vulnerable person...”

Any issues pertaining to the issues of food, shelter, clothing or services have already been decided by the Guardianship Commissioner and Judge whereby they found that Parks acted properly, that there was no evidence of any failure to secure proper medical care and that the financial obligations of Parks under Chapter 159 were satisfied resulting in a discharge of Parks from any liability arising out of her conduct during the time that she was the Temporary Guardian of Waveney Nedd.

Parks submits to the court that this Complaint against her brought by the Plaintiffs is frivolous and that it either be dismissed in its entirety or that summary judgment be entered in her favor pursuant to [NRCPC 56\(b\)](#) and that the court subsequently entertain a motion to be brought by her for an award of attorney's fees pursuant to [NRS 18.010\(2\)\(b\)](#). Clearly, this is an appropriate situation to punish and deter frivolous or vexatious claims because a claim such as the one before the court overburdens limited judicial resources, impinges the timely resolution of meritorious claims and increases the costs of engaging in business and providing professional services to the public. Furthermore, such an award of attorney's fees may be made without the necessity of a written motion therefore or without the presentation of additional evidence pursuant to [NRS 18.010\(3\)](#).

DATED this 11 day of March, 2015.

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