VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 1st day of March, 2018.

Leroy Mangrum, Jr., Appellant,

against Record No. 160782
Circuit Court No. CL14-1485

Brenda Chavis, et al., Appellees.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Hampton.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that there is reversible error in the judgment of the circuit court.

In May 2010, Bobbie F. Wynder appointed Leroy Mangrum, Jr., to be her attorney-in-fact by a general power of attorney subject to the Virginia Uniform Power of Attorney Act, Code §§ 64.2-1600 through -1642 ("the Act"). Wynder died in June 2013.

In July 2014, Wynder's four stepchildren, who are also the beneficiaries under her will, filed a suit against Mangrum under Code § 64.2-1612(H) seeking disclosure of all transactions and financial records from his service as Wynder's attorney-in-fact. Based on a partial accounting Mangrum had provided, the plaintiffs identified several transactions about which they sought additional information. As relevant to this appeal, these transactions included (1) a withdrawal by Mangrum's wife, Doris, of $36,000 from a savings account held jointly with survivorship by Wynder, Doris, and Brenda Chavis, one of the plaintiffs; and (2) Mangrum's surrender of an annuity Wynder owned valued at $116,330.64, the proceeds from which he deposited initially in Wynder's checking account but which he subsequently withdrew and deposited into his own account. The plaintiffs also sought an order under Code § 64.2-1615 that Mangrum restore any assets transferred in violation of the Act and an award of attorney's fees.

Following a series of evidentiary hearings, the circuit court issued a letter opinion finding that Doris's withdrawal had been improper. It also found that Mangrum had improperly surrendered the annuity. In its final order the court found that Mangrum had "failed to account

properly with care, competence and diligence" as required by the Act.[1] It awarded judgment to the plaintiffs, ordering Mangrum to restore $152,330.64 to Wynder's estate and to pay $19,284.75 in attorney's fees.

In the first of four assignments of error, Mangrum asserts that the circuit court erred by ordering him to restore $36,000 to Wynder's estate as a result of Doris's withdrawal of that amount from the joint savings account. He argues that the circuit court expressly found that Doris alone had made the withdrawal. It made no finding that Mangrum was responsible for it, and the plaintiffs acknowledged that Doris acted alone. He contends that there was no evidence that he ever had authority over the money after it was withdrawn, and the withdrawal did not arise from or depend upon the power of attorney by which he was appointed Wynder's attorney-in-fact.

The plaintiffs respond that Mangrum was liable under Code § 64.2-1612 because he had a duty under subdivision (B)(6)(a) to preserve Wynder's estate plan and a duty under subdivision (B)(2) to not act to create a conflict of interest. They argue that he breached these duties by not preserving the funds in the joint account, even if he did not withdraw them himself. Further, they argue, he had knowledge of the transaction and benefitted from it, which created a conflict of interest. They also contend that under *Parfitt v. Parfitt*, 277 Va. 333, 672 S.E.2d 827 (2009) and *Ayers v. Shaffer*, 286 Va. 212, 748 S.E.2d 83 (2013), Mangrum had a confidential relationship with Wynder, so he bore the burden of establishing that he had exerted no undue influence upon her. The circuit court determined that he did not meet this burden.

The question of whether Mangrum is liable under Code § 64.2-1612 for his wife's withdrawal from the joint account is one of statutory interpretation, which this Court reviews de novo. *Shepherd v. Conde*, 293 Va. 274, 281, 797 S.E.2d 750, 753 (2017).

The parties do not dispute that the $36,000 was withdrawn from a joint saving account with survivorship, that Doris was one of the joint owners of the account, or that Doris alone made the withdrawal. On these facts, whether Mangrum had a confidential relationship with Wynder is irrelevant and neither *Parfitt* nor *Ayers* applies.

The parties also do not dispute that the $36,000 was deposited into the joint account solely by or on behalf of Wynder. Consequently, despite being deposited into a jointly-held account, the $36,000 remained solely Wynder's property. Code § 6.2-606(A); *see also King v.*

[1] The court attributed Mangrum's failure to his advanced age, not intentional wrongdoing.

Merryman, 196 Va. 844, 850-51, 86 S.E.2d 141, 144 (1955) (noting that the fact of a joint account "establishes no presumption as to the ownership of the money as between the two persons named," that "questions presented as to the ownership of the fund must be determined in the light of common law principles under the circumstances attending the deposit," and that "[i]n that determination, the intention of the depositor is a primary and controlling factor").

Doris, as a joint account holder, was Wynder's agent for the purposes of the funds Wynder owned in it, and was liable as an agent for any breach of fiduciary duty. Code § 6.2-619; *see also Parfitt*, 277 Va. at 341-42, 672 S.E.2d at 830 (citing prior statute, former Code § 6.1-125.15:1). However, this agency relationship between Wynder and Doris is separate from, and forecloses Mangrum's liability under, the agency relationship between Wynder and him. *See* 1 Floyd Russell Mechem, Law of Agency § 1484, at 1103 (2d ed. 1914) (stating that an agent is not liable for the conduct of other agents unless he has a duty to appoint or supervise them, directs or takes part in their misconduct, or failed to perform a duty owed jointly to the principal with them).

In this case, the trial court expressly found that only Doris withdrew the $36,000. There is no finding that Mangrum directed or participated in the withdrawal, even if he benefited from it. Because his agency relationship was established by the power of attorney, and Doris's agency relationship was established separately by her status as a joint account holder, they did not owe their fiduciary duties to Wynder jointly. Consequently, as a separate agent, Mangrum cannot be liable for Doris's acts unless he had a duty to supervise her. *See id.* Code § 64.2-1612(B) imposes no such duties. Subdivision (B)(2) provides that an attorney-in-fact must "[a]ct so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest." Subdivision (B)(6)(a) provides that an attorney-in-fact must "[a]ttempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors, including [t]he value and nature of the principal's property."[2] Neither of these provisions makes an attorney-in-

[2] The plaintiffs appear to construe Code § 64.2-1612(B)(6) to require the attorney-in-fact to "[a]ttempt to preserve the principal's estate plan . . . including [t]he value and nature of the principal's property." However, a correct reading of that statutory provision merely includes "[t]he value and nature of the principal's property" as one of four factors an attorney-in-fact must consider when determining whether preservation of his or her principal's estate plan is in the principal's best interest.

fact liable for the alleged misuse of his or her principal's property solely by a third party (including by a separate agent over whom he or she has no express authority), or to affirmatively act to recover such property when stolen. The circuit court therefore erred by requiring Mangrum to restore the $36,000 to the estate.

In another assignment of error, Mangrum asserts that the circuit court erred by ordering him to restore to the estate the $116,330.64 in proceeds from the surrendered annuity. He argues that the financial instrument was never admitted into evidence and was variously described as an annuity or a life insurance policy, but that there is no evidence that the benefits would have passed to the estate. He contends that the only evidence is that the plaintiffs would have been beneficiaries under the annuity or policy upon Wynder's death. He also contends that the only relief the plaintiffs sought was restoration to the estate, not to themselves in their individual capacities.

This Court reviews the evidence and all reasonable inferences fairly drawn from it in the light most favorable to the plaintiffs, who prevailed below. *Palmer v. R. A. Yancey Lumber Corp.*, 294 Va. 140, 159, 803 S.E.2d 742, 753 (2017). The evidence in the record establishes that when Mangrum surrendered the annuity, he deposited the proceeds into a checking account owned by Wynder and payable upon her death to Gregory Wynder, one of the plaintiffs. Nine days later, Mangrum withdrew the proceeds from that account and deposited it into one only he owned. Consequently, at the time Mangrum placed the annuity proceeds beyond Wynder's control, Gregory was the sole beneficiary and her successor-in-interest to those proceeds for the purposes of Code § 64.2-1615(1). However, his cause of action to seek restoration of the proceeds is assignable. *See Winston v. Gordon*, 115 Va. 899, 917, 80 S.E. 756, 763 (1914) (noting that causes of action to recover property are assignable at law and in equity).

Under these specific facts, where Gregory is a plaintiff to this action but the prayer for relief seeks restoration only to the estate, rather than to Gregory in his personal capacity, the Court may infer that there was such an assignment here. Accordingly, the circuit court did not err by ordering Mangrum to restore the $116,330.64 proceeds to the estate.

In another assignment of error, Mangrum asserts that the circuit court erred by entering an order that he restore money to the estate rather than entering a money judgment against him. He argues that the court's order amounts to an injunction or decree for specific performance, which is enforceable through the court's contempt powers, rather creating a lien for damages

upon which the defendants must execute. He contends that equity lies only when there is no adequate remedy at law, and the plaintiffs did not prove that a money judgment would be inadequate.

The plaintiffs respond that Code § 64.2-1615(1) expressly permitted the circuit court to order Mangrum to "[r]estore" the funds to the estate. Mangrum counters that the plaintiffs do not dispute his contention that they did not file an equitable action, that law would provide them an adequate remedy, and that the circuit court's order exposes him to potential incarceration for contempt. Further, he argues, the plaintiffs misconstrue the statute: Code § 64.2-1615 provides that an attorney-in-fact "is liable . . . *for the amount required* to [r]estore the value of the principal's property." (Emphasis added.) He concludes that this wording merely establishes a liability that may be enforced through a judgment for money damages; it does not authorize the imposition of an equitable remedy.

The meaning of Code § 64.2-1615(1) is again a question of law the Court reviews de novo. *Shepherd*, 293 Va. at 281, 797 S.E.2d at 753. The plain language of the statute provides that attorneys-in-fact are "liable to the principal or the principal's successors in interest *for the amount* required to *[r]estore the value* of the principal's property to what it would have been had the violation not occurred." (Emphases added.) This language permits the circuit court to award a judgment for money damages against the attorney-in-fact to his or her principal, or to the principal's successors-in-interest, not to enjoin or to decree specific performance that a *res* be returned.

The circuit court's final order includes ambiguous features that could be interpreted as imposing an equitable remedy. For example, it "adjudged, ordered and decreed" that Mangrum "is ordered to restore" $152,330.64 to the estate. However, in light of this Court's interpretation of the statute, the circuit court merely awarded a money judgment against Mangrum to the plaintiffs rather than decreeing equitable relief.

In his fourth assignment of error, Mangrum asserts that the circuit court erred by awarding the plaintiffs $19,284.75 in attorney's fees under Code § 64.2-1615(2) because the statute does not authorize such an award in this case. He argues that the statute makes an attorney-in-fact liable to reimburse his or her principal or the principal's successors-in-interest only "for the attorney [sic] fees and costs *paid on the agent's behalf*." Code § 64.2-1615(2) (emphasis added). He contends that the purpose of the statute is to require attorneys-in-fact to

repay their principals for attorney's fees the attorneys-in-fact spent from the principal's property. He notes, however, that the plaintiffs did not seek reimbursement for attorney's fees paid on Mangrum's behalf; rather, they sought attorney's fees that *they* incurred during this action against him. He concludes that those attorney's fees are not within the scope of the statute, so the American rule making each party liable for its own fees applies.

The plaintiffs respond that Code § 64.2-1615(2) is intended to make principals whole when they must undertake litigation to recover from an attorney-in-fact who breached his or her fiduciary duty.

This Court reviews an award of attorney's fees for abuse of discretion. *Lambert v. Sea Oats Condo. Ass'n*, 293 Va. 245, 252, 798 S.E.2d 177, 182 (2017). However, "a court . . . abuses its discretion if it inaccurately ascertains the outermost limits of the range of choice available to it." *Id.* (internal quotation marks and alteration omitted). "[A]bsent a specific contractual or statutory provision to the contrary, attorney's fees are not recoverable by a prevailing litigant from the losing litigant," *Reineck v. Lemen*, 292 Va. 710, 721, 792 S.E.2d 269, 275 (2016) (internal quotation marks omitted), so an award of attorney's fees under such circumstances is an abuse of discretion because the court lacks authority to choose to make such an award. The Court therefore must consider whether Code § 64.2-1615(2) permits an award of attorney's fees in this case.

The plain language of the statute is clear: an attorney-in-fact is "liable to the principal or the principal's successors in interest for the amount required to [r]eimburse the principal or the principal's successors in interest for the attorney [sic] fees and costs *paid on the agent's behalf*." (Emphasis added). Neither Wynder nor the plaintiffs have paid any attorney's fees or costs on Mangrum's behalf, nor is there any evidence that Mangrum paid any attorney's fees from Wynder's property. If the General Assembly had intended to authorize courts to award attorney's fees to principals or their successors-in-interest to reimburse their own expenditures in actions against attorneys-in-fact against whom they alleged violations of the Act, it could have included language in the statute to that effect. It did not do so.[3] The circuit court therefore

[3] The legislature's choice is especially informed because the Act is drawn from a uniform act proposed by the National Conference of Commissioners on Uniform State Laws. The Conference's commentary on the provision enacted and codified as Code § 64.2-1615(2) states that it makes an attorney-in-fact liable to reimburse the principal for "any amounts for attorney's

abused its discretion by awarding attorney's fees to the plaintiffs in this case.

For the reasons set forth above, the Court reverses the portions of the circuit court's judgment awarding the plaintiffs $36,000 based on Doris's withdrawal of that amount from the joint savings account and awarding them $19,284.75 in attorney's fees. The Court affirms the circuit court's judgment awarding them $116,330.64. The Court therefore enters final judgment against Mangrum and awards money damages to the plaintiffs in the amount of $116,330.64.

This order shall be certified to the Circuit Court of the City of Hampton.

A Copy,

Teste: Jack L Harrington

Clerk

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fees and costs *advanced from the principal's property on the agent's behalf*." Uniform Power of Attorney Act (2006) § 117 cmt. at 30 (2006) (emphasis added). Thus, while "extrinsic legislative history may not be used to create an ambiguity, and then remove it, where none otherwise exists," *Brown v. Lukhard*, 229 Va. 316, 321, 330 S.E.2d 84, 87 (1985), the commentary shows that the General Assembly was on notice of the effect of the statutory language and chose not to alter it to authorize an award of attorney's fees in cases where nothing was advanced by the principal to pay his or her attorney-in-fact's fees.