



IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANGELA M. BARLOW and	)	
JOHN BARLOW, JR., wife and	)	Appeal No. 468, 2012
husband, and ANGELA M. BARLOW,	)	
as Next Friend of JOHN BARLOW,	)	
III, a minor, and DAWN LOCKE,	)	
as Next Friend of KIMBERLY FOTH,	)	
a minor,	)	
Plaintiffs Below,	)	Appeal from the Superior Court
Appellees as to Barlow,	)	of the State of Delaware in and
	)	for New Castle County
v.	)	
	)	C.A. No. N11C-04-237 JAP
MICHAEL P. FINEGAN,	)	CONSOLIDATED CASES
DANA M. FINEGAN, and	)	
MICHAEL P. FINEGAN, JR.,	)	
Defendants Below,	)	
Appellees.	)	
DAWN LOCKE, As Guardian Ad Litem	)	
of KIMBERLY FOTH,	)	
Plaintiff Below,	)	C.A. No. N11C-09-105 CHT
Appellant,	)	
	)	
v.	)	
	)	
MICHAEL PATRICK FINEGAN and	)	
MICHAEL P. FINEGAN, JR.	)	
Defendants Below,	)	
Appellees,	)	
TITAN INDEMNITY COMPANY,	)	
Plaintiff Below,	)	
Appellee,	)	
	)	
v.	)	C.A. No. N12C-03-013 JAP
	)	
DAWN LOCKE, as Next Friend of	)	
KIMBERLY FOTH and ANGELA	)	
BARLOW, as Next Friend of JOHN	)	
BARLOW, III,	)	
Defendants,	)	
Appellant as to Foth	)	

APPELLANT DAWN LOCKE, AS GUARDIAN AD LITEM
OF KIMBERLY FOTH'S OPENING BRIEF

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Dated: November 8, 2012

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NATURE OF THE PROCEEDINGS

These actions arise from an auto accident that occurred on October 2, 2009 wherein the individual Plaintiffs above and a third party were injured. In C.A. No. N11C-04-237 JAP, Gary S. Nitsche, Esquire filed suit on April 28, 2011 and represents Angela M. Barlow, John Barlow, Jr. wife and husband and Angela M. Barlow as Next Friend of John Barlow, III (hereinafter Barlow). However, Mr. Nitsche also included and purported to represent Dawn Locke, as Next Friend of Kimberly Foth, a minor (hereinafter Foth) as a Plaintiff even though he had not been retained by her and did not represent her. Foth is represented by the undersigned who filed suit on September 14, 2011 which is C.A. No. N11C-09-105 CHT. Titan Insurance Company filed an interpleader action, C.A. No. N12C-03-013 JAP on March 1, 2012.

On June 7, 2012, Barlow filed a Petition to Consolidate the aforesaid cases which was granted on June 26, 2012 despite objections by Foth.

The dispute in this case dealt with the division of the insurance proceeds by the two minors. On December 29, 2011, Barlow filed a Petition to enforce an agreement to equally divide the \$15,000 insurance proceeds which was agreed to by Foth's attorney relying on a misrepresentation and without authority to do so. On March 2, 2012 the Court, despite Foth's objections, entered an Order enforcing the aforesaid settlement agreement.

On March 3, 2012, Foth filed a Motion for Reargument which was denied on April 27, 2012. On May 8, 2012, Foth filed an appeal to

this Court which was denied as an interlocutory appeal on May 22, 2012.

On July 12, 2012, the Superior Court requested a "form order of final judgment apportioning the available funds and dismissing the claims against defendant". On July 26, 2012, a Final Order was issued entering judgment in favor of the minor Plaintiffs and providing for the payment of \$7,500 to each minor Plaintiff. Foth, the Appellant, has appealed that Order as well as the prior Order to this Court¹.

This is Appellant's Opening Brief.

¹Although the Court's letter of July 12, 2012 referred to "dismissing of the claims against Defendant" the Final Order does not expressly do so. Nevertheless, that appears to be implied and will be treated in this appeal as if the claim in Civil Action No. N11C-09-105 CHT against the Defendants personally have also been dismissed. For that reason, all parties in the 3 above actions will be treated as Appellees.

SUMMARY OF THE ARGUMENT

- I. THE LOWER COURT ERRED IN ENFORCING THE SETTLEMENT AGREEMENT ON THE BASIS OF "PRESUMED AUTHORITY".
- II. THE LOWER COURT ERRED IN ENFORCING SETTLEMENT OF A MINOR'S CLAIM IN VIOLATION OF 12 DEL. C. §3926 AND THE COURT RULES.

STATEMENT OF FACTS²

The Appellant, Kimberly Foth, a minor, was injured in an automobile accident that occurred on October 2, 2009. John Barlow, III, also a minor, was allegedly also injured along with his mother. Mr. Nitsche filed suit on their behalf but improperly also included Foth as a plaintiff even though he had not been retained by Foth and did not represent her³. That action, Civil Action No. N11C-04-237 JAP, was assigned to Judge Parkins. The undersigned also filed suit for Foth and that case, Civil Action No. N11C-09-105 CHT was assigned to Judge Toliver. The Defendants' carrier, Titan Insurance, offered their policy limits and it was agreed that Angela Barlow would receive \$15,000. Foth's attorney also agreed that the remaining \$15,000 would be divided by the minors since it was represented to Foth's attorney that the minors' injuries were similar "or about the same"⁴. Subsequently, it was ascertained that that representation was dramatically wrong and Foth's attorney asked Defendants' carrier to interplead its policy limits which it did on March 1, 2012 so the Court could decide what was a fair and just award for each minor.

²The relevant facts which are undisputed are contained in the pleadings and argument which are included in the Appendix.

³Mr. Nitsche did not dispute that he had not been retained by Foth but attempted to justify including Foth in the Barlow suit in part because "when it was getting close to the statute of limitations, we added her to the lawsuit because I certainly didn't want to blow a statute." Page 4 of March 2 hearing transcript (hereinafter Transcript) A27 It should be noted however that the Barlow suit was filed about 155 days before the statute of limitations would have expired.

⁴In Foth's opposition to Barlow's Motion to Consolidate, the factual basis for said misrepresentation and the injuries to Foth were more fully described in detail.

On December 29, 2011, Barlow filed a motion to enforce the settlement in Civil Action No. N11C-04-237 JAP. A13-A18 Foth's attorney opposed same, first on the basis that Judge Parkins did not have jurisdiction over Foth since she was improperly included as a Plaintiff in the Barlow suit and Foth's claim was before Judge Toliver in C.A. No. N11C-09-105 CHT.

Second that Foth's Attorney's agreement to equally divide the \$15,000 was based on a misrepresentation and that Foth was a minor and therefore Court approval and a determination by the Court that a settlement was fair and reasonable were required.

Third that Foth's attorney did not have authority from the client to settle.

Fourth that there was a material issue of fact and an evidentiary hearing was necessary.

Fifth that a "fair and just distribution of the policy limits" should be decided in the interpleader action. A19-23

The same arguments and facts were presented at the presentation of the Motion to Enforce Settlement on March 2, 2012. The Court was advised that the cases had not been consolidated and therefore Foth's case was before Judge Toliver. The Court responded:

"THE COURT: And I can pretty surely promise you what Judge Toliver will say." Transcript Page 6 A29

Foth's attorney explained that the agreement to equally divide the proceeds was based on "my understanding that the two minors had similar or about the same type of injuries." Transcript Page 6 A29 Foth's attorney also explained that he did not have authority and that "I never even spoke to my client about the settlement offer".

Transcript Page 7 A30 Foth's attorney also explained the dramatic difference between the minors' injuries and treatment and that Barlow's treatment was nothing more than a emergency room visit. None of these representations by Foth's attorney were disputed nor could they be. Nevertheless, the Court ruled that:

"I am going to enforce the settlement. It is presumed that a lawyer has authority to bind his client.

* * *

I will refer this matter for a hearing before a judge on the approval of a minor settlement." Transcript Page 8⁵ A32

Subsequently, after the cases were consolidated, the Court wrote a letter on July 12, 2012 asking Barlow's attorney to submit a form order. The letter stated:

"I request Mr. Nitsche to circulate and submit a form of final judgment apportioning the available funds and dismissing the claims against defendant."

Despite Foth's objection on July 26, 2012, the Court entered a Final Order. (Both the letter and Final Order are attached as exhibits.)

⁵Subsequently, in denying Foth's Motion for Reargument, the Court referred the matter to a Commissioner for a hearing and Court approval of the minors' settlement but no such hearing or approval ever occurred and the Final Order did not provide for same.

ARGUMENT I

THE LOWER COURT ERRED IN ENFORCING THE SETTLEMENT AGREEMENT ON THE BASIS OF "PRESUMED AUTHORITY".

(1) Questions presented

(1) Whether the lower court erred in enforcing the settlement on the basis of "presumed authority" as a matter of law. (Preserved in Appellant's Opposition to Appellee's Motion to Enforce Settlement (A19-A23) and at the presentation of the motion on March 2, 2012 (A30-A31)).

(2) Scope of Review

The issue is whether there is an absolute presumption of authority that cannot be rebutted as a matter of law as the lower court apparently ruled. The issue presented in this appeal is one of law, which is subject to plenary or *de novo* review by this Court. *Waggoner v. Laster*, Del. Supr., 581 A.2d 1127, 1132 (1990); *Fiduciary Trust Col, v. Fiduciary Trust Co.*, Del. Supr., 445 A.2d 927, 930 (1982).

(3) Merits of Argument

The lower Court erred in its ruling enforcing the settlement agreement on the basis that there is a presumption that the attorney has authority from the client to settle a claim. The lower court's ruling ignores the controlling case law that the presumption can be and was rebutted.

Initially however the lower court erred because it did not have jurisdiction over Foth or her claim since her claim was properly before another judge. Consolidation of the cases months later did not cure the lack of jurisdiction on March 2, 2012.

More important, it is clear that an attorney cannot bind a client without the client's express authority. In fact, Rule 1.2 of the Rules of Professional Conduct state that: "A lawyer shall abide by a client's decision whether to settle a matter."

In *Aiken v. National Fire Safety Counsellors, et al.*, 127 A.2d 473, 476; (Del. Ch. 1956), the Chancery Court stated that: "Plaintiffs' attorney contends that there was no binding settlement because he did not have authority to settle." The Court ruled that although there is a presumption, "it is only a presumption which the client may rebut." The Court explained that "attorneys have no implied or apparent power to compromise an action solely by virtue of their employment."

In *Williams, et al. v. Chancellor Care Center of Delmar*, 2009 Del. Super. LEXIS 166 (Decided April 22, 2009) (attached hereto), the Plaintiff's attorney, who was also Mr. Nitsche, sought to enforce a settlement that he had made on behalf of his client and with her approval but which she subsequently objected to. The Court stated that:

"While an attorney lacks the inherent authority to accept a settlement offer, an attorney acquires lawful authority when the client either gives special authority or subsequently ratifies the agreement. It is the client's burden to rebut a presumption of lawful authority."

In *Williams*, the Court acknowledged that the presumption can be rebutted but after an evidentiary hearing found that "Mr. Nitsche

presented Ms. Williams with the settlement offer and she verbally agreed to accept it."

In this case, both in the pleadings and at the argument on the motion to enforce settlement, Foth's attorney made it clear that he did not have authority to settle and that the client did not agree and did not ratify the agreement and those factual representations were undisputed. Nevertheless, in this case, there was no evidentiary hearing or testimony or even a contention by the Appellees that the settlement agreement was in fact authorized, agreed to, or ratified by the client. Moreover, the pleadings and factual representations clearly contained sufficient evidence to rebut the presumption. It was undisputed, as stated in Foth's opposition to Barlow's Motion to Enforce Settlement, that:

"The undersigned did not have authority from the client to settle this claim and in light of the disparity in the injuries and treatment, the client is correctly not willing to authorize and agree to the proposed settlement." A20

Foth's opposition also contended that the Court "cannot make factual determinations without an evidentiary hearing." A20 At the argument, Foth's attorney made it clear that he did not have authority:

"THE COURT: Well, did you write this [the settlement agreement note] before you received your client's approval? MR. RAMUNNO: Absolutely, Your Honor, absolutely. So, I mean, I had no authority whatsoever to do it. And that case - - frankly, I mean, the law is pretty clear that you need authority from your client, and you just simply can't do it on your own. My client - - I never even spoke to my client about the settlement offer..." Transcript Page 7 A30

Foth's attorney explained that his client told him that "Barlow wasn't even injured. And she obviously was aghast that someone would--" [contend otherwise]. Transcript Page 7 A30

The undisputed statements and undisputed factual representations of Foth's attorney clearly rebutted the presumption but at the very least created an issue of fact precluding the lower court's decision as a matter of law without an evidentiary hearing. Clearly the lower court's ruling was in error and must be reversed.

ARGUMENT II

THE LOWER COURT ERRED IN ENFORCING SETTLEMENT OF
A MINOR'S CLAIM IN VIOLATION OF 12 DEL. C. §3926
AND THE COURT RULES.

(1) Questions presented

(1) Whether the lower court erred in enforcing settlement of a minor's claim in violation of 12 Del. C. §3926 and the Court Rules. (Preserved in Appellant's Opposition to Appellee's Motion to Enforce Settlement (A19-A23) and at the presentation of the motion on March 2, 2012 (A31)).

(2) Scope of Review

The issue is whether a guardian can settle a minor's tort claim without prior Court approval as required by 12 Del. C. §3926 as the lower court apparently ruled. The issue presented in this appeal is one of law, which is subject to plenary or *de novo* review by this Court. *Waggoner v. Laster*, Del. Supr., 581 A.2d 1127, 1132 (1990); *Fiduciary Trust Col, v. Fiduciary Trust Co.*, Del. Supr., 445 A.2d 927, 930 (1982).

(3) Merits of Argument

Even if the presumption of authority was not or could not be rebutted, the law is crystal clear that a guardian cannot settle a minor's claim without prior Court approval. When dealing with minors' tort claims, no settlement is final until approved by the Court after hearing testimony, and reviewing medical records concerning the injuries, appointing an acceptable guardian and providing for the proceeds to be protected by being deposited in a guardianship account

with withdrawal only by Order of the Chancery Court, etc. In fact, in this case and in all cases dealing with minors, a settlement agreement is nothing more than a proposed settlement and the insurance companies require Court approval, as did the insurance company in this case, for a settlement to be binding. Delaware law so provides. 12 Del. C. §3926 provides that:

"No person dealing with the receiver of a minor or with a guardian of a disabled person shall be entitled to rely on the authority of such receiver or guardian to:

- (1) Release claims;
- (2) Settle tort claims; or
- (3) Convey title to real property without prior court approval of such act."

In this case there was no prior approval by the court. In fact, the lower court enforced a settlement agreement for a minor that was entered into by the guardian's attorney without authority and in clear violation of Section 3926. The subsequent ruling and enforcement by the court did not and could not cure that violation and certainly did not comply with the required statutory protections of minors nor did it apply the safeguards provided for by the statute and the Court rules.

Rule 133 of the Superior Court Rules provides for an evidentiary hearing as a safeguard before approving the settlement of a minor.

Rule 133(c) provides:

"(c) A petition to authorize settlement of a tort claim for a disabled person shall be accompanied by medical reports or other evidence satisfactory to the Court and, in the absence of such evidence, the Court may require oral testimony. Such petitions shall be heard in open court, with the disabled person present, unless otherwise ordered. (Added, Feb. 14, 1996, effective Jan. 15, 1996.)"

That provision is identical to subsection (b) of Rule 185 of the Chancery Court Rules. In fact, the lower court, after finding that the proposed settlement entered into by the attorneys was binding in its

March 2, 2012 Order, referred the matter for an approval hearing. The lower court stated:

"I will refer this matter for a hearing before a judge on the approval of a minor settlement."

The lower Court reiterated that an approval hearing in compliance with Rule 133 was required when, in denying the Motion for Reargument, it once again referred the matter to a Court Commissioner for a hearing and "consideration of the minor settlement".⁶ However, no such hearing ever took place and such a hearing would have been a nullity since the Commissioner would have been bound by the lower court's Order holding that the settlement agreement by the attorneys without prior Court approval and without the Court having any medical records or holding an evidentiary hearing, etc. was binding.

The purpose of the statute and Rule 133 is to make sure that the court, not the guardian, after considering the evidence (medical records, testimony, etc.) decides that a proposed settlement is fair and equitable. In this case, that did not occur. The lower court, in enforcing the settlement, had no medical records to consider and did not request same and did not even have any specific indication or knowledge of the minors' injuries. The lower court did not request any medical records or even sought information as to the minors' injuries. The lower court did not hold an evidentiary hearing and disregarded Foth's undisputed representation that an equal division of the \$15,000 was unfair in light of the fact that Barlow only had an initial emergency room visit and Foth had "serious injuries" and "medical bills

⁶At that time on April 27, 2012, the Court had changed its procedure so that approval of minors' tort claims settlements were heard by the Court Commissioners.

in excess of PIP." Transcript Page 7. A30 The Court's ruling without considering Foth's injuries deprived Foth, a minor, of fair and equitable compensation for her injuries.

The lower court's ruling disregarded the statutory and the Court's Rules' built in protection of minors and their tort claims and was clearly unfair and unjust to Foth, a minor, since it deprived the minor of adequate compensation that she is entitled to for her injuries. The Court has an obligation to protect minors but in this case the lower court failed to do so. Justice requires that the lower court's Order be reversed.

Additionally, the lower court also erred in dismissing the claim against the Defendants in Civil Action No. N11C-09-105 CHT if that is the effect of the Court's Final Order. Foth had agreed not to seek a default judgment in that case since no Answer had been filed if Defendants' carrier filed an interpleader action which it did but the interpleader action became a nullity in light of the lower court's Order. Foth has a right to pursue a claim against the Defendants personally if she elects to do so and she preserved that right to do so in her Answer that was filed in the interpleader action.

CONCLUSION

For all of the foregoing reasons, the lower Court's ruling that the settlement agreement of the minor's claim was binding should be reversed because it was entered into as a result of a misrepresentation and without authority. In addition, it should be reversed because the lower court's ruling was in violation of 12 Del. C. §3926 and Superior Court Rule 133.

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INDEX OF EXHIBITS ATTACHED

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Court's Order of March 2, 2012	A
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