EFiled: Aug 06 2013 05:14PM Filing ID 53457294 Case Number 468,2012



IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANGELA M. BARLOW, JOHN BARLOW, JR., wife and husband, and ANGELA M. BARLOW, as Next Friend of JOHN BARLOW, III, and DAWN LOCKE, as Next Friend of KIMBERLY FOTH, a minor, Plaintiffs Below, Appellees as to Barlow, v.)))))))))))))))))))))))))))))))))))))))	No. 468, 2012 Court Below: Superior Court of the State of Delaware, in and for New Castle County C.A. No.: N11C-04-237 (Consolidated)
MICHAEL P. FINEGAN, DANA M.)	
FINEGAN, and MICHAEL P. FINEGAN,)	
JR., Defendants Below, Appellees,		
Derendants Derew, Appenees,)	
DAWN LOCKE, as Guardian Ad Litem of)	
KIMBERLY FOTH,)	C.A. No.: N11C-09-105
Plaintiff Below, Appellant,)	
)	
V.)	
MICHAEL PATRICK FINEGAN and		
MICHAEL P. FINEGAN, JR.,		
Defendants Below, Appellees,)	
	/	
TITAN INDEMNITY COMPANY,)	
Plaintiff Below, Appellee,)	C.A. No.: N12C-03-013
)	
V.)	
DAWN LOCKE as Next Eriand of)	
DAWN LOCKE, as Next Friend of KIMBERLY FOTH and ANGELA)	
BARLOW, as Next Friend of JOHN		
BARLOW, as Next Thend of John V BARLOW, III,)	
Defendants Below, Appellants as to Foth.)	
	/	

APPELLEE ANGELA BARLOW AS NEXT FRIEND OF JOHN BARLOW, III'S ANSWERING SUPPLEMENTAL MEMORANDUM

Dawn Locke, on behalf of minor Appellant Kimberly Foth (Foth), appealed the Superior Court's July 26, 2012 Order entering final judgment in favor of Foth and minor Appellee John Barlow, III ("Barlow") and the March 2, 2012 Order granting Barlow's motion to enforce the parties' settlement agreement wherein Foth and Barlow would each receive \$7,500. On May 6, 2013, this Court vacated the Superior Court's Order entering final judgment and remanded this matter for the purpose of holding a minors' settlement hearing for Foth and Barlow. On remand, the Superior Court conducted a minors' settlement hearing on June 7, 2013 and considered testimony from both minors and their mothers, and reviewed the minors' medical records.

On July 8, 2013, the Superior Court issued a Report on Remand in which it summarized the evidence presented and determined that an equal division of the \$15,000 settlement proceeds between the minors is fair and reasonable. (Exhibit A) Significantly, the Court noted "the focus here must be on whether the division of the available funds is fair. This necessitates a comparison of the injuries suffered by each minor." *Id.* at 4. After summarizing the minors' medical records and testimony, the Court noted that it "can find no significant difference in which [the minors'] respective injuries limit their activities of daily living." *Id.* at 7. The Court further stated that if it "were to disregard the settlement agreement and instead decide the apportionment on a clean slate, it would award [Foth] \$10,000

and [Barlow] \$5,000." *Id.* However, "the difference between the settlement apportionment and the 'clean slate' apportionment ... is not so great as to render the 50-50 division unfair or unreasonable." *Id.*

The Superior Court properly exercised its discretion in approving an equal division of the settlement proceeds between the two minors following a minors' settlement hearing. Determining whether a proposed minor's settlement is fair and reasonable is a matter of judicial discretion. Super. Ct. Civ. R. 133(a). Not surprisingly, Foth contends that the trial judge abused his discretion in approving the equal division of the proceeds. Foth's argument fails to point to a single instance in which she believes the trial court exceeded the bounds of reason or ignored recognized rules of law or practice to produced injustice. Instead, the alleged deficiencies that Foth outlines deal with issues that fall within the trial court's exercise of discretion. "An abuse of discretion occurs when a court has exceeded the bounds of reason in view of the circumstances or so ignored recognized rules of law or practice to produce injustice." Harper v. State, 970 A.2d 199, 201 (Del. 2009). "Judicial discretion is the exercise of judgment directed by conscience and reason, and when a court has not exceeded the bounds of reason in view of the circumstances and has not so ignored recognized rules of law or practice so as to produce injustice, its legal discretion has not been abused." Firestone Tire & Rubber Co. v. Adams, 541 A.2d 567, 570 (Del. 1988).

2

Foth contends that the Superior Court erred in admitting testimony of Barlow's injuries without an expert report. Foth clearly confuses the legal standard applicable to the minors' settlement hearing with the standard applied on a motion for summary judgment in the context of a plaintiff's burden of proof at trial. In Roache v. Charney, 38 A.3d 281 (Del. 2012), this Court summarized that standard in the context of whether the trial judge abused its discretion in denying a brief continuance request to clarify an expert's report. However, the standard applied in a minors' settlement hearing is not the same as that for summary judgment or trial. Instead, courts look to whether the minor's proposed settlement is fair and reasonable under the circumstances. It is remarkably rare to have expert testimony or a report introduced into evidence at a minor's settlement hearing and it is extremely common for the court to rely upon medical records. The Court's discretion extends to determining the sufficiency and types of evidence required and it is free to give evidence the appropriate weight. "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." Super. Ct. Civ. R. 133(c).

A thorough review of the record reveals that both minors sustained relatively similar injuries and the questioning of both minors revealed similar complaints even to this day. Barlow saw his pediatrician on August 19, 2011 who records a

history of a car accident two years ago with headaches every day and low back pain. (Ex. D to Foth's Supp. Mem.) His pediatrician referred him for a CT scan of his head for a diagnosis of "Chronic headaches after motor vehicle accident", which revealed mild sinus disease. Id. What Foth's counsel does not tell this Court is that Foth waited for six months after the accident before she began treating with a chiropractor on March 5, 2010. Foth treated regularly until August of 2010 and did not seek any treatment until April of 2011, eight months later, and had not treated since that time. The Court went on to explain in detail the difficulty of establishing causation in Foth's claim. (Ex. A at 5-6) The Court was accurate in finding "no significant difference in which their respective injuries limit their activities of daily living." Id. at 7. The court reached this conclusion after extensive questioning of the respective minors in addition to listening to testimony elicited by the attorneys. Therefore, based upon the foregoing, the Superior Court properly exercised its discretion in approving the minors' settlements and its decisions should be affirmed.

WEIK, NITSCHE & DOUGHERTY

/s/ Gary S. Nitsche

Gary S. Nitsche, P.A. (ID 2617) Michael B. Galbraith, Esq. (ID 4860) 305 North Union Street, Second Floor Wilmington, DE 19805 (302) 655-4040 Attorneys for Appellee Barlow

Dated: August 6, 2013