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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

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

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NATURE AND STAGE OF THE PROCEEDINGS

The dispute in this case initially dealt with the division of the insurance proceeds by the two minors that were involved in an accident on October 2, 2009 and the Superior Court's Order of March 2, 2012. Three different related actions were consolidated on June 26, 2012: C.A. No. N11C-04-237 JAP, which was filed by Gary S. Nitsche on April 28, 2011 was assigned to Judge Parkins; C.A. No. N11C-09-105 CHT which was filed by the undersigned on September 15, 2011 was assigned to Judge Toliver; C.A. No. N12C-03-013 JAP which was an interpleader action filed by Titan Indemnity on March 1, 2012 was assigned to Judge Parkins.

On March 2, 2012, the Superior Court enforced an agreement by the minor's attorneys, Mr. Nitsche representing John Barlow, III (hereafter Barlow) and the undersigned representing Kimberly Foth (hereafter Foth) as to the division of the insurance proceeds based on the "presumed authority" of Foth's attorney despite the fact that the agreement had not been authorized by the client and despite the fact that the Order was contrary to 12 Del. C. §3926.

The Superior Court's decision was based on Barlow's Motion To Enforce Settlement Agreement (A13-A18), Foth's initial Response in Opposition to the Motion (B19-B20), Foth's Amended Opposition Response (A19-A23). The arguments at the March 2,2012 hearing as reflected in the transcript (A24-A33) and possibly Foth's attorney letter of

December 19, 2011 to Titan Indemnity's attorney (B13).[1] However, the Combined Brief and Appendix filed by Barlow and Titan Indemnity (hereinafter Titan) refers to and includes a multitude of correspondence both before and after March 2, 2012 including correspondence between the attorneys, etc. which was not before the Court or considered by the Court on March 2 and therefore should be stricken.

The pro se appellees, Michael Patrick Finegan and Michael P. Finegan, Jr. (hereinafter collectively Finegan), have not filed an Answering Brief and Titan, their insurance company, did not include a response on their behalf in their Combined Answering Brief. Consequently, no defense has been raised to Foth's contention that even if the lower's Court Order as to the division of the insurance proceeds is affirmed Foth can pursue her claim against Finegan the tortfeasor's individually and personally.

This is Appellant Foth's Reply Brief.

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[1]There was also a letter to Judge Parkins dated January 11, 2012 by Foth's attorney stating that Barlow's motion was incorrectly filed before him and should have been filed before Judge Toliver who had been assigned the Foth's suit.

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.

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*, 581 A.2d 1127, 1132 (Del. 1990); *Fiduciary Trust Co. v. Fiduciary Trust Co.*, 445 A.2d 927, 930 (Del. 1982).

(3) Merits of Argument

Foth's initial contention, both before the lower Court and in her Opening Brief in this appeal was that the lower Court erred because it did not have jurisdiction over Foth or her claim since Foth's claim was properly before another judge. That was based on the fact that Barlow's attorney improperly included Foth as a Plaintiff in the suit assigned to Judge Parkins even though he did not represent

her.[2] Nevertheless, Barlow and Titan's combined Answering Brief did not address or counter Foth's contention that Judge Parkins did not have jurisdiction and that alone justifies reversal.

Otherwise, the Appellees do not dispute that an attorney's "presumptive authority" to bind his client can be rebutted but they contend that in this case it was not rebutted. They contend at page 14 that "To date, Foth has not produced any evidence, such as an affidavit, written statement or testimony, to support the claim that she did not authorize her attorney to accept the settlement." Interestingly, no such argument or finding was made below. In fact, the record below is completely devoid of the word "rebut" or that contention.

At the March 2 argument, the Appellees did not argue or contend that Foth had failed to rebut the presumption of authority and the lower Court made no such statement, reference or finding when it granted the Motion to Enforce the Settlement. The lower Court simply ruled that "It is presumed that a lawyer has authority to bind his client." A31 Moreover, there is no rule or procedure that would allow Foth to file an affidavit after March 2 and "to date".

In fact, both in the initial response in opposition to Barlow's motion and in the Amended Opposition Foth requested and/or pointed out the need for an evidentiary hearing. In the initial opposition, Foth referring to the holding in *Levykin v. Henry*, 1998 WL 283403

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[2]Mr. Nitsche did not dispute that he did not represent Foth but in part attempted to justify filing suit for Foth as her attorney 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." A27 His justification lacked candor since he filed suit about 155 days before the statute of limitations would have expired.

(Del.Super.),[3] a case cited by Barlow, stated that a factual issue existed and that a hearing was necessary. B19-B20 In the Amended Opposition, Foth requested an "evidentiary hearing" and cited *Levykin*. A20

It should also be noted that in *Levykin*, in deciding a Motion for Summary Judgment, the Court ruled that "...I am going to consider Plaintiff's statement in open Court as the equivalent of an affidavit ... for summary judgment purposes" which "raises an issue of fact and the Court cannot determine the issue as a matter of law on summary judgment." Obviously, if a party's statement in open Court is treated as an affidavit for purposes of defeating a Motion for Summary Judgment, an attorney's representations in open Court, as an officer of the Court, cannot be treated any less. The fact is that on March 2, 2012 no one disputed that Foth's attorney did not have authorization and clearly the attorney's unequivocal representation to the Court that he lacked authority precluded the Court's ruling and at the very least required an evidentiary hearing.

Appellee also contends that "Significantly, Foth's counsel admitted that he had authority to settle for Foth if it was fair" (Page 14) That statement is erroneous since what was stated was that "I knew she would agree, if that was a fair - - if the injuries were the same, but they are not." A30 All that Foth's attorney was saying was that if the 2 minors' injuries were "about the same" as

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[3]This opinion as well as all other unreported opinions cited in this brief are contained in Appellees' Compendium of Unreported Decisions and therefore are not attached to this brief.

misrepresented he believed that his client would agree that an equal division of the insurance proceeds was fair and equitable.

Appellees cite a series of cases and contend that the cases support their position. However, a brief review of the cases clearly demonstrate that the lower Court erred in not ruling that the presumption was rebutted or not holding an evidentiary hearing as requested by Foth.

In *Moyer v. Moyer*, 602 A.2d 68, 70 (Del. 1992) after a hearing, the Family Court ruled that "1) appellant had authorized his former counsel to bind him to an 'agreement settling marital rights' with appellee; and 2) there was clear and convincing evidence of part performance by appellant...". There was no evidentiary hearing and no such finding in Foth's case.

In *Shields v. Keystone Cogeneration Sys., Inc.*, 620 A.2d 1331, 1335 (Del. Super. Ct. 1992) the Court found the parties had a meeting and discussed settlement and what issues were nonnegotiable. The parties were expressly asked if the attorney "was authorized to settle with Keystone if the nonnegotiable demands were met and no one expressed dissent from that authorization." There was no such finding in Foth's case.

In *Williams v. Chancellor Care Ctr. of Delmar*, 2009 WL 1101620, at *3 (Del. Super.) after an evidentiary hearing the Court found that "Mr. Nitsche presented Ms. Williams with the settlement offer and she verbally agreed to accept it." There was no evidentiary hearing and no such finding in Foth's case.

In *Aksoy v. SelecTrucks of America, LLC*, 2009 WL 2992554 at *3 (D.Del.) the Court found that "It is also undisputed that the

plaintiff gave his counsel full authority to dismiss the case in its entirety." There was no such finding in Foth's case.

In *Lawson v. Hudson*, 1990 WL 263566 (Del. Super.) the Court found and "Plaintiff acknowledged" that:

> "Plaintiff gave Fletcher [his attorney] the authority to determine if a previous offer by the defendant of $10,000 plus court costs was still available 'for purposes of concluding the matter.'"

That did not occur on Foth's case.

In *P & A, LLC (Maryland) v. Yorkshire Realty, LLC*, 2012 WL 1407961 (Del. Super.) in a Motion to Enforce Arbitration the Court held a hearing and took testimony from the attorneys who had agreed to arbitration. The Plaintiff's attorney testified that the Defendant's attorney stated at the meeting that "he had authority to agree to arbitration". Based on the parties agreement, the trial was cancelled and the defense attorney testified his client or his client's "primary contact" who was with him at the meeting "favored arbitration" but his superior did not agree. He also testified he did not "purposely exercise authority". There was no such hearing or finding in Foth's case.

In *Pevar Co. v. Hawthorne*, 2010 WL 1367755 (Del. Super.) at a hearing to enforce a settlement, that cancelled the trial the following day, the Court found that the attorney "had both actual and apparent authority to settle" or alternatively "when all the evidence is compared I find that Plaintiff has failed to meet its burden of rebutting the presumption ...". There was no such hearing or finding in Foth's case.

As evidenced above contrary to Appellees' assertion the cases cited by the Appellees only confirms the lower's Court's obligation to make a factual finding as to whether the presumption had been rebutted or not. No finding or even discussion of rebuttal took place in Foth's case. The lower Court did not even consider the fact that the presumption can be rebutted and did not conduct an evidentiary hearing as requested by Foth.

The Appellees also argue that a mutual mistake is needed to rescind a contract. That may be the law but it has no relevancy in this case because before we reach the issue of mutual mistake, the Court has to find actual authority to enter into a contract. If there is no authority than whether it is a mutual mistake or not is irrelevant. Nevertheless, it should be noted that a material misrepresentation does render an agreement voidable. *Alabi v. DHL Airways, Inc.*, 583 A.2d 1358, 1361 (Del.Super. 1990). Also, The Restatement (Second) of Contracts, Section 164 provides that a material misrepresentation that induces the recipient to enter into an agreement renders the agreement voidable if the recipient's reliance was reasonable.

In this case, there was a material misrepresentation as evidenced by a review of the facts as related in Foth's Opposition to Consolidate. B41-B44 As stated therein, the basis for the proposed agreement as to the division of the insurance proceeds which resulted in the Court's Order of March 2, 2012 was Titan's attorney's misrepresentations that the undersigned relied on. Titan's attorney told the undersigned after the undersigned filed suit on behalf of Foth on September 15, 2011 that Titan had paid the $15,000 minimum

coverage to a third party but nevertheless had offered its full 15/30 policy limits to Mr. Nitsche, who on April 28, 2011 had filed suit for the remaining claimants including Foth. He told the undersigned that one of Mr. Nitsche's clients, (Angela Barlow) was "badly injured" but that the injuries of the 2 minor claimants, (John Barlow, III and Kimberly Foth) which at the time Mr. Nitsche was claiming he represented, were "about the same". That information was dramatically wrong but was relied on by the undersigned who accordingly agreed to equally divide the remaining $15,000 (after Angela Barlow received $15,000). However, in reality, John Barlow, III was hardly injured and only went to the Emergency Room. On the other hand, Foth was seriously injured and received substantial treatment and owes $1,437.00 in medical expenses in excess of the no fault coverage that was exhausted and has a permanent injury according to Dr. Yacucci.[4]

Logically, it was reasonable for the undersigned to rely on Titan's attorney's misrepresentation and assume that for Titan to offer its full policy limits of $30,000 (despite the fact that it had already paid out $15,000), Titan and/or its attorney had been provided the medical records by Mr. Nitsche of all the claimants including Foth since Mr. Nitsche was claiming to also represent Foth. It is extremely rare for an insurance company to pay more than its coverage. In reality, however, neither Titan nor it's attorney had received any medical records and the sole basis for the representation that the 2 minors' injuries were "about the same" was Mr. Nitsche's

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[4]For the sake of brevity, only Barlow's Emergency Room records and Foth unpaid medical bill and Dr. Yacucci's report were attached as exhibits to Foth's Opposition to Consolidation but are not included with this brief.

misrepresentations to Titan and/or it's attorney.[5] That was clearly a material misrepresentation that induced Foth's attorney to agree to an equal division of the insurance proceeds and the reliance was reasonable. Consequently, even if authorized, the agreement was voidable.

Finally, Appellees contend that there was an accord and satisfaction because the Prothonotary complied with the Court's Order and sent a check to Barlow and Foth. As stated by the Appellees at page 2, on July 26, 2012, the lower Court entered an Order finalizing its March 2 ruling as to the insurance proceeds and "the Court further directed the Prothonotary to immediately disburse the money held by the Court and to satisfy the judgment." Consequently, sometime after the lower Court's Final Order was appealed by Foth the Prothonotary sent Foth and Barlow a check for $7,500. Barlow cashed the check but the funds are being held in escrow by Barlow's attorney pending the appeal apparently because Barlow's attorney recognizes that Foth has an interest or claim to said funds and he has an ethical obligation pursuant to Rule 1.15 of safekeeping.[6]

Contrary to Appellees' assertion, accord and satisfaction and the ruling of *Acierno v. Worthy Bros. Pipeline Corp.*, 693 A.2d 1066, 1068 (Del. 1997) has no application here because despite repeated requests

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[5]Undoubtedly, Mr. Nitsche's misrepresentation that the minors' injuries were "about the same" was probably intended to avoid a dispute between the clients (Barlow and Foth) since he apparently recognized he had a conflict of interest problem since the representation of one client would necessarily be adverse to the other client.

[6]No such claim or interest is being asserted as to the $7,500 that was paid to Foth.

by Foth's attorney to stay the distribution, including a Motion to Stay Pending An Appeal and Foth's proposed Order that accompanied the letter of July 20, 2012 (B52-53) which provided for a stay the lower Court ordered the immediate payment of the insurance proceeds. The Prothonotary and the parties complied with the Court's Order. Complying with the Court's Order that the lower Court refused to stay (without a $15,000 supersedeas bond that Foth certainly could not obtain) cannot be treated as either ratification or accord and satisfaction.

In addition, *Acierno* is not applicable because the dispute is as to the division of the insurance proceeds that Titan deposited with the Prothonotary. Titan did not offer Foth $7,500. Instead, Titan on March 1, 2012 filed an interpleader action and interpled and eventually deposited with the Prothonotary the $15,000 insurance proceeds to be divided by the Court after hearing the testimony as to the injuries sustained and determining a fair and equitable division of the proceeds. On March 2 the lower Court bypassed such a determination and ordered a division of the insurance proceeds. Barlow did not and could not offer $7,500 since it was not Barlow's money to offer. Barlow simply proposed a division of the insurance proceeds which was agreed to based on misrepresentation. There was no debtor/creditor relationship as required by *Acierno*.

It is clear that the lower Court erred in finding as a matter of law that the agreement as to the division of the insurance proceeds was binding and enforceable solely because of a presumption of authority without at least holding an evidentiary hearing based on the representations of Foth's attorney rebutting the presumption.

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*, 581 A.2d 1127, 1132 (Del. 1990); *Fiduciary Trust Co. v. Fiduciary Trust Co.*, 445 A.2d 927, 930 (Del. 1982).

(3) Merits of Argument

12 Del. C. §3926 clearly provides that a minor's guardian cannot "release claims" or "settle tort claims" without the Court's "prior" approval. Foth contends that since there was no "prior" Court approval, any agreement by Foth's attorney, even if authorized by the minor's guardian, was not binding.

Appellees however argue at page 19 that Foth's contention "would require the Superior Court to conduct simultaneously a hearing on a minor's settlement petition in conjunction with the March 2, 2012 hearing on the Motion to Enforce Settlement Agreement." The response to this non existing problem is rather simple. The lower Court on March 2 should not have enforced the purported settlement agreement but should have held an evidentiary hearing on the interpleader action to determine a fair and equitable division of the insurance proceeds as it was required to do to fulfill its obligation to protect minors. Since there was no prior Court approval there could not be compliance with the statute and the Court's Rules.

In fact, Titan did not recognize and/or was correctly not willing to honor or abide by said agreement since Titan not only required Court's approval, which is the standard procedure in all cases involving minors, but even filed an interpleader action. Consequently, Titan's offer of the policy limits was conditioned on Court approval.

Appellees at page 19 also attempt to justify the lower Court's failure to conduct such a hearing on the Court's statement that it would "'refer this matter for a hearing before a judge on the approval of a minor settlement' ... as well as in its April 27, 2012 Order that '[t]his matter will be referred to a Commissioner for consideration of the minor settlement.'" As Foth's attorney stated repeatedly in various correspondence and/or pleadings, Court approval by a Judge or Commissioner would be a nullity since the lower Court had already ruled that Barlow and Foth would each receive $7,500. The lower Court

was not going to reverse itself and change the amount that each minor would receive and a Commissioner certainly would not do so.

The Appellees also contend that a Court approval was not held because Foth did not file a petition. Appellees further contend at page 20 that Barlow filed a petition but "the hearing has yet to be conducted due to the filing of the instant appeal". In fact, Barlow's petition for Court approval was noticed to be heard by Judge Parkins on March 9, 2012 but was not heard and even though Foth filed an interlocutory appeal a stay was denied and the appeal was denied on May 22, 2012. This appeal was not filed until August 23, 2012. For whatever reason, the lower Court ultimately decided that a hearing for Court approval and compliance with Rule 133 was not necessary since on July 26, 2012 it issued a Final Order requiring the immediate payment to the minors of the insurance proceeds pursuant to its March 2 decision and order. There cannot be any doubt that the lower Court's March 2 Order was contrary to the requirements of 12 Del. C. §3926 and for that reason it should be reversed.

Finally, in its Opening Brief, Foth contended and sought a ruling from the Court that even if the lower Court's decision of March 2 was not reversed the lower Court erred in its Order of July 26 which apparently dismissed the tort claim against the tortfeasors individually. Foth's attorney always made it clear that Foth was reserving the right to pursue her tort claim against the tortfeasor individually and reserved the claim in her answer to the Interpleader action. However, the individual tortfeasors pro se did not file an Answering Brief and Titan Indemnity, in the Combined Answering Brief, ignored Foth's contention and did not address or counter it even

though it had a contractual obligation to defend its insured. Since Foth's contention was not opposed, Foth would request this Court to allow Foth to proceed against the tortfeasors individually if the lower Court's decision is not reversed.

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.

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