



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,	)	Appeal from the Superior Court
III, a minor, and DAWN LOCKE,	)	of the State of Delaware in and
as Next Friend of KIMBERLY FOTH,	)	for New Castle County
a minor,	)	
Plaintiffs Below, Appellees as to Barlow,	)	
	)	C.A. No. N11C-04-237 JAP
v.	)	CONSOLIDATED CASES
MICHAEL P. FINEGAN, et al.,	)	
Defendants Below, Appellees.	)	

DAWN LOCKE, As Guardian Ad Litem	)	
of KIMBERLY FOTH,	)	
Plaintiff Below, Appellant,	)	C.A. No. N11C-09-105 CHT
	)	
v.	)	
MICHAEL PATRICK FINEGAN and	)	
MICHAEL P. FINEGAN, JR.	)	
Defendants Below, Appellees	)	

TITAN INDEMNITY COMPANY,	)	
Plaintiff Below, Appellee,	)	C.A. No. N12C-03-013 JAP
	)	
v.	)	
DAWN LOCKE, et al.	)	
Defendants, Appellant as to Foth	)	

APPELLANT'S REPLY SUPPLEMENTAL MEMORANDUM

In this appeal from the lower Court's decision enforcing a "settlement agreement" made by Foth's attorney based on a misrepresentation and without authority and in violation of 12 Del. C. §3926 this Court remanded the case to decide "the proposed settlement's relative fairness to the minors." After the hearing the lower Court found that in a "clean slate" or fair division of the \$15,000 available coverage Foth would be entitled to \$10,000. Nevertheless, the Court once again enforced the purported "settlement agreement" and awarded her \$7,500. In doing so the lower Court violated its obligation of "fairness" especially in dealing with minors and this Court's remand. The lower Court's decision was arbitrary and capricious and an abuse of discretion.

Barlow contends that the lower Court did not abuse its discretion in that it did not "exceed the bounds of reason". Reason would dictate that the lower Court cannot protect minors by deciding that a minor should receive \$10,000 but then only award her \$7,500. That cannot be fairness and it is not reasonable. In deciding what is a fair award for a minor, "close enough" cannot be the acceptable standard.

Barlow also contends that the lower Court did not err in allowing over Foth's objection testimony of his injury without any supporting medical records or testimony. Contrary to Barlow's contention the lower Court routinely requires medical records to relate and support the claimed injuries in minors' settlement hearings. To admit self-serving testimony without medical support relating the

injury to the accident is sheer speculation and contrary to the Court's repeated rulings and this Court's holding in *Roach v. Charney*, 38 A.3d 281 (Del. 2012).

Barlow states that almost 2 years later, he saw his pediatrician who ordered a CT scan "for a diagnosis of 'Chronic headaches after motor vehicle accident'".

That statement is incorrect and lacks candor. The CT scan records simply relate the history, not the diagnosis as indicated below:

"INDICATION/HISTORY: Chronic headaches after motor vehicle accident" (Exhibit D of Foth's Supplemental Memorandum)

"History" is a far cry from "diagnosis". The history came from Barlow's mother, Angela Barlow, who stated "car accident 2 yrs ago, plays a lot of sports". However, the CT scan established the headaches were caused by a sinus infection.

The undisputed facts are that there is no admissible evidence whatsoever (except possibly for the emergency room records) that Barlow was even injured in the accident. That was clearly summarized by Barlow's mother's testimony that after October 2, 2009 to date Barlow did not see any doctor that related any injury or any complaint to this accident. For the Court to allow inadmissible testimony of any injury and award Barlow \$5,000 (or worse \$7,500) was an abuse of discretion.

In response to Foth's contention that the lower Court erred in dismissing the claim against the tortfeasors, Finegans' attorney filed a Response and contends that Foth is collaterally estopped to "re-litigate the issue of damages" as a result of the

lower Court's decision. The case cited by Finegan, *Hondros v. Morton and Fink and Commercial Union Insurance*, 1995 Del. Super LEXIS 209, is not controlling because in that case there was no limitation of funds and the Court decided the award based on damages and not what funds were available. Here, the lower Court was directed to determine the "relative fairness" division of the \$15,000 insurance coverage. The lower Court expressly made it clear that it was not deciding whether the \$15,000 was fair but only if "the division of the available funds is fair".

In contending that the Court's award adequately compensated Foth, Finegan misstates the evidence. Contrary to Finegan's contention Foth does have unpaid medical bills that she is liable for of \$1,437 and does have a permanent injury.¹

Titan also contends that Titan should not be required to pay Foth's Court costs of \$1,700 or so but since the lower Court's decision is essentially a judgment against Titan on the interpleader action Rule 54 should require costs.²

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¹Finegan's attorney did not participate in the fairness hearing and was not present at the hearing.

²Pursuant to Rule 20 this Court can also award costs.