



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,)
v.) C.A. No. N11C-04-237 JAP
MICHAEL P. FINEGAN, et al.,) CONSOLIDATED CASES
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 SUPPLEMENTAL MEMORANDUM

The dispute in this case dealt with the division of \$15,000 insurance proceeds by the two minors, Kimberly Foth, hereinafter Foth and John Barlow, hereinafter Barlow and the dismissal of Foth's claim. Relying on a misrepresentation that the injuries of both minors were about the same, Foth's attorney, without authority from the client to do so, agreed to an equal division of the \$15,000. Even though Barlow's medical records indicated that he only went to the emergency room and had no other treatment, on March 2, 2012 the lower Court, despite Foth's objections, entered an Order enforcing said agreement. A series of Motions and an interlocutory appeal followed and on July 26, 2012, a Final Order was issued providing for payment of \$7,500 to each minor Plaintiff and dismissing the claim.

That decision was appealed to this Court and Foth argued that the lower Court erred because her attorney did not have authority to settle and the Court's Order was in violation of 12 Del. C. §3926 and the lower Court erred in dismissing the claim against the tortfeasors. On May 6, 2013 this Court issued an Order remanding the case to the lower Court to hold a hearing and decide "the proposed settlement's relative fairness to the minors...".

On June 7, 2013 the lower Court held an evidentiary hearing and heard testimony from the minors and their parents. In addition, Barlow submitted the emergency room records on the date of the accident, October 2, 2009, and an additional doctor visit on August 19, 2011 that diagnosed an unrelated "sinus

disease”. Foth submitted the emergency room records as well as records of approximately 50 chiropractic therapy treatments with treatment notes as well as an unpaid chiropractic bill for \$1,437 and doctors reports dated March 5, 2010 and April 4, 2011 that related her back and neck injuries as well as headaches to this accident along with a report dated February 27, 2012 that opined that she had a permanent back injury as a result of the accident and would need treatment in the future.¹ Exhibit A Foth also submitted a report from a neurologist dated June 3, 2010 that stated that as a result of the accident she sustained neck and back injuries as well as post traumatic cephalgia. Exhibit B

On July 8, 2013 the lower Court submitted a Report on Remand which stated that a “clean slate” apportionment would be \$10,000 for Foth and \$5,000 for Barlow but nevertheless awarded each minor \$7,500 thereby once again enforcing the attorneys unauthorized agreement. The lower Court abused its discretion in finding that it would award Barlow \$5,000 for his injuries since Barlow submitted no medical reports or evidence whatsoever to establish any injury related to the accident. At the very outset of the hearing, Foth objected to any testimony of any injury subsequent to the emergency room visit without a medical report or expert testimony relating same to the accident. Partial Transcript at Pages 9 & 10 Exhibit

¹For the sake of brevity the ER records and Foth’s treatment records are not attached.

C The objection was overruled despite established case law and this Court's decision in *Roache, et al. v. Charney*, 38 A.3D 281 (Del. Supr. 2012):

“When the plaintiff's claim involves bodily injuries, ‘the causal connection between the defendant's alleged negligent conduct and the plaintiff's alleged injury must be proven by the direct **testimony** of a competent **medical expert**.’”

The lower Court's admissibility of testimony of any injury related to the accident without a supporting medical report or admissible evidence relating same to the accident was in error and a clear abuse of discretion.

In its Report the lower Court stated that Barlow's “treatment consisted of a handful of visits to his pediatrician...” Contrary to the lower Court's statement the pediatrician's records indicate one visit on August 19, 2011 and a subsequent visit to review the CT scan of the sinus disease. (Exhibit D) Barlow's mother testified as to the totality of Barlow's treatment as follows:

“Q. The pediatrician records that she produced was, he went on 8-19-11 because he was having headaches and the doctor did a CAT scan which showed that he had sinus disease, right?

A. That's what he just read off.

Q. And that was it, I mean, from 10-2-09 when this accident occurred to 8-19-11, he did not see any doctor, whatsoever, and this was for sinus infection, really, except for Dr. Harris which said he was okay, that we don't have the records, yet to date he has not seen anybody else, correct?

A. Correct.” Exhibit C Angela Barlow's testimony at P.19-20

The Court's finding that Barlow would be entitled to \$5,000 without any supporting admissible evidence of any injury was an abuse of discretion. Moreover,

the lower Court's decision reaffirming or "approving" a \$7,500 split is perplexing. It is difficult to understand how the lower Court can find that a "clean slate" fairness apportionment for Foth is \$10,000 (which is inadequate in light of her permanent injury and medical bills) but then only award her \$7,500 solely because of an unauthorized attorney's agreement and in violation of 12 Del. C. §3926.

Fairness dictates that the lower Court's decision be reversed. Based on Barlow's total lack of evidence of any injury, nothing more than a nominal award for Barlow can be justified. If this Court is not able to make its own determination as to a fair apportionment based on the evidence presented below, this case must be again remanded for a "fairness apportionment" based only on admissible evidence.

The lower Court also erred in not awarding Foth court costs. Since these 3 cases were consolidated and since in essence the Court was deciding Titan Insurance's interpleader action, the Court should have awarded Foth reimbursement by Titan of approximately \$1,700 in Court costs.

Finally, the lower Court's dismissal of the action against the tortfeasors should be reversed so Foth has the option to pursue that remaining claim.

RAMUNNO & RAMUNNO, P.A.

/s/ L. VINCENT RAMUNNO

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Dated: July 23, 2013