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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. MICHAEL P. FINEGAN, DANA M. FINEGAN, and MICHAEL P. FINEGAN, JR., Defendants Below, Appellees,	)	No. 468, 2012 Court Below – Superior Court of the State of Delaware in and for New Castle County C.A. No.: N11C-04-237 JAP (Consolidated)
DAWN LOCKE, as Guardian Ad Litem of KIMBERLY FOTH, Appellee 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 Below, Appellant as to Foth.	)	C.A. No.: N12C-03-013 JAP

APPELLEES' JOINT ANSWERING BRIEF

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Dated: November 28, 2012

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NATURE OF PROCEEDINGS

The instant matter stems from a motor vehicle collision that occurred on October 2, 2009 in which Angela Barlow and the minors, John Barlow, III and Kimberly Foth, were injured. Appellees Angela M. Barlow, John Barlow, Jr. and Angela M. Barlow as Next Friend of John Barlow, III, a minor (collectively "Barlow") are represented by Gary S. Nitsche, P.A. Plaintiff Below, Appellant Dawn Locke, as guardian ad litem of Kimberly Foth (collectively "Foth"), is represented by L. Vincent Ramunno, Esquire. Plaintiff Below, Appellee Titan Indemnity Company ("Titan") is represented by Robert J. Leoni, Esquire.

At the time of the October 2, 2009 collision, the tortfeasor was insured by Titan and carried the mandatory minimum amount of bodily injury liability insurance coverage of $15,000.00 per person and $30,000.00 per accident. Titan agreed to tender the policy limits in order to resolve all three of the personal injury claims and the parties, through counsel, agreed to a distribution of the settlement proceeds pending Court approval of the minors' tort claims with Angela Barlow receiving $15,000.00, and the minors John Barlow, III and Kimberly Foth each receiving $7,500.00.

On November 4, 2011, counsel for Foth, agreed that his client accepted the $7,500.00 apportionment of the settlement (B-11). On December 21, 2011, Foth's counsel then advised that his client would not authorize the $7,500.00 settlement

without first being given an opportunity to review the medical records for minor John Barlow, III (B-15). On December 29, 2011, Barlow filed a motion to enforce the settlement agreement (B-16–B-18). Foth filed an initial response to the motion on January 6, 2012 (B-19–B-20) and an amended response on February 21, 2012 (B-21–B-22).

On March 2, 2012, following oral argument on the motion to enforce settlement, the Superior Court granted the motion (Exhibit A). On March 6, 2012 Foth filed a motion for reargument and/or certification for interlocutory appeal (B-23–B-26), which the Superior Court denied on April 27, 2012 (Exhibit B). Foth filed an interlocutory appeal, which this Court refused in an Order, dated May 22, 2012 (B-33–B-36). On June 7, 2012, Barlow filed a motion to consolidate all three matters (B-37–B-40). On June 14, 2012, Foth filed an opposition to the motion to consolidate (B-41–B-44). On June 26, 2012, the Superior Court entered an Order consolidating all three actions under the earliest filed action, C.A. No.: N11C-04-237 (B-48–B-49).

On July 26, 2012, the Superior Court entered a Final Judgment in favor of Plaintiff Dawn Locke as next friend of Kimberly Foth in the amount of $7,500.00 and in favor of Plaintiff Angela Barlow as next friend of John Barlow, III in the amount of $7,500.00 (Exhibit C). The Court further directed the Prothonotary to immediately disburse the money held by the Court and to satisfy the judgment.

On August 23, 2012, Foth filed an appeal to this Court from the Superior Court's March 2, 2012 decision granting the motion to enforce settlement; the April 27, 2012 Order denying the motion for reargument; and the July 26, 2012 Final Judgment Order. Appellant's Opening Brief was filed on October 26, 2012 and a corrected Opening Brief was filed on November 8, 2012. The following constitutes Appellees' Joint Answering Brief on behalf of Barlow and Titan.

SUMMARY OF ARGUMENT

I. Denied. The Superior Court properly granted the Motion to Enforce Settlement Agreement.

II. Denied. The Superior Court properly granted the Motion to Enforce Settlement Agreement as to a minor's claim.

STATEMENT OF FACTS

On October 2, 2009, Angela Barlow and the minors, John Barlow, III and Kimberly Foth, were injured when their vehicle was struck by a vehicle being operated by Michael P. Finnegan ("Finnegan"), who was also a minor. At the time of the collision, Finnegan's vehicle was insured by Titan and carried the mandatory minimum amount of bodily injury liability insurance coverage of $15,000.00 per person and $30,000.00 per accident (B-7). On September 16, 2011, Titan's counsel wrote to counsel for Barlow and Foth to confirm that Titan agreed to offer the $30,000.00 policy limits to all three of the claimants in full settlement of their claims in exchange for their release of all claims against Titan's insured driver, the named insured, and Titan (B-7). The September 16 letter also confirmed that counsel for Barlow and Foth would work with each other to divide the $30,000.00 between their clients and advise Titan's counsel of the amounts for each claimant (B-8). Titan's counsel also confirmed that Court approval would be required for the minors' settlements as well as W-9 forms from counsels' law firms (B-8).

On September 23, 2011 (B-9) and again on October 20, 2011 (B-10), Foth's counsel wrote to Barlow's counsel proposing to divide the $30,000.00 evenly so that each claimant would receive $10,000.00. On November 1, 2011, Barlow's counsel advised that Angela Barlow must receive $15,000.00 and proposed that the remaining funds be evenly distributed amongst the two minors (B-11). On

November 4, 2011, Foth's counsel agreed to Barlow's proposed division of the settlement proceeds and accepted the $7,500.00 apportionment for Foth (B-11). Foth's counsel submitted his firm's W-9 Taxpayer Identification Number Certification form to Titan's counsel (B-12). On December 19, 2011, Foth's counsel sent a letter to Titan's counsel confirming that the parties had settled the case with Foth receiving $7,500.00 and advising that unless he received the release and settlement check within five days, Foth would move for default judgment in her action against Finnegan (B-13). The following day, December 20, 2011, Titan's counsel confirmed that Barlow and Foth had agreed to the settlement outlined in the September 16 letter with Angela Barlow receiving $15,000.00, John Barlow, III receiving $7,500.00 and Kimberly Foth receiving $7,500.00; and also requested that counsel file petitions for Court approval of the minors' settlements in each of their respective cases (B-14).

Seven weeks later, on December 21, 2011, Foth's counsel then advised for the first time that he would not be able to obtain Foth's "authorization to settle for $7,500.00 until" he received the medical records for John Barlow, III to verify that both minors were similarly injured (B-15). On December 29, 2011, Barlow filed a motion to enforce the settlement agreement (B-16–B-18). Foth filed an initial response to the motion on January 6, 2012, arguing that Foth was not willing to agree to the equal division between the minors until the medical records were

provided and that a genuine issue of material fact existed "as to whether or not an agreement was reached and this Court … cannot make factual determinations and at the approval hearing the Court may also want to review the records." (B-19–B-20). Foth filed an amended response on February 21, 2012, arguing that the Court did not have jurisdiction as to Foth's claim, which was pending in a separate action filed in the Superior Court assigned to a different Judge (B-21–B-22). Foth also contended that her attorney "was informed that the injuries to the minor claimants were similar or about the same and therefore agreed to equally divide the insurance proceeds." (B-22). Foth's counsel also contended for the first time that he "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." (B-22). Foth's counsel further contended that since the client did not authorize the settlement, *Levykin v. Henry*, 1998 WL 283403 (Del. Super.), was not applicable (B-22).

On March 2, 2012, the Superior Court heard oral argument on the motion to enforce settlement (Ex. A). At the hearing, Foth's counsel stated:

> MR. RAMUNNO: I did agree to accept the -- an even division based on Mr. -- on his letter that he wanted to divide -- he wanted his client to have 15 and he wanted the other people to divide equally, which would have been 7,500. Now, but that was based, Your Honor, on my understanding that the two minors had similar or about the same type of injuries.
>
> * * *
>
> And that is not the case, Your Honor. And when I -- when I talked to

> my client -- and I knew my client would agree, if that was the case. And when I talked to my client, because we told him he had a settlement, there was a release and so forth, but we had to prepare a petition. My client said that Barlow wasn't even injured. And she obviously was aghast that someone would --
>
> THE COURT: Well, did you write this before you received your client's approval?
>
> MR. RAMUNNO: Absolutely, Your Honor, absolutely. So, I mean, I had no authority whatsoever to do it.
>
> * * *
>
> What the bottom line is, is that I do not have authority and it was based on my understanding, which was wrong.
>
> * * *
>
> THE COURT: I am going to enforce the settlement. It is presumed that a lawyer has authority to bind his client. And there are two indications in the record here, clearly, that Mr. Ramunno intended to bind his client and did not disclose to opposing counsel that he lacked authority to do so. I will refer this matter for a hearing before a judge on the approval of a minor settlement.

(Ex. A at 6-8).

On March 6, 2012, Foth filed a motion for reargument (B-23–B-26), which the Superior Court denied on April 27, 2012 (Ex. B). On June 7, 2012, Barlow filed a motion to consolidate all three matters (B-37–B-40). On June 14, 2012, Foth filed an opposition to the motion to consolidate (B-41–B-44). On June 26, 2012, the Superior Court entered an Order consolidating all three actions under the earliest filed action, C.A. No.: N11C-04-237 (B-48–B-49).

On July 26, 2012, the Superior Court entered a Final Judgment in favor of Plaintiff Dawn Locke as next friend of Kimberly Foth in the amount of $7,500.00

and in favor of Plaintiff Angela Barlow as next friend of John Barlow, III in the amount of $7,500.00 (Ex. C). The Prothonotary was directed to pay out the $15,000.00 evenly to each of the minors and satisfy the judgments entered pursuant to the Order (Ex. C).

On November 13, 2012, Barlow's counsel wrote to the Superior Court concerning the Petition for Approval of a Minor Settlement that was filed on February 20, 2012, which, despite being advised by the Court that it would rule on the papers without a hearing, had not yet been approved and counsel requested a status of the pending petition. (B-54).

On November 12, 2012, Foth's counsel sent a letter to Barlow's counsel requesting that the $7,500.00 settlement be kept in an escrow account and to not disburse the funds pending resolution of this appeal (B-55). The letter also confirmed that Foth's counsel had already disbursed the $7,500.00 he received from the Prothonotary to his client (B-55). Counsel for Barlow continues to hold Barlow's $7,500.00 settlement in escrow and has not disbursed those proceeds.

ARGUMENT

I. THE SUPERIOR COURT PROPERLY GRANTED THE MOTION TO ENFORCE SETTLEMENT AGREEMENT

A. QUESTIONS PRESENTED

Whether the Superior Court properly granted the Motion to Enforce Settlement Agreement. This issue was raised in Barlow's Motion to Enforce Settlement Agreement (B-16–B-18); Foth's initial response in opposition to the motion to enforce settlement agreement (B-19–B-20); Foth's amended response in opposition to the motion to enforce settlement agreement (B-21–B-22); oral argument on the motion to enforce settlement agreement (Ex. A); Foth's motion for reargument (B-23–B-26); and the Superior Court's April 27, 2012 Order denying reargument (Ex. B).

B. SCOPE OF REVIEW

Questions of law are reviewed *de novo*. *State v. Cephas*, 637 A.2d 20, 23 (Del. 1994). Where the issue is one of construction and the application of law to the facts, the Supreme Court's review is plenary. *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985).

C. MERITS OF ARGUMENT

The Superior Court properly determined that the settlement agreement was binding on the parties because Foth's counsel unequivocally accepted the settlement offer and did not overcome the burden to rebut the presumption of

lawful authority. Foth contends that the Superior Court erred in enforcing a settlement agreement because the Court ignored legal precedent that the presumption of authority can be rebutted. Foth argues that the presumption of authority was rebutted by Foth's counsel's representation that he did not have his client's authority to settle the claim. This argument is without merit because Foth fails to point to a single piece of persuasive evidence in the record supporting Foth's rejection of the settlement proposal or counsel's lack of authority to settle the claim.

Significantly, Foth's counsel's bare assertion that he lacked authority was not supported by an affidavit or sworn testimony from his client, nor did he seek to present such evidence at the March 2, 2012 hearing before the Court. Therefore, the Superior Court properly granted the motion to enforce the settlement based on the record presented. Had Foth's counsel wished to present additional evidence in the form of testimony or affidavit, it was Foth's burden to do so and Foth cannot now claim error based upon Foth's counsel's failure to supply the Court with competent evidence sufficient to overcome the presumption of authority.

Under Delaware law, there is a presumption that an attorney of record who agrees to a settlement in a pending action has lawful authority to make such an agreement. *Moyer v. Moyer*, 602 A.2d 68 (Del. 1992); *Aiken v. Nat'l Fire Safety Counsellors*, 127 A.2d 473, 475 (Del. Ch. 1956); *Shields v. Keystone Cogeneration*

Sys., Inc., 620 A.2d 1331, 1335 (Del. Super. Ct. 1992). "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." *Williams v. Chancellor Care Ctr. of Delmar*, 2009 WL 1101620, at *3 (Del. Super.) (*citing Aiken*, 127 A.2d at 475). The burden to overcome the presumption of authority is upon the party challenging the authority of the attorney. *Shields*, 620 A.2d at 1335; *Aiken*, 127 A.2d at 475. A client's intent to limit an attorney's settlement authority "which remains unexpressed and is not manifest to others cannot prevail." *Shields*, 620 A.2d at 1334. "Settlement contemplates that each side may make concessions in the interest of terminating litigation." *Id.* A client's "second thoughts" after the parties reach a settlement agreement are insufficient to overcome the presumption of an attorney's authority. *Aksoy v. SelecTrucks of America, LLC*, 2009 WL 2992554 at *3 (D. Del.)

Delaware Courts have addressed the question of an attorney's presumed authority to accept a settlement offer on numerous occasions and have overwhelmingly upheld the challenged settlement agreement over a client's subsequent attempt to repudiate an attorney's authority to settle. *See, e.g., Shields*, 620 A.2d 1331 (client, by not dissenting from group's authorization of attorney to settle case, was bound by settlement reached and failed to overcome presumption of attorney's authority to settle); *Lawson v. Hudson*, 1990 WL 263566 (Del.

Super.) (client failed to produce evidence showing a genuine issue of material fact to overcome summary judgment on the defense of accord and satisfaction where client expressly authorized attorney to settle); *Joyner v. News Journal*, 1996 WL 659005 (Del. Super.) (client failed to overcome the presumption that attorney acted within the scope of authority in agreeing to a settlement); *Levykin v. Henry*, 1998 WL 283403 (Del. Super.) (client's statement in open Court, treated as an affidavit, raised an issue of fact for summary judgment purposes but finding defendants had a litigable defense in accord and satisfaction and/or compromise and settlement); *Williams*, 2009 WL 1101620 (client failed to overcome presumption of authority where client verbally agreed to accept settlement offer, which was ratified by client's subsequent actions); *Aksoy*, 2009 WL 2992554 (client's "second thoughts" that began after the parties reach a settlement agreement are insufficient to overcome the presumption of an attorney's lawful authority); *Pevar Co. v. Hawthorne*; 2010 WL 1367755 (Del. Super.) (finding that an attorney's letter and email supported conclusion that opposing attorney had both actual and apparent authority and that client acquiesced in the settlement or alternatively, that client failed to overcome burden of rebutting the presumption of authority); and *P & A, LLC (Maryland) v. Yorkshire Realty, LLC*, 2012 WL 1407961 (Del. Super.) (counsel's statement that he did not "purposely" exercise authority to bind his client to arbitration was insufficient to rebut presumption of authority where

counsel did not present testimony from client).

Here, it is undisputed that Foth's counsel unequivocally agreed to accept the settlement agreement wherein Angela Barlow would receive $15,000.00, John Barlow, III would receive $7,500.00, and Kimberly Foth would receive $7,500.00. It is further undisputed that Foth's counsel's acceptance of the settlement offer was unconditional. Therefore, in order to rescind the agreement, Foth had the burden to rebut the presumption of authority by producing sufficient evidence that her attorney was not authorized to accept the settlement. 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. Significantly, Foth's counsel admitted that he had authority to settle for Foth if it was fair (Ex. A at 6-8). The issue, as Foth claims, was that counsel's authority was based on counsel's understanding that the minors' injuries were about the same. (Ex. A at 6-8). Foth contends that her counsel's "mistake" is sufficient to rescind the settlement agreement. However, Foth's counsel's "mistake" was unilateral, and therefore cannot justify rescission.

"A contract may be rescinded by the affected party in a case of mutual mistake where: (1) both parties were mistaken as to a basic assumption; (2) the mistake materially affects the agreed upon exchange of performances; and (3) the party adversely affected did not assume the risk of the mistake." *Lang v. Koziarz*,

1987 WL 15554, *5 (Del. Ch.). A mutual mistake occurs where "the parties have a common intention and each labors under the same misconception" or where there is a "common fundamental error" which, if initially known, would vitiate the parties' agreement. *Burgess v. Medical Ctr. of Delaware*, 1997 WL 718653 at *3 (Del. Super.). Foth is not entitled to rescind the settlement agreement because there was no mutual mistake between the parties. Delaware has adopted the Restatement (Second) of Contracts' approach to analyzing a claim for mutual mistake. *Lang*, 1987 WL 15554 at *5. Section 152 provides:

> Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of a mistake under the rules stated in Section 154.

Restatement (Second) of Contracts § 152. Under the Restatement analysis, a party may bear the risk of a mistake under section 152 when:

> (a) the risk is allocated to him by agreement of the parties, or (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the fact to which the mistake relates but treats his limited knowledge as sufficient, or (c) the risk is allocated to him by the Court on the ground that it is reasonable under the circumstances to do so.

Restatement (Second) of Contracts § 154. Foth's counsel's mistake was unilateral because there is no indication that the parties operated under the same misconception in reaching the settlement agreement. Conversely, even if there was a mutual mistake, Foth bore the risk of the mistake because her counsel was aware,

at the time the agreement was reached, that counsel had only limited knowledge regarding Barlow's injuries, but treated that limited knowledge as sufficient. However, even assuming that Foth did not authorize the settlement, she is not without remedy for her attorney's unauthorized settlement of her claim because she is able to bring a direct claim against her attorney.

Because Foth failed to overcome the presumption that her attorney was authorized to settle her claim, the Superior Court properly determined that the settlement agreement was binding on the parties. Conversely, even if Foth's counsel lacked settlement authority, Foth ratified the agreement through subsequent actions. Significantly, Foth's counsel recently advised that he dispersed the $7,500.00 settlement to Foth (B-50), which constitutes an accord and satisfaction. The elements for an accord and satisfaction are: (1) a bona fide dispute exists as to an amount owed based on mutual good faith; (2) the debtor tenders an amount to the creditor with the intent that payment would be in total satisfaction of the debt; and (3) the creditor agrees to accept the payment in full satisfaction of the debt. *Acierno v. Worthy Bros. Pipeline Corp.*, 693 A.2d 1066, 1068 (Del. 1997). "An overt manifestation of assent, not a subjective intent, controls the formation of a contract. The unexpressed subjective intention of a party is therefore not relevant. A Court should consider only a creditor's objective manifestation, not his subjective intent, when a check is negotiated that was

offered as payment in full." *Id.* at 1070. "If a creditor cashes a check that has been clearly designated as payment in full, the creditor is deemed to have assented to the terms of the accord and is bound by the acceptance if the other two essential elements for an accord and satisfaction exist." *Id.*

II. THE SUPERIOR COURT PROPERLY GRANTED THE MOTION TO ENFORCE SETTLEMENT AGREEMENT AS TO A MINOR'S CLAIM

A. QUESTIONS PRESENTED

Whether the Superior Court properly granted the Motion to Enforce Settlement Agreement as to a minor's claim in accordance with 12 *Del. C.* § 3926. This issue was raised in Barlow's Motion to Enforce Settlement Agreement (B-16–B-18); Foth's initial response in opposition to the motion to enforce settlement agreement (B-19–B-20); Foth's amended response in opposition to the motion to enforce settlement agreement (B-21–B-22); oral argument on the motion to enforce settlement agreement (Ex. A); Foth's motion for reargument (B-23–B-26); and the Superior Court's April 27, 2012 Order denying reargument (Ex. B).

B. SCOPE OF REVIEW

Questions of law are reviewed *de novo*. *State v. Cephas*, 637 A.2d 20, 23 (Del. 1994). Where the issue is one of construction and the application of law to the facts, the Supreme Court's review is plenary. *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985).

C. MERITS OF ARGUMENT

The Superior Court properly determined that the settlement agreement was binding on the parties. Foth contends that even if the presumption of authority was not rebutted, the Superior Court erred in finding that the settlement agreement was binding on a minor because "there was no prior approval by the court" of the

minor's tort claim as required by 12 *Del. C.* § 3926.

Foth misconstrues the purpose behind section 3926 in an attempt to justify Foth's counsel's nonfeasance in connection with settling the minor's claim. Foth's argument 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. Moreover, Foth's argument ignores the importance of the Superior Court's statements at the conclusion of the March 2nd hearing that it would "refer this matter for a hearing before a judge on the approval of a minor settlement" (Ex. A at 8) 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." (Ex. B).

12 *Del. C.* § 3926 provides: "No person dealing with the receiver of a minor or with a guardian of a person with a disability 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."

Despite the fact that the Court clearly intended to have the minors' settlements approved in accordance with Superior Court Civil Rule 133, Foth speciously notes that a hearing for approval of Foth's settlement did not occur but fails to explain that the reason this has not taken place is because Foth never filed a minor's settlement petition seeking Court approval. Conversely, Barlow did file

such a petition seeking Court approval of the settlement for minor John Barlow, III, however, the hearing has yet to be conducted due to the filing of the instant appeal (B-54).

Foth also claims error with the Superior Court's enforcement of the settlement agreement without reviewing the minors' medical records, injuries, or outstanding medical bills. This argument must also fail because Foth's counsel likewise failed to consider his own client's medical records, injuries and medical bills when he agreed to settle his client's case in the first place.

In spite of Foth's claimed error over the Superior Court not conducting a minor's settlement approval hearing, which Foth contends was required, Foth's counsel subsequently disbursed the minor's settlement proceeds directly to Foth without seeking Court approval in violation of the same statute upon which the claim of error is based, 12 *Del. C.* § 3926. (B-55).

CONCLUSION

WHEREFORE, the Appellees respectfully request that this Court affirm the decisions of the Superior Court.

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