



IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANGELA M. BARLOW, JOHN BARLOW, )  
JR., wife and husband, and ANGELA M. ) No. 468, 2012  
BARLOW, as Next Friend of JOHN )  
BARLOW, III, and DAWN LOCKE, as Next ) Court Below – Superior Court  
Friend of KIMBERLY FOTH, a minor, ) of the State of Delaware  
Plaintiffs Below, Appellees as to ) in and for New Castle County  
Barlow, ) C.A. No.: N11C-04-237 JAP  
) (Consolidated)  
v. )  
)  
MICHAEL P. FINEGAN, DANA M. )  
FINEGAN, and MICHAEL P. FINEGAN, )  
JR., )  
Defendants Below, Appellees, )

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

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TITAN INDEMNITY COMPANY, )  
Plaintiff Below, Appellee, ) C.A. No.: N12C-03-013 JAP  
)  
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. )

**RESPONSE BRIEF OF APPELLEES**  
**MICHAEL P. FINEGAN, DANA M. FINEGAN AND MICHAEL P.**  
**FINEGAN, JR. TO APPELLANT FOTH'S SUPPLEMENTAL**  
**MEMORANDUM**

The Supreme Court remanded this matter for the limited purpose of having Superior Court Judge Parkins conduct a minor settlement hearing. The Court conducted that hearing on June 7, 2013 at which time the Court heard testimony from both minors and their mothers. The Court also received certain documents including Kimberly Foth's chiropractic records into evidence.

While the Superior Court started its determination by stating "there is no point in determining whether the size of the settlement pie is fair, rather, the focus must be on the division of the available funds is fair", the Court in its final paragraph on the Report on Remand came to the conclusion that if the Court were to disregard the Settlement Agreement and instead decide the apportionment on a clean slate, it would award Kimberly Foth \$10,000.00 and John Barlow \$5,000.00.

After the motor vehicle accident on October 2, 2009, the minor, Dawn Locke, was taken to the emergency room after the accident and was found to not have suffered any serious injury. Ms. Foth had initially complained of upper back and neck pain. It was not until six months after the accident that she began treating with a chiropractor. The chiropractor's notes do not contain any indication of severe pain and generally state that Kimberly was suffering mild to moderate pain. The Superior Court noted representative samples of the chiropractor's notes concerning Kimberly's upper back and neck pain. It was not until almost a year

later that Ms. Foth started complaining of low back pain. It should be noted that this first initial complaint of low back pain was two years after the accident.

The Superior Court also noted that Ms. Foth's complaints of a headache at some point after the accident was never causally or proximately related to the accident by any competent expert report.

The Superior Court also heard testimony from Ms. Foth. She was pleasant and engaging and was not in any apparent physical distress and did not attempt to exaggerate her injuries. Ms. Foth was actively participating in high school softball at the time of the testimony. Kimberly did not miss any of her softball games because of her injuries.

In Appellant's Supplemental Memorandum, his last sentence is "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." If by this Appellant is submitting that Dawn Locke has a further right of recovery against Michael Patrick Finegan and Michael P. Finegan, Jr., Appellees submit that Titan's payments of damages represent full damages due to Kimberly Foth. Foth, along with other claimants with suits pending, participated in a non jury inquisition to determine damages in the Titan matter. Judge Parkins heard testimony from all interested parties as to their damages including affects on lifestyle, pain and suffering, etc. There were no medical bills not covered by PIP. The \$7,500.00 awarded by the Court to Ms. Foth represented an award for pain and suffering. Given the minor plaintiff's mild injury and her apparent full recovery, it appeared that the Court

weighed all of the evidence of Locke's damages prior to making any award. Locke is now unable under the doctrine of collateral estoppel to re-litigate the issue of what damages are due her as a result of the accident. See Winkler v. Balentine Del. Supreme 254 A.2d 849, 851 (1969).

Therefore, because Locke cannot re-litigate the amount of her damages, and she has already collected the full amount of damages awarded by the Court, any cause of action in which Locke claims that Finegan and Finegan and Titan are joint tortfeasors is no longer a claim upon any further relief might be granted Hondros v. Morton and Fink and Commercial Union Insurance 1995 Del. Super LEXIS 209.

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Date: August 6, 2013

**CERTIFICATION OF SERVICE**

I, the undersigned, do hereby certify on this 6<sup>th</sup> day of August, 2013, that a true and correct copy of the Reply Brief has been served electronically, to the following:

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