IN THE COURT OF COMMON PLEAS

PROBATE DIVISION

SUMMIT COUNTY, OHIO

[illegible] COURT OF SUMMIT, OH.
FILED

MAR 27 2003

BILL SPICER, Judge

IN THE MATTER OF

THE GUARDIANSHIP OF:

ADAM MATYASZEK, A MINOR

CASE NO. 1988 GM 04051

MAGISTRATE'S DECISION

This matter comes before the Court on the motion of Edward J. Riegler (Movant) as the Guardian Ad Litem of Adam Matyaszek (Infant) for an order vacating the Courts prior order pursuant to Rule 60(B)(5) of the Ohio Rules of Civil Procedure.

The Court, having heard and considered all of the testimony and exhibits offered and admitted into evidence at the evidentiary hearing held in this matter on January 23, 2001, hereby makes the following findings of fact:

1. On the 19th day of April, 2000, Movant qualified and was appointed by the Probate Division of the Court of Common Pleas of Stark County, Ohio, as Guardian of Adam Matyaszek, an Infant.
2. On the 26th day of April, 1987, Walter J. Matyaszek, Jr., the father of Adam Matyaszek, was operating his 1984 Ford Bronco II and traveling in a northerly direction on Interstate 77 in the City of Cleveland, Ohio. Adam

Matyaszek, then two (2) years of age, was a guest passenger in his father's Bronco II. Mr. Matyaszek claims that he saw two vehicles rapidly approaching in his rear view mirror and turned to the right in order to avoid being hit. Subsequently, the Bronco II rolled over, causing serious injury to the occupants of the vehicle.

3. Movant has presented the report of Dr. Melvin K. Richardson, Ph.D. who, in his analysis of the accident, concludes as follows:

"As described above, the Bronco II is defective and unreasonably dangerous in its design due to the handling defect which produces loss of control, and the stability defect, which causes the vehicle to roll over if control is lost. These defects were the proximate cause of the loss of control and subsequent rollover of the Bronco II being driven by Mr. Matyaszek."

4. Movant presented several Court cases dealing with the rollover of a Bronco II that was defective, the defect being the proximate cause of the accident.

5. Ford Motor Company learned of the Matyaszek accident and opened a file in this matter in 1987, hiring Shepard Claims Service of Michigan to conduct an investigation. (Ford partial claim file, admitted as Inf. Exh. 8; refer to letters of December 28, 1987 and January 22, 1988). The investigator, Thomas E. Schacher, obtained a copy of the police accident report, took photos of the vehicle and the accident scene and, after contacting Walter Matyaszek, Jr., received from him a medical authorization which resulted in him obtaining records from providers of medical and hospital services to

Adam Matyaszek. *(Id., various letters of January 22, 1988).*

6. Over the course of the next several months, Mr. Schacher sent to, and received from, Harold "Skip" Keyes of Ford's Office of General Counsel numerous communications regarding the investigation of the case, including personal information about Adam's parents and the medical condition of Adam. In one such letter, dated March 4, 1988, Mr. Schacher reported to Mr. Keyes at Ford the following observations (Inf. Exh. 8):

"Walter, Jr. and Adam had no hospitalization insurance. Walter, Jr.'s hospital bills are $643.25 plus a total loss of the 1984 Bronco II which had a retail value of approximately $9,000 at the time of the accident. Adam has unpaid medical expenses in the amount of $12,327.66. These are not covered by an insurance. On February 29 and March 1 visited with Walter and his present wife, Peaches, in their home at 3268 Revere Road, Richfield, Ohio. We discussed at length the relationships between Walter, Jr., and his two children, Jennifer and Walter III, as well as his relationship with his previous wife. Neither she nor the children are aware of any discussion of possible settlements in this matter. The first wife's efforts have been directed against her former husband in requiring him to pay the medical expenses not covered by her hospitalization. To that end she has now had an order issued by the court giving Walter, Jr. until March 15 to pay the outstanding bills for Jennifer and Walter III or be held in contempt of court."

7. On February 1, 1988, Dr. Hugh McLaughlin wrote a letter to Shepard Claims Service referring to Adam's condition following the accident (Infants Exh. 2). This was done at the request of Mr. Schacher (Infants Exhibit 8)

8. On or about April 15, 1988, Robin Weaver, a partner in the Cleveland law firm of Squire, Sanders & Dempsey, drove to Akron and visited Mr. and Mrs. Matyaszek at their home and tendered certain documents for their review and signatures. (Tr., pp. 271, 282, 283). Ford Motor Company had engaged

Mr. Weaver's services and had sent him a "packet" of materials, including "some letters" and "medical records." (Tr., p. 278).

9. Ford had given Mr. Weaver further instructions, telling him that the "settlement" had been consummated and the necessary Probate Court papers should be prepared and "submitted for approval by Mr. Matyaszek and then ultimately the Probate Court." (Tr., p. 280). According to the file sent to him from Ford, Adam "was supposed to receive $10,000 and the father was supposed to receive $12,000...and change for the medical bills...." (Weaver testimony, Tr., p. 281).

10. Mr. Weaver had never drafted Probate Court papers before, so he "asked Tony (O'Malley) to go about determining how you prepare such papers." (Tr., p. 281). He acknowledged that "we prepared the papers" (Tr., p. 282, lines 1-9), including the "Application for Settlement," in which it was represented that "said minor has recovered from his injuries." (Tr., pp. 283-284, 308).

11. Walter J. Matyaszek, Jr. signed the "Application for Settlement of Claim for Injuries," the "Application for Order Dispensing with Appointment of Guardian or Termination of Existing Guardianship," and the "Report of Settlement", containing Affidavits. Walter J. Matyaszek, Jr., had his wife, Peaches Matyaszek, sign a "Waiver of Notice." All of the above documents are contained in the official file in this Court. Those documents were prepared by, or at the direction of, either Mr. Weaver or Mr. O'Malley. (See, *e.g.*, Tr.

281, 282, 301). The Application for Settlement of Claim for Injuries containing Walter J. Matyaszek, Jr.'s affidavit as to the truth of the matter was notarized by Mr. Weaver. The Report of Settlement containing Walter J. Matyaszek, Jr.'s affidavit as to the truth of the matter was notarized by Mr. O'Malley.

12. The probate documents were never reviewed by an attorney whose responsibility it was to represent the interest of Adam and it is also an undisputed fact that, as of April 22, 1988, no guardian had been appointed on Adam's behalf.

13. On April 22, 1988, former Referee George Wertz conducted a hearing regarding the settlement with Matyaszek. Ford alleges that Mr. Matyaszek and Anthony O'Malley, then a SS&D associate (now a partner with Vorys, Sater, Seymour & Pease LLP) were present. No verbatim transcript was taken of that hearing. Moreover, former Referee Wertz has stated that "he had, and presently ha[s], no specific recollection of those particular (Adam Matyaszek) proceedings or the parties or attorney involved." (Wertz Affidavit, ¶3.)

Walter Matyaszek, Jr. denies attending the proceedings. (Tr., p. 158). Ford's interests were represented by its attorney, Anthony J. O'Malley. (Referee's notes in Court file). Mr. O'Malley did not represent Matyaszek in any way.

14. Former referee Wertz testified that he would not have approved a minor's

settlement where no one appeared on behalf of the minor unless: (1) the sum of the claim was a "small claim" between $1,500 and $3,000; (2) "there's really no injuries at all...not even soft tissue injury;" and (3) Mr. Wertz knew by reputation the attorney offering the settlement by "longstanding dealings with the Court." (Hearing Transcript, pp. 231-232.) Mr. Wertz confirmed that none of these elements would have been met in the probate court approval of the settlement of Matyaszek's claims. (Hearing Transcript, p. 232.)

15. Mr. O'Malley stated that Mr. Matyaszek not only attended the hearing, but actively participated in responding to questions posed by Mr. Wertz about the terms of the settlement which included a "substantial discussion about the type of injury (Matyaszek) had sustained, what treatment he had received (and) how (Matyaszek) was fairing." (O'Malley Transcript, pp. 16-17). Mr. O'Malley's recollection was so precise that he recalled trying to keep up with Mr. Matyaszek, who was driving a minivan, when following Mr. Matyaszek in his car from the probate court to Matyaszek's house following the hearing to have the release papers signed. (O'Malley Transcript, pp. 30-31.) Mr. Matyaszek confirmed that the family did, in fact, own a minivan at that time. (Hearing Transcript, p. 159.)

16. After hearing the representations of Mr. O'Malley and reviewing the Application for Settlement prepared by Squire, Sanders & Dempsey averring that Adam had recovered from his injuries, and after apparently reviewing a discharge summary prepared by Dr. Mary Hlavin of Cuyahoga County

Hospitals, dated May 5, 1987, stating that Adam's prognosis was "excellent" (Inf. Exh. 12), which summary was provided by Mr. O'Malley, the Settlement and Release were approved by the Referee, George Wertz, and on that same day the Honorable W. F. Spicer entered an Order purportedly terminating Adam's rights and claims against Ford. (Inf. Exh. 15.)

17. No one testified that the Dr. Hugh McLaughlin letter, dated February 1, 1988, alleging more serious injuries and a much less optimistic prognosis were discussed or presented to the Court for consideration at the hearing.

18. As no record was made of the hearing, there is differing testimony as to the evidence presented and the representations made.

19. Mr. O'Malley did not produce for the Referee's review or consideration the letter from Dr. Hugh McLaughlin (Inf. Exh. 2), describing with particularity the residual effects of the fractured skull and brain damage being experienced by Adam just prior to the date of the probate proceedings. Mr. Weaver could not say with certainty whether he had the McLaughlin letter in his possession at the time he tendered the settlement papers to Mr. Matyaszek the previous week (April 15, 1988) (Tr., p. 311). Ford, in its post-hearing brief, asserts that Mr. Weaver's firm if in possession of the McLaughlin letter as of April 22, 1988, would not be bound by law to produce it.

20. Peaches Matyaszek testified that, since the accident, Adam has never been without seizures. He is on medication that has reduced the frequency of the seizures, but he still experiences one to ten a week (Tr., pp. 130, 131). He

is "completely dependent. I home school him. We can't take the dogs for a walk without taking cell phones because he can go into seizures." (Tr., p. 131).

21. Dr. Robert D. Voogt, a certified rehabilitation specialist involved in long-term planning for individuals with brain injuries, has been retained on behalf of Adam to evaluate his residual disabilities and prepare a life care plan. The life care plan was admitted as Inf. Exh 1.

22. There appears to be a correlation between Dr. McLaughlin's letter and the Dr. Voogt life care plan.

23. As for Adam's present condition, Dr. Voogt describes some of his problems as follows (Tr., pp. 91, 92):

> "You know, for instance, just the constant headaches, the seizure – the seizures he has, the constipation, the visual changes that he's had with medications. He's not doing the self-care skills. You know, for instance, will you go brush your teeth? He goes and brushes his teeth, but he doesn't put toothpaste on it...He needs constant direction to do household chores, to complete tasks. Of course, he'll never drive. He has problems with problem solving; memory; he loses things; difficulty with his attention; easily distracted; poor concentration; word-finding difficulties; impaired safety awareness...Impaired judgement; poor planning abilities. These are all necessary for adult functioning."

24. Ford paid the sum of $10,000.00 at the time of the settlement and this was the only payment reported to Referee Wertz. (Referee's Report, Inf. Exh. 23; Order Confirming Report of Settlement, Inf. Exh. 24; Wertz testimony, Tr., p. 217).

25. Ford paid additional sums of $12,143.25 and $12,327.66, respectively, to

Adam's parents.

26. In response to questions by the Magistrate (Tr., pp. 246, 247), Mr. Wertz acknowledged that Dr. Mary Hlavin's discharge summary had been presented to him at the hearing. He was then asked by the Court to suppose that Dr. McLaughlin's report had been given to him on the date of the hearing. Had that occurred, he stated that the McLaughlin report "was much later in time, almost a year later. I think at that time I would have had some concerns probably to appoint a guardian ad litem to make sure the appropriate interests were represented." When asked if a "[g]uardian ad litem at that point...would have one purpose and one purpose alone, right, which would have been to satisfy the Court that the best interests of Adam were being protected," Mr. Wertz responded "that's correct."

27. As of October 22, 1999, attorney Edgar F. Heiskell, III, was engaged to represent Adam Matyaszek. Mr. Heiskell wrote to John Mellen, an Assistant General Counsel at Ford, and advised Mr. Mellen that he represented Adam Matyaszek. (Ford Exh. 25-1). There is no evidence in the record that Ford responded to Mr. Heiskell's letter, and this action was thereafter commenced. Prior to filing the Guardian's Rule 60(B)(5) motion in this case, between October 1999, and June 2000, Mr. Heiskell and his co-counsel pursued the personal injury action of Adam's brother, Walter III, in the U.S. District Court for the Northern District of Ohio, using the discovery process and the retention of experts in that case to gain information that would

ultimately be of benefit to Adam.

CONCLUSIONS OF LAW

To prevail on a Civ.R. 60(B)(5) Motion, the Movant must demonstrate the following: (a) that the Movant is entitled to relief under Civ.R. 60(B)(5); (b) that the Movant has a meritorious claim to present if relief is granted; and (c) the motion is made within a reasonable time (and where the grounds are under Civ.R. 60(B)(4) or (5), the motion need not be brought within (1) year after the judgment or order is entered). In re: Estate of Alexander (1993), 92 Ohio App.3d 190, 199, 634 N.E.2d 670, 676.

It is a fundamental precept of law that minor children are to be protected. They are to be protected even from their natural parents or others having custody. Such is the purpose of R.C. 2111.18. R.C. 2111.18 provides for the resolution of a minor's claim for injury with the "advice, approval, and consent of the probate court." While this section provides for the appointment of a guardian to accomplish the settlement, if the amount of the settlement is for $10,000.00 or less, the appointment of a guardian may be dispensed with and the Probate Court may authorize delivery and execution of a release.

Perhaps the Tenth Appellate District said it best in *Davis v. Dembek*, 150 Ohio App.3d 423, 2002-Ohio-6443, ¶40:

> "We now turn to the question of whether plaintiff's execution of the settlement agreement as the mother and next friend of decedent's minor children bars the children from recovering their wrongful death claims. The issue of whether a parent has the authority to release the future wrongful death claim of a child is a question of first impression in Ohio. Nonetheless,

> it is well established that parents do not ordinarily possess the authority to settle the existing claims of their minor children. *Hewitt v. Smith* (Dec. 16, 1998), Lorain App. No. 97C006987; *Weiand v. Akron* (1968), 13 Ohio App.2d 73, 75. The fear that parents will be influenced by emotional and financial pressure where their children are concerned, as well as the potential for fraud, appear to be the primary motives behind this rule. *Zivich v. Mentor Soccer Club, Inc.* (1998), 82 Ohio St.3d 367, 373. The Ohio General Assembly has created an exception to the authorization of the probate court when the settlement amount is $10,000 or less. R.C. 2111.18. However, where the settlement amount is more than $10,000, only a guardian appointed by the probate court may settle the claims of a minor with the "advice, approval, and consent of the probate court." R.C. 2111.18."

R.C. Chapter 2111 protects children. Even when a guardian is appointed by the Court, R.C. 2111.50 states that the court is the superior guardian of the ward subject to its jurisdiction. This is, in effect, a double protection for children who come within the jurisdiction of the Court.

With this premise in mind, the Court must look to whether the actions of Adam's parents or Ford's attorneys, has failed in the protection of him. On April 26, 1987, the accident occurred. On May 5, 1987, Dr. Hlavin wrote a discharge summary stating Adam's prognosis as excellent. On February 1, 1988, Dr. Hugh McLaughlin wrote his letter describing Adam's condition in much more serious terms. On April 22, 1988, then Referee Wertz conducted the hearing to approve the settlement.

Who was representing Adam when the Court was told that $10,000 was a reasonable settlement and who was representing Adam when the discharge summary was presented as justification for the settlement. Certainly, the parents had an obligation to fairly and responsibly complete a medical examination for their son. The attorneys for Ford, as officers of the Court, had an obligation to present accurate and complete

information to the Court. Regardless, no one represented Adam. The Court should have had all the necessary information in order to make a proper decision.

Movants claim that Ford's attorneys perpetrated a fraud on the Court by not presenting the McLaughlin letter. There is a strong inference that Ford or its insurance claims agent had possession of the letter. Referee Wertz testified that he would not have approved the settlement had he known about the letter. Should the parents have provided this letter? Should those attempting to benefit financially have provided this letter? Black's Law Dictionary defines fraud as deceit, artifice, trick, design, the employment of cunning deception or artifice used to circumvent or cheat another. Fraud is also defined as any act of omission contrary to legal or equitable duty, trust or confidence justly reposed which is contrary to good conscience and operates to the injury of another. This is the case at bar.

When a minor child has a "minor" injury, the Court must rely on the parties before it to present all information necessary to render a fair and equitable decision on behalf of the minor. If it did not, then, in all cases the Court would have to rely on extensive costly medical analysis which might far exceed the compensation for the injury. If the Court does not have before it all existing information, it cannot make a determination which is in the best interest of the child. As then Referee Wertz testified, had he known about the Dr. McLaughlin letter, he would not have rendered a decision approving the settlement. Would any decision maker have decided the issue based on both the McLaughlin letter and a discharge summary as should have been presented in this case? At the minimum, a further more comprehensive report would have been justified and/or the appointment of a guardian ad litem. However, the lack of the presentation of the McLaughlin letter is not

the only failure to provide information to the Court.

Supreme Court Rule of Superintendence 68(B) (formerly number 36), in existence at the time of Adam's settlement, states: "The application shall state what additional consideration if any is being paid to persons other than the minor, as a result of the incident causing the injury to the minor." The purpose of the rule is clear. It is to prevent parties from paying money to individuals other than the minor in order to avoid scrutiny from the probate court.

In this case, two checks were given to the parents in the amount of $12,327.61 and $12,143.25. This information was not disclosed by the parents or the Attorney for Ford who signed, prepared the application, and notarized Mr. Matyaszek's signature which affirmed the veracity of the statements contained therein. Further, both the Application and Order confirming settlement identify the reimbursement to the parents as zero. It appears that the Attorneys for Ford notarized the statements with the knowledge that they were untrue.

Therefore, based on the evidence, testimony and law, Movant has proved by clear and convincing evidence that the attorneys for Ford Motor Company submitted to Referee Wertz an Application for Settlement which they prepared representing that Adam had recovered from his injuries, when in fact said attorneys knew or reasonably should have known that there was another doctors report which disagreed with their application and that would have put into question the approval of the settlement. Therefore, the Court, finds and concludes that Ford's attorneys thereby committed a fraud on the Court to the detriment of, and prejudice to, the rights of Adam Matyaszek.

Movant proved by clear and convincing evidence that, contrary to the representations made on the face of the Application for Settlement of Claim for Injuries and Report of Settlement prepared by Ford's attorneys that there were to be no monies paid to persons other than Adam, Ford had, in fact, agreed to and did give the parents the two checks for $12,327.66 and $12,143.25, respectively, in addition to the $10,000.00 paid for Adam's benefit. The Court finds that this was an express violation of the mandatory provisions of then Rule 36 of the *Supreme Court Rules of Superintendence for the Court of Common Pleas, Probate Division*, now Rule 68, "Settlement of Claims for Injuries to Minors," which requires that the application state what additional consideration, if any, is being paid to persons other than the minor. Moreover, it was a material misrepresentation of fact and had the effect of misleading the Referee into believing that the appointment of a guardian to protect the interests of Adam was unnecessary. Therefore, the Court finds and concludes that Ford's attorneys thereby committed a fraud upon the Court to the detriment of, and prejudice to, the rights of Adam.

Attorneys for Ford Motor Company, having used the foregoing means and devices to procure this Court's approval of the purported settlement and compromise of Adam's rights, committed a fraud upon the Court. Therefore, the Court finds that Movant is entitled to relief under Rule 60(B)(5), as prayed for in his Motion. See, *Coulson v. Coulson* (1983), 5 Ohio St.3d 12, 16; *Hartford v. Hartford* (1977), 52 Ohio App.2d 79, 83.

It is well established under Ohio law that a settlement of an injured minor's claim for damages may be set aside where there is a showing of prejudicial error in the proceedings or fraud or collusion on the part of those involved, even though the settlement is approved

by both a guardian and the probate court in conformity with Section 2111.18 of the Ohio Revised Code. In re: *Guardianship of Reeves v. Runyan* (1961), 172 Ohio St. 177. The Court finds and concludes that the evidence of fraud upon the Court presented on behalf of Adam at the evidentiary hearing in this matter meets and exceeds the standard of "clear and convincing evidence," and that Ford has not been able to refute the proof of the essential elements of this fraud.

The Court further finds and concludes that as a matter of law and equity, once Mr. Heiskell began representing the interest of Adam in 1999, he proceeded with due diligence and in a timely manner to discover the facts and circumstances which prevailed at the time of the April 22, 1988 judgment which Movant seeks to have vacated, and he used all reasonable means available to obtain the documents and testimony necessary to support a Rule 60(B)(5) Motion. After Ford failed to respond to his October 22, 1999 letter, Mr. Heiskell and his co-counsel pursued the personal injury action of Adam's brother, Walter III, in the U.S. District Court for the Northern District of Ohio, using the discovery process and the retention of experts in that case to gain information that would ultimately be of benefit to Adam. (U.S. District Court Docket, *Walter Matyaszek III v. Ford*, Inf. Exh. 26). The Court further finds and concludes that, once those efforts yielded a reasonable basis to support the Rule 60(B)(5) Motion, counsel for Adam then promptly prepared said Motion for filing by the Guardian.

In *Taylor v. Haven* (1993), 91 Ohio App3d. 46, the Court of Appeals for Butler County held that in determining whether a motion for relief from judgment was brought within a reasonable time the trial court was required to consider factors other than absolute

length of time. "The trial court may also consider the best interests of the child and the possibility that a fraud may have been committed upon the court." In the *Taylor* case, a motion for relief from judgment of paternity was filed twelve years after the judgment. While the court did not find an abuse of discretion in the denial of relief, it did remand the case because of concern that the trial court did not consider any other factor other than length of time.

The Court, therefore, finds and concludes that the Movant has demonstrated each of the following: (a) that he is entitled to relief under Civ.R. 60(B)(5); (b) that he has a meritorious claim to present if relief is granted; and (c) that the motion was made within a reasonable time.

THEREFORE, IT IS THE DECISION OF THE MAGISTRATE that the Motion of the Guardian, Edward J. Riegler, is hereby granted, and the judgment entered in this matter on April 22, 1988, is hereby vacated.

Adam is entitled to have his day in Court, as was and is the intent of our legal system.

IT IS SO DECIDED.

LARRY G. POULOS
CHIEF MAGISTRATE

c: Elizabeth B. Wright, Esquire
Attorney Jennifer A. Lesny
Attorney Charles E. Grisi
Attorney Edward J. Riegler
Attorney Edgar F. Heiskell, III

[illegible] COURT COUNTY OF SUMMIT, OH.
FILED

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BILL SPICER, Judge