IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

ANGEL CARTER, Administratrix of the ESTATE OF WILLIAM CARTER, JR., DECEASED	:	OCTOBER TERM, 1999
v.	:	NO. 2428
SEPTA, ET AL.	:	3194 EDA 2001

O P I N I O N

O'Keefe, J. **December 20, 2001**

I. Overview

Angel Carter, Administratrix of the Estate of William Carter, Jr., Deceased ("Plaintiff") appeals the entry an "Order Approving Settlement and Order For Distribution" dated and docketed October 2, 2001, wherein this Court approved the settlement of Wrongful Death and Survival Actions initiated by Plaintiff.

II. Facts and Procedural History

Plaintiff commenced this action by way of a complaint on October 20, 1999, against the Southeastern Pennsylvania Transportation Authority ("SEPTA") and Ronald Koran ("Koran") (collectively known as "Defendants") to recover damages arising from an incident involving a SEPTA trolley. According to the original complaint, Decedent William Carter, Jr., was struck and killed by the trolley on the morning of December 1, 1997. The cause of death was characterized as massive injuries to the chest and abdomen. At the time of his death, Decedent was unemployed and his only source of income was Social Security Income in the amount of $537.40 per month.

A civil trial was held in this matter before the Honorable Joseph I. Papalini and a jury, from June 18 to June 25, 2001. On June 25, the jury returned a verdict in favor of defendants SEPTA and Ronald Koran on all claims of plaintiff. Plaintiff's Petition for Approval of Settlement reveals that during jury deliberations, the parties reached an agreement whereby if the jury returned a verdict in favor of defendant, plaintiff would still receive the sum of Fifty Thousand Dollars ($50,000.00). As a result of the jury verdict in favor of both defendants, the stipulation to receive $50,000.00 was invoked by plaintiff.

On August 16, 2001, plaintiff filed a "Petition for Approval Settlement and Allocation in Wrongful Death Action", which was thereafter assigned to this Court on September 18, 2001. On October 2, 2001, this Court entered an "Order Approving Settlement and Order For Distribution." The Order allocated the settlement funds as follows:

To: Deutsch, Larrimore, Farnish and Andersson, LLP Reimbursement of Costs	$10,000.00
To: Deutsch, Larrimore, Farnish and Andersson, LLP Counsel Fees	$7,553.23
Wrongful Death Claim	$00.00
Survival Claim	$32,446.77

Plaintiff filed a Motion for Reconsideration of that Order on October 12, 2001. Before this Court had an opportunity to render a ruling on the Motion for Reconsideration, Plaintiff took the instant appeal of this Court's Order of October 2, 2001. Thereafter, this Court denied the Motion for Reconsideration on November 5, 2001. Upon receiving proper notice of the instant appeal, this Court instructed Plaintiffs to file a statement pursuant to Rule 1925(b), which was timely filed on November 21, 2001.

III. Argument

An initial issue which warrants significant discussion is the procedural status of this matter. The Appellant/Plaintiff is identified as Angel Carter, Administratrix of the Estate of William Carter, Jr., Deceased. Nevertheless, the identified plaintiff was not aggrieved by this Court's Order of October, 2001 -- plaintiff's counsel was aggrieved. Included in plaintiff's "Petition for Approval of Settlement and Allocation in Wrongful Death Action" was a proposed order. The terms of the proposed settlement order prepared by plaintiff's counsel are as follows:

To: Deutsch, Larrimore, Farnish and Andersson, LLP Reimbursement of Costs	$27,339.63
To: Deutsch, Larrimore, Farnish and Andersson, LLP Counsel Fees	$7,553.45
Wrongful Death Claim	$00.00
Survival Claim	$15,106.92

The final Order issued by this Court altered the proposed distribution and allocation to the extent that counsel, instead of receiving a total sum (costs plus fee) of $34,893.08, received $17,553.23. By the same token, the plaintiff, instead of receiving $15,106.92, received $32,446.77. This Court's Order granted plaintiff a net gain of $17,339.85 over what plaintiff believed she was going to recover from the original proposed order submitted to the court by plaintiff's counsel.. Based on these figures, this Court finds it extremely difficult to believe that the true aggrieved party in this matter is the actual named plaintiff. Rather, it seems as though plaintiff's counsel is the party, in fact the only party, that was harmed as a result of this Court's Order.

The Pennsylvania Rules of Appellate Procedure are quite clear as to which parties may take an appeal of a lower court order. Rule 501 states:

> Except where the right of appeal is enlarged by statute, any party who is aggrieved by an appealable order, or a fiduciary whose estate or trust is so aggrieved, may

appeal therefrom.

Pa. Rules. App. P. 501. Subsequent applications and interpretations of this rule have led to the conclusion that "[a] party is 'aggrieved' when the party has been adversely affected by the decision from which the appeal is taken. *A prevailing party is not 'aggrieved' and therefore, does not have standing to appeal an order that has been entered in his or her favor.*" Ratti v. Wheeling Pittsburgh Steel Corp., 758 A.2d 695, 700 (Pa. Super. Ct. 2000) (emphasis added) (citations omitted); see also In re McCune, 705 A.2d 861, 864 (Pa. Super. Ct. 1997).

What is readily apparent from a review of the applicable law in this area, is that counsel for Appellant should have significant familiarity with Rule 501. In 1988, just thirteen (13) years ago, the firm that currently represents appellant, or an older version thereof, found itself in a similar situation. In Green v. SEPTA, 551 A.2d 578 (Pa. Super. Ct. 1988), the Superior Court reprimanded counsel for appellant for identical conduct in which counsel now engages on the current appeal. A comprehensive review of the facts and holding in Green is necessitated because it is evident that counsel for appellant has apparently forgotten the law established by the Superior Court in that case.

In Green, a minor plaintiff and her mother appealed an order of the Court of Common Pleas approving settlement and directing the distribution of proceeds in a minor's action, as authorized by Pennsylvania Rule of Civil Procedure 2039. 551 A.2d at 578-79. The effect of the trial court order was to reduce the amount of counsel fees as proposed by counsel, thereby increasing the amount distributed to the minor plaintiff. Id. at 579. The minor plaintiff took an appeal from the court's order and trial counsel continued to represent the minor plaintiff and her mother on appeal. Id. On appeal, it was plaintiff's argument that the trial court had abused its discretion by reducing fees. Id. The Superior Court was careful to note that the minor plaintiff and her mother were not

represented by separate counsel during the appeal and the defendant did not appear or file a brief. Id.

The Court engaged in an analysis of whether a prevailing party could be considered an aggrieved party for the purposes of appeal. 551 A.2d at 579. As has been previously discussed, it is clear that a prevailing party is not aggrieved and has no standing to appeal. See id. Applying the applicable law to the facts of Green, the Superior Court stated:

> In the instant case, it is readily apparent that the plaintiffs have not been "aggrieved" by the trial court's order which reduced the amount of counsel fees payable from the settlement proceeds and increased the amount distributable to the minor plaintiff. Because they have not been aggrieved by the trial court's order, they do not have standing to appeal therefrom.
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> The party aggrieved by the trial court's order is the lawyer who represented the plaintiffs and whose fees were reduced by the trial court. To obtain a review of the trial court's order reducing counsel fees, it was necessary that counsel file an appeal in his own name. If such an appeal had been filed, the clients would then have been able to obtain other counsel to represent their separate interests. We will not permit counsel to use an appeal by his client as a means for advancing his own interest at the expense of his clients whose interests are not separately represented.
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> APPEAL DISMISSED.

551 A.2d at 579-80.

The similarities between that case and the present matter are striking. The firm that represented the plaintiff in Green was "Deutsch & Larrimore, P.C." 551 A.2d at 579. The firm currently representing plaintiff is "Deutsch, Larrimore, Farnish & Andersson, L.L.P." and the same attorney who argued before the Superior Court in Green, Dale G. Larrimore, is listed as a member of the firm in the present matter. The appellant in this matter, as evidenced from the official Superior Court of Pennsylvania, Eastern District, docketing statement, is identified as "Angel Carter as the Administratrix of the Estate of William Carter, Jr." -- the plaintiff in the underlying matter, and not plaintiff's counsel. Furthermore, in plaintiff's "Concise Statement of Matters Complained of

on Appeal", filed pursuant to Pennsylvania Rule of Appellate Procedure 1925(b), the plaintiff/appellant is identified as the plaintiff from the underlying matter. In her concise statement, plaintiff alleges that this Court "erred" by altering its Order so as to benefit plaintiff. This Court has a difficult time reconciling the vigor of this allegation considering that plaintiff received an increased amount of the settlement proceeds then what had been originally proposed as a result of this Court's Order.

Nevertheless, on the current appeal, trial counsel continues to represent plaintiff even though the interests at stake between trial counsel and the plaintiff are in direct conflict. This Court is of the opinion that, based on the Superior Court's language in Green, trial counsel would take extra care in dealing with this issue and would have already advised plaintiff to obtain separate counsel and take the necessary steps to substitute itself as the appellant instead of continuing to identify the plaintiff as appellant. However, neither appropriate action has been undertaken by trial counsel. What is most troubling about these facts is that trial counsel is *the same or substantially the same firm that was harshly rebuked by the Superior Court in Green for precisely the same conduct*. If this were the first example of this conduct by trial counsel, it could be viewed as a mistake, but a second occurrence, coupled with a published opinion addressing the same issue gives rise to serious ethical questions that trial counsel should be forced to answer.

While the present appeal respectfully should be dismissed due to the forgoing reasons, the substantive issues raised by plaintiff (which, as has been previously discussed, is trial counsel) are equally without merit.

An appellate court has limited power to review a court award of counsel fees and costs. The standard has been stated as thus:

> [T]he responsibility for setting such fees lies primarily with the trial court and [the appellate court] have the power to reverse its exercise of discretion only where is

> plain error. Plain error is found where the award is based either on factual findings for which there is no evidentiary support or on legal factors other than those that are relevant to such an award.

Gilmore v. Dondero, 582 A.2d 1106, 1108 (Pa. Super. Ct. 1990) (citations omitted).

Courts in this jurisdiction are in agreement that it is within the discretion of the trial court to adjust fees and costs because "[i]t is peculiarly within the purview of a trial court to develop this sense for what is an appropriate fee in a given locale for a given type of case." 582 A.2d at 1110. The basis for the deference given to trial court decisions regarding fees is sounded in the Pennsylvania Supreme Court's landmark opinion in LaRocca Estate, 246 A.2d 337 (Pa. 1968). The Court summarized those factors to consider as follows:

> the amount of work performed; the character of the services rendered; the difficulty of the problem involved; the importance of the litigation; the amount of money or value of the property in question; the degree of responsibility incurred; whether the fund involved was "created" by the attorney; the professional skill and standing of the attorney in his profession; the results he was able to obtain; the ability of the client to pay a reasonable fee for the services rendered . . . .

246 A.2d at 339. The Court, in a footnote to this discussion, acknowledged the "fact than an attorney can rarely ever receive a reasonable fee when the services rendered are very numerous and the amount of money or value of the property involved is small." Id. at FN4.

The standard set forth in LaRocca Estate has significant implications when a Court must settle a matter involving a minor or estate. In these two specific instances, the Pennsylvania Legislature, understanding the extra protection that must be afforded minors and estates, has established a clear mandate for a trial court to analyze and scrutinize all aspects of the settlement. Pennsylvania Rule of Civil Procedure 2039 (pertaining to minors) states:

> Rule 2039. Compromise, Settlement, Discontinuance and Distribution
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> (a) No action to which a minor is a party shall be compromised, settled or discontinued except after approval by the court pursuant to a petition presented by the guardian of the minor.

> (b) When a compromise or settlement has been approved by the court, or when a judgment has been entered upon a verdict or by agreement, the court, upon by petition by the guardian or any party to the action, shall make an order approving or disapproving any agreement entered into by the guardian for the payment of counsel fees and other expenses out of the fund created by the compromise, settlement or judgment; *or the court may make such order as it deems proper fixing counsel fees and other proper expenses.*

Pa.R.Civ.Pro. 2039 (emphasis added). The corresponding language that applies to estates is as follows:

> § 3323. Compromise of controversies.
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> (a) In general. -- Whenever it shall be proposed to compromise or settle any claim, whether in suit or not, by or against an estate, or to compromise or settle any question or dispute concerning the validity or construction of any governing instrument, or the distribution of all or any part of any estate, or any other controversy affecting any estate, the court, on petition by the personal representative or by any party in interest setting forth all the facts and circumstances, and after such notice as the court shall direct, aided if necessary by the report of a master, may enter a decree authorizing the compromise or settlement to be made.
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> (b) Pending court action --
>
> (1) Court order. Whenever it is desired to compromise or settle an action in which damages are sought to be recovered on behalf of an estate, any court or division thereof in which such action is pending and which has jurisdiction thereof may, upon oral motion by plaintiff's counsel of record in such action, or upon petition by the personal representative of such decedent, make an order approving such compromise or settlement. *Such order may approve an agreement for the payment of counsel fees and other proper expenses incident to such action.*

20 Pa.C.S. § 3323 (emphasis added).

The mechanism by which these matters are reviewed in Philadelphia County is Joint General Court Regulation No. 97-1, which vests this oversight authority with the Orphans' Court Division. In acknowledging the difficult but important task and seriousness with which trial courts view the determination a reasonable fee, the Superior Court drew on the language of a Court of Common Pleas Court opinion:

> Preliminarily, we are mindful that counsel certainly have a right to be compensated

> for their services. But at the same time, when that compensation becomes so handsome as to constitute a patent windfall for a lawyer, to the unfair detriment of the minor, discretion is best exercised by decreasing that fee. Generally, this court is reluctant to poke its judicial nose into contracts between client and counsel, and even with the situation the rights of a minor, we are reluctant to be too intrusive, too assertive. But under our Rule 2039 mandate, we have an affirmative duty to be more than a passive, *pro forma* rubber stamp. The line must be drawn somewhere . . . .

Gilmore, 582 A.2d at 1109 (quoting Edwards v. Downington Area Schoo District, 34 Ches.Co.Rep. 346, 347 (1986)). The Superior Court essentially ratified this reasoning in upholding the trial court's reduction in fee. The Superior Court has consistently upheld the principle that trial courts may adjust counsel fees and costs. See, e.g., Estate of Murray v. Love, 602 A.2d 366, 369 (Pa. Super. Ct. 1992). Similarly, the authority of a trial court to review settlements involving an estate is unquestioned. See Moore v. Gates, 580 A.2d 1138, 1141 (Pa. Super. Ct. 1990).

This Court fully rejects the notion expressed by plaintiff (again, plaintiff in this context should not be the true plaintiff in this matter but rather plaintiff's counsel) that this Court is without a mandate to approve settlements of survival actions, "even where no minor incapacitated person has an interest." Concise State of Matters Complained on Appeal #6. The law could not be clearer, both in statute and case law, that this averment is incorrect. The Superior Court has emphatically stated that "[t]he necessity for court approval of a survival action is not determined by the amount of the settlement. . . . The *requirement for court approval of survival actions is intended to protect the estate, as well as the creditors and beneficiaries thereof.*" Moore, 580 A.2d at 1141 (emphasis added).

Both the mandate for trial court review of settlements involving minors contained in the Pennsylvania Rules of Civil Procedure and the mandate for trial court review of settlements involving estates contained in the "Probate, Estates and Fiduciaries Code" are similarly worded

rules. The rules of statutory interpretation in Pennsylvania provide that similar statutes should be interpreted similarly. 1 Pa.C.S. § 1921(c)(5). Therefore, it is a reasonable application of this rule of statutory interpretation to apply the provisions for court approval of settlements similarly.

Looking to the relevant case law, statutes and rules of statutory interpretation, this Court can find no authority which lends any credence whatsoever to plaintiff's averments that this Court was without a mandate to review and revise the settlement in this matter. The petition filed by plaintiff involved allocation and distribution to a survival action. The plain language of the rules in Pennsylvania fully permitted this Court to apply a LaRocca analysis to determine whether the fees and costs were reasonable. This Court considered several factors, including that the matter resulted in a jury verdict for the defendant. The Court carefully reviewed the itemized list of costs for which counsel sought reimbursement and considered the costs to be excessive in light of the total recovery amount and that the case resulted in a jury verdict for the defendant.

Under the proposed allocation and distribution, counsel stood to recover nearly $35,000.00 of the total $50,000.00 settlement while the estate stood to recover only $15,000.00. In the view of this Court, such a recovery by counsel is analogous to the "patent windfall" for the lawyer "to the detriment of the [estate] . . . ." Gilmore, 582 A.2d at 1109. This Court is mindful of plaintiff's counsel's averments that plaintiff herself acknowledged that she understood the potentially high costs associated with settling the litigation. Concise Statement of Matters Complained of on Appeal #2. However, at the juncture in the litigation where plaintiff was presented with her options, it is apparent that she had very little choice but to go along with the proposed settlement. Otherwise, she stood to recover nothing. Plaintiff's on-the-record acknowledgment of the potential terms of the settlement, while not to be completely disregarded, must be viewed with skepticism because not only did she have no other realistic options, but the acknowledgment of a plaintiff does

not relieve a court of its oversight authority. The Superior Court has found that trial courts are fully empowered to second guess contingent fee agreements signed by a client before the start of the litigation process. See Gilmore, 582 A.2d at 1109-10. The overriding interest at stake is the "trial court's continuing responsibility to guard the interests of the [estate] and, where necessary, to disapprove the payment of a windfall to counsel." Gilmore, 582 A.2d at 1110.

After applying the appropriate analysis, this Court adjusted counsel fees and costs and increased the amount of recovery due to the estate. The Court undertook the difficult task of fashioning an order that was equitable to all parties. It was very clear that the proposed distribution which granted trial counsel nearly 70% of the total recovery *after a jury verdict for defendants* was anything but equitable. The Court restructured the distribution so that trial counsel recovered approximately 1/3 of the total settlement and the client (the estate) recovered approximately 2/3 of the total. This allocation more closely comports with normal practices and procedures in this jurisdiction. Based on the forgoing analysis, this Court respectfully submits that it did not commit an abuse of discretion in adjusting trial counsel's fees and costs.

IV. Conclusion

This Court respectfully submits that the present appeal should be dismissed due to the severe procedural defects contained therein. For purposes of appeal, a party must be aggrieved. It is clear that the true plaintiff in this matter was not aggrieved by an Order of this Court. Instead, it was plaintiff's counsel who was aggrieved by an Order of this Court. However, plaintiff's counsel continues to pursue the present appeal in the name of plaintiff. This is most troubling because plaintiff's counsel was discouraged from this behavior in a Superior Court opinion published in 1988.

This Court respectfully submits that aside from the substantial procedural problems with the present appeal, the substantive issues raised by plaintiff are clearly without merit. Plaintiff's counsel misstates the applicable law regarding a trial court's authority to approve settlements involving estates.

Therefore, this Court respectfully requests that the present appeal be dismissed due to the procedural defects and/or denied based on the substantive merits.

BY THE COURT,

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O'Keefe, J.