IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2009-CA-01200-SCT

LAURA CARPENTER **APPELLANT**

V.

TANGELA BERRY, RICKY BANKS and TANGELA BERRY AND RICKY BANKS, AS THE NEXT OF KIN AND FRIEND TO THE MINOR, RYHEIM BANKS **APPELLEES**

ON APPEAL FROM THE CHANCERY COURT OF ADAMS COUNTY, MISSISSIPPI
TRIAL COURT NO.: 2005-432

BRIEF OF THE APPELLEE

ORAL ARGUMENT IS NOT REQUESTED

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CERTIFICATE OF INTERSTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. The representations are made in order that the Justices of the Supreme Court may evaluate possible disqualification or recusal.

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This the 11th day of May, 2010.

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BRIEF OF APPELLEES

Appellees Tangela Berry Banks[1] and Ricky Banks, as guardians of their minor son Ryheim Banks ("the Banks"), pursuant to Rule 28(b) of the Mississippi Rules of Appellate Procedure, file this this Brief of Appellees.

STATEMENT OF THE CASE

The "STATEMENT OF THE CASE" set forth in the Brief of Appellant filed in this cause by appellant Laura Carpenter ("Defendant Carpenter"), while thorough, omits some important facts and events that the Banks supplement below.

Ryheim Banks is now a six year old child. He suffers from catastrophic and permanent neurological damage. (R., Vol. 3, at 11-12.) He cannot talk, walk, feed himself, bathe himself, go to the bathroom by himself, etc. His permanent neurological disability is as severe as it gets. The medical bills and, consequently, medical liens relating to this injury total hundreds of thousands of dollars. (R., Vol. 3, at 3.) Future medical bills, lost wages, etc., will total millions.

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[1] Mr. and Mrs. Banks, Ryheim's natural parents, caregivers and the court appointed co-guardians, were married after the filing of the lawsuit and remain married today.

The Banks in their original complaint filed in the Circuit Court of Adams County on June 4, 2004 alleged that Ryheim's neurological injury was caused substandard medical care rendered to Ryheim by Defendant Carpenter, and others, following the admission of Tangela Berry Banks, Ryheim's mother, to Natchez Community Hospital with signs and symptoms of premature labor at approximately 27 weeks gestation. (Complaint, R. at 66.) Almost a year to the date after the complaint was filed, the Banks' former counsel, Howard Bowan, Esq., purportedly on behalf of Ryheim and his parents, "negotiated" a settlement with Defendant Carpenter through her counsel Christopher Daniel, Esq., of the Simmons Law Group, P.A. (June 14, 2005 letter, Daniel to Bowan, R. at 29.)

The settlement was a lump sum aggregate or "global" settlement of $25,000 that included a release of the parents' individual claims, if any, and Ryheim's claims against Defendant Carpenter. (R. at 66.) Oddly, the settlement confirmation letter reflects that it was Mr. Daniel i.e., Defendant Carpenter's lawyer, who undertook to prepare Ryheim's chancery court filings necessary to seek approval of the settlement of a doubtful claim of a minor as required under Miss. Code Ann. §93-13-59 (1972). Mr. Daniel in his letter specifically referenced Rule 6.10 of the Uniform Chancery Court Rules which provides in part:

> Every petition for authority to compromise and settle a claim for ... injury shall set forth the facts in relation thereto and the reasons for such compromise and the settlement and the amount thereof. The material witnesses concerning the injury ... and the damages resulting therefrom shall be produced before the Chancellor for examination. Where counsel representing the petition has investigated the matter and advised settlement, he shall so appear and give testimony touching the result of his investigation.

So, it is clear from the record that counsel for Defendant Carpenter as well as Ryheim's lawyer jointly undertook the duty to ensure that the minor's settlement complied with Rule 6.10 and Miss. Code Ann. §93-13-59. As we will argue below, they failed miserably to meet that duty on several levels.

Mr. Daniel prepared the chancery court filings quickly. Within days of the negotiated settlement, a petition was filed to appoint the Banks co-guardians. On August 4, 2005, after the Banks had been appointed co-guardians, the "Petition for Authority to Settle Minor's Claim" was filed. A week later, on August 11, 2005, a hearing was held. Mr. Bowan's co-counsel, Everett Sanders, Esq., appeared on behalf of the Banks. Mr. Daniel appeared on behalf of Defendant Carpenter. Mr. Daniel, who had prepared the chancery court filings, examined Mr. and Mrs. Banks under oath. Mr. Sanders did not participate in the examination. (R., Vol. 3, at 11-12.) Following Mr. Daniel's examination of the Banks the settlement was approved. (R., Vol. 3, at 9.)

As stated above, the settlement was an aggregate settlement. Ryheim did not receive the full $25,000 settlement. Instead, the settlement proceeds were distributed as follows:

$10,000 to Howard Bowan, Esq. and Everett Sanders, Esq.;

$5,000 to mother Tangela Banks;

$5,000 to father Ricky Banks; and

$5,000 to Ryheim's guardianship account.

The "evidence" filed in the chancery court or offered at the hearing purportedly to show that the settlement was fair and reasonable and in the child's best interest speaks for itself. (R., Vol. 3, at 1-9.) It is nonexistent.

Nothing in the record even remotely attempts to satisfy Rule 6.10 or Miss. Code Ann. §93-13-59. Where in the petition drafted by Defendant Carpenter's counsel does it set forth the "facts in relation [to the claims for injury] and the reasons for such compromise and the settlement" as required under Rule 6.10? Where in the hearing transcript did Mr. Daniel, while examining Mr. and Mrs. Banks, elicit testimony "concerning the injury and the damages resulting therefrom" as required under Rule 6.10? Its not there. The law was ignored.

Nothing in the record even hints that this child is severely, permanently neurologically impaired requiring 24/7/365 care for the rest of his life. Nothing, save counsel's comment that the "involvement" of Defendant Carpenter "as individually, is negligible", provides the chancery court with any information whatsoever of Defendant Carpenter's actual involvement and role in the care of Mrs. Banks when she presented at Natchez Community in premature labor. (R., Vol. 3, at 1-9.) Nothing in the record shows that the chancery court was informed that Defendant Carpenter was the primary caregiver responsible for assessing and monitoring Mrs. Banks upon her admission to Natchez Community Hospital and for hours and hours before co-defendant Dr. Tom Carey even arrived at the hospital. Neither Mr. Daniel nor Mr. Sanders offered anything that would support a finding that the minor's settlement was fair, reasonable and in this child's best interest. Further, neither offered any evidence to support a $5,000 allocation to Ryheim or the $10,000 awarded to Mr. Bowan and Mr. Sanders.

Most disturbingly, it is clear from the record that the chancery court pleadings prepared by Defendant Carpenter's counsel, as well as the argument and presentation at the hearing, were at best misleading and clearly omitted material facts. The misrepresentations include the representation that "Attorneys(sic) Howard Bowan has been (sic) rendered good and valuable services . . . ." (Petition, R. at 3, ¶12.) This representation was made when counsel for Defendant Carpenter had actual knowledge that Mr. Bowan had done nothing since filing the lawsuit. (Letter, R. at 29.)[2]

[2] Defendant Carpenter in her brief argued that Judge Middleton knew that Ryheim's counsel had done nothing but approved the settlement anyhow. (Appellant's brief at p. 17.) In support of this argument Defendant Carpenter cited the June 2005 letter from Mr. Daniel to Mr. Bowan where he referenced the then moot issue that Mr. Bowan had conducted no discovery. With the several other contradictory claims that Mr. Bowan's efforts were "long, hard and diligent" it's doubtful that Judge Middleton even noticed this reference.

Another misrepresentation is found in the "Decree Authorizing Settlement of Claim" prepared by counsel for Defendant Carpenter and presented to Chancery Judge Middleton on the same day of the hearing where it was decreed:

> That this Court has reviewed and heard evidence concerning the relevant medical information, that said offer is the best offer that can be had after long, hard and diligent efforts by Petitioners and that it is in the best interest of Ryheim Banks, a minor, and Petitioners that said offer be accepted ...."

(Decree, R. at 31, ¶4.) Defendant Carpenter's counsel Mr. Daniel drafted this Decree and when presented to Honorable Middleton Mr. Daniel had actual knowledge that Honorable Middleton in fact had not "reviewed and heard evidence concerning the relevant medical information" and that there were no "long, hard and diligent efforts" advanced by anyone on behalf of the minor Ryheim.

Additionally, as acknowledged by Defendant Carpenter, at the time that the minor's settlement was submitted to the chancery court for approval neither the court nor counsel for the Banks had knowledge that Defendant Carpenter had $1,000,000.00 in insurance coverage available to pay Ryheim's claim for his catastrophic injuries. Defendant Carpenter does not deny that neither the Banks, nor their counsel nor judge Middleton was aware of this fact, she simply argues that counsel for the Banks never sought this information before the "long, hard and diligent" settlement negotiations were concluded or before the settlement was approved by the court. (Appellant brief at p. 17.) She ignores the fact that she and her counsel had actual knowledge of this material fact; that her counsel worked with the Banks' counsel to ensure compliance with Rule 6.10 and Miss. Code Ann. §93-13-59; and that Defendant Carpenter's counsel was a full participant at the hearing to approve the minor's settlement but failed to inform anyone of this material fact.

Then, Defendant Carpenter in her brief argued that the existence of the $1,000,000.00 coverage would have been immaterial to Judge Middleton. (Appellant brief at p. 17.) Her rationale behind this speculation is that the court approved a "nuisance" settlement with knowledge of staggering past medicals; so, therefore, it's safe to assume the court would have approved the settlement with this omitted information as well.

That argument is interesting. It is as though Defendant Carpenter forgot that Judge Middleton when advised of this omitted fact entered an order referencing "insufficient evidence" at the 2005 hearing and "additional evidence" presented by the Banks' new counsel as justification for setting aside the August 11, 2005 Decree that approved the Ryheim's $5,000 settlement distribution. (Order Setting Aside Settlement, R. at 206.) And while the standard is not a subjective standard involving a guess of what Judge Middleton would have done but rather an objective standard of whether a reasonable jurist following the law would have considered the existence of a $1,000,000.00 policy to be material, it is nonetheless clear that Judge Middleton concluded that the omitted insurance information was very material in this particular case.

Time Delay in Filing Motion to Set Aside Decree Approving Settlement Did Not Prejudice Defendant Carpenter

Just like nothing was done to prosecute the Banks' claims before Ryheim's settlement was approved in the Summer of 2005, nothing was done after the settlement in the underlying circuit court litigation until the Banks finally discharged their counsel and hired other counsel. Defendant Carpenter has never offered any evidence or argument identifying how she has been prejudiced. In fact, at the August 26, 2008 chancery court hearing on the Banks' motion to set aside the settlement, counsel for the Banks challenged counsel for Defendant Carpenter to identify even <u>one</u> prejudice that the delay has caused her:

> He [counsel for Defendant Carpenter] hasn't shown any prejudice. He has the burden to show that they've been prejudiced. He hasn't offered anything to show that they've been prejudiced, unlike Dr. Bush [in the Lang case]. Dr. Bush in the Lang decision indicated that if he, if the claims go forward against him he'd have to file bankruptcy because he had no insurance coverage. Counsel opposite doesn't even suggest that in this case. We believe that Laura Carpenter may very well have significant insurance coverage. We don't know. That issue is not there but the point is, as we sit here today, and this is the first time we've heard this, that Ms. Carpenter, through her counsel, is suggesting that she could be prejudiced by the delay. She can suffer no prejudice. The litigation in the Circuit Court is ongoing. There hasn't been a trial date set. To my knowledge there is still a significant amount of discovery that has to be done in Circuit Court. She hasn't suffered any prejudice whatsoever and counsel opposite and party opposite, Your Honor, has not offered any evidence of prejudice before this Court so I submit, Your Honor, this Court must ignore that argument. Not ignore it but reject that argument and enter an order setting aside the settlement.

(R., Vol. 3, at 21.)

In response to this challenge, Defendant Carpenter through her counsel simply stated, "I think the prejudice is obvious on its face . . . ."; and then went on to completely ignore the issue. (R., Vol. 3, at 23.) She has done the same thing in the Brief of Appellant filed in this Court. (Brief of Appellant at pp. 6-7.)[3]

In the time between the 2005 settlement with Defendant Carpenter and the Banks' filing of their original petition to set aside the settlement and amended petition to set aside the settlement, the law in Mississippi was evolving with regard to the effect that settlement and release of an agent has on a vicarious liability claim against the principal. The release entered into in connection with the 2005 settlement with Defendant Carpenter expressly reserved Ryheim's vicarious liability claims against her employer Natchez Community Hospital. (Release, R. at 37.) At the time of the settlement, the law in Mississippi was that the release of an agent had no effect on a vicarious claim against that agent's principal. W. J. Runyon & Son,

[3] Defendant Carpenter, for example, cannot point to even a single deposition that was taken without the participation of her counsel. In fact, her counsel was present in all of the many depositions taken in 2009 after the Banks filed their motion to set aside the settlement and bring Defendant Carpenter back into the litigation.

Inc. v. Davis, 605 So. 2d 38 (Miss. 1992), *over'r on other grounds by* Richardson v. APAC-Mississippi, Inc., 631 So. 2d 143 (Miss. 1994).

Subsequent to the 2005 settlement, this Court decided J & J Timber Co. v. Broome, 932 So. 2d 1 (Miss. 2006) which expressly overruled Runyon and held that the release of an agent or employee operated as a matter of law to release vicarious claims against that agent's principal notwithstanding any reservations in the release to the contrary. Then, in February of 2008, the Mississippi Court of Appeals handed down its decision in In the Matter of the Guardianship of Lane, 994 So. 2d 775 (Miss. App. 2008) which affirmed an order of a chancery court setting aside a minor's settlement with a doctor defendant because, in light of J&J Timber, the settlement would have had the unintended effect of releasing the doctor's clinic. The Mississippi Court of Appeals in Lane denied the doctor defendant's petition for rehearing in June 2008. The doctor then petitioned the Mississippi Supreme Court for certiorari review, which was granted. In the meantime, in July 2008 counsel for the Banks mindful of these opinions filed the original petition to set aside the settlement with Defendant Carpenter. This original petition was grounded on the same theory as the petition filed by the minor plaintiff in Lane, i.e., that the possible retroactive application of J&J Timber justified setting aside a minor's settlement that predated that decision. The Banks then on August 26, 2008 brought on for hearing their motion to set aside Ryheim's settlement.

At the time of the filing of the Banks' original petition and at the time of the hearing this Court had not completed its *certiorari* review of Lane and had not handed down Whitaker v. T & M Foods, Ltd., 7 So. 3d 893 (Miss. 2009). The Banks, therefore, at the August 2008 hearing only addressed the effect of J&J Timber and not the complete and utter unfairness of a settlement that paid $5,000 to a catastrophically brain damaged minor in exchange for the release of a

principal tortfeasor with a $1,000,000.00 liability policy; a policy the existence of which was known only to the tortfeasor and her counsel, i.e., counsel who prepared the chancery court filings and participated at the hearing.

Following the August 2008 hearing, this Court handed down its original opinion in Whitaker v. T & M Foods, Ltd., No. 2006-CT-01365-SCT (Miss. Oct. 2, 2008), *withdrawn and substituted by* Whitaker v. T & M Foods, Ltd., 7 So. 3d 893 (Miss. 2009), wherein the Court ruled that the Constitution Clause of the Mississippi Constitution of 1890 (Miss. Const., art. 3, section 16) prohibited the retroactive application of J & J Timber. Within weeks of this opinion, the Banks on October 24, 2008 filed their Amended Motion to Set Aside Settlement. In the Amended Motion the Banks acknowledged that Runyon and not J & J Timber applied to the August 2005 settlement with Defendant Carpenter; and, therefore, the settlement with employee Carpenter did not act to release the Banks' claims against the principal Natchez Community Hospital.[4] Consequently, at this time it was now appropriate for the Banks to advance their alternative theory to set aside the settlement: that the settlement must nonetheless be set aside because it was absurdly unfair; that Defendant Carpenter's counsel prepared the chancery settlement filings and expressly undertook to ensure compliance with Rule 6.10 and Miss. Code Ann. §93-13-59 (1972), and conducted the only witness examinations at the "fairness" hearing; that Defendant Carpenter and her counsel concealed the material fact that Carpenter had a $1,000,000.00 policy to insure this claim; and, finally, that Defendant Carpenter and her counsel (and the Banks' counsel) misrepresented to the chancery court that the Banks' counsel had worked "long, hard and diligent" when in fact nothing had been done in the prosecution of this case.

[4] No parties to this litigation have denied that Whitaker prohibits retroactive application of J & J Timber to the Banks's settlement with Defendant Carpenter.

STATEMENT OF ISSUES

Notwithstanding all of the procedural history above, the bottom line is J & J Timber and its prodigy are not at issue in the present appeal. The J & J Timber fears that first motivated the Banks' substitute counsel to seek dissolution of the settlement with Defendant Carpenter were rendered moot by Whitaker v. T & M Foods, Ltd., 7 So. 3d 893 (Miss. 2009). The August 2005 settlement with Defendant Carpenter did not serve to release the Banks' vicarious liability claims against her employer Natchez Community Hospital and no one has argued otherwise.

But, this ludicrous minor settlement must nonetheless be set aside because it was absurdly unfair and tainted with the concealment and misrepresentation of material facts. Judge Middleton, who approved the first settlement and then set aside his own approval, recognized as much. The only issue before this Court is whether Judge Middleton's June 30, 2009 Order setting aside his August 2005 Decree was arbitrary, capricious and an abuse of discretion. With this Defendant Carpenter and the Banks' agree.

ARGUMENT

Jude Middleton's june 2009 Order setting aside his Honor's 2005 Decree that approved the settlement with Defendant Carpenter referenced only Rule 60(b). The 2009 Order also made the factual finding that the 2005 Decree approving the settlement was based on "insufficient evidence at the time of the settlement" that would have allowed a finding that the settlement was "fair and reasonable and in the best interest of the minor, Ryheim Banks." (R. 206.) Further, Judge Middleton found that "additional evidence" [presented in the motion, amended motion, supplement to amended motion, and hearing] proved that the settlement in fact "was not fair and reasonable and in the minor's best interest." Id.

The Order does not specify under which subsection(s) of Rule 60(b) that the relief was granted. While all of the subsections may have application to the facts in this case, the Banks will address only Rule 60(b)(6) since Defendant Carpenter agrees that this subsection is not limited by a "six month" time period and since the Banks, respectfully, submit that Defendant Carpenter cannot meet her burden to show that the grant of relief under Rule 60(b)(6) by Judge Middleton was arbitrary, capricious or an abuse of discretion. Page v. Siemens Energy & Automation, Inc., 728 So. 2d 1075, 1079 (Miss. 1998).

The August 2005 Settlement Was Properly Set Aside Under Rule 60(b)(6)

As acknowledged by Defendnat Carpenter in her Brief of Appellee, Rule 60(b)(6) of the Mississippi Rules of Civil Procedure has been described as a "'grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding clauses, or when it is uncertain that one or more of the preceding clauses afford relief.'" Page, 728 So. 2d 1080, *quoting* Accredited Sur. And Cas. Co. v. Bolles, 535 So. 2d 56, 59 (Miss. 1988). This rule is most applicable to Judge Middleton's Order setting aside the August 2005 Decree that approved the settlement with Defendant Carptener. Further, Defendant Carpenter acknowledges that there is no specific time period during which relief under this subsection of Rule 60(b) must be sought. (Brief of Appellee at p. 23) Rather, as expressly set forth in Rule 60(b) the requested relief must be sought within a "reasonable time." Miss. R. Civ. P. 60(b). A determination of the timeliness of the motion is within the sound discretion of the trial judge who must consider the facts of the individual case. Specifically, the court should weigh the prejudice that the delay suffered on the non-movant against the reasons for the delay. Briney v. United States Fidelity & Guaranty Co., 714 So. 2d 962, 968 (Miss. 1998).

The balancing test described in Briney supports Judge Middleton's finding that the Banks' Rule 60(b) motion was not untimely. As noted above, Defendant Carpenter even when challenged at the August 2008 hearing could not articulate even ONE prejudice. Defendant Carpenter at the hearing and in her Brief of Appellee rather than attempting to identify a prejudice just side-stepped the issue altogether and stated, "I think the prejudice is obvious on its face . . . ." (R., Vol. 3, at 23.) Such a "showing of prejudice" fails as a matter of law.

Further, as to the second prong of the Briney balancing test, the Banks have shown that they were unaware of the existence of Defendant Carpenter's $1,000,000.00 insurance policy until sometime after the August 2008 hearing to set the settlement aside. Up until that point, the Banks' counsel was simply reacting to the evolving law from Runyon, J & J Timber, Lane and finally Whitaker relative to the effect that a release of an agent has on remaining vicarious claims against the principal. In any event, since Defendant Carpenter has chosen to make no attempt to show any prejudice whatsoever the reasons for the delay in filing the Rule 60(b) motion should be given little weight.

The Banks and Defendant Carpenter accept that the six factors quoted below in Page are to guide the court in determining whether a movant should be granted relief under Rule 60(b)(6):

> (1) that the final judgments should not lightly be disturbed; (2) that the Rule 60(b) motion is not to be used as a substitute for appeal; (3) that the rule should be liberally construed in order to achieve substantial justice; (4) whether the motion was made with a reasonable time; (5) whether – if the judgment was rendered after a trial on the merits – the movant had a fair opportunity to present his claim or defense; (6) whether there are intervening equities that would make it inequitable to grant relief; and (7) any other factors relevant to the justice of the judgment under attack.

Page, 728 So. 2d at 1079-80.

These factors are intentionally broad; thus allowing the trial judge wide discretion to remedy a wrong and "do what's right." In the instant case, Judge Middleton recognized that did

not have enough evidence at the August 2005 hearing to conclude that the proposed settlement was "fair and reasonable." He recognized that material information had been omitted. Further, when Judge Middleton appreciated the extent of minor Ryheim's injuries

The thurst of Defendant Carpenter's argument that Judge Middleton abused his discretion centers primarily on the time delay between the August 2005 Decree and the June 2009 Order setting it aside. (Brief of Appellee at pp.

Protections of Minors and Disabled

Perhaps nothing in our equity jurisprudence is more sacred than a chancellor's duty to protect the interests of minors and the disabled. Ryheim is both.

> It is well established that chancellors are considered "superior guardians" over minors and persons with disabilities. . . . The chancery court "'must take all necessary steps to conserve and protect the best interest" of the wards of the court before any binding order affecting them is entered."

Union Chevrolet Co. v. Arlington, et al., 162 Miss. 816, 826, 138 So. 593, 595 (Miss 1932).

A chancellor's statutory duty to protect the interests of a minor when authorizing the settlement of a doubtful claim is not a mere formality but must be supported by meaningful evidence:

> It was not sufficient merely to present to the chancellor the petition which was actually presented in this case and produce before him only one witness, but was the duty of the attorney to acquaint the chancellor of all the facts and produce before him all the witnesses who knew anything about the matter touching the question of liability; the suffering of the deceased between the time of this injury and the time of his death; the solvency of the Union Chevrolet Company [i.e., the defendant]; and every other fact bearing on the fact as to whether or not the claim was doubtful, or one that was not readily collectible.

Union Chevrolet, 138 So. at 823 (emphasis added).

The Union court, after providing a history of the constitutional, common law and statutory underpinnings of the solemn duty of a chancellor to protect the interests of a minor explained:

> Infants and persons of unsound mind are disabled under the law to act for themselves. Long ago it became the established rule of the court of chancery to act as superior guardian for all persons under such disability. This inherent and traditional power and protective duty is made complete and irrefragable by the provisions of our present state constitution. . . . It is the inescapable duty of the said court and of the chancellor to act with constant care and solicitude toward the preservation and protection of the rights of infants and persons non compos menis. The court will take nothing as confessed against them; will make for them every valuable election; will rescue them from . . . designing strangers, . . ., and in general will and must take all necessary steps to conserve and protect the best interest of these wards of the court. The court will not and cannot permit the rights of an infant to by any waiver, or omission or neglect or design of a guardian, or of any other person, so far as within the power of the court to prevent or correct Grif. Chanc. Prac. Secs. 45, 360,530, 533. All persons who deal with guardians or with courts in respect to the rights of infants are charged with knowledge of the above principles, and act to the contrary thereof at their peril.
>
> ...
>
> ...To make a compromise settlement by a guardian effective against their wards in any case the judicial sanction thereof must be upon a real and not a perfunctory or merely formal hearing. . . . And while it is permissible for an attorney to represent ~~both sides in~~ presenting such a petition, provided he fully provide the chancellor thereof, he must in so doing see to it that the testimony and the witness or witnesses who will give the full facts in behalf of the minors are presented and are heard, and if this is not done then there is a fundamental omission which amounts to legal fraud, however free from any thought of wrong the attorney may have been throughout.

Id. at 827 (emphasis added.)

Counsel for Defendant Carpenter prepared the chancery filings on behalf of the minor Ryheim. Only counsel for Defendant Carpenter offered any testimony at minor Ryheim's hearing to determine if the settlement was in Ryheim's best interest. Counsel for Defendant Carpenter, if effect, assumed the dual role of protecting his client and ensuring compliance with Miss. Code Ann. §93-13-59 (1972) and Rule 6.10 of the Uniform Chancery Court Rules, i.e., a statute and rule that have nothing to do with protecting the releasee in a minor settlement but

have everything to do with protecting the minor to ensure that the settlement is fair and reasonable and supported by competent evidence.

CONCLUSION

Counsel for Defendant Carpenter actively undertook to prepare chancery filings and present evidence at the August 2005 hearing to prove that the settlement with his client Defendant Carpenter was fair and reasonable to the minor Ryheim. No evidence of liability or lack thereof was presented. No evidence of Ryheim's catastrophic and permanent physical and mental disabilities was presented. Further, and in direct contradiction of the equity principles and necessary proof governing the compromise of a minor's claim as discussed in Union Chevrolet, neither Defendant Carpenter nor her counsel disclosed to the Banks, their counsel or the chancery court that Ryheims' claim against Defendant Carpenter was covered by a $1,000,000 liability policy, i.e., information not discovered by the Banks until just before the filing of their amended petition to set aside the August 2005 Decree approving the settlement.

In light of the above, including the fact that Defendant Carpenter offered no showing of prejudice, that counsel for Defendant Carpenter actively participated in the representation of the minor and the presentation of the only evidence offered at the "fairness hearing," and that the existence of the $1,000,000 liability policy was only discovered by the Banks shortly before the filing of their amended petition to set aside the settlement, the Banks' motion under Rule 60(b) was made within a "reasonable time" as allowed under Rule 60(b)(6). Judge Middleton's June 2009 Order setting aside his own August 2005 Decree pursuant to Rule 60(b) was not an abuse of discretion and should be affirmed.

Respectfully submitted this the 11th day of May, 2010.

TANGELA BERRY AND RICK BANKS

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Certificate of Service

I do hereby certify that a true and correct copy of the foregoing Motion has been delivered via United States Mail to the following:

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