

Civil Practice and Procedure

Donald Patrick Eckler
Pretzel & Stouffer, Chartered, Chicago

A New Potential Minefield for Defense Counsel in Settling Wrongful Death Cases

In the recent decision of *Estate of Powell v. Wunsch*, the Illinois Supreme Court affirmed the ruling of the Illinois Appellate Court First District that the plaintiff's attorney owed a duty not only to the special representative of the estate of the deceased, but also to the beneficiaries of the estate. *Estate of Powell v. Wunsch*, 2014 IL 115997, ¶ 1. As a result, a legal malpractice claim may lie against the plaintiff's attorney for failing to adequately protect the beneficiary's interests in a settlement. *Powell*, 2014 IL 115997, ¶ 1. This decision has obvious implications for the plaintiff's counsel and those who defend attorneys in malpractice claims. Less clear, and perhaps no less important to defense practitioners, are the issues that defense counsel must now contend with in settling cases and in ensuring adequate protections for clients who settle wrongful death actions and other cases in which the beneficiaries of a settlement are under a legal disability.

Powell was a legal malpractice dispute arising out of a medical malpractice lawsuit brought by Powell's mother, Leona, on behalf of her deceased husband and Powell's father, Perry. *Id.* ¶ 3. Leona was appointed as special administrator of Perry's estate. In addition to his wife, Perry was survived by two children, Emma and Powell. *Id.* Perry died intestate and his only asset was the wrongful death action alleging medical malpractice. *Id.* Leona engaged John Wunsch to represent the estate of her husband in bringing the action. *Id.* Prior to his father's death, Powell had been adjudicated disabled, and his parents were appointed co-guardians of his person but not his estate. *Id.* With Perry's death, Leona was the only remaining guardian of Powell.

With the defendant's assistance, Leona settled the medical malpractice claim between Perry's estate and some of the defendants for \$15,000. *Id.* ¶ 4. The court entered a distribution order, allowing each next of kin, Leona, Emma, and Powell, to receive \$5,000. *Id.* Pursuant to the order of distribution, Powell's share of the settlement proceeds was paid to Leona on his behalf and was placed in a joint account. *Id.*

Because Wunsch was unable to take the underlying matter to trial against the remaining defendants, new counsel, Jill Webb, appeared to represent Perry's estate. *Id.* ¶ 5. Prior to trial, the parties settled the claims against the remaining defendants, which provided \$118,000 to Leona and Powell each. *Id.* Emma waived her claim to the proceeds of the second settlement. *Id.* As before, Leona took possession of the settlement proceeds intended for Powell and placed them in a joint account. *Id.* Wunsch, who assisted in completing the second settlement, purportedly told Leona and Emma that it would be too difficult to have the probate court administer the proceeds for Powell and so Leona did not undertake the probate court procedure for approval and administration. *Id.*

After the settlements were completed, Leona remained Powell's guardian. *Id.* ¶ 6. Emma visited Powell at Leona's home and found Powell was neglected despite the \$118,000 available for his care. *Id.* Emma further discovered that Leona was not using the settlement proceeds that were supposed to be distributed to Powell for

his care. *Id.* Evidence revealed that of the \$236,000 that had been deposited, only \$26,000 remained in the joint account, and Leona had no accounting for the use of the money. *Id.*

Consequently, Emma filed a motion seeking a modification to Powell's guardianship. *Id.* Ultimately, the public guardian became Powell's guardian, which precipitated a legal malpractice action against Wunsch and Webb for failing to properly protect Powell's interests in the settlement proceeds of his father's medical malpractice action. *Id.* ¶ 7.

In the legal malpractice action, the defendant attorneys successfully moved to dismiss the complaint pursuant to 735 ILCS 5/2-615. *Powell*, 2014 IL 115997, ¶ 8. The trial court found that the plaintiff's complaint did not plead allegations sufficient to establish the existence of a duty to Powell, with whom the attorneys did not have an attorney-client relationship. *Id.* The trial court also found that the plaintiff failed to allege that "but for" the defendant attorneys' conduct, the plaintiff would have received more money from the settlements. *Id.*

The appellate court reversed the trial court's dismissal and found that the attorneys retained to represent the estate owed a fiduciary duty to the beneficiaries of the estate. *Id.* ¶ 9. The court found that a direct attorney-client relationship was not needed to support the existence of the duty, citing the recent Illinois Supreme Court decisions of *DeLuna v. Burciarga*, 223 Ill. 2d 49 (2006) and *Carter v. SSC Odin Operating Co.*, 2012 IL 113204. *Powell*, 2014 IL 115997, ¶ 9. The court also found that while there was no proximate cause as to the first settlement in Powell's favor of \$5,000, for which no court supervision was required of the estate under Illinois law, the second settlement, which was intended to benefit Powell in the amount of \$118,000, exceeded the amount required for supervision and that there was proximate cause for the claimed damages. *Id.*

The Illinois Supreme Court Ruling

The Illinois Supreme Court affirmed the appellate court's ruling. The supreme court acknowledged that generally an attorney only owes a duty to the client. But, if a non-client is an intended third-party beneficiary of the attorney's services, the attorney has a duty to the intended third-party beneficiary and can be held liable for damage suffered by that individual non-client. *Id.* ¶ 14. The court applied the "intent to directly benefit" test to determine if a duty existed between Wunsch and Webb and Powell. *Id.* Under this test, the key in determining if a relationship exists is whether the attorney is "acting at the direction of, or on behalf of the client to benefit or influence a third party." *Id.* The supreme court held that the Illinois Wrongful Death Act provides that the decedent's spouse and next of kin are the true parties in interest and that the amount recovered is for their "exclusive benefit." *Id.* ¶ 15. The supreme court further held that the duty owed cannot be only to the personal representative of the estate, who is a mere nominal party, because that limitation would defeat the purpose of the Illinois Wrongful Death Act. *Id.*

In opposing this view, Wunsch and Webb argued that there could be conflicts in representing the interests of the various beneficiaries and that no duty could arise in such a circumstance. *Id.* ¶ 21. The supreme court, however, declined to address this contention because no actual conflict was alleged to have existed in this case. *Id.* Further, the supreme court held that because a wrongful death action is brought for the exclusive benefit of the beneficiaries of the estate, no conflict could arise between the estate and the beneficiaries. *Id.* ¶ 22.

Applying these principles to the case, the supreme court found that the attorneys failed to adequately protect all of the beneficiaries and to ensure that they each receive their share of the proceeds from the settlement. *Id.* ¶ 23. The supreme court also faulted the attorneys for not obtaining administration of the settlement proceeds from the probate court. *Id.* ¶ 23. In failing to do so, the court found that the plaintiff had sufficiently alleged a cause of action against the defendant attorneys. *Id.*

Turning to the proximate cause issue, the supreme court agreed with the holding of the appellate court that there was no causal relationship between any claimed damage and the first settlement of \$5,000. *Id.* ¶ 24. But,

the supreme court agreed that the failure to obtain approval of the probate court with respect to the second settlement caused injury to Powell and could form the basis of an action for legal malpractice. *Id.*

Conclusion

Powell shows the ever expanding potential for duties lawyers may have to third parties even absent a direct attorney-client relationship. In the context of wrongful death cases, *Powell* requires plaintiffs' lawyers to be cognizant of the parties whose real interests they are to protect. While they are described as being fiduciary in nature, the scope of the duty owed by the plaintiff's counsel to the beneficiaries of the estate are not well established in this decision, and it is likely that additional litigation will define those duties. Until that law is developed, the plaintiff's counsel will have to be assiduous in settling wrongful death cases or risk potential liability to beneficiaries.

This decision may also portend duties for defense lawyers in wrongful death cases to ensure that the settlement is completed correctly and that the plaintiff's counsel seeks the necessary approvals to settle. A person under a legal disability, such as a minor or a disabled adult like Powell, on whose behalf a settlement is made, could later claim that the settlement was invalid and seek additional recovery from the defendants if the procedures required by the law are not followed. It has always been important for the defense counsel of a wrongful death case to ensure that all potential next of kin are identified, but now that good practice may be acute as it relates to concerns regarding settlement of the case as well.

While defense lawyers obviously owe no duties to the beneficiaries of the estate of the deceased, circumstances requiring further litigation in a case that was believed settled could be problematic. In cases in which there are questions regarding whether all of the next of kin have been identified, a defense lawyer should consider including language in the release that the special representative warrants that all of the next of kin have been included in the distribution and identifying the distribution in the release. Defense counsel may also monitor the probate proceedings to ensure the process is completed as agreed and to coordinate the completion of the settlement in conjunction with the probate procedures. One aid in this process comes from an unlikely place, the settlement statute, 735 ILCS 5/2-2301. In Section (b) the statute requires that the plaintiff provide to the defendant the order approving the settlement, and in Section (d) no payment of settlement proceeds is required until 30 days after such approval, and all of the other required documents, including the release, are received. *Id.*

These measures should mitigate potential liability of defendants and their counsel, but as the law regarding duties to third-parties expands, we can expect further issues to arise.

About the Author

Donald Patrick Eckler is an associate at *Pretzel & Stouffer, Chartered*. He practices in both Illinois and Indiana in the areas of commercial litigation, professional malpractice defense, tort defense, and insurance coverage. He earned his undergraduate degree from the University of Chicago and his law degree from the University of Florida. He is a member of the Illinois Association Defense Trial Counsel, the Risk Management Association, and the Chicago Bar Association. He is the co-chair of the CBA YLS Tort Litigation Committee.

About the IDC

The Illinois Association Defense Trial Counsel (IDC) is the premier association of attorneys in Illinois who devote a substantial portion their practice to the representation of business, corporate, insurance, professional and other individual defendants in civil litigation. For more information on the IDC, visit us on the web at www.iadtc.org.

Statements or expression of opinions in this publication are those of the authors and not necessarily those of the association. *IDC Quarterly*, Volume 24, Number 4. © 2014. Illinois Association of Defense Trial Counsel. All Rights Reserved. Reproduction in whole or in part without permission is prohibited.

Illinois Association of Defense Trial Counsel, PO Box 588, Rochester, IL 62563-0588, 217-498-2649, 800-232-0169, idc@iadtc.org