

Wu, Re, 2006 CanLII 16344 (ON CA)

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COURT OF APPEAL FOR ONTARIO

LASKIN, SHARPE and MACFARLAND JJ.A.

B E T W E E N :)	
)	
THE ESTATE OF YUAN YUAN WU (a)	Earl A. Cherniak, Q.C. and
lso known as REBECCA WU), DECEA)	Kirk F. Stevens for the appellants
SED, by the Trustees of her Estate, Zhi)	
Chen and Fu Li Zhang, ZHI CHEN, pe)	
rsonally and XU-QI WU)	
)	
)	
Applicants)	
(Appellants))	
- and -)	
)	
ZURICH INSURANCE COMPANY an)	Geoffrey D.E. Adair, Q.C. and
d ING INSURANCE COMPANY OF C)	Robert M. Ben for the respondents
ANADA)	
)	
Respondents)	

On appeal from the order of Justice J.B. McMahon of the Superior Court of Justice dated April 5, 2005.

BY THE COURT:

[1] A party under disability died unexpectedly before the court approved the defendant's agreement to settle her accident benefits claim for a lump sum. The issue before us on this appeal is whether the estate of the party under disability can enforce the settlement.

FACTS

[2] Yuan Yuan Wu (known as "Rebecca Wu") was hit by an impaired driver as she crossed a street in downtown Toronto. She suffered serious physical injuries and brain injuries resulting in significant cognitive impairment. At the time of the accident, Rebecca Wu was twenty-eight years old. She was married and had one child.

[3] Rebecca Wu, represented by her mother and litigation guardian, commenced an action claiming tort damages against the tortfeasor and claiming statutory accident benefits against Zurich Insurance Company and ING Insurance Company of Canada ("the respondents"), pursuant to the *Insurance Act*, R.S.O. 1990, c. I.8 and the *Statutory Accident Benefits Schedule – Accidents After December 31, 1993 and Before November 1, 1996*, Reg. 776/93.

[4] The respondents obtained comprehensive medical assessments of Rebecca Wu's injuries and future care costs. Despite her severe injuries, Rebecca Wu's life expectancy was estimated to be sixty-eight years. Her own experts estimated her claim for past and future income loss and future care costs at between \$5.8 and \$6.6 million. After mediation, the respondents agreed to settle her claim for \$3.1 million. Because of Rebecca's mental disability, the settlement was "subject to necessary court approval". The tort claim remained outstanding but subject to ongoing settlement discussions.

[5] Three months after the date of the settlement with the respondents, Rebecca died suddenly and unexpectedly. Pending resolution of the tort claim, Rebecca Wu's counsel had not presented the settlement of the accident benefits claim for court approval.

[6] The settlement agreement was reduced to writing in the form of minutes of settlement.

Accident of Benefits of Rebecca Wu

Minutes of Settlement

In consideration of the amount \$3,000,000 plus \$90,000 for party and party costs and \$10,000 for disbursements, Yuan Yuan Wu also known as Rebecca Wu, by her Guardian of Property, Zhi Chen and Zhi Chen and Xu-Qi Wu personally, hereby agree to settle with Zurich Insurance Company and ING Insurance Company of Canada and any successors, for all past, present and future accident benefit claims in connection with the motor vehicle accident of August 29, 1996.

All of the above is subject to necessary court approval to be obtained by counsel for the applicants.

Pending securing all necessary approval, Zurich/ING agree to pay all current AB Benefits to the time of securing necessary court approval. The total amount of accident benefits paid after February 3, 2003 and up to the date of court approval shall be paid back by the applicants to Zurich/ING out of the court approved settlement amount. The Full and Final Release and Disclosure Notice will be paid by counsel for the insurer and will be executed by the applicants after court approval [emphasis added].

[7] Rebecca Wu's estate, her estate trustees, her spouse and her parents ("the appellants") brought an application to enforce the minutes of settlement. The application judge ruled that the requirement for court approval amounted to a "true condition precedent" that had to be satisfied in order to make the settlement agreement enforceable. He ruled that Rebecca Wu's death made it impossible for the court to approve the settlement and, as her estate could not meet the condition precedent, there was no longer a binding agreement between the parties.

ISSUE

[8] The sole issue on this appeal is whether the appellants can enforce the settlement of the accident benefits claim against the respondents.

ANALYSIS

[9] The starting point for analyzing the legal status of the settlement agreement is to consider the situation that existed immediately before Rebecca Wu's unexpected death. In *Smallman v. Smallman*, [1971] 3 All E.R. 717 at 720 (C.A.), Denning M.R. provided the following helpful statement of the legal status of a settlement agreement that is subject to court approval:

In my opinion, if the parties have reached an agreement on all essential matters, then the clause 'subject to the approval of the court' does not mean there is no agreement at all. There is an agreement, but the operation of it is suspended until the court approves it. It is the duty of one party or the other to bring the agreement before the court for approval. If the court approves, it is binding on the parties. If the court does not approve, it is not binding. But, pending the application to the court, it remains a binding agreement which neither party can disavow.

[10] The requirement for court approval of settlements made on behalf of parties under disability is derived from the court's *parens patriae* jurisdiction. The *parens patriae* jurisdiction is of ancient origin and is "founded on necessity, namely the need to act for the protection of those who cannot care for themselves...to be exercised in the 'best interest' of the protected person...for his or her 'benefit or 'welfare'": *Re Eve*, 1986 CanLII 36 (SCC), [1986] 2 S.C.R. 388 at para. 73. The jurisdiction is "essentially protective" and "neither creates substantive rights nor changes the means by which claims are determined": *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 1998 CanLII 5454 (ON CA), 41 O.R. (3d) 257 at 268 (C.A.). The duty of the court is to examine the settlement and ensure that it

is in the best interests of the party under disability: *Poulin v. Nadon*, 1950 CanLII 121 (ON CA), [1950] O.R. 219 (C.A.). The purpose of court approval is plainly to protect the party under disability and to ensure that his or her legal rights are not compromised or surrendered without proper compensation.

[11] The requirement for court approval of settlements involving parties under disability is codified in Ontario in rule 7.08(1):

No settlement of a claim made by or against a person under disability, whether or not a proceeding has been commenced in respect of the claim, is binding on the person without the approval of a judge.

[12] As explained by Garry D. Watson & Craig Perkins, *Holmested and Watson: Ontario Civil Procedure*, looseleaf (Toronto: Carswell, 1984) vol. 2 at 7-33

Rule 7.08... merely codifies a rule established by case law that a party under disability is bound only by a settlement that is for his or her benefit....it is designed to protect the party under disability from mistakes of the litigation guardian. The settlement of a claim by or against a party under disability, whether or not a proceeding has been commenced, is not binding on the party under disability without the approval of a judge.

[13] The wording of rule 7.08(1) may be contrasted with the language of the English “compromise rule” that provides that no settlement involving a party under disability shall “be valid without the approval of the court.” This wording was considered by the House of Lords in *Dietz v. Lennig Chemicals*, [1969] 1 A.C. 170 to deprive a settlement that is subject to court approval of any legal effect and to allow either party to repudiate it unless and until it was approved by the court. The situation in Ontario is different: see *Richard (Litigation Guardian of) v. Worth* (2004), 2004 CanLII 34517 (ON SC), 73 O.R. (3d) 154 (S.C.J.), holding that an insurer could not repudiate an infant settlement, yet to be approved by the court, on the ground that the law relating the insurer’s liability had been changed by a subsequent Court of Appeal decision. The effect of rule 7.08(1) coincides with *Smallman v. Smallman*, *supra*, to this extent: the party under disability has an agreement from which the opposite party cannot resile and that will become fully operational once approved by the court.

[14] We conclude from this analysis that immediately prior to Rebecca Wu’s death there was in law an agreement, which the respondents could not disavow, to settle her claim on the terms recorded in the minutes of settlement, but that the operation of that agreement was suspended pending “necessary” court approval.

[15] The crucial issue for us to decide is what effect did Rebecca Wu’s death have on the status of the settlement agreement? The respondents make two central submissions. First, they say that the obligation to pay the settlement never arose because the requirement for court approval was never met. They say that the application judge correctly found that the requirement for court approval is a “true condition precedent” upon which the existence of any contractual obligation to pay depends and, as the settlement was not approved, it died with Rebecca Wu. Second, the respondents submit that it is an implicit term of the settlement that Rebecca Wu must be alive to permit the court to approve it. As her death

makes court approval impossible, the respondents submit that the agreement must be treated as being void *ab initio*.

[16] For the following reasons, we are unable to accept the respondents' submissions.

[17] With respect to the respondent's first submission, we do not agree that that the settlement died with Rebecca Wu. Prior to her death, Rebecca Wu's claim for accident benefits had, by virtue of the settlement, become a contractual right to the agreed amount, contingent upon obtaining the court's approval of the settlement. That contractual right was a chose in action that, by operation of law, devolved to Rebecca Wu's estate upon her death: *Estates Administration Act*, R.S.O. 1990, c.E.22, s. 2.; Carmen S. Thériault ed, *Widdifield on Executors and Trusts*, looseleaf (Toronto: Carswell, 2002) at p. 2-52: "The general principle is that a right of action in common law survives death and is transmissible automatically to the personal representative." By their terms, the minutes of settlement speak of "necessary" court approval. Once Rebecca Wu's contractual right passed to the estate, there was no longer a party under disability. Court approval was no longer necessary to protect the interest of the party seeking to enforce the settlement. As the need for court approval disappeared upon Rebecca Wu's death, the minutes of settlement became operational and her estate could enforce the obligation to pay.

[18] This analysis is supported by a purposive interpretation of the need for court approval. The respondents' argument that the settlement in Rebecca Wu's favour should be nullified because it was not approved in her lifetime runs directly contrary to the protective purpose of *parens patriae* jurisdiction and of court approval of settlements involving parties under disability. The risk created by the enforced gap in time to allow the court to review the settlement to ensure it meets the plaintiff's interests should not be borne by the plaintiff and *parens patriae* jurisdiction should not be used to defeat the very interests it serves to protect. In this regard, we find persuasive the reasoning in *Reed v. United States of America*, 891 F. 2d 878 at 881 (11th Cir. 1990). The claim of an infant plaintiff was settled days prior to his death and "all that remained for final judgment to obtain was for the court to approve the settlement and enter judgment." The court ruled that as "[t]he statute requiring court approval is designed for the protection of minors" and as the defendant had agreed to settle the case, the only legitimate basis for refusing enforcement would be the failure of the agreement to protect the minor's interests. See also *Blackhurst v. Transamerica Insurance Co.*, 699 P. 2d 688 (Sup. Ct. of Utah 1985).

[19] In *Olive Clear v. Thermal (Ireland) Limited*, [1969] I.R. 133, the Supreme Court of Ireland considered the enforceability of an infant settlement where the infant had died prior to court approval. O'Dalaigh C.J. analyzed the legal effect of the settlement in terms similar to those expressed in *Smallman v. Smallman*, *supra*, but ruled, at p. 139, that the requirement for court approval implied that the infant must be alive. We return to the issue of post-death court approval below, but for present purposes the significant point from this decision is that the other two members of the court suggested that the settlement contract survived and that the proper procedure was for the infant's estate to sue upon the contract: per Walsh J. at p. 140 and per Budd J. at p. 141. Accordingly, although the court concluded that the settlement could not be approved after the death of the infant plaintiff, there is a majority view that the settlement contract could be enforced at the suit of the infant's estate despite the fact that it had never been approved by the court.

[20] Nor do we agree with the submission that the issue before us should be resolved on the basis of *Turney v. Zilka*, 1959 CanLII 12 (SCC), [1959] S.C.R. 578 and so-called "true

conditions precedent”. *Turney v. Zilka* involved an agreement for the purchase and sale of land that made the contract conditional on the annexation of the subject property to another municipality. The Supreme Court of Canada rejected the contention that the clause was for the benefit of the purchaser and could therefore be waived by the purchaser. As the condition had not been met, neither party had any right to enforce performance. Judson J. explained at pp. 583-84:

The obligations under the contract, on both sides, depend upon a future uncertain event, the happening of which depends entirely on the will of a third party... This is a true condition precedent – an external condition upon which the existence of the obligation depends. Until the event occurs there is no right to performance on either side.

[21] *Turney v. Zilka* and other similar cases involving “true conditions precedent” typically involve the interpretation of agreements for the purchase and sale of real estate and terms negotiated by the parties to allocate the risk of uncertain future events, such as planning approval, that are beyond the control of the parties but that will affect the value of the property that is the subject of the contract. That contractual setting is, in our view, distinguishable from the circumstances of the present case.

[22] When determining whether a contractual term is to be considered a “true condition precedent,” the intentions of the parties must be considered: see *Kempling v. Hearthstone Manor Corp.*, [1996 ABCA 254 \(CanLII\)](#), [1996] A.J. No. 654 at para. 32 (C.A.). See also G. Davies, “Conditional Contracts of the Sale of Land in Canada” (1977), 55 Can. Bar Rev. 289 at 322: “a desirable approach to the interpretation of conditional contracts would be to recognize that the effect of a condition must depend upon the language in which it is expressed with the result that conditions must be subjected to individual scrutiny.” The requirement for court approval in the case at bar was not a negotiated term designed to allocate the risk of an uncertain future event that would affect the value of the bargain. As reflected by the language of the minutes of settlement - “subject to *necessary* court approval” - the requirement for court approval was a term legally imposed upon the parties specifically to protect the interests of the party under disability.

[23] It is significant that rule 7.08(1) provides that the agreement is not binding on the party under disability unless the court approves the agreement, but says nothing to limit the binding effect of the agreement on the other party. This reflects the unilateral and protective purpose of court approval that is related to ensuring the fairness of the agreement itself, quite unlike the type of extraneous third-party decision at issue in *Turney v. Zilka*. In our view, *Turney v. Zilka* does not apply to the contract at issue here.

[24] With respect to the respondent’s second submission, even if we were to accept the respondents’ submission that court approval is a “condition precedent” that must be satisfied to make the agreement enforceable by the appellant, we see no reason why court approval cannot be granted despite Rebecca Wu’s death. The purposive interpretation of the *parens patriae* jurisdiction and rule 7.8(1) that we have already outlined suggests that authority to approve the settlement should survive the death of the party under disability to the benefit of that party’s estate. There was an obvious risk that Rebecca Wu might die earlier than projected and the respondents must have taken into account her projected life expectancy as one of the many contingencies that influenced their assessment of the value of her claim: *White (Litigation Guardian of) v. Godin*, [1997] O.J. No. 314 (C.A.) at para.

3: “In agreeing to the assessment of damages, the defendants knew that there was a risk that their evaluation of the life expectancy of the plaintiff...might be proved wrong by future events.” Parties under disability cannot re-open settled claims when unfavourable contingencies materialize: see *Tsaoussis (Litigation Guardian of) v. Baetz, supra*. Fairness requires similar treatment for insurers. The minutes of settlement could have provided that Rebecca Wu must be alive at the time of court approval but they do not. We do not agree that it would be just to imply a term that would, after the fact, materially alter the parties’ allocation of the risk related to her life expectancy.

[25] We do not find persuasive the opinion to the contrary in *Olive Clear v. Thermal (Ireland) Limited, supra*. O’Dalaigh C.J., at pp. 138-39, gave the following example which corresponds to some degree to the case at bar:

An example will illustrate the point. A defendant, in a case of paraplegic injury to an infant plaintiff, agrees to pay to the next friend a large sum for damages, a great part of which is calculated to be in respect of full-time nursing care. Before approval of the settlement the infant dies from extraneous causes. The infant’s death, as it seems to me, prevents the exercise of the court’s function of pronouncing on the adequacy of the settlement. A new situation has arisen; a situation which the parties have not contemplated.

The death of the infant alters the basis of the settlement, and its effect must, in my opinion, be to discharge the parties. The foundation of their dealings, the continued existence of the infant, is withdrawn, and the parties are left to such rights as they had before the settlement was entered into and as survive the infant’s death.

[26] The death of the plaintiff may eliminate the cost of future care and thereby diminish the value of the claim but, for the reasons already expressed, it does not create a new situation that should not have been contemplated by the parties. Life expectancy is but one of many contingencies that parties settling personal injury claims are bound to take into account when determining the worth of the claim, and the unexpected death of the plaintiff does not remove the entire foundation for the agreement.

[27] The statement in *Stevens (Litigation Guardian of) v. Forney*, [1994] O.J. No. 407 (Gen. Div.) to the effect that court approval cannot be given after the death of a party under disability is not binding on this court and, in any event, was *obiter* as the court held that no contract had been formed prior to the infant plaintiff’s death.

[28] In the absence of any persuasive authority to the contrary, we hold that if it were necessary to do so, the settlement in favour of Rebecca Wu could be approved by the court after her death.

[29] Finally, we note that the considerations of fairness and promoting settlements favour enforcement. We see nothing unfair to the respondents in enforcing this settlement. They agreed to pay the sum specified in the minutes of settlement to settle Rebecca Wu’s accident benefits claim. When they decided to settle the claim for that amount, they were in possession of all the relevant facts respecting the claim and had ample opportunity to

assess all contingencies. There are no grounds such as mistake or misrepresentation for refusing to enforce the settlement.

CONCLUSION

[30] For these reasons, the appeal is allowed, the decision below is set aside, and in its place, there shall be judgment in the following terms:

1. A declaration that a valid settlement agreement was reached between Yuan Yuan Wu ((also known as Rebecca Wu) by her guardian of property, Zhi Chen, Zhi Chen personally, Xu-Qi Wu, Zurich Insurance Company and ING insurance Company of Canada on February 3, 2003, on the following terms;
 - (i) payment in the amount of \$3,000,000.00, plus \$90,000.00 for costs and \$10,000.00 for disbursements from Zurich Insurance Company and/or ING Insurance Company of Canada to Rebecca Wu, Zhi Chen and Xu-Qi Wu; and
 - (ii) settlement of all past, present and future accident benefit claims in connection with a motor vehicle accident that occurred on August 29, 1996.
2. An order and judgment requiring the respondents to pay the appellants the sum of \$3,100,000.00
3. Pre-judgment interest and post-judgment interest pursuant to the provisions of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended.

[31] The appellants are entitled to their costs of this appeal fixed at \$20,000 inclusive of disbursements and GST. If the parties are unable to agree as to the costs before the application judge, we will receive brief written submissions in that regard.

“J.I. Laskin J.A.”
“Robert J. Sharpe J.A.”
“J. MacFarland J.A.”

RELEASED: May 17, 2006