Book v. Cociardi, CITATION: 2022 ONSC 3125
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SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Brandon Book, Phillip Book and Marcia Book, plaintiffs

AND: Augustin Cociardi, defendant

AND: Rebecca Wissenz, affected person with leave to intervene

BEFORE: Mr Justice Ramsay

COUNSEL: Aron Zaltz for the plaintiffs; Kenneth J. Raddatz for the defendant; Jillian Van Allen for Rebecca Wissenz

HEARD: May 16, 2022 at Hamilton and May 18, 19, 20, 24 and 25, 2022 at Hamilton by videoconference

ENDORSEMENT

[1] The plaintiffs move to set aside the order of the Registrar which dismissed the action on consent. If the dismissal is set aside, they move to appoint a litigation guardian for Brandon Book. A trial of the issue was directed under Rule 37.13(2)(b). An order has been made under Rule 13.01 giving Rebecca Wissenz leave to intervene. The plaintiffs have filed an action against Ms Wissenz for solicitor's negligence. In that action Brandon has a litigation guardian. I refer to Brandon by his first name because "Mr Book" could also refer to his father.

[2] Brandon Book was injured in a car accident on September 15, 2012. On August 21, 2013 he and his parents retained Rebecca Wissenz. On August 20, 2014 a statement of claim was issued in the name of Brandon and his parents as plaintiffs. The defendant issued a statement of defence. Brandon was examined for discovery on April 9, 2015.

[3] On September 11, 2015 the parties agreed to settle the action for payment of approximately $231,000, which resulted in Brandon receiving a cheque for $150,000 after deductions for fees and other expenses. His parents received nothing. On September 29, 2015 the Registrar dismissed the action on consent. Brandon and his parents now move to set aside the dismissal on the ground that when Brandon settled the action, he was a person under disability within the meaning of Rule 7.08, and that with respect to his parents the settlement was unconscionable and improvident.

[4] The plaintiffs called the evidence of Brandon's father, Phillip Book, Brandon's psychiatrist, Dr Archie, and Dr Schabort, the family doctor. They also called Alanna Kaye,

an expert on capacity to manage property. The defendant called the evidence of one expert. Rebecca Wissenz filed her own affidavit, upon which she was cross-examined before a special examiner. She appended the transcript of Brandon's examination for discovery to her affidavit as an exhibit.

[5] After the present action was settled Brandon's insurance company settled his accident benefits claim on the basis of a $200,000 payment and a structured plan that will pay him $2,250 a month until age 65. According to his father, Brandon still has $30,000 of that settlement in investments.

[6] Rule 7.08 speaks of a person under disability. The applicable definition of disability is defined in Rule 1.03:

> "disability", where used in respect of a person, means that the person is, …
>
> (b) mentally incapable within the meaning of section 6 or 45 of the Substitute Decisions Act, 1992 in respect of an issue in the proceeding, whether the person has a guardian or not …

[7] The *Substitute Decisions Act, 1992* provides:

> **6** A person is incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his or her property or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.
>
> **45** A person is incapable of personal care if the person is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

[8] Whether Brandon was a person under disability, then, depends on whether he was able to understand, or perceive the meaning of, information that is relevant to making the decision to settle the action and able to appreciate the reasonably foreseeable consequences of a decision to settle or not to settle. See *Starson v. Swayze*, 2003 SCC 32 with respect to the test in the *Health Care Consent Act, 1996*, which is expressed in the same terms as the test in sections 6 and 45 of the *Substitute Decisions Act*.

[9] Rule 7.08 provides:

> **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.

> (2) Judgment may not be obtained on consent in favour of or against a party under disability without the approval of a judge.

If Brandon was under disability, must the settlement be set aside?

[10] Before deciding whether Brandon was a person under disability I consider whether the relief he seeks is available in either event. The relevant circumstances are that the money was paid, the action was dismissed, and Brandon spent the money and cannot pay it back. He proposes that I set aside the dismissal and order him to provide security for re-payment in the form of orders or agreements assigning to the defendant the first $231,000 that he recovers from Rebecca Wissenz in his action against her and an order deducting the $231,000 from any judgment given him in the present action.

[11] The proposed security is hardly comparable to the value of $231,000 in cash, which is what the defendant gave up as his part of the bargain.

[12] First, what is the effect of Rule 7.08? The plaintiffs submit that if Brandon was under disability, the settlement is void. They cite in support an unreported case, *Korczynski v. Barragan*, December 2, 2010. I have been given a transcript entitled "draft ruling." In that case, the plaintiff was knocked down by a car while jaywalking and suffered a head injury. A statement of claim was issued without a litigation guardian. The plaintiff settled for $250,000. The action was dismissed on consent. The plaintiff was subsequently declared incapable under the *Substitute Decisions Act, 1992*. He then moved to set aside the settlement and the dismissal of the action.

[13] Herold J. set aside the settlement and the dismissal. He held that because the plaintiff was under disability at the time of the settlement, Rule 7.08 provided that the settlement was void. The fact that counsel for the defendant did not know about the disability was held to be irrelevant. Herold J. set aside the dismissal of the action and ordered the plaintiff to pay back what he could, and to provide security for the rest.

[14] I do not propose to follow this decision. An oral draft ruling is not necessarily intended as a precedent. But if it is a precedent I think that it is plainly wrong.

[15] First, Rule 7.08 does not say anything about an unapproved settlement being void. It says that a settlement with a person under disability "is not binding" on the person without approval of a judge. It further provides that without approval of a judge, judgment may not be obtained on consent for or against the party under disability.

[16] Here, no one is seeking to enforce the settlement, and no one is seeking judgment against Brandon Book. The contract has been executed. The defendant paid the money, the plaintiffs consented to the dismissal of the action and the action was dismissed.

[17] Second, in *Scherer v. Paletta*, [1966] 2 O.R. 524, the Court of Appeal said:

> A solicitor whose retainer is established in the particular proceedings may bind his client by a compromise of these

> proceedings unless his client has limited his authority and the opposing side has knowledge of the limitation, subject always to the discretionary power of the Court, if its intervention by the making of an order is required, to inquire into the circumstances and grant or withhold its intervention if it sees fit; and, subject also to the disability of the client. It follows accordingly, that while a solicitor or counsel may have apparent authority to bind and contract his client to a particular compromise, neither solicitor nor counsel have power to bind the Court to act in a particular way, so that, if the compromise is one that involves the Court in making an order, the want of authority may be brought to the notice of the Court at any time before the grant of its intervention is perfected and the Court may refuse to permit the order to be perfected. If, however, the parties are of full age and capacity, the Court, in practice, where there is no dispute as to the fact that a retainer exists, and no dispute as to the terms agreed upon between the solicitors, does not embark upon any inquiry as to the limitation of authority imposed by the client upon the solicitor.

[18] I take from this that even if counsel for the defendant did not know about the disability, the court can refuse to honour a settlement that involves making a court order if the matter is brought to the court's attention before it is granted. If a party is not of full age and capacity, the court can embark upon an inquiry before making an order. It does not follow that the court must set aside an order if the matter is brought to its attention after the order has been made.

[19] After the order dismissing the action is made, in my opinion it should be set aside only if the moving party demonstrates circumstances which warrant deviation from the fundamental principle that a final judgment, unless appealed, marks the end of the litigation line: *Mohammed v. York Fire and Casualty Insurance Co.* (2006), 79 O.R. (2d) 354 (C.A.); *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 41 O.R. (3d) 257 (C.A.)

[20] If Brandon was under disability, that would be a factor militating in favour of setting aside the order of dismissal. But to me, the following circumstances would in any event militate against setting it aside:

a. The plaintiffs are not prepared to pay the money back; in effect, they only want part of the settlement set aside.

b. The defendant had no knowledge of any issue with respect to disability and settled the matter in good faith.

c. Phillip Book admits pushing for the settlement while of the opinion that his son could not handle money.

d. It does not appear that the settlement was unfair or unreasonable.

e. The motion was not brought until October 30, 2019, four years after the settlement.

[21] On balance, I think that the latter factors outweigh the former factor. Whether Brandon was under disability or not, the justice of the case does not call for deviation from the principle that a final judgment, unless appealed, marks the end of the line. Defendants will be discouraged from settling in good faith if the settlement can be set aside for reasons of which they have no knowledge and over which they have no control, particularly if they are not entitled to get their money back. The main advantages to settling, finality and limiting exposure, will be gone. I would dismiss the motion on this basis alone.

Disability

[22] In addition, I would dismiss the motion because I find on the balance of probabilities that Brandon was not a person under disability when he made the settlement.

The evidence – Rebecca Wissenz

[23] Rebecca Wissenz is a very experienced lawyer who specializes in personal injury work for plaintiffs. She has personal and professional experience with persons who have mental illness and with the implications of mental illness for capacity or disability.

[24] Ms Wissenz held up very well under cross-examination. I did not have the benefit of seeing her in person, but her evidence was consistent, cogent and plausible. It rang true. She made the point that mental illness does not disable every mentally ill person from making decisions always and forever. She was aware that Brandon had suffered psychotic episodes in 2015. Psychotic episodes are just that – episodic. A person may be incapable for a time, but then regain his capacity later. Ms Wissenz visited Brandon in the hospital. She recognized that she would not take instructions from him at that time. At other times, however, she had no reason to doubt his capacity.

[25] Ms Wissenz's evidence is supported by Brandon's deposition on examination for discovery. The test for testimonial capacity is not the same as the test for capacity to make decisions within the meaning of section 6 of the *Substitute Decisions Act, 1992*, but Brandon's answers to the 434 questions did not suggest any confusion or lack of understanding.

[26] I also note that in connection with discussions between Ms Wissenz and Brandon Book in the absence of his parents, Ms Wissenz's evidence is uncontradicted. Brandon did not testify. In his out of court statements he professes no memory of the contents of these discussions.

[27] I found Ms Wissenz to be a reliable witness. I believe her testimony.

Phillip Book

[28] Phillip Book was not so impressive, in chief or on cross-examination. He seemed at times unwilling to give a straightforward answer without repeated, focused questioning. His

essential contentions are that Brandon was forgetful, he did not know what to do with his money, he terrified his parents with his unreasonable outbursts and Ms Wissenz consulted only Brandon, and never his parents, with respect to the settlement of the action.

[29] The last contention rings false. It would not have been to Ms Wissenz's advantage to exclude Brandon's parents from settlement discussions to which they were parties. It would also be inconsistent with Mr Book's admitted active involvement with Brandon's criminal lawyer in negotiating the settlement of Brandon's criminal case.

[30] Ms Wissenz deposed that she had a lengthy discussion about settlement with all three parties. Ms Wissenz favoured a structured settlement, but Brandon wanted cash. She went along with that because his plans seemed reasonable. He wanted to move from Mount Hope to downtown Hamilton and get his own place to live there, closer to facilities and amenities. He wanted to go to school for vocational training. I accept Ms Wissenz's account of the settlement discussions. To me, the fact that Brandon could articulate sensible plans for his money is evidence that that he had the capacity to appreciate the consequences of decisions.

[31] The parents insisted that any money they might have got under the *Family Law Act* claims should go to Brandon. Because of that, and Brandon's reasonable plans, Ms Wissenz accepted their instructions to settle the matter on the basis of a cash payment to Brandon. I believe her on this point, and I do not believe Phillip Book.

[32] Phillip Book testified that he does not know to this day that he is a plaintiff in the present action. I do not see how that can be true. He had to hire a lawyer and instruct him to bring the present motion. The motion seeks the setting aside of the dismissal of his action as well as Brandon's.

[33] After the settlement was executed, Mr Book kept pestering Ms Wissenz about whether more money was coming to the extent that she asked Brandon to tell him to stop calling. What I take from this is that Mr Book was never serious about following through with the deal.

[34] Mr Book seems to have had intense feelings about the claims from early on. Dr Parmar did an assessment of Brandon for the purposes of an OCF-3 (an accident benefits form) in October 2012. Dr Schabort, Dr Parmar's supervisor, testified that on October 22, 2012 she requested an independent examination of Brandon because Phillip Book disagreed with Dr Parmar's OCF-3 assessment. She testified that Phillip Book screamed at Dr Parmar that he would sue him.

The treating doctors

[35] Dr Schabort was the supervising physician at the family medicine clinic that Brandon attended from 2012 to January 2015. Dr Archie is a psychiatrist. She first met Brandon in February 2015. She treated him between then and June of 2015. Brandon and his parents had reported that Brandon had had paranoid ideation, delusional thinking, non-compliance with medication and problems with insight and functioning. He was treated in hospital and then as

an outpatient. Dr Archie did not assess Brandon's capacity to manage his property or cause an assessment to be done.

[36] On April 10, 2015 Brandon was admitted to hospital for 72 hours on a Form 1 under the *Mental Health Act* because of suicidal ideation. On his release he continued as an outpatient until June 2015. The doctors prescribed medicine, to which Brandon responded, but Brandon declined to continue. He discharged himself from the outpatient programme against medical advice.

[37] Dr Archie's discharge diagnoses were as follows:

> DISCHARGE DIAGNOSES: Acquired brain injury, psychosis NOS [not otherwise specified], posttraumatic stress disorder, generalized anxiety, adjustment disorder, cluster B traits [traits of certain personality disorders characterized by dramatic, overly emotional or unpredictable thinking or behaviour], constipation, query carpal tunnel syndrome.

[38] Dr Archie also noted a propensity for paranoia, anxiety symptoms, PTSD-type symptoms, a propensity to depression, poor impulse control and concentration difficulties.

[39] Dr Archie's records make no mention of any command hallucinations to give money away. I do not believe that Brandon suffered from such hallucinations.

The experts

[40] The plaintiffs called Alanna Kaye, a psychiatric nurse and designated capacity assessor within the meaning of s.1(1) of the *Substitute Decisions Act, 1992*. She gave expert opinion that Brandon likely remained a person under disability in September 2015.

[41] The defendant called Peter Cook, a psychiatrist. He is not a designated capacity assessor under the *Substitute Decisions Act*, but as a physician he is qualified to assess patients for capacity to manage property under section 54 of the *Mental Health Act* and he has experience in conducting such assessments. Dr Cook gave expert opinion that Brandon was capable of instructing counsel and understanding and appreciating the consequences of the settlement of September 11, 2015. On the balance of probabilities, he was not a person under disability in the sense of the Rule.

[42] As to whether Brandon was a person under disability in September 2015, I accept the opinion of Dr Cook over the opinion of Ms Kaye for the following reasons:

a. He is more qualified than Ms Kaye.

b. His opinion is more in line with the observations of Rebecca Wissenz, who I found to be reliable.

c. Ms Kaye's opinion relies on the observations of Phillip Book, who I found to be unreliable.

d. Dr Cook's opinion is supported by neuropsychological assessments completed in 2014 by Dr Lad and Dr Valentin, which are largely consistent with the Montreal Cognitive Assessment (MoCA) performed in May 2015. These tests all suggested a mild cognitive impairment.

e. Ms Kaye did not interview Brandon until 2019, by which time four years had elapsed since the settlement.

f. Ms Kaye relied on her interviews with Brandon and Phillip Book, which were conducted at a time when both knew that they were challenging the validity of the settlement.

g. Ms Kaye gave weight to Brandon's contention that he was subject to command hallucinations to give away money and I have found that he was not.

[43] Dr Lad's assessment of June 2014 at Hamilton General Hospital was based on psychological testing done over two sessions amounting to five and half hours. Its findings were consistent with an assessment that was performed by Dr Valentin in September 2014. These tests are more extensive than the Folstein screening tool used by Ms Kaye, which, like the MoCA, consists of a short questionnaire. The results of the Folstein were not inconsistent with the neurological assessments of 2014 and the Montreal Cognitive Assessment of 2015 in any event. They all suggested a mild cognitive impairment. Ms Kaye referred to the neurological assessments, but I agree with Dr Cook that her opinion did not reflect their effect. Ms Kaye limited their relevance to the time when the neurocognitive testing took place. Dr Cook, however, thought that the two neurological assessments of 2014, the MoCA of 2015 and the Folstein of 2019 demonstrated a certain stability in Brandon's capacity. I believe him.

[44] I accept Dr Cook's opinion that Brandon experienced mild traumatic brain injury with psychological and behavioural consequences that affect his social and vocational abilities. The data from the testing performed close to the time of settlement showed that Brandon had the attention, memory and executive functioning capacity to consider relevant information and appreciate his options. Brandon functioned cognitively in the low average range, which falls within the normal spectrum.

[45] Dr Cook testified that the finding of catastrophic impairment by Dr Chu in 2015 is not inconsistent with his opinion. Capacity is specific to the activity in question. In other words, Brandon's inability to so such things as hold a job and a steady relationship and live on his own do not equate to an inability to understand the facts that are relevant to settling an action and to appreciate the consequences of settling or not settling.

[46] I conclude that Brandon had trouble keeping a job and a girlfriend. He was not good with his money. But he was able to understand the information relevant to the settlement and to appreciate the consequences of accepting it. In particular, I think he was able to understand

that by settling he would be getting a certain amount of money sooner and that by not settling he could get more money later but might not. I think he also appreciated the consequences of a sensible application of the funds (one's own apartment and job training) and a spendthrift application (gambling, giving away money to friends). Brandon himself told Ms Postoff, another assessor, in 2017, "I need to put a big chunk away … I blew the money last time. I won't do that again." In his case, of course, the difference was not life and death. He was a young man with no dependants, and he knew that his parents would take care of him. Bad decisions are not necessarily the result of incapacity.

[47] I found the cross-examination of Dr Cook on his alleged lack of compliance with the prescribed guidelines for assessing capacity to be misplaced. Dr Cook was not conducting a capacity assessment. He was asked to give an opinion about the likelihood of Brandon's capacity seven years ago, which requires application of his expertise in psychiatry to the available evidence. An interview of Brandon by Dr Cook would have been no more useful than Ms Kaye's.

[48] On the preponderance of the evidence I find that Brandon was not a person under disability within the meaning of Rule 7.08 when he gave instructions to accept the settlement and when he executed it. Certainly he has not proven the contrary.

The derivative claims

[49] Phillip and Marcia Book ask to set aside the dismissal of their actions on the basis that the settlement was unconscionable and improvident. Phillip Book says that he and Marcia were not properly advised by Ms Wissenz, but

a. I do not believe him; and

b. That is between them and Ms Wissenz and has nothing to do with the defendant, who was entitled to rely on Ms Wissenz's authority.

[50] The parents' argument that the settlement was unconscionable is based on their contention that they misapprehended Brandon's capacity. I find that they did not.

[51] Furthermore it has not been proven that the settlement was improvident. *Family Law Act* awards for injury to one's grown child are not usually substantial, and they are subject to a deductible under section 267.1(8) of the *Insurance Act*. I accept the evidence of Rebecca Wissenz that Mr and Mrs Book wanted whatever amount might be attributed to their claims to be paid to Brandon. There is no basis for setting aside the dismissal of the action as far as it relates to them.

Conclusion

[52] The motion is dismissed. The parties may make written submissions to costs not exceeding three pages in length, to which a bill of costs and any offers to settle may be appended, the defendant and Ms Wissenz within 7 days and the plaintiffs within 7 further days, with no right of reply.

J.A. Ramsay J.

Date: 20220526