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**CONFIDENTIAL**



**COURT OF APPEALS  
SECOND DISTRICT OF TEXAS  
FORT WORTH**

**NO. 2-97-163-CV**

JOSEPHINE GRILLO, AS NEXT  
FRIEND FOR CHRISTINA GRILLO,  
A MINOR

APPELLANT

V.

MICHAEL J. HENRY AND JOSE,  
HENRY & BRANTLEY

APPELLEES

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FROM THE 96<sup>TH</sup> DISTRICT COURT OF TARRANT COUNTY  
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**OPINION**  
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**I. INTRODUCTION**

In a suit against a guardian ad litem, the trial court granted summary judgment in favor of the ad litem. Because the summary judgment cannot be supported on any of the ad litem's grounds, we reverse and remand the trial court's judgment as to the claims grounded in the ad litem's failure to recommend a structured settlement.

## II. BACKGROUND FACTS

Christina Grillo was severely brain damaged when she was born in 1982. Josephine Grillo, Christina's mother, hired Tom L. Pettiette, T.E. Swate, and the firm of Hardy, Milutin & Johns to sue Harris Methodist Hospital for medical negligence. The trial court, based on Grillo's motion, appointed Michael J. Henry to serve as Christina's guardian ad litem.<sup>1</sup>

The parties settled after Harris Hospital agreed to pay \$2.5 million. Under an agreed judgment, the settlement funds were deposited into the court's registry for later disbursement, and Henry received \$26,844.35 as his guardian ad litem fee. The court held a hearing regarding how the funds should be distributed. Harris Hospital offered to settle Grillo's medical malpractice suit through a structured settlement with qualified assignment. Grillo testified that she wanted Henry to recommend the creation of a chapter 142 trust<sup>2</sup> and the purchase of six annuities. Henry recommended Grillo's option to the trial court. The trial court later disbursed the settlement funds to award (1) \$700,000 to Merrill Lynch for a chapter 142 trust for Christina's benefit, (2) \$300,000 to Merrill Lynch to buy six annuities with Christina as beneficiary, (3) \$413,271.05 to Grillo, and (4) \$20,000 to John Juniker, Christina's father.

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<sup>1</sup>See TEX. R. CIV. P. 173.

<sup>2</sup>TEX. PROP. CODE ANN. § 142.005 (Vernon 1995 & Supp. 1999).

Pettiette received \$598,328.95 as attorney's fees, and Swate received \$468,400 as attorney's fees. The remaining amounts were distributed to the trust.

Grillo, as next friend for Christina, sued Henry and his law firm Jose, Henry & Brantley (collectively, "Henry") for acts and omissions arising out of Henry's service as guardian ad litem for Christina in the medical malpractice case. Grillo also named as defendants Swate, Pettiette, and Hardy, Milutin & Johns. She raised claims for fraud, negligence, gross negligence, breach of contract, violations of the deceptive trade practices act, forfeiture, breach of fiduciary duty, and constructive fraud. The basis for her claims against Henry was that Henry did not protect Christina's interests by failing to investigate, explain, and recommend a settlement that was structured to maximize the benefits of the settlement available to Christina or to maximize the actual dollars that could have been available for Christina's ongoing medical needs. In other words, Grillo was seeking the settlement benefits that she claimed were lost to Christina through the settlement structure recommended by Henry.

Henry moved for summary judgment, arguing that (1) he had absolute immunity for his actions as a court-appointed guardian ad litem, (2) he did not breach any duty owed to Christina, and (3) his acts or omissions were not a

proximate or producing cause of any damage to Christina.<sup>3</sup> The trial court granted a general, partial summary judgment in favor of Henry. Appellant nonsuited her claims against Henry and the other defendants, and the trial court entered an order dismissing Grillo's remaining claims against Henry with prejudice and dismissing the claims against the other defendants without prejudice. The trial court then severed Grillo's claims against Henry from the claims against the other defendants. Grillo appeals the trial court's summary judgment on her claims for negligence, breach of fiduciary duty, and constructive fraud.

### III. STANDARD OF REVIEW

When reviewing a summary judgment granted on general grounds, we consider whether any theories set forth in the motion will support the summary judgment. See *Harwell v. State Farm Mut. Auto. Ins. Co.*, 896 S.W.2d 170, 173 (Tex. 1995). We review the summary judgment granted in this case under the familiar standard: (1) the movant for summary judgment has the burden of showing that there is no issue of material fact and that it is entitled to judgment

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<sup>3</sup>Henry also moved for summary judgment on the ground that (1) there was no attorney-client relationship with Christina, (2) Christina was not a consumer under the DTPA, and (3) Christina had no claim for forfeiture. On appeal, Grillo does not challenge the summary judgment as to the DTPA and forfeiture causes of action, or as to the existence of an attorney-client relationship.

as a matter of law; (2) in deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the nonmovants will be taken as true; and (3) every reasonable inference must be indulged in favor of the nonmovants and any doubts resolved in their favor. *See Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985).

A defendant is entitled to summary judgment on an affirmative defense if the defendant conclusively proves all the elements of the affirmative defense as a matter of law such that there is no genuine issue of material fact. *See Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995). To accomplish this, the defendant-movant must present summary judgment evidence that establishes each element of the affirmative defense. *See Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 121 (Tex. 1996).

#### IV. DUTY OF AD LITEM TO EXPLAIN

We first address Grillo's allegations that Henry had a duty to explain Harris Hospital's offer to her. A guardian ad litem and a minor have a formal relationship of confidence, and the ad litem is an officer appointed by the court to assist in properly protecting the child's interests. *See American Gen. Fire & Cas. Co. v. Vandewater*, 907 S.W.2d 491, 493 n.2 (Tex. 1995). The ad litem has a duty to conduct a thorough investigation and evaluate: (1) the damages suffered by the minor, (2) the adequacy of the settlement, (3) the proposed

apportionment of settlement proceeds among the interested parties, (4) the proposed disbursement of the settlement proceeds, and (5) the amount of attorney's fees charged by the minor's attorney. *See Delcourt v. Silverman*, 919 S.W.2d 777, 784 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1996, writ denied), *cert. denied*, 117 S. Ct. 1698 (1997). There is no duty imposed on an ad litem to explain his actions to the minor's parents. Accordingly, we hold that, as a matter of law, Henry had no duty to explain to Grillo Harris Hospital's offer.

#### V. JUDICIAL IMMUNITY

Grillo first challenges the summary judgment by arguing that Henry was not entitled to judicial immunity by virtue of his position as Christina's guardian ad litem.

The Fifth Court of Appeals has previously found that a rule 173 guardian ad litem is not protected by judicial immunity because to do so would give the minor no recourse for an inadequate representation of her interests. *See Byrd v. Woodruff*, 891 S.W.2d 689, 708 (Tex. App.—Dallas 1994, writ dismissed by agreement). The reason for this is because when a guardian ad litem is appointed based on a possible conflict between the next friend and the minor and the case settles, the resulting settlement agreement is binding on the minor. *See id*; 6 TEXAS TORTS & REMEDIES § 103.04[1][b] (J. Hadley Edgar, Jr. & James B. Sales eds., 1998); 25 B. THOMAS McELROY, TEXAS PRACTICE: CIVIL PRE-TRIAL PROCEDURE

§ 1329 (1980); see also *Howell v. Fifth Court of Appeals*, 689 S.W.2d 396, 398 (Tex. 1985) (orig. proceeding) (Gonzalez, J. dissenting) (recognizing that judgment, entered when there is a conflict and minor is represented by only a next friend, is not binding on minor). In other words, a guardian ad litem, who has replaced the next friend under rule 173, can be held liable in a civil action for damages resulting from a breach of his duties as a personal representative of the minor. See *Byrd*, 891 S.W.2d at 708.

For these reasons, we decline Henry's invitation to disregard *Byrd* and extend judicial immunity to a rule 173 guardian ad litem. Accordingly, the doctrine of derived judicial immunity was not a proper ground for summary judgment, and we sustain Grillo's second point.

## VI. BREACH OF FIDUCIARY DUTY

Grillo concedes that a constructive fraud claim is dependent upon a breach of fiduciary duty; thus, we now focus on Henry's fiduciary duty, which would also encompass any negligence claims. Henry does not dispute that he owed Christina a fiduciary duty. See generally *id.* at 706-08. What Henry does argue is that he did not breach this fiduciary duty by failing to recommend a structured settlement.



#### A. COMPETENCE OF GRILLO'S SUMMARY JUDGMENT EVIDENCE

Grillo relied on the affidavits of Ronald Cresswell and Rockne W. Onstad to rebut Henry's motion for summary judgment and raise a fact issue on whether Henry breached his fiduciary duty to recommend the structured settlement to the trial court. Before we begin our examination of Grillo's arguments, we will address Henry's attacks on the competence of Grillo's summary judgment evidence. Henry specifically argues that the affidavits of Grillo's two experts are insufficient to raise a fact issue.

Cresswell stated that Henry had a duty to explore the structured settlement option and that failure to do so would be "a breach of a standard of care" or "negligence." He further asserted that Henry should have recommended the structured settlement to the trial court because the Harris Hospital offer would have given Christina a "significantly greater economic benefit" than the offer recommended to the trial court. Henry argues that this affidavit is insufficient to raise a fact issue because: (1) it does not state that any alleged failure would have been a breach of a fiduciary duty and (2) the assertion regarding greater economic benefits is a mere legal conclusion. But Cresswell specified the duty Henry had as a guardian ad litem and then stated that a failure by the ad litem in these duties would be a breach of the standard of care. This standard of care necessarily refers to that imposed on a guardian

ad litem. Further, Cresswell's economic benefit statement was based upon a "reliable foundation" — his review of the calculations and report made by Vincent P. Apilado, a finance professor at the University of Texas at Arlington, who had reviewed the facts regarding Christina's settlement. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556-57 (Tex. 1995). Thus, Cresswell's affidavit was competent summary judgment evidence. See TEX. R. CIV. P. 166a(c).

Onstad stated that Henry breached the fiduciary duty owed to Christina by failing to explain any structured settlement proposal offer and by failing to recommend such a settlement option to the trial court. Henry states that this affidavit is not competent to create a fact issue on whether he breached any duty to Christina because Onstad states that Henry had an obligation to explain or recommend a structured settlement *only if* it would have provided maximum benefits for Christina. But Onstad also states that in the "number of cases" he has handled on behalf of brain-damaged children, none were settled without the use of a structured settlement with qualified assignments. He further asserts that it is a breach of an ad litem's fiduciary duty not to examine all options regarding single premium annuities. This affidavit is also competent summary judgment evidence.

In sum, we find no merit to Henry's arguments raising the competency of Grillo's summary judgment evidence. We will now turn our attention to whether Grillo's evidence raised a material fact issue.

#### B. MATERIAL FACT ISSUE

In reviewing these expert affidavits, we are to determine whether they present some probative evidence of the facts at issue. *See Ryland Group, Inc.*, 924 S.W.2d at 122. As we pointed out above, Cresswell stated that Henry breached his duty to recommend Harris Hospital's offer because that offer would have resulted in a "greater economic benefit" to Christina. Onstad also asserted that Henry breached his fiduciary duty by not seeking to maximize the settlement benefits through Harris Hospital's offer.

We hold that this evidence is sufficient to raise a fact issue regarding Henry's breach of his fiduciary duty owed to Christina and was, thus, some probative evidence of the facts at issue. Accordingly, Henry's assertion that there was no evidence of a breach of his fiduciary duty was not a proper ground for summary judgment, and we sustain point three.

#### VII. PROXIMATE CAUSE

In her fourth point, Grillo argues that the trial court was incorrect to grant summary judgment on the ground that no act or omission by Henry was a producing or proximate cause of damage to Christina. Viewed in the light most

favorable to Grillo, the summary judgment evidence shows that a structured settlement — such as the one offered by Harris Hospital — would have given Christina substantially greater benefits, which would have been excludable from taxable income.

Harris Hospital offered to settle Christina's claims for \$1,267,579 through a structured settlement. Grillo stated in her affidavit that the current settlement structure gives Christina less than 1/20 of the value of what she could have received under Harris Hospital's offer. Cresswell asserted in his affidavit that with a structured settlement, Christina would have received a greater economic benefit, which would have better served her interests. Thus, Henry's assertion that there was no evidence that any breach by Henry was the proximate cause of Christina's damages was not a proper ground for summary judgment, and we sustain point four.

#### VIII. COSTS

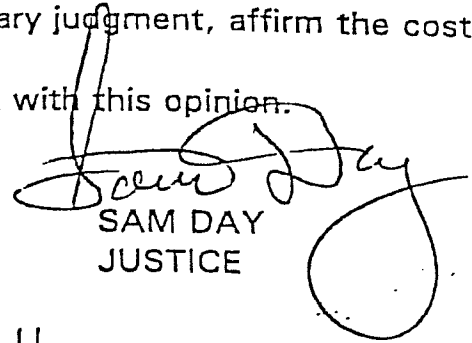
Finally, Grillo argues that the trial court erred in taxing all costs, including the guardian ad litem fees, against her. She argues that if we hold the summary judgment to be erroneous, costs cannot be assessed against her because Henry would not be the prevailing party. *See* TEX. R. CIV. P. 131. But Grillo nonsuited her claims after the summary judgment was granted; thus, the

costs could have been permissibly awarded based on the nonsuit. *See id.* 162.

We overrule point five.

### IX. CONCLUSION

We hold that summary judgment was improper on all grounds raised by Henry regarding Grillo's claims that Henry breached his duty by failing to recommend a structured settlement to the trial court. We sustain point one. We affirm the trial court's cost award in Henry's favor based on rule 162. Accordingly, we reverse the trial court's summary judgment, affirm the costs awards, and remand for proceedings consistent with this opinion.



SAM DAY  
JUSTICE

PANEL B: DAY, DAUPHINOT, and BRIGHAM, JJ.

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