

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

CLAUDETTE K. KING, guardian for	)	CASE NO. SX-09-CV-467
ARIANNA I. MODESTE, a minor,	)	
	)	
Plaintiffs,	)	ACTION FOR PERSONAL INJURY AND
	)	DAMAGES
v.	)	
	)	
KMART CORPORATION,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM

BEFORE THE COURT is a Joint Motion for Authority to Compromise Litigated Controversy, to Pay Legal Cost, and for the Appointment of a Special Guardian ad Litem. For the reasons stated below, the Court must deny the motion for the moment.

I. BACKGROUND

Plaintiff Claudette E. King commenced this action individually and as legal guardian for Plaintiff Arianna I. Modeste, her eight-year old granddaughter, for personal injuries Modeste sustained in April 2009 while visiting Defendant Kmart Corporation's department store in Frederiksted, St. Croix, U.S. Virgin Islands. (Compl. ¶¶ 3, 6, filed Sept. 29, 2009. *See also id.* at Ex. 1 ("Order, entered Aug. 14, 2009, *In re Guardianship of Modeste*, SX-09-GU-038 (V.I. Super. Ct.)).) While in the store, "a metal clothing-rack collapsed upon . . . Modeste, and knocked her to the floor." *Id.* ¶ 7. Plaintiffs alleged that "the clothing-rack was overloaded with merchandise and, as such, created a dangerous condition for its customers and invitees" *Id.* ¶ 9. Modeste suffered "severe contusions and abrasions on or about the left side of her body from the waist down to her leg, causing bodily impairment, physical pain and mental anguish" *Id.* ¶ 13. On Modeste's behalf, King sought damages for the minor's injuries. *Id.* ¶ 16. Individually, King sought to recover the costs of medical expenses and the time and care needed to care for Modeste and damages for loss of consortium and companionship. *Id.* ¶¶ 15, 17-18.

Defendant appeared and filed its Answer. (Answer, filed Oct. 27, 2009.) The parties then began discovery. Approximately a year later, Plaintiffs, through counsel, served

Defendant with a settlement demand, asking for \$30,000.00, \$2,500.00 for each of the twelve months Modeste suffered. (*See* Jt. Mot., Ex. 2 at 1 (settlement demand (July 8, 2010)), filed Aug. 13, 2010.) Defendant countered for \$20,000.00. (*See* Def. Resp. to Pl. Pet. to Approve Settlement 1, filed Sept. 7, 2010.) Plaintiffs moved for court approval to settle Modeste's claims against Defendant at that amount. (Jt. Mot. 1.) Plaintiffs also move for appointment of a special guardian ad litem to invest and manage the proceeds of Modeste's settlement until she reaches the age of majority.

II. SETTLEMENT OF MINOR'S CLAIMS

Minors lack capacity to sue or be sued and therefore must be represented in litigation by "a legally authorized person, either a parent, guardian, 'next friend,' or guardian ad litem." 42 Am. Jur. 2d Infants § 148 (2010). Such persons may participate in settlement negotiations. *Id.* § 175 ("While a next friend, guardian ad litem, or other duly appointed person acting for an infant in a litigation may negotiate for a compromise or settlement of the litigation, a natural guardian, without a court appointment, cannot enter into a binding settlement of an infant's claim absent court approval."). But "parties may not compromise (settle) claims involving minors . . . without court approval." 53 Am. Jur. Trials 1, § 311 (1995).

When considering settlements involving minors, the court "must independently investigate and evaluate any compromise or settlement of a minor's claims to assure itself that the minor's interests are protected, even if the settlement has been recommended or negotiated by the minor's parent or guardian ad litem." *Rojas v. Two/Morrow Ideas Enters., Inc.*, 53 V.I. 684, 694 (2010) (internal quotation and citations omitted). In reviewing the materials submitted in support of settling a minor's claim, courts must consider: (1) the minor's injuries; (2) the tortfeasor's funds; and (3) where multiple claimants are involved, the fairness of the minor's portion. *Id.* at 694-95 (quoting 53 Am. Jur. Trials 1, § 313 (1995)). Each will be examined and discussed below.

a. The Minor's Injuries

First, the Court must consider the minor's injuries, as shown by supporting documentation.¹ Courts "look closely at the offer of settlement to determine if the amount is

¹ A petition for compromise of a minor's claim should show, *inter alia*, the following:

- Age and sex of the minor

justified” *Id.* at 695 (quoting 53 Am. Jur. Trials 1, § 313 (1995)). “Settlement should be proportional to injuries sustained by the minor.” *Id.* (quoting 53 Am. Jur. Trials 1, § 313 (1995)). Here, the Court does not have any objective documentation regarding the extent of Modeste’s injuries. No medical reports or medical bills were provided. No affidavit was submitted. The only source of information before the Court detailing Modeste’s injuries is a settlement demand letter Plaintiffs’ counsel sent to Defendant’s counsel, which was attached as an exhibit to the Joint Motion. (*See* Jt. Mot., Ex. 2.) According to that document, Modeste “suffered an injury to the left side, waist down and leg” *Id.* at Ex. 2, p. 1. Immediately afterward, Modeste sought treatment at the Juan F. Luis Hospital on St. Croix. *Id.* A physician diagnosed Modeste “as having a contusion of the left leg.” *Id.* “Because of persistent pains to the left leg and hip,” Modeste required additional medical care. *Id.* At least three different doctors treated Modeste’s injuries through 2009 and early 2010. *Id.* at Ex. 2, p. 1-2. She walked with crutches for approximately six weeks after the incident. *Id.* at Ex. 2, p. 1. She did not fully recover until “the Spring of 2010” *Id.* at Ex. 2, p. 2. The incident occurred on April 2, 2009. (Compl. ¶ 6.) Modeste “experienced pain, discomfort, and lost [sic] of enjoyment of life for a minimum of 12 consecutive months” *Id.* at Ex. 2, p. 2.

Considering Modeste’s injuries, the length of her treatment, her age at the time of the incident, and her subsequent improvement, a \$20,000.00 settlement amount appears justified and proportional to her injuries. But without medical reports or bills, the Court has no independent basis to arrive at that conclusion. A settlement demand letter, by design, cannot

-
- Nature and extent of the injury giving rise to the claim, with sufficient particularity to inform the court whether the injury is permanent or temporary
 - Facts or events and circumstances out of which the claim or injury arose . . .
 - Accident report, if applicable
 - Medical reports showing diagnosis, treatment, and prognosis
 - Medical bills evidencing cost of treatment
 - Amount and terms of the settlement
 - Amount of litigation costs and expenses
 - Amount of attorney fees requested
 - Amount and nature of other payments requested by petitioner to be ordered by the court from settlement proceeds (e.g., medical bills or liens, repayment of parent’s expenses, etc.)
 - Proposed disbursement amounts of the settlement, including attorney fees and costs, other expenses, and net proceeds to the minor
 - Proposed disposition of funds to the minor

support an independent assessment. In addition, Plaintiffs have not explained whether Modeste's injuries were temporary or permanent. Plaintiffs did indicate that Modeste recovered by Spring 2010. In their Complaint, however, Plaintiffs alleged that "bodily impairment, physical pain and mental anguish . . . will, in reasonable probability, continue . . . in the future by reason of the nature and severity of the impact and [Modeste's] injuries." (Compl. ¶ 13.) Therefore, additional documentation showing the nature and extent of the minor's injuries is required for the Court to reach a final determination.

b. The Tortfeasor's Funds

Next, the Court must consider the tortfeasor's funds. "Where defendant tortfeasor is adequately insured to cover plaintiff's claims, defendant's assets do not generally concern the court." *Rojas*, 53 V.I. at 695 (quoting 53 Am. Jur. Trials 1, § 313 (1995)). "However, if, for example, defendant in an automobile accident is insured for \$15,000 and settlement is proposed at policy limits, but the minor's claim could be reasonably valued at \$50,000, counsel must adequately explain to the court why the \$15,000 settlement is appropriate." *Id.* (quoting 53 Am. Jur. Trials 1, § 313 (1995)). "Reasonable explanations include (a) that defendant has few, if any, reachable assets, (b) that the minor was contributorily negligent, or (c) that an early settlement at \$15,000 is in the best interests of the minor." *Id.* (quoting 53 Am. Jur. Trials 1, § 313 (1995)).

Here, neither Plaintiffs nor Defendant have addressed Defendant's funds vis-à-vis the settlement offer. Defendant stated in its Rule 26(a) disclosures that "KMART does not maintain primary insurance applicable to [Modeste's] claim." (Def. Init. Discl. 2, filed Feb. 1, 2010.) Thus, the proposed settlement here would not be at any policy limit. Additionally, neither Plaintiffs nor Defendant have indicated whether settlement reflects an offset for any contributory negligence. Defendant did raise that defense in its Answer. (Answer 3, filed Oct. 27, 2009.) The only information before the Court is King's counsel's statement that "[u]nder the facts and circumstances of this case, [King] believes, and so alleges, that it is within the best interest of the said minor that this personal injury matter be compromised and settled for the sum of \$20,000.00." (Jt. Mot. 3.) King did not file an affidavit in support, however. Therefore, additional documentation is necessary is necessary here.

c. Fairness of the Minor's Portion

Lastly, where other claimants are involved, the Court must consider the fairness of the portion of the minor's settlement. "In actions where there are multiple claimants, the court must ensure that the proportion of settlement proceeds awarded the petitioning minor is fair and representative." *Rojas*, 53 V.I. at 695 (quoting 53 Am. Jur. Trials 1, § 313 (1995)). Here, neither Plaintiffs nor Defendant have referenced King's individual claims. King commended this personal injury action on her own behalf and on behalf of Modeste. (Compl. ¶ 3.) She alleged loss of consortium. *Id.* ¶ 18. She sought compensatory and special damages personally and recovery of the costs she incurred for Modeste's medical expenses. *Id.* ¶¶ 15-18. However, King and Kmart have not voluntarily discontinued King's individual claims. King's medical expenses and costs incurred as legal guardian may not be recovered from Modeste's settlement. In their settlement demand letter, however, Plaintiffs' initial demand did cite King's out-of-pocket expenses. Thus, without knowing the status of King's individual claims, the Court is unable compare and evaluate the fairness to Modeste.

d. Conclusion

Having reviewed the pleadings and papers filed to date here, the Court finds it is unable at this time to approve the proposed settlement. Kmart's proposed settlement amount appears fair and reasonable to Modeste and proportionate to her injuries. But without supporting medical documentation and without knowing the status of King's individual claims, the Court cannot reach that final determination yet. Plaintiffs will be granted leave to file additional materials in support of their Motion.

III. APPOINTMENT OF GUARDIAN

Plaintiffs also move for appointment of "a *Special Guardian* to manage and protect the net proceeds . . . and preserve the same on behalf of [Modeste] until she attains the age of majority." (Jot. Mot. 3 (emphasis in original).) As King is "legally responsible for the support of the minor," she is ineligible to administer the proceeds of any settlement Modeste might receive. V.I. Code Ann. tit. 15, § 823 (1996).² Accordingly, a guardian is required.

² The Court notes that Plaintiffs' moved for appointment of a guardian in 2009. Subsequently, however, the law governing guardianships has changed. In 2009, the Legislature of the Virgin Islands repealed Chapter 51 "Guardians and Wards" of Title 15 in its entirety. Act No. 7150, 2009 V.I. Sess. L. p. 420, 421 ("Title 15 Virgin Islands Code chapters 1 through 51; and chapter and 63 [sic] are repealed . . ."). In its place, the Legislature

While this Court has the authority to appoint a guardian here, the type of guardian Plaintiffs seek is not a guardian to defend the minors interests in this litigation, but rather a guardian who would invest, safeguard, and administer the monies received by the minor through settlement. That guardian would have responsibility over the funds until Modeste reached the age of majority. Such guardians are best appointed by the Family Division of the Superior Court, particularly as that Division retains jurisdiction over the guardianship proceeding to monitor the guardian's accounting until Modeste reaches adulthood. Accordingly, Plaintiffs should initiate the proceeding for appointment of guardian with the Family Division so that a guardian may be appointed to administer the proceeds of Modeste's settlement once this Court approves it.

IV. LEGAL FEES

Plaintiffs also move for approval of their attorney's legal fees, to be paid out of Modeste's proposed settlement amount. "[W]hen a litigant requests that a court approve or manage a settlement, the court's jurisdiction encompasses the entire settlement" *Rojas*, 53 V.I. at 693. The "reasonableness of [a] contingency fee is properly before trial court when plaintiff requests approval of minor's settlement agreement" *Id.* (quoting parenthetically *Hoffert v. General Motors Corp.*, 656 F.2d 161, 165 (5th Cir. 1981)). Approval of Plaintiffs' counsel's attorney's fees is contingent upon approval of the settlement. Therefore, the Court cannot grant the motion for approval of attorney's fees at this time.

V. CONCLUSION

For the reasons stated above, the Court is unable to grant Plaintiffs' motion at this time. Additional documentation is required before the Court can independently evaluate Modeste's

enacted the "Virgin Islands Uniform Guardianship and Protective Proceedings Act" ("UGA"). V.I. Code Ann. tit. 15, § 5-101 (Supp. 2011). The UGA was slated to take effect on May 1, 2010. 2009 V.I. Sess. L. at 724. In May 2010, the Legislature stayed implementation until January 1, 2011. Act No. 7174 (approved May 17, 2010), available at <http://www.governordejongh.com/news/legislation/signed/Act-7174.pdf> (last visited July 14, 2011). In November 2010, the Legislature further stayed implementation until July 1, 2011. Act No. 7241, § 6(b) (approved Nov. 24, 2010), available at <http://www.legvi.org/vilegsearch/ShowPDF.aspx?num=7241&type=Act> (last visited July 14, 2011). In April 2011, the Legislature "re-enact[ed]" title 15 Virgin Islands Code, Part I Decedents Estates, chapters 1-5, and Part II Administration of Estates, chapters 11-29 as they existed prior to December 21, 2009." See Act. No. 7254 (approved Apr. 9, 2011), available at <http://www.legvi.org/vilegsearch/ShowPDF.aspx?num=7254&type=Act> (last visited July 14, 2011). The Legislature did not re-enact Part III Fiduciary Relations, however, which included Chapter 51 governing guardians and wards. Accordingly, the UGA has taken effect. Whether it must govern Plaintiffs' motion, filed before enactment, is a question this Court need not determine.

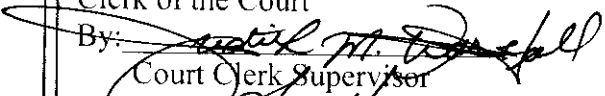
injuries and determine whether Kmart's proposed settlement amount is fair. An appropriate Order follows.



DARRYL DEAN DONOHUE, SR.
Presiding Judge of the Superior Court

ATTEST:

VENETIA H. VELAZQUEZ, Esq.
Clerk of the Court

By: 

Court Clerk Supervisor

Dated: 8/24/11