NO. 123990

IN THE
SUPREME COURT OF ILLINOIS

ALEXIS NICHOLS, f/k/a ALEXIS BRUEGGEMAN Plaintiff/Respondent/Appellee, vs. DAVID FAHRENKAMP, and DAVID FAHRENKAMP d/b/a FAHRENKAMP LAW OFFICES, Defendants/Petitioners/Appellants.	Appeal from the Illinois Appellate Court, Fifth District, No. 5-16-0316 On appeal from the Circuit Court of the Third Judicial Circuit, Madison County, Illinois, No. 13-L-1395 The Honorable Barbara Crowder, Circuit Judge, Presiding

BRIEF OF PLAINTIFF/APPELLEE ALEXIS NICHOLS

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E-FILED
1/16/2019 4:34 PM
Carolyn Taft Grosboll
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POINTS AND AUTHORITIES

NATURE OF THE CASE

This legal malpractice action was brought to recover damages occasioned by the alleged negligence of the defendants David Fahrenkamp ("Defendant" or "Fahrenkamp") and his law firm, David Fahrenkamp d/b/a Fahrenkamp Law Offices, during the time he was acting as Plaintiff's guardian ad litem. C 25-32. Plaintiff alleged that Defendants' negligence caused the dissipation of settlement proceeds she had recovered in a personal injury lawsuit. *Id.* The trial court entered summary judgment for the defendants, relying primarily on the premise that a private attorney appointed as a guardian ad litem has absolute immunity for his or her acts or omissions, "so long as the guardian ad litem follows the directions of the court and is within the scope of the appointment." C 185-190 (quoted material on C 189). The appellate court reversed, and this Court granted Defendants' petition for leave to appeal. No questions are raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in holding, as a matter of law, that a private attorney appointed by a court to act as a guardian ad litem for a minor has absolute immunity for his or her acts or omissions, "so long as the guardian ad litem follows the directions of the court and is within the scope of the appointment," particularly where the order appointing him does not provide any specific directions for the appointment.

2. Whether the trial court erred in determining there were no genuine issues of material fact in regard to whether Defendant followed the directions of the court and was within the scope of the appointment, where the parties disputed what actions Defendant did or did not take to protect the interests of the plaintiff, and whether he ever met or communicated with the plaintiff before making recommendations to the probate

court to approve her mother's request to withdraw funds from the plaintiff's settlement.

STATEMENT OF FACTS

A. Defendant's Appointment as Guardian Ad Litem in 2004

Plaintiff, when she was 11 years old and known as Alexis Brueggeman (she is now known as Alexis Nichols), received a $600,000.00 settlement for injuries she sustained in a motor vehicle accident. C 25, Def. Ex. 1, p. 1 (Petition to Appoint Guardian, filed February 23, 2004).[1] Plaintiff's mother, Jelanda Miller, was appointed as Plaintiff's guardian in case number 04-P-139. C 26, Def. Ex. 1, p. 13 (Order Appointing Guardian, filed February 24, 2004). Defendant was appointed as Plaintiff's guardian ad litem. C 25, Def. Ex. 1, p. 12 (Order filed February 24, 2004). The order appointing him stated, "The court being fully advised in the premises does hereby appoint David Fahrenkarnp as Guardian Ad Litem for the minor child, ALEXIS BRUEGGEMAN." *Id.*

B. The Trial Court's Order in 2013 Limiting the Damages Plaintiff Could Be Awarded Against Her Mother Because Plaintiff Had a Guardian Ad Litem

Plaintiff brought suit against her mother in 2012, alleging that her mother obtained and spent funds from Plaintiff's settlement that were not used for the benefit of or in the interest of Plaintiff, but instead were for her mother's sole benefit. C 28, C 60-64. That matter, which had case number 12 MR 188, went to hearing in 2013; on April 17, 2013, the trial court found that Plaintiff could not recover from her mother for any expenditures that had been approved by Defendant. C 28; C 60-64. During the hearing, the trial court asked, "And where was the GAL [guardian ad litem] in all of this?" and

[1] The probate file for Case No. 04-P-139 was placed in the record on appeal in a sealed envelope by the Circuit Clerk and marked "Defendant's Exhibit 1, Motion to Dismiss Amended Complaint."

"And you made the only defendant this defendant [the mother]?" C 146, Transcript at 6. *Id.* The trial court, in limiting the damages Plaintiff could recover, stated, "This court … cannot and will not charge back for items approved in another file while [Plaintiff] had a guardian ad litem who approved the estimates and expenditures." C 61.

C. Plaintiff's Allegations Against Defendants

On August 16, 2013, Plaintiff filed suit against Defendants. C 3-5. This suit was assigned to the Honorable Barbara A. Crowder, the same judge who had presided over the probate suit between Plaintiff and her mother (12 MR 188). C 6; C 60-64.

In response to a notice of demand for a bill of particulars, Plaintiff ultimately filed an amended complaint (C 25-32), which included the following allegations:

> 9. All of **the withdrawals** from the net proceeds during the time Plaintiff was a minor child **were approved by Defendant** as Plaintiff's guardian ad litem, and the probate court thereafter approved Miller's requests.
>
> 10. **Defendant did not request Miller furnish receipts or any documentation itemizing these expenses prior to granting his approval** to Miller for these requests.
>
> …
>
> 12. Defendant charged Plaintiff fees for serving as guardian ad litem, including during the times described in the preceding paragraphs.
>
> 13. Plaintiff brought suit against Miller. In an Order entered April 17, 2013 in case number 12-MR-188, **the Court found Plaintiff could not recover against Miller for the expenditures described in this Complaint because they were approved by Defendant**. **Plaintiff is not seeking damages for conduct for which the Court held Miller liable in case number 12-MR-188**.
>
> 14. In his capacity as guardian ad litem for Plaintiff, Defendant Fahrenkamp owed a duty to Plaintiff, Alexis Nichols, in the rendering of advice and in the protection of Plaintiff's assets and interests arising out of the underlying personal injury litigation.
>
> 15. As set forth herein, **during the time that Defendant**

> **served as guardian ad litem for Plaintiff, Plaintiff's mother was allowed to improperly withdraw funds from Plaintiff's trust account for the sole benefit of Plaintiff's mother**.
>
> 16. **Defendant Fahrenkamp was negligent in one or more of the following respects**, to-wit:
>
> a) **Defendant failed to monitor the requests made by Plaintiff's mother** against Plaintiff's trust account to determine if the requests were truly for the benefit of Plaintiff;
>
> b) Defendant failed to audit the account to determine if requests made for funds were made for the benefit of and in the interest of Plaintiff;
>
> c) **Defendant failed to report any irregularities to the Court or to Plaintiff** so that the withdrawal of the subject funds could be stopped or that any withdrawn firms could be immediately recovered;
>
> 17. As a result of Defendant's conduct as set forth above, Plaintiff, Alexis Nichols, sustained actual damages, including not limited to suffering the denial of the use and benefit of the funds placed into the trust account for her benefit, incurring a loss of time and expenses associated with having to retain separate counsel to attempt to recover the funds or obtain compensation for the loss of those funds, and being charged fees by Defendant despite the negligence described in the preceding paragraphs.

C 26-29 (emphasis added)

D. The Trial Court's Denial of Defendants' Motion to Dismiss

Defendants did not respond to the amended complaint until July 30, 2015, at which time they filed a motion to dismiss, which raised many of the same arguments regarding immunity and limited duties that they ultimately raised in their motion for summary judgment. *Compare* C 52-71 *with* C 97-102.

The trial court denied the motion to dismiss (C 89-90): "The court is unable to rule as a matter of law that defendants receive quasi-judicial immunity for all actions at this point which is the basis for defendants' motion." C 90. The trial court stated Defendants could raise their defenses "by answer or in other dispositive motions." *Id*.

E. Defendants' Motion for Summary Judgment

Defendants subsequently moved for summary judgment, in which they continued to advance their immunity and limited duty arguments. C 97-102.

During a hearing on this motion, the trial court began asking questions regarding evidence that Fahrenkamp breached any duty. C 120-122. Because that issue had not been briefed, Plaintiff requested, and was granted, leave to file additional materials in response. C 120-123. Plaintiff's supplemental materials included excerpts from the transcript of the underlying probate proceeding, an affidavit from Plaintiff, and additional legal argument. C 131-140, C 125-127.

1. Plaintiff's Affidavit

Plaintiff's first supplemental response included this affidavit from Plaintiff:

> I, Alexis Nichols, formerly known as Alexis Brueggeman, under oath and duly sworn do hereby state:
>
> 1. That I am over 18 years of age, am of sound mind and could testify competently to the facts stated herein.
>
> 2. My understanding is that my probate file, Case No. 04-P-139, was closed on September 2, 2010, after I reached the age of 18 years.
>
> 3. After my 18th birthday, I learned that during relevant times that my probate file was open, I had been assigned a guardian ad litem. **Before I turned 18, I had no idea any guardian ad litem had been appointed, let alone that it was David Fahrenkamp.**
>
> 4. It is now my understanding that Mr. Fahrenkamp was appointed to ensure that my interests were protected while I was a minor, and to serve as my advocate in the course of handling the proceeds I obtained from a 2004 settlement.
>
> 5. After turning 18, I learned that I should have been able to rely on him to protect my interests and make sure that the money from my settlement was being appropriately spent.
>
> **6. During the time he was my guardian ad litem, Mr.**

Fahrenkamp never met with me. To this day, I have never met him.

7. **During the time he was my guardian ad litem, Mr. Fahrenkamp never talked to me, either in person or by telephone. To this day, I have never spoken to him.**

8. **During the time he was my guardian ad litem, Mr. Fahrenkamp never asked me if the representations made by my mother regarding expenses she claimed to have incurred on my behalf, or that she would need to incur on my behalf, were accurate. If he had done so, I would have told him that the expenses were exaggerated or falsified, or referred to expenses I paid for out of separate funds.**

9. To this day, I am not aware of any efforts Mr. Fahrenkamp made to verify that the representations made by my mother regarding expenses she claimed to have incurred on my behalf, or that she would need to incur on my behalf, were accurate, before he recommended approval of petitions to disburse funds.

10. **Prior to my 18th birthday, there were occasions where my mother's attorney asked me to sign "Approval" documents regarding her petitions to disburse funds.**

11. **At no time did Mr. Fahrenkamp advise me that I should submit these documents for his review, or that I had a right to utilize either him or another attorney of my choice prior to agreeing to my mother's requests or any attorney's requests.**

12. At no time prior to the closing of my probate file did Mr. Fahrenkamp advise me that he was no longer acting as my guardian ad litem, or that I should seek new representation.

C 125-126 (emphasis added).

The Amended Complaint mistakenly assumed Fahrenkamp was the attorney who advised Plaintiff to sign various documents. C26-29, Par. 11. Plaintiff's affidavit clarified she was asked to sign these documents by her mother's attorney, and that she had no contact with Fahrenkamp prior to doing so. C 125-126.

2. Documents in the Probate File

Plaintiff noted the trial court still had possession of the original Probate file, No.

04-P-139. C 133; *see also* C 89 (indicating the trial court reviewed the original probate file in resolving the motion to dismiss).

Plaintiff noted the Probate file showed that on May 8, 2008, Fahrenkamp approved a Petition to Disburse Funds that was filed that same day (May 8, 2008) by Plaintiff's mother. C 133; *see also* Def. Ex. 1, pp. 38-40.

Fahrenkamp approved the disbursement of funds of $5,700.00 in each of two separate school years, and the Petition recited that Defendant was charging a fee of $200.00 for his services. *Id.* The Petition included a number of statements by Plaintiff's mother that were not supported with any documentation, asserting that certain expenses had been or would be incurred by Plaintiff over the course of two school years, and that these expenses had been or would otherwise be incurred by Plaintiff's mother. These expenses were listed as follows:

- $50.00 per week for gas
- $500.00 for cheerleading camp
- $500.00 for cheerleading apparel
- $600.00 per year for shows, concerts, cell. phone and Internet
- $600.00 per year for hair cuts and coloring
- $400.00 per year for camera and supplies for photography class
- $500.00 per year for clothes and accessories for dances and prom

Id.

Plaintiff noted that her Affidavit showed that if Defendant had attempted to contact her, he would have learned that these expenses were exaggerated (in other words, the amount of these expenses that were presented to the court significantly exceeded the

actual expenses), falsified (in other words, some of these expenses were not incurred by anyone), or referred to expenses that ***were not*** paid for by Plaintiff's mother, but by Plaintiff out of earnings from part-time jobs. C 134.

Plaintiff noted that in a Motion for Approval of Attorney Fees filed by the mother's attorney on April 22, 2010, the time entries indicate that attorney spoke with Defendant for 0.2 hours regarding the May 8, 2008 petition for a total of 0.2 hours. C 134; Def. Ex. 1, pp. 55-60.

Plaintiff also noted the Probate file showed that on July 9, 2009, Plaintiff's mother's counsel filed another Petition to Disburse Funds, and caused Plaintiff, who was still a minor at the time, to sign an Approval of this Petition. C 134; Def. Ex. 1, pp. 42-44.

Plaintiff stated she was not advised by Defendant at any time that he was acting as her guardian ad litem in this matter, that she should contact him if anyone attempted to have her sign any legal document pertaining to her settlement proceeds, or that she should seek other counsel if anyone attempted to have her sign any legal document pertaining to her settlement proceeds. C 125-126.

Plaintiff noted the Probate file included a Motion for Approval of Attorney Fees filed by the mother's counsel on April 22, 2010, which included an itemized billing of attorney's fees from October 17, 2007 through April 15, 2010. C 134-135; Def. Ex. 1, pp. 55-60. This Motion did not include any entries showing any attempt by the mother's attorney to contact Defendant (referred to as GAL) on or after April 30, 2008. *Id.*

Plaintiff noted that the last item in the Probate file showing Defendant's involvement was the May 8, 2008 approval of the mother's petition to withdraw $5,700.00 during each of two school years. C 135; Def. Ex. 1, pp. 38-40, 55-60.

The Probate file was closed on September 2, 2010. Def. Ex. 1, p. 93. Between May 8, 2010 through September 2, 2010, there is no indication of any activity by Defendant intended to guard or protect Plaintiff's interests, even though he did not inform the Probate Court at any time during this period that he wished to withdraw from acting as Plaintiff's guardian ad litem. Def. Ex. 1, *generally*.

Plaintiff noted the Probate file includes a petition to disburse funds filed on April 22, 2010 by the mother's attorney. C 135-136, Def. Ex. 1, pp. 61-88. This petition, among other things, included a request to allow the mother to withdraw $7,100.00 in funds for the purchase of various items for the Plaintiff's separate residence, during the time she would still have been a minor. C 135, Def. Ex. 1, pp. 61-62. Plaintiff, a minor, was asked by the mother's attorney to sign an affidavit in support of the Petition. C 135, Def. Ex. 1, p. 63. The April 22, 2010 petition does not explain why the minor would need to live in a separate residence from her mother during the months of May, June, July and August prior to reaching 18 years of age; the petition's exhibit A shows the mother lived in Brighton, Illinois at that time, with the petition noting the minor would be attending cosmetology school at SIU-Edwardsville. C 135, Def. Ex. 1, pp. 61-65. Plaintiff noted in the instant civil case that the distance between the mother's address at that time and SIU-Edwardsville is approximately 21.5 miles. C 127. Nevertheless, the April 22, 2010 petition sought $1,300.00 from the Plaintiff's settlement proceeds for a rental deposit and first month's rent, $7,100.00 for furniture and other household items, and $2,450.00 in living expenses during these months. C 136, Def. Ex. 1, pp. 61-62.

Plaintiff noted that the April 22, 2010 petition attached quotes of prospective expenses as an exhibit D to the petition. C136, Def. Ex. 1, pp. 78-87. Plaintiff noted that

while that petition sought $7,100.00 for furniture and other household items, the quotes, when added together, reach the sum of $6,061.92. C136, Def. Ex. 1, pp. 78-87. Plaintiff noted that there was no apparent explanation for the missing amount of $1,038.08. C 136.

3. Plaintiff's Testimony at the 2013 Hearing

In a second supplemental response, Plaintiff provided excerpts of the evidentiary hearing in Case No. 12-MR-188, which was conducted on March 11, 2013. Those excerpts showed the following:

- No guardian ad litem ever talked to Plaintiff. C 156, Transcript at 46.
- No attorney helped Plaintiff look into these matters until she met with a separate attorney, Todd Sivia, in 2011, well after her 18th birthday in 2010. C 148, Transcript at 15-16.
- Without an attorney advising her, Plaintiff trusted her mother, and took her mother's advice to sign various documents. C 165, Transcript at 124-125.
- Information about Plaintiff's settlement, and the process by which funds could be used on her behalf, was largely kept from Plaintiff during her childhood. C 148, Transcript at 15-17.
- Plaintiff testified that the total amount of her settlement funds that were withdrawn by her mother that were not used on behalf of Plaintiff totaled $79,507.39. C 163-164, Transcript at 100-102. This amount does not include attorney's fees, punitive damages, or interest. *Id.*; *see also* C 145, Transcript at 5. The next day, on re-direct, after a lengthy cross-examination, Plaintiff maintained that even giving her mother the benefit of the doubt, this amount was $70,507.39. C 169, Transcript at 70.

- The judgment that was entered against Plaintiff's mother was for $16,365.00 toward those expenses, along with $10,000.00 in attorney's fees, and the return of a 2007 Jeep Compass. C 174.
- Plaintiff began working when she turned 16, in 2008, and worked at various locations through 2011, including Fazoli's, Golden Corral and Tevona at the Galleria in St. Louis. C 147, Transcript at 11-12.
- Plaintiff was kicked out of her house by her mother when she was 17. C 149, Transcript at 20.
- Plaintiff was supposed to receive $40,000.00 a year toward her educational expenses, but her mother, who was her guardian, only gave her $30,000.00 a year. C 148-149, Transcript at 18-20.
- Plaintiff did not learn $10,000.00 a year had been withheld from her until 2011 or 2012. C 149-150, Transcript at 22-23.
- In the probate proceedings, Plaintiff's mother obtained approval for expenses she claimed would be paid for out of the settlement proceeds. C 131-136, Def. Ex. 1. In fact, Plaintiff's expenses, including gas and other expenses listed in her mother's petitions, were paid for out of money Plaintiff received from her jobs or birthday gifts, or from the $30,000.00 she was already receiving for educational expenses. C 149, 152-154, Transcript at 21, 32-34, 38; C 169, Transcript at 68-70.
- Contrary to her mother's petitions, Plaintiff generally did her own hair care, and paid for any hair products out of her own non-settlement money (from jobs, birthday gifts, etc.). C 152-153, Transcript at 33, 36.
- Contrary to her mother's petitions, Plaintiff did not spend $50.00 a week in gas.

C 153, Transcript at 34.

- Contrary to her mother's petitions, Plaintiff did not go to cheerleading camp in either her junior or senior year; she attended once. C 153, Transcript at 34. Plaintiff was not aware $500.00 was taken out of her settlement proceeds for cheerleading apparel. C 153, Transcript at 35.
- Contrary to her mother's petitions, Plaintiff paid for or reimbursed her mother for her cellular phone out of her own non-settlement money. C 153, Transcript at 35.
- Contrary to her mother's petitions, no one purchased a camera for Plaintiff, and Plaintiff did not incur any photography expenses. C 153, Transcript at 36.
- Plaintiff's Lewis & Clark expenses were paid for out of the $30,000.00 already allocated to Plaintiff's educational expenses (which should have been $40,000.00), or out of her own non-settlement money. C 153, Transcript at 37.
- Contrary to her mother's petitions, Plaintiff paid for or reimbursed her mother for rent and her security deposit out of Plaintiff's own non-settlement funds, and Plaintiff did not get her security deposit back. C 154-155, Transcript at 39-40, 43.
- Contrary to her mother's petitions, Plaintiff and her new attorney in 2013 went through bank statements at length to show that while she was still a minor, Plaintiff paid for the expenses listed in her mother's petitions out of Plaintiff's own non-settlement funds, and that Plaintiff sometimes gave money from those funds to her mother. C 155-157, C 161-162, Transcript at 43-53, 69-72.
- Contrary to her mother's petitions, Plaintiff testified she did not receive $750.00 a month in expenses out of the settlement proceeds. C 162, Transcript at 71.
- Contrary to her mother's petitions, Plaintiff actually donated her non-settlement

money to her mother for her mother's expenses, and paid for groceries out of those funds. C 151-152, Transcript at 28, 32-33.

F. Defendant Fahrenkamp's Affidavit

Defendants filed an affidavit from Defendant Fahrenkamp; he averred he ***had*** met with Plaintiff on at least three (3) occasions. C 181-184. He stated he met her when her settlement was approved in 2004, outside of the presence of her mother, and gave her his business card, which contained his telephone numbers. C 183, par. 3; *see also* Def. Ex. 1, p. 10 (showing Defendant recommended the settlement on February 24, 2004). Plaintiff was 11 years old at the time of this meeting. Def. Ex. 1, p. 1 (Petition to Appoint Guardian, filed February 23, 2004). Defendant claimed there were two additional meetings with Plaintiff in which Plaintiff's mother was present. C 183, par. 4. Defendant contended nothing preventing Plaintiff from contacting him through the telephone numbers listed on the business card he claimed to have given her in 2004. C 184, par. 9.

G. The Trial Court's Order Granting Summary Judgment

The trial court granted summary judgment. C 185-190. The trial court expressly recognized, "Illinois has not held that a guardian ad litem is subject to immunity." C 188.

But the trial court, after reviewing cases throughout the United States pertaining to the duties of guardians, guardians *ad litem*, and next friends in cases such as divorces and child custody hearings, held as follows:

> In short, the law does hold defendant to some specific duties and there is no holding at this point that gives him quasi-judicial immunity in all circumstances although it is rational to argue that so long as the guardian ad litem follows the directions of the court and is within the scope of the appointment, he should enjoy immunity.

C 189.

The court added and concluded as follows:

> Thus, the court must then look to the orders in the probate file to determine whether the defendant was specifically ordered to do those things plaintiff complains of. There is no duty for a guardian ad litem to perform audits or act as an accountant to review receipts unless the court so instructs the guardian ad litem. The orders in the probate file for plaintiff do not require defendant to act in any such manner. **The defendant's role was general and therefore his duty was to act in the ward's best interests by making recommendations to the court.** The court received the petitions from the guardian for the minor, received input from the guardian ad litem, and ruled. **There are conflicting affidavits on whether the defendant met with the plaintiff during the time he was serving as guardian ad litem in the probate file.** The court must weigh whether those disputed affidavits are over a material issue. Plaintiff does not allege any misrepresentations by the defendant on the issue disputed in the affidavits.
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> …
>
> Where the court-appointed individual acts within the scope of his or her appointment to give advice to the court regarding the best interest of the minor for use in the court's decision-making process, that individual must be subject to the same immunity as the court. **Here, there are disputed facts regarding defendant's meeting with the minor.** A review of the court file, however, indicates that the actions plaintiff complains of are monetary requests the court approved in granting a budget to the mother. **The court determines that a failure by the guardian ad litem to meet with the minor over those requests, even taken as true, does not constitute a failure to fulfill the actions and duties that were assigned to defendant by the probate court.** The court therefore grants summary judgment in favor of defendant and against plaintiff.

C 189-190 (emphasis added).

H. The Appellate Court's Ruling

The appellate court agreed with Plaintiff that the trial court erred in granting Defendants quasi-judicial immunity "because of the lack of specific directions in the order appointing attorney Fahrenkamp as guardian *ad litem*." Pet. A 5. It noted that under the circuit court's reason, "the guardian *ad litem* had no independent duty to plaintiff, and the appointment of a guardian *ad litem* was nothing more than an empty gesture." *Id.* It held that "Fahrenkamp was under a duty to serve the best interests of plaintiff, and the

facts, if taken as true, created a material question of fact with regard to whether Fahrenkamp breached his duty to plaintiff." Pet. A 6. It cited *Layton v. Miller*, 25 Ill.App.3d 834, 838 (1975) for the proposition that "in any court proceedings involving minors their best interest and welfare is the primary concern of the court." Pet. A 6. "Here, the probate court recognized that an 11-year-old child needed an attorney who would look out for her best interests and ensure that anyone who sought to use her settlement funds was doing so for the child's welfare." *Id.* "Therefore, a guardian *ad litem* was appointed to protect plaintiff from anyone who could exploit her." Pet. A 6-7.

The appellate court cited *Stunz v. Stunz*, 131 Ill.210, 221 (1890), which recognized the duty of a guardian *ad litem* to determine the rights of his wards, what defense their interest demands, "and to make such defense as the exercise of care and prudence will dictate." Pet. A 7. "As the guardian *ad litem*, Fahrenkamp was obligated to protect and defend the interests of the minor plaintiff, regardless of whether the court order contained any specifics." Pet. A 8. It held that Fahrenkamp, "as guardian *ad litem* for the minor plaintiff, owed a duty to plaintiff to render advice and to protect plaintiff's assets and interests arising out of the underlying personal injury settlement." Pet. A 8-9. "He had a duty to act as an advocate on behalf of plaintiff." Pet. A 9. "His failure to meet with or otherwise communicate with his ward … did not comply with that duty owed plaintiff, as he was not fulfilling his role as plaintiff's advisor, advocate, negotiator, or evaluator." *Id.*

The appellate court held the guardian *ad litem* did not have a duty to provide the court with an accounting. *Id.* But it held there were other common law duties that may have been breached. *Id.*

The appellate court rejected Defendants' immunity argument, stating, "Giving any guardian *ad litem* absolute immunity under the circumstances presented here is contrary to the public policy of this state." Pet. A 9. "Unlike the expert witness in *Heisterkamp* [*Heisterkamp v. Pacheco*, 2016 IL App (2d) 150229], Fahrenkamp was not simply a neutral party, appointed by the court to act as a professional expert." *Id.* "In his role as advisor to the court, Fahrenkamp was not the mother's rubber-stamp, but instead the plaintiff's watchdog, authorized by the court to protect the minor's assets." *Id.* It noted that if Fahrenkamp's role was not to question the mother's request for funds from Plaintiff's settlement, "we question what he was supposed to do, and what he got paid for during the six years he allegedly served as plaintiff's guardian *ad litem*." *Id.* It noted that giving Fahrenkamp quasi-judicial immunity "meant that plaintiff was not allowed to pursue any remedy for the guardian *ad litem*'s failure …" Pet. A 10.

The appellate court recognized authority, including *Vlastelica v. Brend*, 2011 IL App (1st) 102587, supporting immunity for child representatives and guardians *ad litem* in dissolution proceedings. Pet. A 10. But it noted the rationale for immunity in that context "is so that they can fulfill their obligations, without worry of harassment or intimidation from dissatisfied parents." *Id.* "Under the circumstances presented here, there is no reason for granting that kind of immunity. Rather, the situation here is more akin to a fiduciary relationship between a guardian and a ward as a matter of law." *Id.* It held this relationship "is equivalent to the relationship between a trustee and a beneficiary." *Id.*, citing *Parsons v. Estate of Wambaugh*, 110 Ill.App.3d 374, 377 (1982) and *In re Estate of Swieciki*, 106 Ill.2d 111, 117-18 (1985). "The guardian of a minor is a trustee of the minor's property for the minor's benefit and is chargeable as such; in other

words, the guardian must be held to have dealt with the minor's property for the benefit of the minor. *Id.*, citing *Swieciki*, 106 Ill.2d at 119.

The appellate court cited *In re Estate of Finley*, 151 Ill.2d 95 (1992), in which this Court held that a GAL for minors had standing to bring an appeal of an order approving the apportionment of wrongful death settlement proceeds. Pet. A 11.

The appellate court expressly stated its holding ***did not*** apply to GALs in dissolution or child custody proceedings. Pet. A 11. It noted, "the threat of civil liability in those instances where a guardian does not have immunity is no different than that faced by any attorney appearing in any other type of lawsuit and is consistent with the fiduciary obligation imposed upon any guardian in representing a ward under the Probate Act of 1975." Pet. A 11-12, citing 755 ILCS 5/11-13(b), (d).

Because the appellate court noted the evidence "showed there were genuine issues of fact regarding whether defendant breached his duties to [Plaintiff]," it reversed the grant of summary judgment. Pet. A 12.

The dissent contended the majority had read *Vlastelica* too narrowly, and that because Fahrenkamp had been appointed by the court, he should have been entitled to some form of immunity. Pet. A 13-14. The dissent expressed concern that attorneys would refuse to accept appointments as guardians *ad litem* absent a guarantee of immunity. Pet. A 14-15.

ARGUMENT

Standard of Review

"We review the trial court's summary judgment ruling *de novo*." *Monson v. City of Danville*, 2018 IL 122486, ¶ 12, *reh'g denied* (Sept. 24, 2018). Because summary

judgment "is a drastic means of disposing of litigation," "a court must construe the evidence in the record strictly against the movant and should grant summary judgment only if the movant's right to a judgment is clear and free from doubt." *Id.* " “ 'A genuine issue of material fact precluding summary judgment exists where the material facts are disputed, or, if the material facts are undisputed, reasonable persons might draw different inferences from the undisputed facts.' ” *Id.*, quoting *Adames v. Sheahan*, 233 Ill. 2d 276, 296 (2009). "The purpose of summary judgment is not to try an issue of fact but to determine whether one exists." *Id.*

I. The Appellate Court's Decision Advances the Public Policy Goal of Ensuring that the Interests of Children Are Protected, and Does Not Conflict with Decisions Reached in Child Support or Dissolution Matters

A. The Appellate Court's Decision Maintains the Status Quo, Which Protects Children By Encouraging Attorneys Who Are Paid to Serve as Guardians *Ad Litem* to Exercise Reasonable Care

The choice before this Court is a stark one – whether it wishes to continue to protect ***children***, or whether it desires to create new protections for ***negligent attorneys***. The Legislature has not conferred this immunity upon guardians *ad litem* ("GAL"s). The courts below recognized that no Illinois appellate court has previously conferred immunity to GAL in this context. Attorneys continue to seek appointments and payment for serving in the role, despite not having immunity. Thus, decades of experience show there is no "chilling effect," likely because most attorneys exercise reasonable care. And even if there was a "chilling effect," such that fewer attorneys wish to be GALs because the appointment means they would have to confer with the children they are supposed to protect, that would also advance public policy – as the facts here demonstrate, circuit judges often defer to the GAL's recommendation. If a child does not have a GAL, that

will encourage a court to be extra vigilant in protecting the child's interests.

Thus, the appellate court's opinion merely restores the status quo. In that status quo, if a GAL is negligent in representing a child, and that child is damaged, that child can bring suit to recover her damages. Defendants want this Court to shield private attorneys who accept a fee for GAL appointments but who abandon their duties and thereby damage the children they have agreed to protect. Unlike a child custody or dissolution proceeding, a probate proceeding in which a mother is applying to take money out of her child's settlement does not involve adult adversaries on both sides of the litigation. Instead, the only reason to appoint an attorney as a GAL in these probate proceedings is because a court has determined the child cannot protect her own interests. The appellate court chose to maintain the status quo, which allows vulnerable children who have been damaged to sue negligent adult attorneys. Defendants want this Court to overturn the status quo and create new authority protecting negligent attorneys at the expense of the innocent children they have damaged. Such a holding would make a mockery of the GAL process. Plaintiff urges this Court deny that request.

1. The Appellate Opinion Wisely Distinguishes the Role of GALs in Protecting a Child's Assets and the Role of "Child Representatives" or Others in Child Support or Dissolution Matters

The Appellate Court expressly stated its holding ***did not*** apply to GALs in dissolution or child custody proceedings. Pet. A 11. Its decision does not create any conflict, let alone a "direct" conflict with decisions by the First District and Second District. Those decisions involved "child representatives" appointed under section 506(a)(a)(2) of the Illinois Marriage and Dissolution of Marriage Act, 750 ILCS 5/506(a)(2) (West 2014), whereas the instant decision involved a GAL appointed to

safeguard a minor's settlement proceeds. The decision is entirely consistent with the decisions of the Illinois Supreme Court concerning GALs. No Illinois appellate court has adopted Fahrenkamp's position. The Appellate Court's decision maintains a status quo designed to protect the interests of minors, and the parade of horribles suggested in Appellants' Prayer has never occurred.

The Appellate Court's ruling is consistent with precedent. The prior rulings cited by Fahrenkamp did not involve GALs appointed to protect a child's financial estate. *See Davidson v. Gurewitz*, 2015 IL App (2d) 150171, ¶1, 4, *appeal denied*, 48 N.E.3d 672 (2016) (father contended that "child representative" appointed under the Illinois Marriage and Dissolution of Marriage Act, 750 ILCS 5/506(a)(2) "effectively served as [his ex-wife's] advocate"); *Vlastelica v. Brend*, 2011 IL App (1st) 102587, ¶1, *appeal denied*, 962 N.E2d 490 (2011) (same); *Heisterkamp v. Pacheco*, 2016 IL App (2d) 150229, ¶1, *appeal denied*, 60 N.E.3d 873 (2016) (action for psychological malpractice against court-appointed expert in dissolution case). Fahrenkamp quotes a passage from *Cooney v. Rossiter*, 583 F.3d 967, 970 (7th Cir. 2009). But the very next sentence clearly shows it is referring to GALs in dissolution proceedings, not GALs who were appointed to protect the child's financial estate from her parents. *See id.*, quoting *Kurzawa v. Mueller*, 732 F.2d 1456, 1458 (6th Cir.1984). ("Experts asked by the court to advise on what disposition will serve the best interests of a child in a custody proceeding need absolute immunity in order to be able to fulfill their obligations 'without the worry of intimidation and harassment from dissatisfied parents.' "). *Cooney* did not even involve a GAL – it involved a child representative, which it acknowledged had differing statutory responsibilities. 583 F.3d at 969. Fahrenkamp cites *Scheib v. Grant*, 22 F.3d 149, 150

(7th Cir. 1994), which also involved dissolution proceedings. *Id.* at 150.

Defendants claim the GALs or child representatives in dissolution or child representative cases are serving "comparable roles." Pet. at 9. But these are not comparable roles. *Cooney* recognized that in child custody proceedings under 750 ILCS 5/506(a)(3), where the litigants are adversarial parents, GALs function "much like special masters." 583 F.3d at 970. "Experts asked by the court to advise on what disposition will serve the best interests of a child in a custody proceeding need absolute immunity in order to be able to fulfill their obligations 'without the worry of intimidation and harassment from dissatisfied parents.' " *Id.*, quoting *Kurzawa*, 732 F.2d at 1458. Defendants also cite *Davidson* and *Vlastelica*, but both cases also involved a "child representative" appointed in dissolution proceedings through 750 ILCS 5/506(a)(2). 2015 IL App (2d) 150171, ¶1, 2011 IL App (1st) 102587, ¶1. Defendants also cite *Heisterkamp*, which similarly involved an action for psychological malpractice against a court-appointed expert in a dissolution case. 2016 IL App (2d) 150229, ¶1.

There is no public policy reason to confer immunity upon Fahrenkamp. Here, Fahrenkamp's role was not similar to that of a "special master" – he was not making recommendations or offering expert testimony that would favor one parent over another in adversarial proceedings. His role was to represent one side in the litigation, that of his ward's best interests. He is not being sued by a dissatisfied parent because he made a recommendation favoring one parent over another. He is being sued for the same reason any attorney could be sued – he was supposed to be an advocate (here, to advocate for the best interests of a litigant), and failed to exercise reasonable care in doing so.

Defendants' extended discussion of 750 ILCS 5/506(a) is inapposite because

Fahrenkamp was not a GAL in dissolution or child custody proceedings. The appellate court expressly stated its holding did not apply to such proceedings. Pet. A 11. Clearly, the Legislature could seek to immunize a court-appointed attorney, but it just as clearly has chosen not to do so for GALs such as Defendants.

Defendants string cite cases from other jurisdictions, without providing any guidance to the Court as to whether those decisions involved child custody or dissolution proceedings, or something that actually resembles the instant case.

Vlastelica and *Cooney* show that the purpose of giving absolute immunity to child representatives (not GALs) in dissolution proceedings is so they do not have to worry about being sued by an unhappy parent. Further, they note that an unhappy parent has recourse during those proceedings, if they believe the child representative has acted inappropriately. Here, by contrast, giving Defendant absolute immunity is contrary to public policy; instead of ensuring that a child representative can act in the best interest of the minor in a situation in which that representative's recommendations will likely anger one of the minor's parents, immunity here would protect a GAL who was not even colorably acting in the best interests of the minor, but was instead acting as a rubber-stamp for the mother's requests. Here, unlike in the dissolution context, there was no adult available to object to the conduct of the GAL in endorsing the mother's requests.

Here, the allegation is that Defendant was acting for the interest of the parent, and against the interest of the minor he was supposed to represent. *Cooney* notes the expert "is not bound by the child's wishes but rather by the child's best interests." 583 F.3d at 970. But here, Plaintiff has ample evidence Defendant's omissions were not in Plaintiff's best interests, and caused the dissipation of her settlement proceeds.

Quite simply, there is no basis for a holding that GALs are automatically entitled to absolute immunity, regardless of the circumstances.

2. Illinois Has Never Recognized Any Kind of Immunity for GALs Outside of Child Support or Dissolution Matters, and There Has Never Been a "Chilling Effect" or Other Adverse Consequence

Contrary to Fahrenkamp's suggestion, there is no "traditional immunity" for GALs who are appointed to protect a child's financial interests outside of dissolution proceedings. The Circuit Court noted that prior to its order granting summary judgment, no Illinois court had ever held that a GAL under these circumstances was entitled to any immunity. And none of the parade of horribles suggested by Fahrenkamp occurred – there was no confusion or uncertainty, the duties of such appointees were foreseeable, their liability was not limitless, there was no known crisis with a refusal of GAL appointments, and the interests of minors were protected.

Defendants suggest no person would agree to be a GAL absent immunity. But that argument has been proven incorrect by decades of contrary experience. And that argument proves too much. If the potential for a lawsuit was sufficient to keep attorneys from taking on cases, no attorney would ever take any case. The solution is not to deprive a minor who has seen her settlement funds dissipated as a result of her GAL's negligence of a remedy. The solution is for the GALs to be able to show they exercised due diligence before making recommendations that a course of action was in the minor's best interest.

B. Immunity Does Not Flow Merely Because the GAL Was Appointed by the Court; Public Defenders and Other Appointed Attorneys Do Not Have Immunity Absent Specific Legislation Conferring It; Defendants' Position Would Mean That The Persons Who Most Need the Protection of the Courts Would Have Fewer Remedies Than Those With the Resources and Sophistication to Hire Their Own Attorneys

The trial court's order cited several cases from around the United States, without citing any case holding that the mere fact an attorney was appointed by a court to represent a client automatically gave that attorney immunity from a legal malpractice action. C 185-190. And that would be contrary to public policy, because it would mean that those clients who are most in need of protection (*e.g.,* minors, or those who are not of sound mind, or otherwise disabled) would have no recourse if their attorneys failed them, while those persons who hired their own attorneys would still have a remedy for inadequate representation. There is no rationale for such disparate treatment.

The dissent below cited *Clarke v. Chicago Title & Tr. Co.,* 393 Ill. 419, 430 (1946), presumably for its stated that GALs "are considered as agents or officers of the court, appointed either theoretically or in fact by the court, to represent the interest of the infant in the litigation." But whether they are deemed "agents or officers of the court" does not mean they are the same as judges, and it has no bearing on whether they have immunity. The United States Supreme Court has recognized an attorney's duties " 'are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defense program.'" *Polk City v. Dodson*, 454 U.S. 312, 318 (1981), quoting ABA Standards for Criminal Justice 4-3.9 (2d ed. 1980). Furthermore, the Court has noted, "It is often said that lawyers are "officers of the court." But the Courts of Appeals are agreed that a lawyer representing a client is not, by virtue of being an officer of the court, a state actor "under color of state law" within the meaning of § 1983." *Id.*

Simpson v. Doggett, 159 S.C. 294, 156 S.E. 771 (1930) is one of a number of cases showing that it is no answer to state that because the probate court appointed Defendant, Defendant is entitled to quasi-judicial immunity. The trial court's order cited several cases from around the United States, without citing any case holding that the mere fact an attorney was appointed by a court to represent a client automatically gave that attorney immunity from a legal malpractice action. C 185-190. And that would be contrary to public policy, because it would mean that those clients who are most in need of protection (*e.g.,* minors, those who are not of sound mind, indigent persons without any other options) would have no recourse if their attorneys failed them, while those persons who hired their own attorneys would still have a remedy for inadequate representation. There is no rationale for such disparate treatment.

Illinois courts have already rejected similar arguments, holding that public defenders are not immune from legal malpractice actions:

> These cases involving state-employed doctors can not be distinguished from the case at bar. **Every attorney has the duty to exercise a reasonable degree of skill and care in representing his client**. *Smiley v. Manchester Insurance & Indemnity Co.,* 71 Ill.2d 306, 16 Ill.Dec. 487, 375 N.E.2d 118 (1978); *Kerschner v. Weiss & Co.,* 282 Ill.App.3d 497, 217 Ill.Dec. 775, 667 N.E.2d 1351 (1996). **Plaintiff has alleged that defendants breached their duty to use the skill and care ordinarily used by a reasonably well-qualified attorney under similar circumstances. This is the same duty owed by every attorney to every client regardless of whether the attorney is a state employee.** See *Polk County v. Dodson,* 454 U.S. 312, 318, 102 S.Ct. 445, 449–50, 70 L.Ed.2d 509, 516(1981)(" '**Once a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defense program'** [Citations.]") This duty is derived from the lawyer's status as a licensed attorney and is wholly independent of the lawyer's state employment.
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> "**A State employee who breaches a duty he owes regardless of his State employment is no more entitled to immunity than is a private**

> **individual who breaches that same duty; the mere fact of his State employment should not endow him with heightened protection**." *Currie,* 148 Ill.2d at 160, 170 Ill.Dec. 297, 592 N.E.2d 977. Whether the defendants are state employees or county employees, the doctrine of sovereign immunity is inapplicable in this case because the duties that defendants allegedly breached did not arise solely as a result of defendants' state employment and the doctrine of sovereign immunity does not pertain to county employees. See 745 ILCS 5/1 (West 1996); 705 ILCS 505/8(d) (West 1996).

Johnson v. Halloran, 312 Ill. App. 3d 695, 699–700 (1st Dist. 2000), *aff'd*, 194 Ill. 2d 493 (2000), citing *Currie v. Lao*, 148 Ill.2d 151 (1992) (emphasis added)

While *Johnson* was pending, the Legislature conferred immunity upon public defenders through 745 ILCS 19/1. This Court held the Legislature could not confer that immunity retroactively.

> Putting aside the question of whether this legislation might constitute an impermissible attempt by the General Assembly to overrule the appellate court's judgment in a pending case, we note that application of the new law here would have the effect of stripping plaintiff of his negligence claims. That cannot be permitted. Plaintiff's claims vested prior to enactment of the new law and constitute a constitutionally protected property interest. As such, they cannot be abrogated by subsequent legislative action without offending plaintiff's due process rights.

Johnson v. Halloran, 194 Ill. 2d 493, 499–500 (2000)

This development shows: (1) the Legislature will confer immunity when it deems immunity necessary; and (2) that immunity cannot be conferred retroactively.

The argument that appointment by a court creates immunity proves too much, because all attorneys are "officer[s] of the court." *See, e.g., Horwitz v. Holabird & Root*, 212 Ill. 2d 1, 21 (2004) ("We further agree that it should be presumed, as a matter of public policy, that clients hire attorneys to pursue legal remedies in a legal and ethical manner; and that, since **attorneys stand in a fiduciary relationship to their clients and are officers of the court**, clients are reasonably justified in expecting that their attorneys will represent them ethically and within the bounds of the law.") (emphasis added).

Nevertheless, even though all attorneys can be deemed "officers of the court," attorneys can be liable to their clients, without being able to rely on immunity to shield their conduct. *See, e.g., Collins v. Reynard*, 154 Ill. 2d 48, 50 (1992) ("Today we rule that a complaint against a lawyer for professional malpractice may be couched in either contract or tort and that recovery may be sought in the alternative.").

C. In the Absence of a Specific Statutory Grant of Immunity, Plaintiff Should be Able to Obtain a Remedy for Any Damages to Her Proximately Caused by the GAL's Negligence

Thus, it is clear Defendant owed a duty to Plaintiff, and cannot rely on his appointment by the probate court to create immunity. But under the trial court's holding, Plaintiff cannot obtain any remedy for his breach of this duty. At the least, this holding is contrary to the goals set forth in Section 12 of the Illinois Constitution, which states, "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation." Ill. Const. art. I, § 12. While that provision would not protect Plaintiff from a clear statutory immunity, it ought to carry the day here, where the trial court recognized there is no mandatory authority supporting its holding. The trial court acknowledged, "the law does hold defendant to some specific duties and there is no holding at this point that gives him quasi-judicial immunity in all circumstances …" C 189. Under these circumstances, this Defendant should not be granted immunity as to this Plaintiff.

D. There Is No Reason to Extend the Immunity Conferred on Judges to Private Attorneys Who Agreed to Act as GALs For a Fee

Fahrenkamp notes a GAL can only make recommendations to a court, and that judges, who ultimately make decisions affecting the ward, are absolutely immune from civil liability. But it does not follow that the GAL should therefore enjoy absolute

immunity. Instead, this distinction explains why GALs ***should not*** have immunity – it is not their role to make final decisions in which there are adversaries, but only to make recommendations for what is in their ward's best interests. GALs are not acting on behalf of the State, but on behalf of their ward. If they do not exercise reasonable care, it is not as though they have simply chosen one side's arguments over another's – they have breached their duty to their ward(s). This Court has refused to extend existing immunities when only private funds are implicated and not public funds (as would be the case for judicial immunity, which shields judges and thereby the public from suit). *See Bilyk v. Chicago Transit Auth*., 125 Ill. 2d 230, 238 (1988) (immunity from suits over third-party criminal acts conferred on CTA does not extend to private carriers).

E. The Law Recognizes GALs Owe Duties and Are Appointed *Because* of Concern No Other Adult Will Protect the Child's Interests; if Defendants' Position is Adopted, GALs Who Are Negligent in Protecting the Child's Interests Cannot Be Held Accountable

The reason Defendant was appointed was to protect Plaintiff from her parents and anyone else who could exploit her. This was an instance where the probate court recognized an 11-year-old child needed an attorney who would look out for ***her*** interests, and ensure that anyone who sought to use her settlement funds was doing so in her best interests, and the attorney breached his duty. This is not an instance where the courts need to shield a court-appointed expert from a lawsuit filed by a disgruntled parent, where the expert is attempting to protect the child's best interests in a custody matter in which the parents are adverse. This was an instance where only one parent was involved, and it was the child's financial assets that were at stake.

The reason a GAL is appointed is a concern the minor needs an advocate to protect her interest. Under such circumstances, the lawyer "shall" maintain a normal

client-lawyer relationship with the minor, and "may take reasonably necessary protective action":

> (a) **When a client's capacity** to make adequately considered decisions in connection with a representation **is diminished**, **whether because of minority**, mental impairment or for some other reason, **the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.**
>
> (b) **When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action**, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

Illinois Rules of Professional Conduct, 1.14(a) and (b) (emphasis added)

Furthermore, there were no specific actions and duties "assigned to defendant by the probate court," so it is no answer to suggest Defendant fully complied with all of the duties set forth in the order appointing him. The order appointing Defendant simply stated, "The court being fully advised in the premises does hereby appoint David Fahrenkamp as Guardian Ad Litem for the minor child, ALEXIS BRUEGGEMAN." Def. Ex. 1, p. 12 (Order filed February 24, 2004). Thus, the determination of the standard of care for Defendant cannot rest on the Order appointing him, but in the law. To suggest otherwise would mean that Defendant owed no duty to do anything on Plaintiff's behalf. And the trial court even recognized this in a previous page of its order, in which it stated, "Duties of a guardian ad litem for any probate case are defined in respect to the appointed guardian ad litem either specifically enumerated in the court order or in general for safeguarding the minor's best interests if not otherwise specified." C 186.

In fact, the law is clear that a GAL ***does*** have a duty to act as an advocate on

behalf of the minor(s) they represent. *See Rom v. Gephart*, 30 Ill.App.2d 199, 208 (1st Dist. 1961) ("… **the appointment of a guardian ad litem is not a mere formality and it is the duty of such guardian to call the rights of the minor to the attention of the court, to present their interests and claim for them such protection as under the law they are entitled.**") (emphasis added) (citation omitted). Furthermore:

> **A guardian ad litem has a duty**, as was stated in *Stunz v. Stunz*, 131 Ill. 210, 23 N.E. 407, 409 [1890], '**to examine into the case, and determine what the rights of his wards are, and what defense their interest demands, and to make such defense as the exercise of care and prudence will dictate. He** is not required to make a defense not warranted by law, but **should exercise that care and judgment that reasonable and prudent men exercise**, and submit to the court for its determination all questions that may arise, **and take its advice and act under its direction in the steps necessary to preserve and secure the rights of the minor defendants**. **The guardian ad litem who perfunctorily files an answer for his ward, and then abandons the case, fails to comprehend his duties as an officer of the court**.'

Id. at 208 (emphasis added).

Defendants rely on this Court misinterpreting the opinion below. Defendants begin their Argument by stating that a GAL is not the minor's lawyer, and that his or her role "is not to advocate for what the ward wants, but, instead, to make a recommendation to the court as to what is in the ward's best interests." Pet. at 8, quoting *People v. Delores W. (In re Mark W.*), 228 Ill.2d 365, 374 (2008). But the opinion is consistent with *Delores*. *See* Pet. A 9 ("In his role as guardian *ad litem*, he was to advise the court, but only after making careful inquiry for the purpose of protecting the minor plaintiff's interests."). Here, the evidence shows the GAL did not meet or otherwise confer with Plaintiff, or take any other measure to ensure that her interests were being protected.

As further support for the proposition that GALs are required to act as advocates for their minor clients, *see Layton v. Miller*, 25 Ill.App.3d 834, 839 (5th Dist. 1975) ("In

the instant case, clearly a guardian Ad litem should be appointed **to represent the minors** and no reason appears why it could not be the same attorney who was originally appointed as guardian of their estate.") (emphasis added); *Cushing v. Greyhound Lines, Inc.*, 2013 IL App (1st) 103197 (2013) par. 62 ("Citing *Ott v. Little Company of Mary Hospital*, 273 Ill.App.3d 563, 210 Ill.Dec. 75, 652 N.E.2d 1051 ([1st Dist.] 1995), the court noted that it considered GAL Ammendola **as an attorney for the child**.") (emphasis added); *Roth v. Roth*, 52 Ill.App.3d 220 (1st Dist. 1977) ("When a court has notice that a minor is present without proper representation, it is the duty of that court to appoint a guardian ad litem **to help safeguard and protect the interests and welfare of the minor**.") (emphasis added).

> **As further noted above, once appointed, the guardian ad litem is charged with defending the interests of the minor.** (*McCarthy v. Cain* (1922), 301 Ill. 534, 134 N.E. 62; *Roth v. Roth* (1977), 52 Ill.App.3d 220, 10 Ill.Dec. 54, 367 N.E.2d 442; *Rom v. Gephart* (1961), 30 Ill.App.2d 199, 173 N.E.2d 828.) **We believe the appointment of a guardian ad litem vests that individual with exclusive authority to proceed on behalf of the minor in the pending lawsuit and operates to derogate and relieve any other person's authority to do so.** Such a conclusion is implied from the language of section 11–13 of the Probate Act ("[t]he representative of the estate of a ward shall appear for and represent * * * unless another person is appointed for that purpose").
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> It is clear from the above-cited case law, **that once the trial court appointed a guardian ad litem in the instant case, the authority to pursue the minor's rights rested exclusively with the guardian ad litem** and, therefore, Mark Ott could not bring a motion on behalf of the minor to voluntarily dismiss the minor's lawsuit. **Subject to the supervisory authority of the court, the guardian ad litem was the sole representative of the minor and had exclusive power to direct, manage and control the lawsuit on behalf of the minor.**

Ott, 273 Ill.App.3d at 575-577 (emphasis added).

Contrary to Defendants' suggestion, the appellate court recognized the GAL's role was not to advocate what the ward wants, but to recommend what was in the ward's

best interests. Defendants quote the appellate court's reference to a GAL's role as "advisor, advocate, negotiator, or evaluator." Pet. at 13-14, quoting Pet. A 8-9, ¶14. But they do not advise the Court that in the beginning of the Paragraph, the appellate court states that Fahrenkamp "owed a duty to plaintiff to render advice and to protect plaintiff's assets and interests arising out of the underlying personal injury settlement." Pet. A 9, ¶14. It noted Fahrenkamp "should have understood the need to protect the assets of his ward." Pet. A 9, ¶15. It noted Fahrenkamp's role "was to advise the court, but only after making careful inquiry for the purpose of protecting the minor plaintiff's interests." *Id*. Thus, the appellate court understood the role of a GAL.

The trial court cited authority from other jurisdictions holding that GALs should be liable for damages for their neglect:

> **The proper principles declaring the duty of a guardian ad litem are well set forth in 31 Corpus Juris, 1141, as follows**:
>
> > "The position of a guardian ad litem or next friend is one of trust and confidence toward the infant as well as the court; **hence, it is his duty fully to protect the infant's interests in all matters relating to the litigation, as the infant might act for himself if he were of capacity to do so. His duty requires him to acquaint himself with all the rights of the infant in order to protect them, and to submit to the Court for its consideration and decision every question involving the rights of the infant affected by the suit. He should be as careful not to do anything, or allow anything to be done, to the prejudice of his ward's interests, as the court from which he receives his appointment. <u>If in consequence of the culpable omission or neglect of the guardian ad litem the interests of the infant are sacrificed, the guardian may be punished for his neglect as well as made to respond to the infant for the damage sustained.</u>**

Simpson v. Doggett, 159 S.C. 294, 156 S.E. 771, 772–73 (1930), *quoted in Dixon v. United States*, 197 F.Supp. 798, 802-803 (W.D. S.C. 1961) and C 189 (emphasis added).

Defendants claim the Appellate Court improperly relied on *Dixon*. But in reality, the Appellate Court cited with approval language in *Dixon* that was quoting from

Simpson. Furthermore, the Appellate Court was free to apply opinions from other jurisdictions to whatever extent it deemed their reasoning relevant to any of the applicable issues, whether or not they are still an accurate statement of South Carolina law. Defendants claim *Simpson* was overruled by *Fleming v. Asbill*, 483 S.E.2d 751 (S.C. 1997), but all *Fleming* involved was the immunity of GALs ***in custody proceedings***. *See id.* at 755 ("Both persuasive authority and the policy reasons set forth above convince us to hold today that private persons appointed as guardians ad litem in private custody proceedings are afforded immunity for acts performed within the scope of their appointment."). Thus, *Fleming* merely brings the law in South Carolina to the same place the appellate decision sets it in Illinois – GALs have some degree of immunity in private custody proceedings. But this case was not such a proceeding.

E. The Law Recognizes That Evidence a GAL Did Not Meet or Confer with the Child Should Preclude the GAL from Obtaining Summary Judgment

This is not an instance where the trial court specifically found there were no genuine issues of material fact regarding reasonable efforts by Defendant to fulfill his duties. To the contrary, Plaintiff identified ample evidence that Defendant did ***nothing*** to determine if her mother's requested withdrawals were legitimate, or in her best interests. The trial court even recognized, "Here, there are disputed facts regarding defendant's meeting with the minor." C 190. The trial court added, "The court determines that a failure by the guardian ad litem to meet with the minor over those [monetary] requests, even taken as true, does not constitute a failure to fulfill the actions and duties that were assigned to defendant by the probate court." *Id.*

But a reasonable fact-finder could and should hold that an attorney who fails to

meet or otherwise communicate with his client has not complied with any standard of care, because they are not fulfilling their role as an advisor, an advocate, a negotiator, or an evaluator.

> As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. **As advocate, a lawyer zealously asserts the client's position** under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others."

Illinois Rules of Professional Conduct, Preamble, par. 2 (emphasis added).

Contrary to what Defendants suggest, Plaintiff's allegations of negligence against Fahrenkamp are not limited to his failure to stop her mother's misappropriation of funds once they had been approved by the probate court. Primarily, Plaintiff's allegations of negligence against Fahrenkamp involve his role in enabling the approval of these disbursements to her mother in the first place, and his failure to take even basic measures, such as meeting or at least talking to Plaintiff by telephone, to determine whether her mother's requests were valid.

Defendants do not cite a statute or a single Illinois case extending the immunity found in dissolution or child custody cases to this situation, or any comparable context.

The trial court's summary judgment order, which Defendants ask this Court to reinstate, means that a child who was 11 years old at the time she received her settlement cannot get a remedy for her mother's actions in taking money that rightfully belonged to her. The trial court held in 2013 that the damages Plaintiff could recover from her mother for her mother depleting Plaintiff's settlement had to be limited, because Plaintiff had a GAL who was supposed to be protecting her interests. C 61. It even asked, "And where

was the GAL in all of this?" C 146, Transcript at 6. The trial court suggested Defendant should have been a defendant in that suit, asking Plaintiff's then-counsel, "And you made the only defendant this defendant?" *Id.* But in 2016, the trial court held that not only was the mother immune because of the GAL, the GAL was immune simply because he had been appointed GAL. There is no basis for conferring that immunity.

Here, the record clearly shows genuine issues of fact as to whether Fahrenkamp acted with reasonable care. Given that, and the absence of any authority prior to the Circuit Court's order suggesting he could be immune for his conduct, summary judgment must be reversed.

G. Defendants' Suggested Alternative Remedies for Children Will Not Provide Them with Any Meaningful Relief if They Cannot Rely on GALs or Their Parents to Protect Their Interests

Defendants recognize their approach would strip children of a meaningful remedy when a GAL fails to protect their interests. Their first suggested alternative remedy, to bring concerns before the court and seek the removal of the GAL (Pet. at 14-15), and their third suggested remedy, to pursue judicial review of the underlying court decisions, places the burden ***on the child*** to recognize the GAL is not performing his job before the time to appeal has run. But if the child was capable of doing so, one wonders why a GAL was necessary in the first instance.

Defendants' other alternative remedy is to seek recourse from the Attorney Registration and Disciplinary Commission ("ARDC") for alleged misfeasance. Pet. at 15. But they cite no authority suggesting the ARDC could order Fahrenkamp to compensate Plaintiff for the settlement monies that were dissipated because of his neglect. Public policy demands that such guardians be held accountable when they fail to execute their

duties to their minor wards. Defendant's position would make the GAL's role meaningless; a GAL would have no incentive to perform even the slightest amount of work to protect the minor's interests.

II. The Circuit Court Recognized No Statute or Previous Illinois Appellate Decision Had Conferred Immunity on GALs In This Context; Thus, Defendants' Suggestions of "Chilling Effects" and Other Adverse Consequences Have Already Been Proven Incorrect

The Circuit Court recognized, "Illinois has not held that a guardian ad litem is subject to immunity." A 4, C 188. The Circuit Court was right in that respect, and Defendants did not cite any Illinois case in their Petition stating a GAL in this context would have immunity. Thus, all the appellate opinion does is maintain the status quo. And Defendants do not cite anything, in the record or otherwise, suggesting any of the harms they suggest will come from the appellate opinion existed prior to the Circuit Court's order. It is Defendants who are asking this Court to issue the first Illinois appellate opinion conferring immunity on GALs.

To support their claim that immunity is necessary, Defendants cite cases explaining why immunity may be necessary in dissolution or child custody cases. In that context, where a GAL's recommendation is certain to be to the detriment of one of the adversarial parties, immunity may be advisable, and the appellate opinion expressly states it is not attempting to erode immunity in such situations. But here, it is not at all clear that a GAL's recommendation will invite litigation. Ideally, there will be no conflict between the ward and her parent or guardian. And even if there is a conflict, the GAL can avoid liability by a showing of reasonable care, the same way any private attorney can avoid liability. And Defendants' argument proves too much, by suggesting that the potential for harassment warrants full immunity here. But if that were really true, the three alternative

remedies it proposes in its Petition (remove the GAL, file a complaint with the ARDC, or seek judicial review), particularly the ARDC filing, would have the same effect.

Defendants also take issue with immunity existing for GALs in some contexts but not others. But as the Circuit Court noted, there has never been an Illinois decision conferring immunity on GALs in this context, while there have been decisions conferring immunity in custody and dissolution proceedings.

Defendants suggest the duties of a GAL will be "uncertain." But they are the same duties of reasonable care private attorneys have to meet every day.

Quite simply, Defendants have cited nothing indicating attorneys have been reluctant to take GAL appointments in this context (the protection of a child's settlement) without an Illinois appellate decision conferring full immunity for their actions.

III. There Is No Need for This Court to Exercise Its Supervisory Authority to Clarify Prior Decisions

Defendants offer no explanation as to ***how*** they believe the Appellate Court misapprehended or misapplied *Stuntz v. Stuntz*, 131 Ill.210 (1890) or *In re Estate of Finley*, 151 Ill.2d 95 (1992). The opinion accurately discusses what those cases state, and the context in which they arose. *Compare* Pet. A 6-9, 11, ¶¶ 12, 14, 17 *with Stuntz*, 131 Ill. at 221 ("It is the duty of the guardian *ad litem*, when appointed, to examine into the case, and determine what the rights of his wards are, and what defense their interest demands, and to make such defense as the exercise of care and prudence will dictate."); *Finley*, 151 Ill.2d at 100 (guardian *ad litem* had authority to appeal, on behalf of minors, circuit court's approval of settlement). The appellate opinion not only correctly analyzed these cases, it also expressly recognized the duty of a guardian *ad litem* is not to advocate for what the ward wants, but to recommend what is in the ward's best interest. Pet. A 9

("…he was to advise the court, but only after making careful inquiry for the purpose of protecting the minor's best interests.").

IV. The Trial Court Erred in Determining There Were No Genuine Issues of Material Fact in Regard to Whether Defendant Followed the Directions of the Court and Was Within the Scope of the Appointment

The trial court's legal conclusion appears to be that immunity exists "so long as the guardian ad litem follows the directions of the court and is within the scope of the appointment …" C 189. But here, there were no directions from the court, and nothing in the order appointing Defendant defines the scope of the appointment. The order appointing Defendant simply stated, "The court being fully advised in the premises does hereby appoint David Fahrenkamp as Guardian Ad Litem for the minor child, ALEXIS BRUEGGEMAN." Def. Ex. 1, p. 12 (Order filed February 24, 2004). If the trial court's position is that an order that says nothing about the GAL's duties means the GAL has no duties, then the appointment is a completely empty gesture. And in this instance, it was actually worse than useless, as the trial court relied on Defendant's status as a GAL to limit Plaintiff's remedies against her mother. C 61. And further, the trial court on an earlier page of the order suggested that if the duties are not specified in the order of appointment, the duties pertain to "safeguarding the minor's best interests if not otherwise specified." C 186. Here, there was ample evidence Defendant breached those duties.

As noted *supra*, Illinois law is clear that a GAL does have duties to the minor(s) he or she was appointed to represent. The trial court even recognized Defendant had "some specific duties," and that he **would not** have "quasi-judicial immunity in all circumstances," in the very sentence in which it ultimately concluded he **had** immunity

so long as he followed the [non-existent] directions of the probate court and was within the [undefined] scope of the appointment. C 189.

Assuming a GAL is required to do something to protect the minor's best interests, there was clearly sufficient evidence showing there was a genuine issue of material fact as to whether Defendant reasonably complied with his duties. Plaintiff averred that Defendant never informed her that he was acting as her GAL. C125-126. Thus, she had no way of knowing Defendant could have or should have been acting to ensure that her interests were protected, and that money from her settlement was being appropriately spent. *Id.* Defendant is contesting this statement, and he claims he gave her his business card when she was 11, but that merely creates an issue of fact.

Plaintiff will not rehash the Statement of Facts, *supra*. But to summarize, Plaintiff submitted an affidavit stating she had no idea while she was a minor, and before the probate file was closed, that she had ***any*** GAL, let alone Defendant; that she has never met him; that she has never spoken to him; that Defendant never asked her if her mother's representations were accurate; that if he had made any attempt to communicate with her, she would have told him that the expenses her mother stated needed to be paid for out of Plaintiff's net settlement either did not exist, were grossly inflated, or referred to expenses Plaintiff was paying for out of other proceeds, frequently wages she received from part-time jobs; that she had no idea she could ask Defendant or any other attorney for advice regarding the requests of her mother or her mother's attorney to sign documents allowing them to withdraw funds from her settlement proceeds; and that Defendant never advised her at any time before the probate file was closed that he was no longer acting as her GAL, or that she should seek new representation. C 125-126. Under

normal circumstances, this would constitute a breach of an attorney's standard of care toward a client. Here, where the client was 11 years old when the representation began, the evidence is more than sufficient to warrant a trial.

The probate file showed Defendant was paid for his services, while approving requests for reimbursement by Plaintiff's mother that were not supported with any documentation; Plaintiff's affidavit averred that had Defendant contacted her, she could have informed him these requests were misrepresenting the facts. *See* C 133-136, citing Def. Ex. 1, pp. 38-40, 42-44, 55-60, 61-88, 93. Thus, Fahrenkamp is not someone who was conscripted into this role; he agreed to perform it, and was paid for his time.

Plaintiff also cited sworn testimony from the evidentiary hearing supporting her claims. *See* Statement of Facts, section E.3, *supra*, and citations therein.

Defendant did submit an affidavit contesting some, albeit not all, of Plaintiff's evidence. C 181-184. But at most, that affidavit indicates there are issues of fact. The trial court even recognized there were issues of fact whether Defendant ever met the minor, but suggested Defendant met his duties even if he never met or contacted her. C 190. Respectfully, that statement cannot support summary judgment in light of the standards for summary judgment in Illinois cited in the Standard of Review, *supra,* and the case law cited *supra*, regarding the duties of attorneys in general, and of guardians ad litem in particular. *See, e.g., Ahle v. D. Chandler, Inc.*, 2012 IL App (5th) 100346, ¶ 13 ("With a summary judgment motion, the trial court does not decide a question of fact but, rather, determines whether a question of fact exists. Therefore, a court cannot make credibility determinations or weigh evidence in deciding a summary judgment motion.").

There was ample evidence that Defendant did not even do the minimum one

would expect from an attorney representing an adult client, and that these failures led to Plaintiff losing a substantial sum of money out of her settlement funds. There is no public policy reason to extend immunity to Defendant under these circumstances. If GALs for minors with substantial settlement proceeds are given absolute immunity, then it is unclear what remedy those minors would have if they do not fulfill their duties, and the minors are victimized as a result.

In the trial court, Defendant argued that because the withdrawals from Plaintiff's net proceeds of her settlement were all approved by the trial court, he cannot be deemed liable. But the evidence supported Plaintiff's allegation that the trial court's approval only occurred after Defendant indicated **his** approval. *See* C 61 (wherein the trial court stated its approval occurred after Defendant approved the estimates and expenditures). Under the trial court's holding, a probate court can claim it is simply following the recommendation of the GAL, while the GAL can claim it is the probate court's responsibility to protect the minor. And in the end, no one is actually looking out for the minor. **Someone** is supposed to be looking out for the minor's best interests. That someone should be the GAL. The 2013 Order recognizes the probate court was deferring to the GAL's recommendations; it was his role to review the estimates and expenditures, ensure they were in Plaintiff's interest, and only then approve them.

Defendant has also argued he owed no duty to independently review the requests because they were submitted to him by the attorney for Jelanda Miler, the mother and guardian. But that does not mean Defendant's role was simply to approve them – there was surely ***some*** reason a GAL was appointed for Plaintiff. If Miller and her attorney had been deemed sufficient to protect Plaintiff's best interests, there would have been no need

to appoint a GAL.

Defendant has previously attempted to distinguish *Will v. Northwestern Univ.*, 378 Ill. App. 3d 280, 293 (1st Dist. 2007) by stating that there, the GAL "was acting actually as an advocate for the minor, against the wishes of the parent." One of Plaintiff's main points is that this is what Defendant was supposed to be doing here. *Will* recognized that in Illinois, a GAL's role is to represent the minor, while it is the Court's role to exercise judicial functions. *See Will*, 378 Ill. App. 3d at 293 ("Neither a guardian of the minor's estate, nor his next friend or court-appointed guardian, nor even his parents have any legal right to settle the minor's cause of action unless and until the court reviews the settlement and approves it.").

Plaintiff's allegations, which are supported by the probate file and the case law, show that Defendant was not acting in a judicial or quasi-judicial capacity at the time he approved the requests. Instead, Defendant's role was to represent Plaintiff's interests.

As noted *supra*, the trial court held in 2013 that Plaintiff could not pursue all of her claims against her mother, because she had a GAL who was supposed to be protecting her interests. C 61. Giving that same GAL immunity would mean Plaintiff is not allowed to pursue any remedy for conduct by others that depleted settlement funds that were her property during the time that she was a minor. That unfair result is not required by the law; in fact, the Illinois cases Plaintiff has cited that are specific to GALs show that result is contrary to the law.

Based on the foregoing, it is clear that Defendant's role was to represent Plaintiff, similar to any other attorney representing a client, while it was the court's role to approve her settlement and any disbursements. As such, Defendant was not entitled to the same

immunity enjoyed by the Court.

At a bare minimum, the evidence presented by Plaintiff showed there were genuine issues of fact regarding whether Defendant breached his duties to her. As such, summary judgment should not have been entered.

V. Rule 907, the Subject of Supplemental Briefing Requested by the Appellate Court, Supports the Appellate Court's Holding

During oral argument, the appellate court requested supplemental briefing on Rule 907. That Rule lends further support to the appellate court's decision.

A. Rule 907 Impose On Defendants A "Minimum" Duty of Care

"Rule 907 establishes minimum standards of practice for attorneys who represent children." Committee Comments to Rule 907, Special Supreme Court Committee on Child Custody Issues. "Paragraphs (b) and (c) provide guidance on the attorney's *essential duty of investigation: the duty to determine the child's circumstances and the family's needs.*" *Id.* The duties imposed by Rule 907(c) are not limited to child custody proceedings. Rule 907(c) states:

> As soon as practicable, the child representative, attorney for the child ***or guardian ad litem shall interview the child, or if the child is too young to be interviewed, the attorney should, at a minimum, observe the child.*** The child representative, attorney for the child ***or guardian ad litem shall also take whatever reasonable steps are necessary to obtain all information pertaining to issues affecting the child, including interviewing family members and others possessing special knowledge of the child's circumstances.***

Id. (emphasis added).

B. Rule 907 Applies To This Case

Below, Defendants suggested Rule 907 only applies to child custody or allocation of parental responsibilities proceedings. However, Rule 900(b)(2) Part A. Scope states, "Rules 900 through 920, except as stated therein, apply to … guardianship matters

involving a minor under article XI of the Probate Act of 1975." The appointment of guardian *ad litem*s is recognized by Article XI of that Act. 755 ILCS 5/11-10.1 states, "In any proceeding for the appointment of a standby guardian or a guardian the court may appoint a guardian ad litem to represent the minor in the proceeding."

Nothing in the text of Rule 907(c) limits it to child custody cases. Indeed the use of the generic phrase "guardian *ad litem*," without reference to any particular type of proceeding, strongly suggests that this Court intended no limitation. "The same principles that govern the construction of statutes are applicable to Supreme Court Rules." *Hefner v. Owens-Corning Fiberglas Corp*., 293 Ill.App.3d 396, 400 (5th Dist. 1997), citing *Killoren v. Racich*, 260 Ill.App.3d 197, 198 (1994). "In analyzing Supreme Court Rules, our task is to ascertain, and give effect to, the intention of our supreme court, and that inquiry appropriately begins with the language of the rule." *Id.*, citing *Killoren*, 260 Ill.App.3d at 198. "If the language is clear, the court must give it effect and should not look to extrinsic aids for construction." *Id.*, citing *Killoren*, 260 Ill.App.3d at 198.

Plaintiff anticipates Defendants may argue the rule is limited to child custody cases by its official heading. But this Court has recognized that official headings cannot be considered if the text is plain.

> Further, we note that, even if the caption relied upon by plaintiff were an official heading or title enacted by the General Assembly to accompany section 6–105, plaintiff's argument would nevertheless lack merit. **Official headings or titles "are of use only when they shed light on some ambiguous word or phrase" within the text of the statute, and "they cannot undo or limit that which the text makes plain."** *Brotherhood of R.R. Trainmen*, 331 U.S. at 528–29, 67 S.Ct. at 1392, 91 L.Ed. at 1652; *see also Dewitt v. McHenry County*, 294 Ill.App.3d 712, 716, 229 Ill.Dec. 278, 691 N.E.2d 388 (1998); *Baise*, 234 Ill.App.3d 622, 175 Ill.Dec. 452, 600 N.E.2d 75; *People v. Lamb*, 224 Ill.App.3d 950, 953, 167 Ill.Dec. 179, 587 N.E.2d 61 (1992). **We find no ambiguity in the language of section 6–105 in regard to the scope of immunity. Therefore, it would be inappropriate to consider any official titles or headings in construing this**

statutory provision.
Michigan Ave. Nat'l Bank v. County of Cook, 191 Ill.2d 493, 506 (2000) (emphasis added).

Because there is no ambiguity in the rule's language, Rule 907 is, therefore, applicable to any proceeding involving a guardian *ad litem*, including this case.

C. The Rule 907 Discussion of a Child Being "Too Young to be Interviewed" Is Inapplicable; Defendant Claimed He Interviewed Plaintiff When She Was 11 Years Old; While Plaintiff Disputes This, Defendant's Claim Precludes Him From Claiming She Was "Too Young to be Interviewed"

Defendant did not at any time suggest Plaintiff was "too young to be interviewed;" instead, he maintained that he **did** interview Plaintiff on at least three occasions, including in 2004, when Plaintiff was 11 years old and her settlement was approved. C 183-184. Plaintiff disputed this. C 125-126. Rule 907 states that because Plaintiff was not "too young to be interviewed," as of 2004, Defendant had a duty to interview her, particularly as Plaintiff became older. Whether Defendant did in fact interview her is a genuine issue of material fact, precluding summary judgment.

During oral argument, it was suggested that Defendant may not have interviewed Plaintiff because she was too young at the time he began his appointment in 2004. Defendant's averments that he interviewed her at that time (C 183-184), when she was 11 years old (C 25, Def. Ex. 1, pp. 1, 12), precludes him from now claiming she was too young to be interviewed. Plaintiff only got older during Defendant's appointment. She was 15 years old in 2008, when Defendant represented to the Court that additional disbursements sought by Plaintiff's mother were appropriate. Def. Ex. 1, pp. 1, 38-40. Defendant did not withdraw before Plaintiff reached her 18th birthday. Def. Ex. 1, *generally*. Plaintiff's allegations did not pertain to Defendant's approval of the settlement

in 2004, when she was 11, but to his approval of disbursements from it in subsequent years. C 26-29.

D. There Was Evidence Defendant's Conduct Violated Rule 907

Rule 907(c) provides further support for Plaintiff's contention that Defendant's conduct was in derogation of his duty toward her. The plain language of the Rule imposed a "minimum" duty on defendant as the plaintiff's guardian *ad litem.*

The trial court acknowledged there was a conflict in the evidence, and thus a genuine dispute, as to whether Defendant ever interviewed Plaintiff. *See* C 190 (Order). Plaintiff's affidavit averred that defendant never met with the plaintiff, never spoke to the plaintiff in person or by telephone, and never made any inquiry with regard to the expenses claimed by plaintiff's mother. C 125-126. One of Plaintiff's allegations as to why Defendant's conduct in acting as her guardian ad litem was negligent is that he never interviewed her; if he had, Plaintiff maintains she would have told him that many of her mother's requests for allocations from Plaintiff's settlement were illegitimate. C 125-126. This conflict in the evidence precludes summary judgment.

The trial court "determine[d] that a failure by the guardian ad litem to meet with the minor over those [monetary] requests, even taken as true, does not constitute a failure to fulfill the actions and duties that were assigned to the defendant by the probate court." C 190. In addition to the sources of duty identified elsewhere in this brief, Rule 907(c) imposes the precise duty that the trial court determined to be lacking. The trial court's order finding no duty on the part of defendant cannot, therefore, be sustained.

Furthermore, Rule 907 clarifies that even if Defendant **had** averred Plaintiff was too young to provide him with relevant information (in fact, he instead claimed that he

interviewed her), any such belief by him would not have justified his actions or inactions in this matter. Even if Plaintiff at the ages of 11, 15, and 18 was, as a matter of law, "too young to be interviewed," Defendant's obligations were to "observe" her and "take whatever reasonable steps are necessary to obtain all information pertaining to issues affecting the child, including interviewing family members and others possessing special knowledge of the child's circumstances." Plaintiff contends he did not do so. C 125-126.

E. Rule 907 Is Persuasive Evidence Defendant Violated His Duties

Even if this Court finds that Rule 907 is not binding, for whatever reason, it should be treated as persuasive, as it represents a recognition by this Court that attorneys who are appointed to represent children have an obligation to interview those children to protect their interests. If attorneys have that obligation in child custody and other situations, there is no reason they would not have that obligation when a parent is attempting to use settlement proceeds that rightfully belong to the minor child.

F. Rule 907 Is Further Proof Defendant Is Not Entitled to Immunity

Defendant is not entitled to common-law immunity, or any other immunity, for the reasons specified throughout this brief. Rule 907(c), which creates a duty for attorneys representing children in any capacity, including as a guardian *ad litem*, cannot be limited by common law principles, because judicial immunity is inconsistent with Rule 907's judicial imposition of duty. Further, Rule 2(a) precludes any argument that Rule 907 should be narrowly construed as in derogation of the common law. Rule 2(a) states, "These rules are to be construed … in accordance with the standards stated in section 1-106 of the Code of Civil Procedure (735 ILCS 5/1-106)." *Id.* 735 ILCS 5/1-106

states, "The rule that statutes in derogation of the common law must be strictly construed does not apply to this Act or to the rules made in relation thereto." *Id.*

VI. Defendants' Claim Below that Plaintiff Should Have Appealed the 2013 Order in the 12-MR-188 Case is Not Dispositive of Any Issue Here; Defendants Cite No Authority Suggesting the 2013 Order Was Erroneous; Furthermore, Even if it Was, That Does Not Preclude the Instant Order Under Appeal from Also Being Erroneous

Below, Defendants misrepresent the holding from the 2013 Order in the 12-MR-188 case. Defendants suggested that Order precluded Plaintiff from pursuing any damages against her mother for misuse or misappropriation of funds approved by the probate court. But that is an overstatement, because it implies Plaintiff was not allowed to recover for post-approval misuses or misappropriations by her mother. *See, e.g.,* Appendix A11, C 106 ("This court cannot second guess or go behind any orders that were entered approving expenditures to Jelanda Miller in that file. Those specific claims based on the reimbursements approved or monthly budgets allowed are denied."); *see also* Appendix A10, C 105 ("This court ... cannot and will not charge back for items approved in another file while Alexis had a guardian ad litem who approved the estimates and expenditures."). In fact, the court devoted the second half of its 2013 order to what it labeled as "**Alexis claims not related to budgeting and reimbursement orders**." Appendix A11-13, C 106-108. The 2013 order awarded Plaintiff possession and title of a 2007 Jeep Compass it found the mother had misappropriated, as well as $16,365.00 in funds it found the mother had misappropriated, as well as $10,000.00 in attorney's fees to Todd Sivia, Plaintiff's attorney in that matter. Appendix A13, C108.

Thus, the premise of Defendants' argument, that Plaintiff was barred from seeking damages for "misappropriation of funds properly disbursed by the probate court,"

is simply wrong. The 2013 order already awarded damages to Plaintiff to the extent Plaintiff's mother misused or misappropriated funds approved by the probate court. Defendants claimed below Plaintiff is seeking to recover against them because the mother "did not apply the funds in the manner that they were approved by the GAL and the trial court." But as stated *supra*, the operative complaint explicitly states Plaintiff is not seeking to recover damages that she was awarded in the 2013 order. The 2013 order awarded Plaintiff damages to the extent the mother "did not apply the funds in the manner that they were approved by the GAL and the trial court." As noted *supra*, the allegations of negligence against Fahrenkamp are that he was negligent in approving the disbursements in the first place.

Further, Defendants cite no authority that any portion of the 2013 order, rendered after a bench trial, was in error, let alone an abuse of discretion. As such, Defendants' claim "This decision should have been appealed" lacks the necessary support.

Finally, even if some of the damages currently at issue could arguably be claimed to have been caused by Plaintiff's mother, that would not defeat Plaintiff's right to recover damages from Defendants, to the extent Fahrenkamp's negligence was also a cause of her injury. An injury can have more than one proximate cause. *See, e.g.,* IPI Civil No. 15.01 ("When I use the expression 'proximate cause,' I mean a cause that, in the natural or ordinary course of events, produced the plaintiff's injury. [It need not be the only cause, nor the last or nearest cause. It is sufficient if it combines with another cause resulting in the injury.]"); *see also id.*, Notes on Use (collecting authorities holding the long form of this instruction properly states Illinois law).

CONCLUSION

Based on the foregoing, Plaintiffs urge this Court affirm the Appellate Court, reverse the trial court's order entering summary judgment for Defendants, and remand with instructions to the trial court to hold a trial on all issues, and enter such other or further relief warranted under the law.

Respectfully submitted,

_____*/s/ Roy C. Dripps*_____
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CERTIFICATE OF COMPLIANCE

I certify that this Appellee's Brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 315(c)(6), is 50 pages.

Roy C. Dripps

PROOF OF SERVICE and FILING

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that on January 16, 2019, a copy of the foregoing and the attached Appendix was filed and served upon the Clerk of the Illinois Supreme Court via the approved electronic filing service provider and that true and correct copies of the foregoing were sent by electronic mail to the following counsel for Defendant-Petitioner on January 16, 2019, all occurring on or before 5:00 p.m.:

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Attorneys for Defendants-Petitioners David Fahrenkamp and David Fahrenkamp, d/b/a Fahrenkamp Law Offices

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

Roy C. Dripps

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Carolyn Taft Grosboll
SUPREME COURT CLERK

NO. 123990

IN THE
SUPREME COURT OF ILLINOIS

ALEXIS NICHOLS, f/k/a ALEXIS BRUEGGEMAN Plaintiff/Respondent/Appellee, vs. DAVID FAHRENKAMP, and DAVID FAHRENKAMP d/b/a FAHRENKAMP LAW OFFICES, Defendants/Petitioners/Appellants.	)	Appeal from the Illinois Appellate Court, Fifth District, No. 5-16-0316 On appeal from the Circuit Court of the Third Judicial Circuit, Madison County, Illinois, No. 13-L-1395 The Honorable Barbara Crowder, Circuit Judge, Presiding

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APPENDIX
TO APPELLEE'S BRIEF

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IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

IN THE MATTER OF THE ESTATE)
) No.: 04-P-139
OF ALEXIS BRUEGGEMAN, a Minor)

ORDER

The court being fully advised in the premises does hereby appoint David Fahrenkamp as Guardian Ad Litem for the minor child, ALEXIS BRUEGGEMAN.

DATE: 2-24-04

13L1395

AFFIDAVIT

I, Alexis Nichols, formerly known as Alexis Brueggeman, under oath and duly sworn do hereby state:

1. That I am over 18 years of age, am of sound mind and could testify competently to the facts stated herein.

2. My understanding is that my probate file, Case No. 04-P-139, was closed on September 2, 2010, after I reached the age of 18 years.

3. After my 18th birthday, I learned that during relevant times that my probate file was open, I had been assigned a guardian ad litem. Before I turned 18, I had no idea any guardian ad litem had been appointed, let alone that it was David Fahrenkamp.

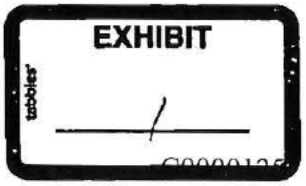
4. It is now my understanding that Mr. Fahrenkamp was appointed to ensure that my interests were protected while I was a minor, and to serve as my advocate in the course of handling the proceeds I obtained from a 2004 settlement.

5. After turning 18, I learned that I should have been able to rely on him to protect my interests and make sure that the money from my settlement was being appropriately spent.

6. During the time he was my guardian ad litem, Mr. Fahrenkamp never met with me. To this day, I have never met him.

7. During the time he was my guardian ad litem, Mr. Fahrenkamp never talked to me, either in person or by telephone. To this day, I have never spoken to him.

8. During the time he was my guardian ad litem, Mr. Fahrenkamp never asked me if the representations made by my mother regarding expenses she claimed to have incurred on my behalf, or that she would need to incur on my behalf, were accurate. If he had done so, I would



have told him that the expenses were exaggerated or falsified, or referred to expenses I paid for out of separate funds.

9. To this day, I am not aware of any efforts Mr. Fahrenkamp made to verify that the representations made by my mother regarding expenses she claimed to have incurred on my behalf, or that she would need to incur on my behalf, were accurate, before he recommended approval of petitions to disburse funds.

10. Prior to my 18th birthday, there were occasions where my mother's attorney asked me to sign "Approval" documents regarding her petitions to disburse funds.

11. At no time did Mr. Fahrenkamp advise me that I should submit these documents for his review, or that I had a right to utilize either him or another attorney of my choice prior to agreeing to my mother's requests or any attorney's requests.

12. At no time prior to the closing of my probate file did Mr. Fahrenkamp advise me that he was no longer acting as my guardian ad litem, or that I should seek new representation.

FURTHER AFFIANT SAYETH NOT.

Dated 3/24/16

Alexis Nichols

SUBSCRIBED AND SWORN to before me this 24th day of March, 2016.

Notary Public

My Commission Expires: 10/28/2017

OFFICIAL SEAL
JEAN ANN SHELEY
NOTARY PUBLIC STATE OF ILLINOIS
My Commission Expires 10-28-2017

AFFIDAVIT

Comes now David M. Fahrenkamp, and hereby states as follows:

1. I met personally with and spoke to Alexis Brueggeman on at least three (3) occasions after being appointed Guardian Ad Litem in 04-P-139.

2. I know this because it is a procedure that I follow in every case in which I have been appointed Guardian Ad Litem.

3. In this case, I met with Alexis Brueggeman prior to Court on the day that her case was set for approval of settlement. I spoke with her personally, out of the presence of her Mother and gave her my business card with my personal cell phone number on it.

4. Her mother also brought her by my office to meet with me and on at least one other occasion met in Court Room 214 to discuss a requested distribution.

5. On each occasion, Ms. Brueggeman was given an opportunity to express any concerns she had to me and expressed none.

6. As each distribution was presented to me for approval, I reviewed it in light of the reasonableness of the request, the documentation or explanation provided, the value of overall settlement and the best interests of Ms. Brueggeman.

7. At the time of the request for distribution for a car and insurance, Ms. Brueggeman had $420,106.32 in her Edward Jones Account and was eager to get her own car. In light of this, the request was very reasonable.

8. At no time did Ms. Brueggeman ever contact me or complain as to the manner in which the vehicle was purchased or managed.

9. My telephone number was known to Ms. Brueggeman and had been the same for over twenty-five (25) years. I had no reason to believe that she was denied access to a phone during that time or that she was prevented from contacting me to express her concern.

Dated this 23 day of May, 2016.

DAVID M. FAHRENKAMP