

# DAILY REPORT

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## Judge Rejects Settlement for Estate of Woman Killed in Poultry Plant Gas Leak

*Although the amounts of [a 4-year-old girl's] father's suit settlement and mother's suit settlement have not been released, the fact that the father's settlement was "at least four times the amount of [her] mother's case" was a factor in her decision, Judge Veronica Cope said in her order Thursday.*



6 killed in liquid nitrogen leak at Foundation Food Group in Gainesville, GA

A judge has denied a company's motion to enforce a settlement agreement regarding a wrongful death lawsuit filed on behalf of the mother of a 4-year-old girl who lost both parents in a 2021 Georgia poultry plant gas leak that claimed six lives and injured

nearly 50 others. The girl, Ximena Sophia Vera, is also a plaintiff in the suit, which was brought by the estate of her mother, Nelly Gisel Perez-Rafael.

The incident happened Jan. 28, 2021, when a Messer-owned immersion freezer at Gainesville's Foundation Food Group poultry plant had an allegedly defective bubbler tube that allowed an overflow of liquid nitrogen in a freezer tank, sucking all the oxygen out of the air and causing the workers in the room to asphyxiate.

Messer, a German-based company, is part of [Messer Group](#), the world's largest privately owned industrial gases business. The judge's decision is the latest in a series of litigation related to the gas leak, including [conduct-related motions](#) filed against Messer or its in-house attorneys.

One wrongful death lawsuit was filed on behalf of each of the six workers who died in the incident, with the rest already being settled, with a handful of other personal injury suits filed on behalf of some of the survivors, all of which have settled. One of those settled wrongful death lawsuits was filed on behalf of Vera's father, Edgar Vera-Garcia.

Although the amounts of the father's and mother's settlements have not been released, the fact that the father's settlement was "at least four times the amount of Ximena's mother's case" was a factor in her decision, Gwinnett County State Court Judge Veronica Cope said in [her order](#) Thursday rejecting Perez-Rafael's settlement.

"The court is also mindful of the fact that Ximena's guardian ad litem [Dana Ashford], appointed specifically for the purpose of safeguarding her interests, has repeatedly testified under oath as to her belief that the settlement was not in Ximena's best interest," Cope said. "This belief is echoed by Ximena's conservator [Stephen Berk], upon whom is placed the statutory duty of bringing the very settlement to which he objects. The court understands that the conservator and guardian ad litem only became formally involved after the settlement was negotiated, but no evidence or argument has been presented to suggest that their assessment of the case is any less genuine as a result. While mindful of defendants' 'slippery slope' warnings, the court must nonetheless make its decision based upon the specific circumstances of *this* case, rather than hypothetical cases which may present similar situations in the future. In light of forgoing, and pursuant to OCGA § 29-3-3, the court will not enforce the settlement reached as to Ximena's claims."

## **‘The Right Decision’**

The November 2021 settlement was contested because the attorney hired to represent Vera on behalf of her mother, Richard Taylor, had some health problems that forced



Matt Cook (clockwise from top left), Nathan Nicholson, Kate Cook and Josh Bearden of the Cook Law Group in Gainesville. (Courtesy photos)

him to quit practicing law. Taking over as plaintiff attorneys were partner Matt Cook, managing partner Kate Cook and associate attorneys Josh Bearden and Nathan Nicholson of the Cook Law Group in Gainesville and Ruben Cruz with Cruz & Associates in Atlanta.

**“We think it’s the right decision, and that’s exactly what the law demands and authorizes her to do,” Matt Cook said of Cope’s order in an interview. “The settlement is grossly unfair**

**for a minor, and that’s where the court’s discretion should be exercised. I think the considered judgment of a court is to listen to the nuances and the facts of a settlement involving a minor. If you’re going to take away a kid’s one shot at recovery, then a court should consider all of the facts and all the circumstances and whether the settlement truly is in the child’s best interest.”**

In an emailed statement, Kate Cook added, **“This girl, in her first four years, has been through more bad luck than most people experience in a lifetime. One of the very few breaks going her way is that Georgia law provides for judicial oversight of settlements such as hers.”**

## **‘Settlement ... Reached in Good Faith’**

In an emailed statement, Messer spokeswoman Amy Ficon said, **“We are pleased that the court agreed with Messer that the settlement reached at the November 2021 mediation was neither substantively nor procedurally unconscionable—rejecting plaintiff’s arguments to the contrary. Messer has resolved all claims and lawsuits arising out of this tragedy.**

“We are disappointed that the court was persuaded to not enforce this settlement—which was reached in good faith with the plaintiff’s representatives and counsel at a session before an experienced mediator. We are optimistic that the standard will be reviewed by the appellate courts, so that future litigants may have confidence in reaching settlements in Georgia through the mediation process.”

Scott Masterson, managing partner at Lewis Brisbois Bisgaard & Smith’s Atlanta office, and Derek Whitefield, a member at Dykema’s Los Angeles office, represent Messer in the case. In an emailed statement, Masterson said he believes the original settlement was legitimate.

“I am still sure that I settled the case at arm’s length at mediation with Rex Smith as the mediator,” he said. “The court found that there was a settlement and it wasn’t unconscionable, which means there was an arm’s-length settlement despite previous name calling my client has endured in these pages.

“As it relates to the minor settlement, Mr. Cook urged the court to adopt factors that are not consistent with the approval of minor settlements in Georgia, and the guardian ad litem he hired supported her opinion relying on a verdict in Gwinnett [County] that occurred after the subject case had been settled.”

Masterson was referring to the \$1.7 billion *Hill v. Ford* damages verdict a jury awarded in August. He added that the normal procedure in settlements is for “plaintiffs and lawyers who agree to a settlement to seek to have it approved. Mr. Cook instead hired a conservator and [guardian ad litem] to support not doing so. The court treated the motion as if plaintiff had brought it, however. At least I think so. And that was probably the way to handle it. As far as I know, I am the only defense lawyer in the history of Georgia who has had to argue such a motion in this posture. It literally never happens this way.

“There is admittedly a lack of precedent for the court to rely on when presented with the issue of being asked to enforce a settlement when the lawyers who agreed to the



Scott Masterson  
Lewis Brisbois Bisgaard & Smith, Atlanta.  
(Courtesy photo)

settlement fail to follow the procedure to get it enforced and the defendant has to seek such relief.”

Masterson noted that Messer plans to appeal the decision.

“The court has indicated it will sign a certificate of immediate review giving the [Georgia] Court of Appeals an opportunity to provide guidance for the future so that litigants can have confidence that when they settle a case at mediation involving minors, the settlement will be enforced and not be subject to second opinions from opportunistic lawyers who get themselves hired to challenge the settlement using information that was not available to the settling parties at the time of settlement because it did not yet exist,” he said.