COMMONWEALTH OF MASSACHUSETTS

Appeals Court

NO. 2014-P-1554

MIDDLESEX COUNTY

ODIN ANDERSON, KERSTIN ANDERSON AND
KATARINA ANDERSON, PPA ODIN ANDERSON,
PLAINTIFFS-APPELLANTS,

v.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA.,
AMERICAN INTERNATIONAL GROUP TECHNICAL SERVICES, INC., AND
AMERICAN INTERNATIONAL GROUP CLAIM SERVICES, INC.,
DEFENDANTS-APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE MIDDLESEX SUPERIOR COURT

BRIEF OF *AMICUS CURIAE* MASSACHUSETTS DEFENSE LAWYERS ASSOCIATION

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Dated: March 9, 2015

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STATEMENT OF THE INTEREST OF THE *AMICUS*

The Massachusetts Defense Lawyers Association ("MassDLA"), *amicus curiae*, is a voluntary, non-profit, state-wide professional association of trial lawyers who defend corporations, individuals and insurance companies in civil lawsuits. Members of the MassDLA do not include attorneys who primarily represent claimants in personal injury litigation. The purpose of the MassDLA is to improve the administration of justice, legal education, and professional standards and to promote collegiality and civility among all members of the bar. As an association of civil defense lawyers, the MassDLA has a direct interest in the issues of public importance that affect MassDLA members and their clients. Those interests could be affected by the issues before the Court in this appeal, including the legal standard to be used in cases involving claims of unfair and deceptive practices in the settlement of civil lawsuits by insurers. The MassDLA offers its experience and perspective to the Court to assist in the Court's resolution of the matter now before it.

ISSUES PRESENTED

Where the Superior Court applied the wrong standard to determine whether or not liability in this matter was reasonably clear, should this court reverse that ruling and apply the standards previously announced in cases such as Bobick v. United States Fidelity and Guaranty Trust, 439 Mass. 652 (2003)(Bobick II) and Clegg v. Butler, 424 Mass. 413 (1997).

Where the Superior Court ruled that reliance on the advice of independent and objective appellate counsel was a bad faith claims-handling action, because the Court disagreed with said advice, it erred in finding a bad faith insurance practice. This Court should hold that such reliance, both as a general matter and in this case, compels a finding of good faith on the part of the insurer.

STATEMENT OF THE CASE

The MassDLA adopts by reference the Statement of the Case contained in the Appellate Brief of Defendants-Appellees National Union Fire Insurance Group, et al., at pp. 3-4.

ARGUMENT

I. The Superior Court Misapplied And Misunderstood The Decisional Rules Established By The Appellate Courts For Determining When Liability Is Reasonably Clear In An Unfair Claims Practices Suit.

In the underlying decision, the trial court judge held that:

> In either case [defendant operator striking a normal pedestrian or striking an intoxicated pedestrian appearing normal], it is entirely reasonable to expect that the driver will be found primarily, if not entirely, at fault for the parties' accident, and the possibility that the pedestrian ultimately might be assessed some fractional comparative fault for the event does not mean that the driver's own liability is not "reasonably clear."

Anderson v. American Inter. Group, Inc. (AIG), 2014 WL 1878882, at p. *18 (not officially reported). The trial judge relied upon one other Superior Court opinion as support for this proposition, that case being Lane v. Commerce Ins. Co., 16 Mass.L.Rptr. 295 (2003), despite extensive appellate case law on the issue.

This quoted passage from the trial court's order is the heart of its error in this matter relating to the alleged c.93A/c.176D liability. The trial court fundamentally and significantly misunderstood and misapplied the established law as to when liability in

any matter is "reasonably clear" under the statutes noted.

This court and the Supreme Judicial Court (SJC) have repeatedly held, for decades at this point, that an insurer has a duty to effectuate a prompt, fair and equitable settlement once the liability of the insured has become "reasonably clear," and that liability is reasonably clear only when it is clear as to both fault and damages. Mass. Gen. Laws c.176D, §3(9)(f); Van Dyke v. St. Paul Fire & Marine Ins. Co., 388 Mass. 671, 675 (1983); Clegg v. Butler, 424 Mass. 413, 421 (1997); O'Leary-Alison v. Metro. Prop. & Cas. Ins. Co., 52 Mass.App.Ct. 214, 217 (2001). The Superior Court did not acknowledge this well-established rule of law. The Superior Court below rather relied upon the Lane decision by another Superior Court judge. The reliance by the Superior Court was misplaced, as the facts and holding of Lane were not applicable to the case at bar.

In Lane, the Superior Court (Hely, J.) had a very peculiar set of facts before it. The court was faced with the issue of an intoxicated and speeding defendant who struck the plaintiff's car, causing extensive bodily injuries and death. Plaintiff at the

time of the accident was taking a left hand turn across two lanes of traffic and had her parking lights on (at 6:51 p.m. on 4/5/97), but not her headlights. The defendant's insurance policy had a $100,000 limit. The insurer knew the above essential facts months prior to the defendant being convicted of motor vehicle homicide, operating under the influence and operating to endanger. All parties agreed that the damages well exceeded $200,000, and a real estate attachment in the amount of $500,000 had been granted by the Superior Court. The court held that since no reasonable jury would likely find that the Plaintiff's comparative negligence exceeded that of the Defendant, "any damages award would exceed the policy limit, even with the maximum fifty percent reduction of damages based upon comparative negligence." The insurer conceded that this analysis was appropriate. Id. at *2. The insurer only contested at what point in time was the liability reasonably clear. Id. On those unique facts, the court held that it was a bad faith settlement practice for the insurer to wait until after the criminal conviction (some 2 years after these facts were known) to offer the policy limits. The insurer was obliged to offer the policy limit at

the point when the investigation showed a reasonably clear likelihood (as opposed to a near certainty) that plaintiff's negligence would not exceed the insured's negligence, given that the damages were far beyond the amount of the policy limit. Id. at *7.

The Lane decision was just a specialized application of the rule established in 1997 in Clegg. In Clegg, the primary insurer for the insured driver had a policy limit of $250,000. There was an excess policy providing $1 million of coverage. 424 Mass. at 414. The primary carrier determined that the case was a 100% liability case against the insured. Id. at 421. Further, the primary carrier knew that damages were well in excess of its primary limits; however, there was some question as to how far beyond those primary limits were the likely damages (that is, how far damages were likely to go into the excess limits). Id. The SJC held that:

> As Utica [the primary insurer] had amassed enough information to know it was highly probable that it would be liable to the full extent of its policy, the judge was warranted in finding that the structured settlement offers [well less than the policy limits] finally offered in July were "unreasonably low," "unrealistic," and "unjustified."

Id. at 422. The Clegg court repeatedly stated, nonetheless, that liability is not reasonably clear until both liability and damages are reasonably clear. Id. at 418, 421 and n. 8. In both Clegg and Lane, the issue of fault was reasonably clear (by admission and/or by the reasonably clear relative degrees of negligence of the parties) and the issue of damages was reasonably clear due to the extremely high amount of damages in each case relative to the low policy limits available, so that in combination, liability became reasonably clear.[1] None of the unique factors of Clegg or Lane exist in the case at bar. The Superior Court was in error in holding that liability was reasonably clear in the case at bar. See also

[1] The Superior Court's misapplication of law continued in its attempt to distinguish in footnote 24 McMillan v. Westport Ins. Corp., 2004 WL 3106733 (MA Superior Court, 2004)(Botsford, J.). In McMillan, the court noted the Bobick II/Clegg standard that liability is not reasonably clear unless both fault and damages are reasonably clear, and held that a genuine dispute over the amount of comparative negligence in the case there under consideration meant that the insurer did not engage in bad faith in its handling of the case. The McMillan court discussed Bobick II and then noted and contrasted the unusual factual situation of Clegg. Id. at fn. 11. McMillan is in accord with all applicable appellate case law. Indeed, the McMillan decision was affirmed on appeal, a fact that the Superior Court in this case did not even cite. 65 Mass.App.Ct. 1105 (2005)(R. 1:28 Memorandum and Order).

Giacalone v. Commerce Ins. Co., 83 Mass.App.Ct. 1115 (2013)(R. 1:28 Memorandum and Order)(Upholding summary judgment for the insurer on a bad faith claim where the facts did not establish that Plaintiff's legitimate damages dwarfed the policy limits and there still existed issues of causal relation of the damages.)

In Anderson, the primary carrier for the Defendants, National Union, had an insurance policy limit of $1 million. 2014 WL 1878882 at *2, n. 5. National Union also wrote the excess policy with limits of $10 million. Id. A close review of the facts found by the Superior Court demonstrates that the degree of comparative negligence on the plaintiff's part was a contested issue throughout the case. Nonetheless, the Superior Court held that it was reasonable to expect that the Defendant driver would be found "primarily, if not entirely, at fault." Id. at *18. This holding flies in the face of even the plaintiff's liability expert's testimony that anticipating a comparative negligence finding of 25-30% would have been reasonable. Id. at *16. [Interestingly, immediately after noting this expert testimony the Court stated it agreed with the

plaintiff's expert (Id. at *17), only to change its mind one page later (Id. at *18).] The trial court then leapt to the position that the insurer(s) were accordingly required to make reasonable efforts to effectuate a prompt, fair and equitable settlement. Id. at *18. Essentially, the trial court ruled as a matter of law that the insurer(s) were obligated to make settlement offers because the comparative negligence of the plaintiff in the court's view could not reasonably be said to be expected to exceed 50%, without even discussing the amount of damages. It did so citing, but misapplying, Lane, and incorrectly distinguishing McMillan. This ruling is simply not the law and it is not in keeping with binding appellate precedent. Where there is a legitimate dispute as to the extent of fault of the parties, even where plaintiff's fault is less than 50%, liability is not clear as a matter of law absent highly unusual facts. Bobick II, supra; O'Leary-Allison, supra. Only in rare situations, not found in the case at bar, where comparative fault is reasonably established to be 50% or less AND it is reasonably expected that causally related damages reduced by the maximum 50% set-off dwarf the coverage available – such as in

Clegg or Lane – is there any obligation to make a settlement offer. While it may very well be a sound business practice to make such an offer where the degree of the parties fault is not yet reasonably clear, it is not a legal requirement.[2] See also Van Dyke, supra; Demo v. State Farm Mut. Auto. Ins. Co., 38 Mass.App.Ct. 955, 957 (1995); Clegg, supra; Scott v. Vermont Mut. Ins. Co., 2011 WL 4436984 (D.Mass. 2011); Kitchell v. Arbella Mut. Ins. Co., 81 Mass.App.Ct. 1128 (2012); Bohn v. Vermont Mut. Ins. Co., 922 F.Supp.2d 138 (D.Mass. 2013).

In its rush to judgment, the Superior Court, in addition to overlooking binding appellate precedent on when fault is reasonably clear, likewise completely ignored the issue of damages. Nowhere in the lower court's opinion is there any discussion of whether or not damages were reasonably clear at any particular point in time. Anderson, 2014 WL 1878882, Rulings of Law, §3 (at *16-18). It is unknown how the court decided this significant legal issue. The trial court

[2] Indeed, as noted in AIG's brief, in this case the insurers did offer a $2.5 million settlement. This figure was agreeable to the plaintiff. However, the settlement fell apart when the plaintiff insisted that the insurers also agree that said settlement amount would be the base sum for any future c.93A/c.176D liability.

ignored the binding precedent of Bobick II and its progeny and did not address a crucial question regarding whether or not damages were reasonably clear or when the damages became reasonably clear. It is not at all clear that it was highly probable that the insurers would be liable to the full extent of their policies. The trial court erroneously omitted a required step in the legal analysis and its ruling should be reversed.

Since Bobick II, it has been well-established law that liability is reasonably clear for purposes of c.176D liability only when both fault is reasonably clear and when causally related damages are reasonably clear. The Superior Court either misapplied this law or ignored it when it found that the insurers in this action violated an obligation to effectuate a prompt, fair and equitable settlement. This court should reverse that holding and follow the Bobick II line of case law.

II. The Superior Court's Ruling That The Pursuit Of The Appeal In The Underlying Tort Action Was A Violation Of C. 176D Was Also Erroneous. Further, That Ruling Is Chilling To The Rights of Insurers.

In Davis v. Allstate Ins. Co., 434 Mass. 174 (2001), the SJC held that an insurer does have an obligation to appeal from a judgment against the insured where "reasonable grounds exist to believe that the insured's interests might be served by the appeal." 434 Mass. at 180. Applying this standard in the context of a bad faith claim, the insurer acts in bad faith only when there is no reasonable basis for the appeal. Id. Reliance on advice of counsel is evidence of good faith. Resendes v. Boston Edison Co., 2000 WL 421004 at *10 (Van Gestel, J.)("If an appeal following an adverse jury verdict is wholly frivolous or interposed solely for delay in an effort to wear down the plaintiff, then, in the first instance, there is objective bad faith, and in the second, there is subjective bad faith. Violations of G.L.c. 93A/176D arise in either instance.")(emphasis added); Tallent v. Liberty Mut. Ins. Co., 2005 WL 1239284 (Haggerty, J.)(Insurer has duty to objectively investigate appellate issues and the reasonable likelihood of success on those issues.)

The Superior Court quoted this general rule, but then proceeded to ignore its own factual findings in ruling that the appeal of the underlying tort action was in bad faith. The trial court held that it was bad faith on the part of the insurer to appeal where the trial court believed that a better result on appeal or remand was not likely, 2014 WL 1878882 at *19, rather than applying the Davis standard that an appeal might serve the interests of the insured.

The Superior Court used the wrong standard. In the case at bar, there was a reasonable - and certainly not wholly frivolous- chance of prevailing on appeal. Several outside attorneys, hired to evaluate the appeal, and not trial counsel, opined to the insurers that the odds of success on appeal were just less than 50-50%.[3]

In both Resendes and Tallent, the Superior Court used a multi-factor test as set forth in Davis to

[3] The Superior Court cites no expert opinion in the case that there was no reasonable chance of Defendant establishing greater than 50% comparative negligence on retrial. Even Plaintiff's liability expert opined that up to 30% comparative negligence would be reasonably expected. Such substantial comparative negligence lends credence to, and certainly does not negate, the possibility of comparative negligence of more than 50% on retrial. Note, of course, the tort jury did find 47% comparative negligence on Plaintiff's part.

determine whether the taking of an appeal was in good faith. Chief among those factors was the good faith advice of independent counsel.[4] See Hartford Cas. Ins. Co. v. New Hampshire Ins. Co., 417 Mass. 115 122 n. 5 (1994), citing Boston Symphony Orchestra, Inc. v. Commercial Union Ins. Co., 406 Mass. 7, 14 (1989) and Van Dyke, 388 Mass. at 677 (1983); Mayer v. Med. Malpractice Joint Under. Ass'n, 40 Mass.App.Ct. 266, 274 (1996); Liquor Liability Joint Underwriting Ass'n of MA v. Great Am. Ins. Co., 16 Mass. L. Rptr. 268 (2003) (all using a multifactor test); 14 Couch on Insurance 3d, §200:45.

Here, however, the Superior Court rushed to judgment and ignored its own factual finding that independent and objective appellate counsel advised that there was a significant chance to prevail on appeal, albeit just less than 50%. It ignored all other elements of the appropriate legal standard of review and held that appellate counsel were wrong in their opinions. Thus reliance on such opinions was

[4] Other factors include the underlying verdict, the legal merits of the appeal, whether the appellate court found the appeal to be frivolous, the independence and objectivity of review counsel and the state of the law.

not reasonable and the appeal was taken in bad faith to harass Plaintiffs. 2014 WL 1878882 at *19.

This Court should clearly restate and apply the law that reliance on the good faith advice of independent, objective, experienced, well-informed and unbiased appellate counsel is extremely strong evidence of good faith on the part of the insurer in pursuing an appeal. Where said counsel in this matter opined that odds of prevailing on appeal were close to 50%, and no expert testimony ever stated that an as favorable-if not more favorable-result was impossible on retrial of the tort claim, there was no bad faith exhibited by the insurer in following said advice. Similarly, insurers generally should be entitled to rely upon the legal advice of independent, objective, well-informed, experienced outside counsel, counsel who have reviewed thoroughly the available record and the state of the law in reaching their opinions. Even if the opinions of counsel are eventually held to be incorrect, or where other counsel or even judges might reach different conclusions, absent demonstrated subjective bad faith by said counsel an insurer must be entitled to rely upon said advice in formulating its appellate strategy. If the strategy does not prevail, then the

insurer will pay for the reliance by paying the judgment in accord with its policy language plus all accrued interest. The insurer runs an ordinary business risk. It should not be exposed to c.93A/c.176D liability.

The Superior Court's ruling also chills the rights of insurers to exhaust judicial remedies when defending their insureds. The prospect that an insurer will face c.93/c.176D liability (rather than liability under its policy) where it has taken an appeal in good faith is simply not compatible with notions of justice, due process and fair play. An appeal taken in good faith, even where it is not a near certain winner, is not adverse to the policies of c.176D with regard to claims settlement practices. The insured and the insurer do not act in bad faith by availing themselves in good faith of all possible judicial avenues of legal review.[5]

[5] The MassDLA also supports the many other arguments advanced by the insurers as to why there was no c.93A/c.176D liability in this matter.

CONCLUSION

The MassDLA urges the Appeals Court to reverse the Superior Court's ruling in Anderson v. AIG. The Superior Court did not follow binding appellate precedent in Bobick II and its progeny. This Court should clearly restate and apply the Bobick II standard. Additionally, this Court should hold and apply the law that an insurer does not act in bad faith where it relies upon the well-researched advice of independent, objective, experienced outside appellate counsel in deciding to pursue an appeal, even though the chances of success are somewhat less than 50% but far beyond being frivolous.

Respectfully submitted,

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Dated: March 9, 2015

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R.A.P. 16(a)(6) (pertinent findings or memorandum of decisions); Mass. R.A.P. 16(e) (references to the record); Mass. R.A.P. 16(h) (length of briefs); Mass. R.A.P. 18 (appendix to briefs); and Mass. R.A.P. 20 (form of briefs, appendices, and other papers).

/s/ Martin Rooney

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