COMMONWEALTH OF MASSACHUSETTS

Appeals Court

No. 2009-P-0619

SUFFOLK COUNTY

MARCIA RHODES, HAROLD RHODES
AND REBECCA RHODES,
PLAINTIFFS-APPELLANTS,

v.

AIG DOMESTIC CLAIMS, INC. F/K/A AIG TECHNICAL SERVICES, INC.,
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA,
AND ZURICH AMERICAN INSURANCE COMPANY,
DEFENDANTS-APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT

REPLY BRIEF OF THE DEFENDANTS-APPELLEES AIG DOMESTIC CLAIMS, INC. F/K/A AIG TECHNICAL SERVICES, INC., NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

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INTRODUCTION

Pursuant to Mass. R. App. P. 16(c), the Defendants/Appellees, National Union Fire Insurance Company of Pittsburgh, Pa. and AIG Domestic Claims, Inc. ("AIGDC") (collectively "National Union") submit this Reply Brief in reply to the response of the Plaintiffs/Appellants, Marcia, Harold and Rebecca Rhodes ("the Rhodes"), to the issues presented by National Union's cross appeal.

ARGUMENT

I. The Rhodes Fail to Identify any Record Evidence to Support the Trial Judge's Factual Finding that the Appeal of the Judgment Against the Trucking Defendants Lacked Merit.

The Trial Court based its determination that National Union's post trial offer was unreasonably low on its own evaluation of the merits of the appellate issues, specifically "What is the likelihood that the appeal will succeed?" *Appendix, 73* (hereinafter *A.*__).[1]

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[1] The Trial Court determined that: (a) no "reasonable insurer could have concluded that a 40 percent discount of the judgment was reasonable in view of [National Union's] meager chance of prevailing on appeal." *A. 75*; and (b) "[t]he appeal rested on unusually feeble arguments[.]" *A. 74*.

National Union contends that since the Rhodes failed to present any evidence as to what a reasonable insurer would have done after judgment entered in the Rhodes personal injury action against National Union's insureds (the "Accident Case"), there is no factual basis to support the conclusion that "no reasonable insurer" would have responded to the Rhodes' demand for the full amount of the judgment including interest with an offer of $7 million. A. 75. See Hartford Cas. Ins. Co. v. New Hampshire Ins. Co., 417 Mass. 115, 121 (1994).

In their brief, the Rhodes do not even attempt to rebut the proposition that a trial judge as fact finder may not bring his or her own expert knowledge and experience to bear to supply the opinion evidence necessary to support a plaintiff's bad faith claim. See Commonwealth v. O'Brien, 423 Mass. 841, 558 (1996) (quoting Furtado v. Furtado, 380 Mass. 137, 140 n.1 (1980)) ("A judge's reliance on information that is not part of the record implicates fundamental fairness concerns. . . . Thus, '[a] judge may not rely on his private knowledge of particular facts that are not matters of which he can take judicial notice.'"); Nantucket v. Beinecke, 379 Mass. 345, 353 (1979)

("Judicial notice is not to be extended to personal observations of the judge or juror.").

The Rhodes did not proffer any evidence at trial that National Union's potential appeal based on the trial court's failure to compel the production of Marcia Rhodes' mental health records lacked merit. The Rhodes argue in their Reply Brief, without any citation or support, that it is "well settled" that evidentiary challenges rarely result in new trials. Appellants' Reply Brief, 26. There was no evidence presented at trial concerning this proposition or indicating that National Union was or should have been aware of this proposition.

Moreover, the proposition that evidentiary challenges on appeal are rarely successful is wholly inapposite because the appeal contemplated by National Union was not an evidentiary appeal and, even if it were, the general, unsubstantiated proposition has no probative value in the context of the merits of any particular appeal. In contrast to the absence of record evidence to support the trial judge's factual finding, National Union presented evidence that it was informed by counsel that "in light of plaintiff's testimony at trial about her pre-existing bi-polar

disorder, defendants have a possibility of gaining a new trial on the judge's denial of the defense motion seeking her prior treatment records." *A. 3541.*

Without any evidentiary support, it was error for the Trial Court to have relied upon its own specialized knowledge and expertise to conclude that "[t]he likelihood that an appellate court would find that the trial judge abused her discretion by denying the defendants' motions for disclosure of Ms. Rhodes' psychological records . . . reasonably should still be recognized as minimal." *A. 74.*

II. The Rhodes' Preservation of their Right to Pursue a c. 93A Claim Against National Union Did Not Preserve their Claim for Damages that Were Relinquished by Their Settlement Agreement and the Satisfaction of Judgment.

The Rhodes are not entitled to a "loss of use" award because they filed a Satisfaction of Judgment when they settled the Accident Case. The accord and satisfaction extinguished their right to recover any postjudgment interest related to the Accident Case. *A. 3575-76; A. 6923-25.*

The Rhodes claim that the reservation of the right to pursue their G.L. c. 93A and c. 176D claims in the settlement agreement preserved their right to pursue postjudgment interest on the Underlying

Judgment in this action. Appellants' Reply Brief, 26-27. The reservation of the right to pursue the bad faith claim, however, does not mean that in the litigation of that claim the Rhodes may recover damages that they waived or are estopped from recovering.

The Rhodes also argue that National Union's reliance was not reasonable since the Rhodes expressly retained the ability to litigate the bad faith claim. At the time of the settlement agreement, however, the Rhodes had not made any demand for postjudgment interest in the context of their bad faith claim. The Rhodes c. 93A demand letter only indicated that the Rhodes were seeking multiple damages, there was no suggestion that they were demanding damages for loss of use of settlement money. *A. 3543-3547; 3563-3567.*[2] Because National Union was not on notice that the Rhodes intended to seek postjudgment interest owed in the underlying case as damages in the bad faith action, National Union's reliance was reasonable.

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[2] The failure to properly identify in the demand letter the nature of the damages being sought precludes the recovery of such damages in a subsequent G.L. c. 93A lawsuit. See Clegg v. Butler, 424 Mass. 413, 423 (1997); Bressel v. Jolicoeur, 34 Mass. App. Ct. 205, 211 (1993).

After National Union paid the settlement, the Rhodes filed a Satisfaction of Judgment, extinguishing ipso facto their claim to any postjudgment interest. *A.6923-25.* The Rhodes acknowledged in this pleading that "the judgments which entered after jury verdict on September 28, 2004 have been satisfied in full[.]" Id.

The Rhodes' reliance on Rothenberg v. Boston Housing Auth., 335 Mass. 597 (1957) is misplaced. In Rothenberg, the Supreme Judicial Court held only that "an acknowledgment of satisfaction of a judgment indorsed upon an execution has been held to be invalid where made in consideration of the payment of a smaller sum than the amount due." Id. at 600. In this case, however, National Union did not simply agree to pay the Rhodes less than what was due them. National Union agreed to withdraw the Notice of Appeal filed in the Accident Case on behalf of the trucking defendants as part of the settlement agreement. *A. 3575-76.* Unlike the defendant in Rothenberg, National Union provided consideration in exchange for the Rhodes' agreement to accept less than the total amount then owing on the Underlying Judgment.

The statute was not intended to permit the Rhodes to induce National Union to settle the Accident Case by agreeing to forego postjudgment interest, while permitting them to recover the exact same damages through the "back door" as part of the G.L. c. 93A lawsuit.

III. The Rhodes' Reliance on the Prejudgment Interest Statute to Support the Trial Court's Calculation of their "Loss Of Use" Damages Is Misplaced.

The Trial Court's use of the statutory postjudgment interest rate of 12% per year to measure the Rhodes' loss of use damages is clear error because the only evidence at trial on this issue indicated that the Rhodes would have earned 3.5% per year in investment interest if the settlement had been paid earlier.[3] Thus, the Trial Court should have used 3.5% per year rather than 12% per year to calculate loss of use damages, resulting in a $130,739.58 actual damage award.

The Rhodes' argue that a "statute governs the calculation of postjudgment interest, and the Trial

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[3] Harold Rhodes testified at trial that he invested all settlement monies in "[l]ow-risk bonds" that earned "closer now to three and a half percent post-tax" in interest. *A. 1642.*

Court followed it." Appellants' Reply Brief, 28.[4] However, the measure of damages awarded by the trial judge was expressly based on the loss of use of the judgment funds and there is no evidence to support a finding that the Rhodes would have earned 12% annual interest on the judgment funds if they had received them.

Assuming the Rhodes meant to refer to statutory postjudgment interest pursuant to G.L. c. 235, § 8, (see footnote 4), this statute does not require the Trial Court to use a hypothetical 12% interest rate on

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[4] The statute cited by the Rhodes, however, G.L. c. 231, § 6C, provides for the calculation of *prejudgment* interest in *contract* actions and has no applicability to the Rhodes c. 93A damages claim. See Makino, U.S.A., Inc. v. Metlife Capital Credit Corp., 25 Mass. App. Ct. 302, 320 n.9 (1988) (in c. 93A action, the parties agreed "that the applicable pre-judgment interest provision is G.L. c. 231, § 6B."); Hopkins v. Liberty Mut. Ins. Co., No. 950053, 11 Mass. L. Rptr. 101, 1998 WL 1258423, *8 (Mass. Super. Ct. Aug. 5, 1998), aff'd, 434 Mass. 556 (2001) (since the plaintiff and defendant do not stand privity with one another, unfair settlement practices claim "sounds more in tort than in contract," thus G.L. c. 231, § 6B applies to calculation of pre-judgment interest); Industrial Gen. Corp. v. Sequoia Pac. Sys., 849 F. Supp. 820, 827 n.14 (D. Mass. 1994), rev'd on other grounds, 44 F.3d 40 (1st Cir. 1995) ("[P]laintiff's Chapter 93A count as submitted to the jury sounds in tort rather than contract. Interest, therefore, on the underlying award will be paid from the date of the filing of the action. See G.L. c. 231, § 6B.").

the Rhodes "loss of use" of the funds, rather than the 3.5% per year they actually earned by investing the settlement funds. While postjudgment interest may have been accruing at a rate of 12% per year on the Underlying Judgment between December 2004 (when Zurich paid the Rhodes $2,322,995.75; its policy limits plus accrued postjudgment interest) and June 2005 (when the settlement agreement was reached in the Accident Case), the Rhodes agreed to forego any unpaid interest as part of the settlement in the Accident Case. The actual damages awarded in this matter should have been based on the Rhodes' actual loss of money.

CONCLUSION

For the foregoing reasons, and the reasons discussed in National Union's opening brief, National Union requests that this Court reverse the Trial Court's determination that: (a) the appeal of the Underlying Judgment against the trucking defendants in the Accident Case lacked merit; (b) the Rhodes are entitled to "loss of use" damages for the postjudgment conduct; and (c) to the extent "loss of use" damages are appropriate the Trial Court erred in calculating the amount of "loss of use" damages awarded to the Rhodes. Thus, the Trial Court should have used 3.5%

per year rather than 12% per year to calculate loss of use damages, resulting in a $130,739.58 actual damage award. Assuming that it was appropriate to award double the judgment, the total damages award should have been $261,479.16.

Respectfully Submitted,

Dated: August 31, 2009

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CERTIFICATION

Pursuant to Mass.R.A.P. 16(k), I, Anthony R. Zelle, certify that this 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); Mass. R. A. P. 16(e); Mass. R. A. P. 16(f); Mass. R. A. P. 16(h); Mass. R. A. P. 18; and Mass. R. A. P. 20.

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