

COMMONWEALTH OF MASSACHUSETTS.

# Appeals Court.

No. 2009-P-0619.

SUFFOLK COUNTY.

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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.

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ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT.

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**SUPPLEMENTAL MEMORANDUM FOR  
THE PLAINTIFFS-APPELLANTS,  
MARCIA RHODES, HAROLD RHODES AND REBECCA RHODES.**

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**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. GORE SUPPORTS THE RHODES FAMILY’S ARGUMENTS. ... 1

    A. AIGDC’s duty to make a prompt, fair settlement offer did not depend on the Rhodes Family’s willingness to accept such an offer. .... 1

    B. Because liability was clear, and damages clearly exceeded policy limits, Zurich violated its duty to effectuate a prompt, fair settlement. .... 2

    C. Zurich’s failure to make a prompt, fair settlement offer cannot be blamed on the Rhodes Family. .... 4

    D. As the Trial Court found a willful violation of c. 176D/93A, the Rhodes Family is entitled to punitive damages equal to double the underlying judgment. .... 4

III. AIGDC’S RELIANCE ON GORE IS MISPLACED AND SHOULD BE REJECTED. .... 6

IV. CONCLUSION ..... 8

**TABLE OF AUTHORITIES**

**CASES:**

Drywall Sys., Inc. v. ZVI Constr. Co.,  
435 Mass. 664 (2002) ..... 6, 8

Gore v. Arbella Mutual Ins. Co.,  
77 Mass. App. Ct. 518 (2010) ..... *passim*

Hershenow v. Enterprise Rent-A-Car,  
445 Mass. 790 (2006) ..... 2

Hopkins v. Liberty Mut. Ins. Co.,  
434 Mass. 556 (2001) ..... 2

**STATUTES:**

Massachusetts General Laws

c. 93A ..... *passim*

c. 93A, § 9(3) ..... 5, 6

c. 93A, § 11 ..... 8

c. 176D ..... 1, 3, 4, 5, 8

## I. INTRODUCTION

Gore v. Arbella Mutual Ins. Co., 77 Mass. App. Ct. 518 (2010), clearly establishes that the Trial Court erred in:

- Requiring the Rhodes Family to prove that it would have accepted an offer that Zurich and AIGDC never made.
- Excusing Zurich from liability even though:
  - (a) the insured's negligence was clear within days of the crash in which Mrs. Rhodes suffered permanent paralysis;
  - (b) Mrs. Rhodes' damages would clearly exceed Zurich's policy limits; and,
  - (c) Zurich made no settlement offer for more than two years after the crash.
- Refusing to multiply the underlying judgment against both Zurich and AIGDC when assessing punitive damages, as required by c. 93A.

## II. GORE SUPPORTS THE RHODES FAMILY'S ARGUMENTS.

### **A. AIGDC's duty to make a prompt, fair settlement offer did not depend on the Rhodes Family's willingness to accept such an offer.**

The Trial Court concluded that AIGDC willfully and knowingly violated c. 93A/176D by refusing to make a reasonable settlement offer until one month before trial. Nevertheless, the Trial Court excused AIGDC from liability because of the Rhodes Family's failure to prove that if AIGDC had made a prompt and fair

settlement offer, "the plaintiff would have accepted that offer and settled the actual or threatened litigation." (Trial Court Order, Appendix ("App.", p. 69.)

The Trial Court went to great lengths to conclude that Hopkins v. Liberty Mut. Ins. Co., 434 Mass. 556 (2001), was "effectively overruled" by Hershenow v. Enterprise Rent-A-Car, 445 Mass. 790 (2006). (App., pp. 68-69.)

Gore outright rejects that conclusion. It expressly reaffirmed the holding in Hopkins that "[a]n insurer's statutory duty to make a prompt and fair settlement offer does not depend on the willingness of a claimant to accept such an offer." Gore, 77 Mass. App. Ct. at 529 (quoting Hopkins, 434 Mass. at 567). Gore elaborates, "a claimant's conduct is not relevant to the insurer's duty." Id. at 529. Accordingly, the Trial Court erred in excusing AIGDC's liability by finding that the Rhodes Family had not proven that it would have accepted a hypothetical offer.

**B. Because liability was clear, and damages clearly exceeded policy limits, Zurich violated its duty to effectuate a prompt, fair settlement.**

Zurich failed to make any settlement offer or tender its policy for more than two years after the crash. The other driver's negligence, his insured status and Ms. Rhodes' paralysis caused by the accident were never in question. However, Zurich waited for

five months after it received the Rhodes Family's demand, which included extraordinary detail of medical and other special damages exceeding the policy limits, before finally tendering its policy limits. (App., p. 54.) Nevertheless, the Trial Court concluded that Zurich did not violate c. 176D/93A.

Gore requires reversal of that ruling. It reaffirms:

And where, as here, the insured's liability was clear within days, and **damages clearly exceeded the policy limits**, [the insurer's] tactic of delay constituted a violation of its obligation 'to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear' pursuant to G.L. c. 176D § 3(9)(f).

77 Mass. App. Ct. at 528. (emphasis added). Gore continues, "[a]n insurer knowingly violates c. 93A and c. 176D when liability is reasonably clear yet it still fails to settle within a reasonable time." Id. at 532. (finding that a five month delay in responding to demand letter and seven month delay in making a settlement offer violates c. 176D).<sup>1</sup>

Thus, Gore compels a finding that Zurich not only violated its statutory duty to effectuate a fair settlement with the Rhodes Family, it did so knowingly.

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<sup>1</sup> Zurich waited eight months after the demand before offering its policy limits to the Rhodes Family. (App., p. 60.)

**C. Zurich's failure to make a prompt, fair settlement offer cannot be blamed on the Rhodes Family.**

The Trial Court found that by January 30, 2002 (21 days after the crash) Zurich's third party administrator knew that Zurich's insured was negligent and had caused Ms. Rhodes to suffer catastrophic injuries. (App., p. 45.) Nevertheless, the Trial Court found that Zurich could not have reasonably determined the scope of damages until August of 2003, when the Rhodes Family sent a formal demand letter with medical documentation. Id. Inexplicably, the Trial Court continued to excuse Zurich's inaction for another five months until it tendered its policy limits to AIGDC in January 2004. (App., p. 51.)

Gore mandates reversal of that ruling: "Nor do we find persuasive [the insurer's] claim that [claimant's] failure to provide medical authorization excused its failure to respond." 77 Mass. App. Ct. at 527. Here, as in Gore, Zurich had sufficient information to "conclude that damages would exceed policy limits" long before it made its tender. Id. Accordingly, Zurich must be found to have breached its statutory duty to effectuate a prompt settlement under c. 176D.

**D. As the Trial Court found a willful violation of c. 176D/93A, the Rhodes Family is entitled to punitive damages equal to double the underlying judgment.**

Gore rejects the Trial Court's unprecedented interpretation of c. 176D/93A. Gore is the latest in a

line of cases holding that where an insurer is found to have willfully violated c. 176D, then c. 93A mandates that actual damages, defined as the amount of the judgment on all claims arising out of the same and underlying transaction or occurrence, shall be doubled or tripled. G.L. c. 93A, § 9(3).

Gore stated, "[the claimant] argues that the judge erred in concluding that the damages on the [underlying] assigned claim did not constitute a judgment that could be multiplied under c. 93A. We agree." 77 Mass. App. Ct. at 534. Here, as in Gore, the damages that must be doubled were determined in a separate action between the Rhodes Family and the insured.

The critical difference, however, is that in Gore the parties had negotiated the damages on one of the claims. Therefore, the trial court in the later unfair settlement practices action independently determined whether the stipulated judgment was reasonable and noncollusive.

In this case, a jury verdict and a judgment determined the underlying damages that the Rhodes Family suffered. Therefore, under c. 93A, the calculation of punitive damages is a straightforward multiplication of that judgment. The Trial Court, having recognized the amount of that judgment in the 93A action, (App., p. 41), clearly erred in refusing to do so.

**III. AIGDC'S RELIANCE ON GORE IS MISPLACED AND SHOULD BE REJECTED.**

The appellants foresee that AIGDC may rely on this isolated language in Gore: "where multiple damages are sought under G.L. c. 93A based on 'claims arising out of the same and underlying transaction,' those claims must be determined in the same proceeding with the multiple damages claims." 77 Mass. App. Ct. at 535.<sup>2</sup> From this, AIGDC presumably will argue that the Rhodes Family should have presented its c. 93A claim in the underlying lawsuit. However, that reliance is misplaced and that argument must be rejected.

Analysis of this argument must begin with the statute itself. G.L. c. 93A, § 9(3) provides, in pertinent part:

For the purposes of this chapter, the amount of actual damages to be multiplied by the court shall be the amount of the judgment on all claims arising out of the same and underlying transaction or occurrence, regardless of the existence or nonexistence of insurance coverage available in payment of the claim.

Under this statute, the Rhodes Family is entitled to a multiple of its "actual damages." Its "actual damages" are then specifically defined as "the amount of the judgment on all claims arising out of the same and underlying transaction or occurrence[.]" The "claims arising out of the same and underlying transaction or occurrence" are the Rhodes Family's

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<sup>2</sup> Gore quotes this language from Drywall Sys., Inc. v. ZVI Constr. Co., 435 Mass. 664, 668 (2002).

claims for damages against the insured that resulted from the insured's negligence in the crash. These claims were determined by a jury verdict and judgment against the insureds. Therefore, this case presents a straightforward application of the statute to the facts and procedural history of the case.

The procedural history of Gore made the application of this statutory language less straightforward, though clear enough. In Gore, there was no jury determination of the plaintiff's damages. Instead, the judgment was a stipulated judgment based on a negotiated settlement. The trial court in the plaintiff's c. 93A action in Gore determined that the stipulated judgment was reasonable. The Court of Appeals therefore held that the amount of the stipulated judgment constituted the plaintiff's "actual damages to be multiplied" under c. 93A. 77 Mass. App. Ct. at 535. Accordingly, the Court of Appeals remanded the case for entry of a judgment that doubled or tripled those actual damages. Id. at 536.

Gore supports the Rhodes Family's c. 93A claim for this simple reason: If a stipulated judgment in an underlying action that is determined to be reasonable

meets the requirements of c. 93A, then surely a judgment on jury verdict must also.<sup>3</sup>

Lastly, the public policy implications of AIGDC's argument are astounding. AIGDC's argument would mandate that every plaintiff in a personal injury suit make a c. 93A claim in the underlying action! And, it would be legally impossible for a court to award damages under c. 93A for a violation that occurs after suit is filed.

Most importantly, nothing in Gore undermines the duty of an insurer to effectuate a fair, prompt and equitable settlement, even after suit is filed. Accordingly, the Rhodes Family is entitled to punitive damages calculated by doubling the amount of their judgment.

#### **IV. CONCLUSION**

For the foregoing reasons, the rulings in Gore support the Rhodes Family's entitlement to a finding of a willful and knowing violation of c. 176D/93A against both Zurich and AIGDC. Thus, the Rhodes Family is entitled to punitive damages calculated by multiplying the judgments entered against the insureds in the

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<sup>3</sup> As noted, Gore quotes from Drywall Sys, Inc. v. ZVI Constr. Co., 435 Mass. 664 (2002). That case also presented an usual procedural history, distinguishable from the present case. In that case, the plaintiff's underlying claim and the unfair trade practices claim under § 11 of c. 93A arose from the same facts. The court merely concluded, rather unremarkably, the parties' arbitration agreement requires that the claims must be presented in the same proceeding and that such a combined proceeding met the requirements of c. 93A.

underlying action arising from the automobile crash  
that paralyzed Marcia Rhodes for life.

Respectfully submitted,

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Dated: September 27, 2010

**CERTIFICATE OF COMPLIANCE**

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) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

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