SUPREME JUDICIAL COURT
COMMONWEALTH OF MASSACHUSETTS
SJC FAR-19379

APPEALS COURT NO. 2009-P-0619

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
SUFFOLK COUNTY SUPERIOR COURT

OPPOSITION OF DEFENDANT-APPELLEE ZURICH AMERICAN INSURANCE COMPANY TO APPLICATION FOR FURTHER APPELLLATE REVIEW OF PLAINTIFFS-APPELLANTS

Gregory P. Varga
(gvarga@rc.com)
BBO #629227
Linda L. Morkan
(lmorkan@rc.com)
Pro Hac Vice - pending
Danielle Andrews Long
(dlong@rc.com)
BBO #646981
ROBINSON & COLE LLP
One Boston Place, Floor 25
Boston, MA 02108
617(557-5900)

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STATEMENT OF NECESSARY FACTS

The Appeals Court included in its opinion a very thorough statement of the relevant facts of this matter. 2010 Mass. App. LEXIS 1507, *1-*10 (included in appendix to Plaintiffs' Application for Further Appellate Review dated 12.13.10) (hereafter "App. FAR at __"). That statement was taken from the even more thorough findings of fact made by the trial court (Gants, J.). *See* 2008 Mass. Super. LEXIS 169, *1-*44 (also included in appendix to App. FAR).

Specifically as they relate to the claims against Zurich American Insurance Co., certain facts are highlighted as follows:

In January 2002, Plaintiff Marcia Rhodes was seriously injured when the passenger vehicle she was driving was struck from behind by a truck insured by Zurich under a primary policy of automobile liability insurance with a bodily injury limit of $2 million. There was also a $50 million excess liability policy provided by National Union Fire Insurance Company.[1]

Through its third-party administrator, Zurich was notified of the Rhodes accident on the day it

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[1] AIG Domestic Claims Inc. provided claims administration services for National Union. Together the two companies are referred to herein as "AIGDC."

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occurred. About six months later, suit was filed on behalf of by Ms. Rhodes, her husband and their minor daughter ("Plaintiffs"). By mid-2003, no settlement demand had yet been made, nor had Zurich been provided with a copy of Ms. Rhodes's medical records.

In early September 2003 Zurich finally received a detailed demand package from Plaintiffs' counsel that included a "day in the life" video presentation, and Ms. Rhodes's medical records. Zurich then retained a life care expert to assess Ms. Rhodes's future medical expenses. The expert reported back to Zurich in early October and, in November, Zurich received defense counsel's evaluation regarding the strength of the Rhodes's claims and any possible defenses. On the basis of those two reports, Zurich scheduled a conference call involving the various interested parties on the defense side (Zurich, AIGDC, and the insureds). That call occurred on November 19, 2003.

During that call, Kathleen Fuell, Zurich's claim representative, informed the other participants of her intent to seek supervisor authority to tender Zurich's $2 million policy limits to AIGDC. Following the call, Ms. Fuell promptly sought such authority by preparing a detailed internal report which was submitted to

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management in mid-December 2003. Unfortunately, the recipient of the report was leaving the company, so the report was forwarded to her replacement. Approval to tender policy limits came on January 22, 2004. The very next day Ms. Fuell contacted AIGDC and verbally tendered Zurich's policy limits.[2]

Thereafter, resolution of the action rested with AIGDC. AIGDC and the Plaintiffs mediated the claim in August 2004 but failed to compromise. AIGDC authorized a settlement value of $4.75 million but the Plaintiffs were then demanding $15 million.

The case was tried in September 2004. Just prior to closing arguments, AIGDC's claim representative increased its offer, but Plaintiffs instead opted to send the case to the jury. The jury returned a verdict of $9.412 million on all of the claims. Although AIGDC initially appealed the judgment,[3] it ultimately settled

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[2] AIGDC initially rejected the verbal tender. A written tender was made in March 2004. Also in March 2004, Zurich tendered the $2 million directly to Plaintiffs' counsel, but the offer was rejected out of hand as too meager. Because Zurich was the primary carrier and the damages demand exceeded its policy limits, it was clear to all that additional monies would have to be paid by AIGDC in order to settle the Rhodes family claims.

[3] Numerous times in their application the Plaintiffs claim that "the Defendants" appealed the jury's verdict, but it was only AIGDC who did so, not

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the matter for $8.965 million. All in all, Plaintiffs received roughly $11.835 million in their tort action.

Plaintiffs then commenced this action against Zurich and AIGDC claiming that they violated G.L. ch. 176D § 3(9)(f) (and, in turn, G.L. ch. 93A) by failing to effectuate a prompt, fair, and equitable settlement of a claim in which liability was reasonably clear.

This action was tried to the court (Gants, J.) over 16 days in 2006, following which the Court issued a thorough 65-page written exposition of his findings of fact and conclusions of law. With respect to Zurich, the trial court concluded that the evidence at trial established that: (1) Zurich promptly tendered its $2 million policy limits to the excess insurer when liability and damages became reasonably clear; and (2) even if Zurich had violated its duty to provide a prompt tender, an earlier tender "would not in any way have affected either the timing or the amount of AIGDC's subsequent settlement offer," therefore, Plaintiffs had suffered no injury. The Plaintiffs appealed the judgment in favor of Zurich to the Appeals Court. That court unanimously affirmed,

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Zurich which had earlier tendered its limits and thereby discharged its duties under ch. 176D. App. FAR at 2, 5-6.

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holding that the trial court's decision was well supported by the factual record. 2010 Mass. App. LEXIS 1507, *33-35.[4]

ARGUMENTS AGAINST FURTHER REVIEW

The Plaintiffs ask this Court to review the decision of the Appeals Court, citing, essentially, three reasons:

(1) The Appeals Court applied an incorrect measure of punitive damages;

(2) The Appeals Court did not address the question of the proper standard of proof for an award of emotional distress damages under c. 93A; and

(3) The Appeals Court wrongly affirmed the trial court's decision that Zurich American did not violate c. 93A.

App. FAR at 6-7.

As to these issues, only the last concerns Zurich. The other two, both of which address the subject of the proper calculation of damages, cannot reach Zurich as the trial court held that Zurich did not violate chs. 93A or 176D and, therefore, was not liable to the Plaintiffs. Thus, although it is of the opinion that the Appeals Court's rulings on the first

[4] Although there was a separate opinion concurring and dissenting to the majority's holdings with respect to AIGDC, all of the judges unanimously agreed that the judgment in Zurich's favor was correct.

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and second issues above are proper, Zurich will limit its discussion to whether this Court has reason to grant the extraordinary relief of further appellate review on the third ground.

A. THE APPEALS COURT PROPERLY AFFIRMED THE JUDGMENT IN ZURICH'S FAVOR BECAUSE THE RECORD AMPLY SUPPORTED THE TRIAL COURT'S FACTUAL FINDINGS

By claiming that Zurich "inexcusably delayed" making a settlement offer to the plaintiffs for two years, the Plaintiffs would have this Court believe that a great injustice has been done by the Appeals Court. *See* App. FAR at 7. The reality, however, is that the evidence never supported the Plaintiffs' contention that Zurich had delayed in trying to effectuate a settlement for "two years." The trial court held - and the Appeals Court affirmed - that Zurich tendered its policy limits in a timely manner after liability became reasonably clear in November 2003, and, in so doing, complied with its duties under ch. 176D § 3(9)(f).

Contrary to the plaintiffs' assertions, App. FAR at 15-16, the trial court correctly found that Plaintiffs did not "fail[] to effectuate a prompt settlement" because there was no evidence that either

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liability or damages in excess of Zurich's $2 million policy limits became "reasonably clear" at any time before November 2003 – the point at which Zurich first informed AIGDC that Zurich's primary policy limits would be tendered to it. 2008 Mass. Super. LEXIS 169, *58-59. And at that moment when liability did become "reasonably clear," Zurich representatives acted quickly to secure the authorization necessary to tender the full policy. *Id.* These were factual determinations made by the trial court based on the evidence it received during 16 days of trial. *Clegg v. Butler*, 424 Mass. 413, 422 (1997). They are not clearly erroneous and the Appeals Court was correct to rebuff Plaintiffs' attempts to secure their reversal. 2010 Mass. App. LEXIS 1507, *34-35.

Moreover, as duly noted by the Appeals Court, the plaintiffs never took issue with the trial court's factual findings regarding the critical timeline of Zurich's handling of the claim, *id.* at 35, thus there was never any ground for the Appeals Court to reverse the trial court's careful factual findings. It is simply too late for the Plaintiffs to now seek relief from this Court - claiming the "public interest"

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warrants review - when they never before argued that the trial court's factual findings were in error.

B. EVEN IF THE PLAINTIFFS COULD HAVE PROVEN ZURICH'S LIABILITY, THEY COULD NOT ESTABLISH THAT THEY SUFFERED ANY INJURY BECAUSE ZURICH'S TENDER COULD NOT BE SEPARATELY ACCEPTED

Moreover, even if Plaintiffs were right that they had proven a violation of G.L. ch. 176D §3(9)(f), they could not recover under Chapter 93A as there was no proof offered at trial that Plaintiffs suffered any injury due to the timing of Zurich's tender of its policy limits. 2008 Mass. Super. LEXIS 169, *59-60.[5] To the contrary, Plaintiffs could not have suffered any harm because their claims against Zurich's insured could not settle without the participation of AIGDC, and there was no question (again based on the trial court's unchallenged subsidiary findings) that AIGDC: (1) had no intent to settle with Plaintiffs before August 2004; and (2) never presented Plaintiffs with a high enough offer to settle. *Id.* Thus, a pre-trial compromise was impossible. Even if Zurich had offered

[5] The Appeals Court did not reach this issue because it held that the trial court rightfully held that Zurich had acted reasonably. If this Court were to grant review as requested by the Plaintiffs, however, and it found error in the Appeals Court's decision as it respects Zurich, then it would have to reach and resolve this secondary issue.

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the Plaintiffs the policy limits the day after the accident occurred, the interposition of AIGDC in the claims process and the manner in which AIGDC recalcitrantly handled the claim after the tender meant that the Plaintiffs would not have been able to act on an earlier tender by Zurich; nothing would have changed the course of events. As Judge Gants astutely observed: "There is literally nothing that AIGDC would have done any differently had Zurich's formal tender been provided during the November 19, 2003 conference call." *Id.* at *59. The Plaintiffs can gain nothing by further appellate review by this Court.[6]

CONCLUSION

The trial court issued a thorough and thoughtful 65-page written opinion, outlining its factual findings and legal conclusions. Plaintiffs did not show that the findings were not supported by evidence in the record, nor did the Plaintiffs establish that

[6] Although sounding superficially similar, this issue is different than the claim that Plaintiffs could not have been damaged because they would have rejected an earlier settlement offer, a theory rejected by the Appeals Court. *See* 2010 Mass. App. LEXIS 1507, *15-16. This issue centers on what AIGDC (as the excess carrier) would have done if Zurich had acted sooner, not what the Plaintiffs would have done in that instance. Thus, the issue is still legally viable.

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the legal conclusions were illogical or incorrect. The Appeals Court properly affirmed that judgment based on the particular facts of this case. There is no conflicting case law to reconcile, nor is there a question of statutory interpretation for this Court to weigh; this is purely an appeal by plaintiffs disappointed in a trial court's factual resolution. The Plaintiffs have not set forth a good and adequate reason for this Court to grant the relief of further appellate review.

DEFENDANT/APPELLEE,
ZURICH AMERICAN INSURANCE CO.

By its Attorneys,

Linda L. Morkan (*pro hac vice*)
Gregory P. Varga (BBO #629227)
Danielle Andrews Long (BBO#646981)
Robinson & Cole LLP
One Boston Place
Floor 25
Boston, MA 02108
(617) 557-5900

Dated: December 23, 2010

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