COMMONWEALTH OF MASSACHUSETTS

Appeals Court

No. 2018-P-0789

WORCESTER COUNTY

COMMERCE INSURANCE COMPANY,
PLAINTIFF-APPELLANT,

v.

MATTHEW PADOVANO & others,
DEFENDANTS-APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT

BRIEF FOR THE PLAINTIFF-APPELLANT,
COMMERCE INSURANCE COMPANY

JOHN P. GRACEFFA, ESQ.
BBO #205920
LAWRENCE M. SLOTNICK
BBO #549734
MORRISON MAHONEY LLP
250 Summer Street
Boston, Massachusetts 02210
(617) 439-7500
lslotnick@morrisonmahoney.com

Dated: July 9, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

CONSTITUTIONAL PROVISIONS:

STATUTES:

RULES:

STATEMENT OF THE ISSUES PRESENTED

May a liability insurer preserve its right to a meaningful adjudication of a valid insurance coverage question by depositing its policy limits (plus accrued post-judgment interest) into court, thereby ending the accrual of post-judgment interest, in conformity with the suggested procedure in the case of Davis v. Allstate Ins. Co., 434 Mass. 174 (2001)?

STATEMENT OF THE CASE

The plaintiff, appellant, Commerce Insurance Company ("Commerce") filed this declaratory judgment lawsuit seeking a judicial declaration of its duty to indemnify (not its duty to defend) Matthew and Stephen Padovano under a standard Massachusetts Automobile Insurance Policy. Record Appendix[1] V.I:23. The underlying lawsuit arose out of an incident which occurred outside of the Captain's Lounge bar in Leominster, Massachusetts, on August 3, 2013. R.A. V.I:80. On that night, defendant Matthew Padovano and his girlfriend Sandra Gabis got into a dispute with defendant David Szafarowicz inside the Captain's Lounge bar. The dispute escalated such that

[1] Citations to the Appendix will be in the form R.A. V.X:XX.

the Captain's Lounge staff intervened and asked both parties to leave. Mr. Padovano and Ms. Gabis were escorted out a side door and went to their car which was parked nearby. Mr. Szafarowicz left through the front door and walked to the parking area in front of the Captain's Lounge.

Rather than getting in his car and driving away from the Captain's Lounge, Mr. Padovano chose a route that brought him back in front of the Captain's Lounge. When he reached the front of the Captain's Lounge, he saw Mr. Szafarowicz standing in the parking area. Mr. Szafarowicz walked in front of Mr. Padovano's car and apparently gestured toward Mr. Padovano. In response, Mr. Padovano accelerated his car and ran over Mr. Szafarowicz. Mr. Padovano dragged Mr. Szafarowicz for 40 to 50 feet, killing Mr. Szafarowicz.[2]

Mr. Padovano was promptly arrested and charged with first degree murder. Eventually, Mr. Padovano

[2] The present appeal is interlocutory. As a result, the precise facts of the incident have never been determined by a judge or jury because the underlying dispute was never tried on the merits. Instead, they will be the subject of the trial in the present lawsuit. However, the general sequence of events is not disputed by the parties, and the precise facts of the incident are not dispositive to the single legal issue presented in this appeal.

pled guilty to the lesser included offense of manslaughter and was sentenced to 15 to 20 years in the state prison. *Noted in* R.A. V.II:112.

The Estate of Mr. Szafarowicz filed a wrongful death lawsuit within a month after the incident (hereinafter referred to as "the underlying lawsuit"). R.A. V.I:80. In the underlying lawsuit, the Estate of Mr. Szafarowicz sued Matthew Padovano (the driver), Stephen Padovano (Matthew's father and the owner of the vehicle involved in the accident) and the Captain's Lounge seeking damages for wrongful death.[3] Just days before trial, the Padovanos (over the written objection of Commerce) entered into agreements with the Estate in which the Padovanos waived their defenses to the lawsuit, confessed to negligence, agreed to cooperate with the Estate (rather than with their insurer, Commerce), assigned their rights against Commerce to the Estate, and permitted the

[3] The Captain's Lounge settled out of the underlying lawsuit prior to trial and is not a party to this appeal.

Court to assess damages in lieu of an actual trial.[4] On December 29, 2016, the Superior Court entered an amended judgment against Matthew and Stephen Padovano in the total amount of $7,721,419.92. *Noted in* R.A. V.II:115 Commerce contends that this judgment was procedurally improper, and the issues regarding this judgment are the subject of the separate appeal noted in footnote 2.

The present declaratory judgment lawsuit was filed by Commerce promptly, on January 21, 2014, R.A. V.I:4, meaning that Commerce filed its declaratory judgment action three years before judgment entered in the underlying lawsuit. In the declaratory judgment action, Commerce (as auto insurer for the Padovanos) sought a declaration stating that it does not have a duty to indemnify either Matthew Padovano or his father Stephen Padovano under the Optional Bodily Injury coverage of the policy for two reasons: (1) because the death of Mr. Szafarowicz was not an "accident" within the meaning of a standard

[4] Commerce believes that this type of agreement, especially one agreed to before the trial of a dispute, is impermissible as a matter of law, and a breach of contract. This issue is the subject of an appeal by Commerce which sought, and was denied, the right to formally intervene. This appeal is currently pending in this Court.

Massachusetts Auto Insurance Policy; and (2) because Matthew Padovano was a "customary operator" of the vehicle in question, yet was not listed as a customary driver on the policy as was required by the terms of the policy. *Policy Provision 18*, R.A. V.I:65. The underlying lawsuit and this declaratory judgment lawsuit were consolidated for discovery, and during that time Commerce repeatedly requested that the Superior Court adjudicate this insurance dispute before the trial of the underlying lawsuit. *See motions noted in* R.A. V.I:10 – 12. Despite repeated requests by Commerce to proceed in this order, its requests were denied by the Superior Court. R.A. V.I:12.

Although Commerce may not provide liability coverage for the judgment entered by the Superior Court in favor of the Estate,[5] the Estate argues that Commerce owes post-judgment interest on the entire amount of the judgment, and not just on the amount of Commerce's remaining coverage limits of $480,000.[6] The

[5] Commerce does not contest its obligation to pay $20,000 in Compulsory Bodily Injury coverage, and has previously paid that amount to the Estate.

[6] The issues with regard to accident and customary operator are scheduled for a jury trial on July 23, 2018, in the Worcester Superior Court.

Estate points to the terms of the insurance policy and the Supreme Judicial Court's decision in Davis v. Allstate Ins. Co., 434 Mass. 174 (2001). Post-judgment interest accrues at the rate of 12% simple interest per year (or approximately $926,570 per year), meaning that the accruing post-judgment interest greatly exceeds Commerce's potential liability under the policy itself.

If Commerce cannot limit its exposure to post-judgment interest, then Commerce (or any liability insurer in similar circumstances) will be effectively precluded from ever litigating its duty to indemnify (not the duty to defend) any time there is a judgment in excess of policy limits entered through no fault of the insurer. Commerce believes that the Supreme Judicial Court ("SJC") recognized this fundamental unfairness in the case of Davis v. Allstate Ins. Co., 434 Mass. 174 (2001) and provided a method for addressing it. In footnote 13 of the Davis decision, the Supreme Judicial Court ("SJC") suggested that a liability insurer such as Commerce could end the accrual of post-judgment interest on an underlying judgment by depositing the full amount of its applicable policy limits (and accrued post-judgment

interest to that date) with the Court[7] thereby ensuring that the insurance policy limits will be available to satisfy the judgment if the insurer is found to have a duty to indemnify. However, the SJC noted that this procedure had not been requested by the insurer in Davis, so the propriety of the procedure was not formally before the court for determination. Accordingly, the SJC said that it would "leave the availability of this procedure for another day because it is not involved in this case." Davis, *supra*, at footnote 13.

Commerce filed a timely motion to deposit the full policy proceeds plus accrued post-judgment interest into the Court.[8] R.A. V.I:15. This motion was opposed by the Estate and denied by the Superior Court on July 17, 2017. R.A. V.II:82. Commerce then filed a petition pursuant to G.L. c. 231, § 118, ¶ 1, seeking interlocutory review of the Superior Court's July 17, 2017, memorandum and order denying Commerce's "Motion to Deposit Money With the Court."

[7] Or, by agreement, in an interest bearing account.

[8] In this case, Commerce voluntarily and promptly paid its compulsory limits of $20,000 plus then-accrued post-judgment interest, and timely moved to deposit the remaining coverage limits which were in dispute in this litigation.

R.A. V.II:89. On September 19, 2017, the Single Justice declined to grant interlocutory relief on the grounds that Commerce had not shown "a clear error of law or an abuse of [the judge's] discretion". However, the Single Justice noted that the case "presents extraordinary circumstances warranting an interlocutory appeal". Accordingly, the Single Justice gave Commerce leave to file the present full appeal to this Court. R.A. V.II:190.

Commerce, in this appeal, is asking the Appeals Court to determine the question explicitly left open by the Supreme Judicial Court in the Davis case: May a liability insurer, such as Commerce, limit its exposure to post-judgment interest during the pendency of a promptly filed declaratory judgment action by depositing its full policy limits plus then-accrued post-judgment interest with the Court? This petition presents a legal issue of first impression in the Commonwealth of Massachusetts.

ARGUMENT

I. THE SUPERIOR COURT'S DECISION SHOULD BE REVERSED AND THE DEPOSIT WITH THE COURT PROCEDURE SUGGESTED IN THE DAVIS V. ALLSTATE CASE SHOULD BE MADE AVAILABLE TO LIABILITY INSURERS SUCH AS COMMERCE AS A MATTER OF LAW.

A. Standard of Review.

In this case, the Single Justice has previously held that the trial court did not abuse its discretion, but that the matter presented extraordinary circumstances warranting an appeal. Essentially, this case presents an issue of first impression and Commerce believes that this court's review is *de novo*.

B. The Superior Court Erred In Ruling That Commerce Could Not Deposit Its Policy Limits With The Court and End The Accrual of Post-Judgment Interest.

1. The Supreme Judicial Court in Davis v. Allstate Identified the Proper procedure for an insurer to limit the accrual of post-judgment interest by depositing the policy limits plus accrued interest into the Court.

Commerce issued a standard Massachusetts Automobile Insurance Policy to Stephen Padovano as the

named insured.[9] The relevant provision in the standard policy states that Commerce will pay, in addition to its limits:

> "Interest that accrues after judgment is entered in any suit we defend. We will not pay interest that accrues after we have offered to pay up to the limits you selected."

The interest that is accruing on the underlying (and artificially obtained) judgment is substantial, and far in excess of the policy limits themselves. This means that, as a practical matter, Commerce will be denied any meaningful opportunity to have its declaratory judgment case heard because the amount of accruing interest will vastly exceed the policy limits at issue in the insurance coverage case, even if Commerce wins its coverage case. This is patently unfair to Commerce, which has done everything available to a liability insurer to fairly and meaningfully litigate its coverage obligations in a timely manner.

---

[9] Under longstanding Massachusetts law, standard automobile insurance policies, drafted by the Division of Insurance, are construed neutrally, and ambiguities are not construed against the insurer. Ramirez v. Commerce Ins. Co., 91 Mass. App. Ct. 144, 147, 71 N.E.3d 1199, 1202, *review denied*, 478 Mass. 1102, 94 N.E.3d 396 (2017).

Commerce suggests and reasonably argues that the SJC has contemplated a straightforward procedure whereby Commerce, as a matter of law, can deposit its policy limits (and accrued post-judgment interest) into court pursuant to Mass. R. Civ. P. 67 and, in so doing, end the accrual of post-judgment interest during the pendency of the declaratory judgment case.

The circumstances which led up to footnote 13 of the Davis v. Allstate case are illustrative. The deposit into court procedure discussed in footnote 13, *supra* arose not in the context of an insurer pursuing a legitimate adjudication of its duty to indemnify, but in the context of an insured who wanted its insurer to pursue an appeal. In Davis, plaintiff sued defendant in a motor vehicle negligence case. The result of the trial was a substantial judgment in excess of Allstate's policy limits. Both the insured and Allstate felt that there were valid appellate issues and wished to appeal. Allstate paid to prosecute the appeal, which was ultimately unsuccessful.

After the appeal, Allstate paid its policy limits of $25,000, but a dispute arose as to Allstate's obligation to pay post-judgment interest. Allstate's

insurance policy contained a provision similar to the provision in the Commerce policy. The plaintiff argued that Allstate was responsible for post-judgment interest on the entire amount of the underlying verdict, and that Allstate's prior offer to settle for its policy limits in exchange for a release was insufficient to end its responsibility for post-judgment interest. Allstate argued that its offer to settle for policy limits was sufficient to end its obligation to pay post-judgment interest under the terms of the policy. Ultimately, a divided Supreme Judicial Court held that Allstate was responsible for post-judgment interest on the entire judgment until it unconditionally paid its policy limits.

The late Justice Sossman, writing in dissent, noted that the majority's holding worked a substantial unfairness on both insurers and insureds. By holding that an insurer must either give up its appeal (by paying policy limits without a release) or paying post-judgment interest on a judgment that could be far in excess of policy limits, the majority would force insurers to drop meritorious appeals solely for financial considerations. This was unfair to insurers (who would lose the ability to raise meritorious

appeals) but it was an even greater issue for insureds, because they would become liable for an excess judgment that might have been reduced on appeal, simply because the post-judgment interest issue would, as a practical matter, force the insurer to pay the policy and drop the appeal.

The majority took note of Justice Sossman's point about the unfairness created by the majority's holding. In footnote 13, the majority noted that an insurer could end its obligation to pay post-judgment interest by depositing the policy limits plus accrued interest with the Court. In footnote 13, the majority said:

> The dissent's "disturbing ramifications" analysis creates somewhat chimerical problems in an effort to favor insurers in an area that raises problems no different from those insurers face every day. *Post* at 193-195, 747 N.E.2d 141. The requirement that an insurer pay postjudgment interest if an appeal is pursued will require insurers to reevaluate the case in the face of judicial finding of liability. If an appeal lacks merit or is otherwise weak, an insurer will have strong incentive to pay. There is nothing wrong with this. After all, the whole purpose of the post judgment interest rule and G.L. c. 176D is to require insurers to pay when liability becomes clear and to penalize them when they stonewall and unnecessarily prolong the litigation. An insurer has no obligation to pursue an appeal that has no reasonable likelihood of success in an effort to grind down a

> successful claimant until a settlement is accepted. **If the insurer seeks to pursue an appeal that has merit, it may be able to control its postjudgment interest obligations by paying the policy limits (with accrued interest) into court. We leave the availability of this procedure for another day because it is not involved in this case. We mention it only to suggest that insurers are not in the hapless situation hypothesized by the dissent.**

Davis v. Allstate Ins. Co., *supra* at 187 (footnote 13, emphasis added). In the present case, Commerce sought to avail itself of the procedure mentioned by the SJC in the Davis case, but its motion was denied. Clearly, the procedure described in footnote 13 was not the Court's formal holding because the SJC left discussion of the "availability of this procedure for another day". In this appeal, Commerce has squarely presented the issue, and the matter is therefore ripe for appellate review.

2. The "Deposit Into Court" Procedure Identified By The SJC In Davis Is A Just And Fair Method Of Addressing This Situation In This Case.

As this case illustrates, the "deposit into court" procedure noted in Davis and advanced by Commerce is one of basic fairness. By denying Commerce the ability to control its exposure to post-judgment interest, Commerce will pay more in accruing

post-judgment interest than it will ever owe on the policy whether it wins or loses in its coverage action. This result is absurd because it will force Commerce to give up its lawful and legitimate right to be heard in a declaratory judgment action, solely because the accruing post-judgment interest will be greater than the policy limits. This ensures that Commerce, as a practical matter, will never be able to obtain any meaningful judicial relief in its declaratory judgment action. Mass. Const. Pt. 1, art. XI. (guaranteeing a right to meaningful recourse in the law to all subjects of the Commonwealth).

It is important to point out that Commerce dutifully followed the instructions of the SJC and the Appeals Court in attempting to resolve this coverage issue. Commerce filed a prompt declaratory judgment petition naming all interested parties. *See* Sterilite Corp. v. Cont'l Cas. Co., 17 Mass. App. Ct. 316, 323 (1983) and Lumbermens Mut. Cas. Co. v. Belleville Indus., Inc., 407 Mass. 675, 685 (1990)("A declaratory judgment in an action provides an appropriate means of deciding a dispute concerning the meaning of language in an insurance policy"). Commerce offered to pay its full policy limits of $500,000 without the need for an

adjudication of the wrongful death claim if it lost its declaratory judgment action. Commerce filed a motion to intervene in the wrongful death case, and the two matters were consolidated for discovery to further expedite the ultimate ruling in the case. Commerce filed a motion to stay the wrongful death case (and corresponding request to hear the declaratory judgment action first) in order to expeditiously resolve the coverage issues and pay what (if anything) it owed. Even after the judgment in the wrongful death case, Commerce filed a prompt motion to deposit the full amount of the policy (plus then-accrued post-judgment interest) into the Court. In short, Commerce has done everything that the appellate courts in Massachusetts have guided it to do. And yet it cannot obtain a meaningful decision on its legitimate coverage claim without having to pay over a million dollars in post-judgment interest as the price for access to the court system.

The denial of Commerce's right to be heard is not just a one-time event. Rather, this will occur every time there is a jury verdict in excess of policy limits in a case with a legitimate coverage dispute, meaning that this is an issue capable of repetition,

yet evading fairness and justice for plaintiffs such as Commerce.

Depositing policy limits (plus accrued post-judgment interest) with the Court, as suggested by the SJC, would appropriately avoid this problem. It would allow an insurer to exercise its right to be heard on the coverage issue, while ensuring that the Estate will always have the full policy limit (and accrued interest to the date of deposit) available should there be a finding of coverage. This amount is all the Estate would ever be entitled to had there never been a coverage dispute in the first place, so the "deposit into court" procedure works no prejudice to the plaintiff.[10]

[10] If there were no coverage dispute, Commerce would be obligated to pay its policy limits of $500,000 plus whatever post-judgment interest that accrues until the date of payment, and nothing more. That is precisely what Commerce sought to deposit with the Court in the present case. Indeed, it is the Estate, by opposing Commerce's requests to hear the insurance case first, and by entering into assignment/cooperation agreements prior to trial, that is seeking to manipulate the legal process so that it can obtain more from Commerce than it is rightly entitled to.

3. The "Deposit Into Court" Procedure Identified By The SJC In Davis Is A Commonplace Procedure In Several Jurisdictions Which Should Be Formally Affirmed In Massachusetts.

Although the "deposit into court" procedure sought by Commerce and discussed by the SJC in Davis has not formally been adopted in Massachusetts, it is not a new or novel procedure in American jurisprudence generally. Rather, it is a procedure utilized by insurers in related situations in other jurisdictions in the United States.[11] For example, in Wilson v. Traders Ins. Co., 98 S.W.3d 608, 610 (Mo. Ct. App. 2003) the plaintiff obtained a verdict in excess of the insurer's coverage limits. The insurer believed, however, that its policy had been cancelled by the time of the accident and that it did not provide coverage for the judgment. A coverage dispute ensued. The insurer sought to limit its exposure to post-

[11] Commerce notes that there are two Massachusetts cases where unsuccessful litigants (not insurers) were permitted to deposit money into court pending an appeal, thereby ending the accrual of post-judgment interest. Neither case involved a ruling on the propriety of the "deposit into court" procedure, but they are a further reflection that the "deposit into court" procedure for the purpose of ending the accrual of post-judgment interest, at least in a general sense, is not completely foreign to Massachusetts, either. The two cases are O'Malley v. O'Malley, 419 Mass. 377, 381 (1995) and Augustine v. Rogers, 47 Mass. App. Ct. 901, 902 (1999).

judgment interest during the pendency of the coverage dispute by depositing its policy limits plus accrued post-judgment interest with the trial court. On appeal, the Missouri Court of Appeals affirmed the insurer's right to deposit its policy limits and end the accrual of post-judgment interest.

In Duval v. Heritage Life Ins. Co., 339 S.C. 616, 618, 529 S.E.2d 566, 568 (Ct. App. 2000) a life insurer disputed its obligation to pay out on a life insurance policy. A trial on this insurance dispute resulted in a judgment for the claimant and against the insurer. The insurer wished to appeal, so it sought to deposit the policy proceeds into court for the purpose of ending the accrual of post-judgment interest during the pendency of the appeal. The Court of Appeals of South Carolina upheld the insurer's right to deposit the proceeds (plus then-accrued interest) into the Court for the purpose of ending the accrual of post-judgment interest. The Court of Appeals noted that "[t]he rationale was that such a rule encourages the debtor to pay the judgment and assures the judgment creditor the funds will be available." Duval, *supra* at 620 (internal citations omitted). In the present case, Commerce notes that,

by allowing it to deposit its policy limits into Court, it ensures that the funds will be readily and promptly available to the Estate should Commerce fail in its coverage action.

In Grimes v. Swaim, 971 F.2d 622, 623 (10th Cir. 1992) an insurer faced with a verdict in excess of policy limits sought to pay its policy limits to the plaintiff, but the plaintiff refused the tender. The federal court, applying Oklahoma law, permitted the insurer to deposit its policy limits into the court, thereby ending the accrual of post-judgment interest.

In Georgia, the procedure of depositing policy limits into court for the purpose of ending the accrual of post-judgment interest is provided by statute. JTH Tax, Inc. v. Flowers, 311 Ga. App. 495, 496-97, 716 S.E.2d 559, 560-61 (2011).

In federal court practice, deposits into court are provided for by rule, and the procedure is used for different purposes. In non-insurance cases, deposits into court have been permitted to end the accrual of post-judgment interest during the pendency of an appeal. *See, e.g.*, Cordero v. De Jesus-Mendez, 922 F.2d 11, 18 (1st Cir. 1990)(deposit into court pursuant to F.R.C.P. 67 ended the accrual of post-

judgment interest), Kotsopoulos v. Asturia Shipping Co., 467 F.2d 91, 94 (2d Cir. 1972)(appellant by leave of Court may pay the money into the registry of the Court and stop the running of interest); Reliable Marine Boiler Repair, Inc. v. Mastan Co., 325 F. Supp. 58, 64 (S.D.N.Y. 1971)(same); Holborn Oil Trading Ltd. v. Interpetrol Bermuda Ltd., 658 F. Supp. 1205, 1212 (S.D.N.Y. 1987)(allowing deposit of arbitrator's award to prevent accrual of post award interest). The "deposit into court" procedure sought by Commerce is an extension of this common practice to the specific situation of a liability insurer properly seeking a judicial determination of its coverage obligations after a verdict in an underlying lawsuit.

The process of allowing an insurer to deposit its policy limits into court for the purpose of ending the accrual of post-judgment interest has a sound foundation in existing law. Viewed in this context, the reference to the procedure in footnote 13 of the Davis decision should not be viewed as an offhand or ill-considered remark. Rather, it was a reference to an established legal procedure. Commerce asks the Court to formally adopt the procedure in the present case.

4. The Superior Court Erred When It Ruled That The "Deposit Into Court" Procedure Was Not Available To Commerce As A Matter Of Law.

The Superior Court's memorandum suggests that the Superior Court judge felt that the deposit into court procedure was not available to Commerce in this instance as a matter of law. The Superior Court said:

> "This court disagrees with Commerce's position as such interpretation would be inconsistent with the majority's formal holding that an insurer can toll the accrual of post judgment interest only by making an unconditional offer to pay the limits of the policy to the plaintiff or the plaintiff's assignee."

This view is clearly erroneous because the SJC in Davis clearly stated that it was not ruling on the ability to deposit money into court, solely because the insurer had not requested to deposit money in the trial court below. The SJC majority did not reject the procedure; rather it didn't pass on it because it wasn't a live issue in the case. In the present case, Commerce has specifically raised the issue, so the Superior Court's reliance on the "specific holding" of Davis is clear error.

Deposits into court pursuant to Rule 67 are generally a matter of the Superior Court's discretion,

and the Superior Court may have suggested that it would deny Commerce's motion as an exercise of discretion, saying:

> "Further, this court is of the opinion that to allow Commerce to avoid paying the interest removes the incentive for it to expeditiously resolve the case."

To the extent that this sentence is an expression of the Superior Court's discretion, it is a clear abuse of discretion.

First, absent guidance from this Court as to the availability of the "deposit into court" procedure, the Superior Court did not have any appellate authority as to how it should exercise its discretion in this circumstance. Commerce is properly seeking that authority in this appeal.

Second, in Davis, the SJC did not wish to encourage insurers (or insureds) to pursue doubtful appeals by removing the considerations of post-judgment interest, something that every litigant (insured or not) must consider when deciding to take an appeal. Here, however, the "incentive" that the Superior Court is referencing is, essentially, the "incentive" for plaintiff Commerce to simply give up its right to an adjudication of its lawfully raised

coverage issue. Although the Superior Court may, within reason, encourage both parties to compromise a disputed claim, it is not the role of the Superior Court to make rulings which effectively deny a plaintiff access to available judicial relief. Mass. Const. Pt. 1, art. XI.

5. Allowing Commerce To Deposit Money Into Court Will Not Encourage Frivolous Post-Judgment Litigation.

Commerce anticipates that the Estate will argue that a ruling in Commerce's favor will open the door to abuse by encouraging frivolous post-judgment litigation by insurers. This argument is meritless. In the present case, Commerce is seeking the right to deposit money into court so that it may pursue its legitimate right to recourse in the courts to determine the meaning of an insurance policy. Case after case have held that insurers are permitted to do this. If an insurer files a frivolous coverage action, the insured (or claimant) would have recourse under G.L. c. 93A and 176D. *See* Fascione v. CNA Ins. Companies, 435 Mass. 88, 95 (2001)(noting that insurers face treble damages and attorneys' fee awards for improper behavior), G.L. c. 231, § 6F, and Mass. R. Civ. P. 11. The ruling that Commerce seeks does

nothing more than ensure fair access to the court system for legitimate claims, and any "public policy" type arguments should be resolved in Commerce's favor.

6. Commerce Should Be Permitted To Deposit Money Into Court And End The Accrual Of Post-Judgment Interest Because It Has Followed The Guidance Of The Supreme Judicial Court At Every Stage Of This Dispute.

In the present case, Commerce has done everything that the Supreme Judicial Court has asked of a liability insurer faced with a lawsuit which may not involve a covered claim. It promptly reserved its rights, paid for defense counsel, and then promptly filed the present declaratory judgment action. The present declaratory judgment action was filed three years before the resolution of the underlying wrongful death claim, giving all parties fair notice of Commerce's position. *See* Boston Symphony Orchestra, Inc. v. Commercial Union Ins. Co., 406 Mass. 7, 15-16 (1989); Lumbermens Mut. Cas. Co. v. Belleville Indus., Inc., 407 Mass. 675, 685 (1990); Metro. Prop. & Cas. Ins. Co. v. Morrison, 460 Mass. 352, 358-59 (2011)(cases from three decades of SJC jurisprudence asking insurers to file prompt actions to determine insurance coverage). Having taken all the proper

steps, as outlined by the SJC, Commerce should now be in a position to obtain a meaningful and lawful declaration of its duty to indemnify the Padovanos. However, because the Superior Court erred in its denial of Commerce's motion to deposit money in Court, Commerce has been effectively stymied in its effort to exercise its lawful rights.

In contrast, the Estate of Szafarowicz has attempted to manipulate the legal process in an effort to obtain more from Commerce than it should be entitled to. In the present case, the agreements between the Estate of Szafarowicz and the Padovanos (R.A. V.I:166 – 173) meant that there was no meaningful adversity between the Estate and the Padovanos at the time of the assessment of damages hearing. *See, e.g.*, Great Am. Ins. Co. v. Hamel, 2017 WL 2623067 (Tex. June 16, 2017). Without true adversity, and with the defendants waiving potentially valuable defenses, a substantial judgment ensued which was more than seven million dollars in excess of Commerce's policy limit. It is this artificially obtained judgment which is technically accruing interest. The Estate is seeking post-judgment interest on a judgment that it agreed (prior to trial)

to never enforce, and which will never be paid by anyone (because Commerce's policy limits are only $500,000). The Estate is seeking interest on a contrivance.

All Commerce is seeking is the ability to present its valid, legitimate coverage case, without having to pay over a million dollars in post-judgment interest as the price for admission to the judicial system. The result Commerce seeks is fair, appropriate, consonant with Massachusetts practice and with practice in other jurisdictions.

CONCLUSION

For the foregoing reasons, plaintiff, appellant, Commerce Insurance Company requests that this Court reverse the Superior Court's Order of July 17, 2017, denying Commerce's motion to deposit money and, in its stead, order the Superior Court to allow Commerce's motion, *nunc pro tunc* to the date of service thereby permitting Commerce to deposit money for the purpose of ending the accrual of post-judgment interest.

Respectfully submitted,

The Plaintiff, Appellant,
COMMERCE INSURANCE COMPANY,

By its attorneys,
MORRISON MAHONEY, LLP

/s/ John P. Graceffa
John P. Graceffa, Esq.
BBO #205920

/s/ Lawrence M. Slotnick
Lawrence M. Slotnick, Esq.
BBO #549734
MORRISON MAHONEY LLP
250 Summer Street
Boston, Massachusetts 02210
(617) 439-7500
lslotnick@morrisonmahoney.com

Dated: July 9, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this ninth day of July 2018, I have served the Brief and Appendix in Appeals Court No. 2017-P-0789 via the Massachusetts Tyler Host electronic filing system upon:

Michael K. Gillis, Esquire
Gillis & Bikofsky, P.C.
1150 Walnut Street
Newton, MA 02461
mgillis@gillisandbikofsky.com

Kathryn A. Toomey, Esquire
Law Office of Kathryn A. Toomey
303 Main Street
Worcester, MA 01608
katie@toomeylawoffice.com

John C. Koslowsky, Esquire
Law Office of John C. Koslowsky
424 Adams Street
Milton, MA 02186
JohnKoslowsky@aol.com

John E. Anastasi, Esquire
Anastasi & Associates, P.C.
245 Main Street
Oxford, MA 01540
eja@anastasilaw.com

/s/ Lawrence M. Slotnick
Lawrence M. Slotnick, Esq.

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).

/s/ Lawrence M. Slotnick
Lawrence M. Slotnick, Esq.

ADDENDUM

ADDENDUM

TABLE OF CONTENTS

CLERK'S NOTICE	DOCKET NUMBER 1485CV00125	Trial Court of Massachusetts The Superior Court
CASE NAME: Commerce Insurance Co Inc vs. Matthew Padovano et al		Dennis P. McManus, Clerk of Courts
TO: Lawrence Martin Slotnick, Esq. Morrison Mahoney LLP 250 Summer St Boston, MA 02210-1181		COURT NAME & ADDRESS Worcester County Superior Court 225 Main Street Worcester, MA 01608

You are hereby notified that on 07/17/2017 the following entry was made on the above referenced docket:

Endorsement on Motion to Deposit Money with the Court or in the Alternative to Deposit Money in an Interest Bearing Account (#48.0): DENIED
See Memorandum and Order. Notices mailed 7/18/17

RECEIVED

DATE ISSUED	ASSOCIATE JUSTICE/ ASSISTANT CLERK	SESSION PHONE#
07/18/2017	Hon. Richard T Tucker	(508)831-2364

Date/Time Printed: 07-18-2017 09:37:22

SCV016_X1\ 08/2014

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 1485CV00125

COMMERCE INSURANCE CO., INC.

v.

MATTHEW PADOVANO & others[1]

MEMORANDUM AND ORDER ON COMMERCE INSURANCE COMPANY'S MOTION TO DEPOSIT MONEY WITH THE COURT OR IN THE ALTERNATIVE TO DEPOSIT MONEY IN AN INTEREST BEARING ACCOUNT

Commerce Insurance Company ("Commerce") moves, pursuant to Mass. R. Civ. P. 67, that this court grant it leave to deposit the sum of $480,000 plus all post judgment interest with the court or, in the alternative, requests leave to deposit the same amount into an interest bearing account. It asserts that the former option is consistent with procedure outlined in Davis v. Allstate Ins. Co., 434 Mass. 174 (2001), and the latter is available pursuant to Augustine v. Rogers, 47 Mass. App. Ct. 901 (1999) (rescript). This court disagrees, and **DENIES** the motion.

FACTS

On August 3, 2013, David M. Szafarowitz ("Mr. Szafarowitz") was struck and killed outside the Captain's Lounge Bar by a vehicle operated by Matthew Padovano ("Matthew") and owned by Stephen Padovano ("Stephen") (collectively, "the Padovanos"). Matthew eventually pled guilty to manslaughter, which led the Estate of Mr. Szafarowitz ("the Estate") to file a wrongful death action

[1]Stephen Padovano, Justina M. Szafarowicz as the Special Representative of the Estate of David M. Szafarowics and as parent and next friend of minor children Damion Szafarowicz and Alysha Szafarowicz

Entered and Copies Mailed 7/18/17

against the Padovanos in Worcester Superior Court on August 23, 2013.[2]

Upon submitting the matter to their insurer, Commerce, the Padavanos were informed in various "reservation of rights" letters that Commerce denied that there was insurance coverage available, citing the "intentional act" and "customary operator" exceptions.

Just days before trial, the Padovanos, over Commerce's written objection, entered into a settlement with the Estate in which they waived their defenses to the lawsuit, confessed negligence, assigned their rights against Commerce to the Estate, and permitted the court to assess damages in lieu of an actual trial.

On January 21, 2014, Commerce, who insured the vehicle driven by Matthew on August 3, 2013, filed an action seeking a declaratory judgment stating that it does not have a duty to indemnify either Matthew or Stephen because: (1) the death of Mr. Szafarowicz was not an "accident" within the meaning of a standard Massachusetts Auto Insurance Policy; and (2) Matthew was a customary operator of the vehicle in question yet was not listed as a customary driver on the policy as was required by the policy's terms.

On January 27, 2017, this court entered an amended judgment against the Padovanos in the total amount of $7,721,419.92. Commerce has paid its $20,000 compulsory limits, plus post-judgment interest, without recourse, on February 15, 2017, leaving only $480,000 in available policy limits in dispute.

DISCUSSION

In the event Commerce is found to provide liability coverage for the judgment entered by this court in the Estate's favor, it may owe post judgment interest on the entire amount of the judgment

[2]The Estate also sued Captain's Lounge, but that suit was settled prior to trial.

in the underlying case. Commerce now moves the court for leave to deposit money with the court pursuant to Mass. R. Civ. P. 67, which states:

> In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of sum sum or thing. Money paid into court under this rule shall be deposited and withdrawn in accordance with the provisions of any applicable statute or rule.

"The decision whether to allow a Rule 67 deposit generally lies within the discretion of the [trial] court." Augustine, 47 Mass. App. Ct. at 902 (interpreting Fed. R. Civ. P. 67 in the absence of Massachusetts law on point). Commerce requests that the court exercise its discretion and permit it to deposit its policy limits with the court pursuant to the "invitation" in footnote 13 of the decision in Davis. In Davis, a divided Supreme Judicial Court held that Allstate was responsible for post-judgment interest on the entire judgment until it actually paid its policy limits instead of merely offering to pay in exchange for a release. 434 Mass. at 181. Justice Sosman dissented, opining that the majority's holding worked substantial unfairness on both insurers and insureds, as it would force insurers to drop meritorious appeals solely for financial considerations, leaving the insureds liable for an excess judgment that might have been reduced on appeal. Id. at 193-195.[3] The majority addressed the dissenting opinion in Footnote 13 of the decision by stating the following:

> The dissent's "disturbing ramifications" analysis creates somewhat chimerical problems in an effort to favor insurers in an area that raises problems no different from those insurers face every day. . . . The requirement that an insurer pay post-judgment interest if an appeal is pursued will require insurers to reevaluate the case in the face of judicial finding of liability. If an appeal lacks merit or is otherwise weak, an insurer will have strong incentive to pay.

---

[3]Judge Sosman's concern that by not allowing the tolling of interest, an incentive is created for the insurer "to pay its paltry policy limit, leaving the insured to contend with the remaining massive liability for both interest and principal, rather than take an appeal and risk having to pay all postjudgment interest (as well as the policy limit)," is not a pertinent concern here where the insureds have exited themselves from the case.

> There is nothing wrong with this. After all, the whole purpose of the post-judgment interest rule and G. L. c. 176D is to require insurers to pay when liability becomes clear and to penalize them when they stonewall and unnecessarily prolong the litigation. An insurer has no obligation to pursue an appeal that has no reasonable likelihood of success in an effort to grind down a successful claimant until a settlement is accepted. **If the insurer seeks to pursue an appeal that has merit, it may be able to control its post-judgment interest obligations by paying the policy limits (with accrued interest) into court. We leave the availability of this procedure for another day because it is not involved in this case.** We mention it only to suggest that insurers are not in the hapless situation hypothesized by the dissent. (Emphasis added).

Id. at 187 n.13.

Commerce argues that the "mere fact that the Supreme Judicial Court mentioned the procedure [of depositing policy limits with the court], and the context in which it mentioned it, signaled that the highest court looked favorably on the idea." This court disagrees with Commerce's position as such interpretation would be inconsistent with the majority's formal holding that an insurer can toll the accrual of post judgment interest only by making an unconditional offer to pay the limits of the policy to the plaintiff or the plaintiff's assignee. Further, this court is of the opinion that to allow Commerce to avoid paying the interest removes the incentive for it to expeditiously resolve the case. Accordingly, this court will not allow Rule 67 relief.

ORDER

For the above stated reasons, Commerce's motion to deposit money with the court or in an interest bearing account is **DENIED**.

July 17, 2017

Richard T. Tucker
Justice of the Superior Court

Slotnick, Lawrence

From: AppealsCtClerk@appct.state.ma.us
Sent: Tuesday, September 19, 2017 6:00 PM
To: Slotnick, Lawrence; gtevlin@morrisonmahoney.com
Subject: 2017-J-0364 - Notice of Docket Entry

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT CLERK'S OFFICE

September 19, 2017

RE: No. 2017-J-0364
Lower Ct. No.: 1485CV00125

COMMERCE INSURANCE COMPANY
vs.
MATTHEW PADOVANO & others

NOTICE OF DOCKET ENTRY

Please take note that on September 19, 2017, the following entry was made on the docket of the above-referenced case:

MEMORANDUM AND ORDER The plaintiff, Commerce Insurance Company ("Commerce") has filed a petition pursuant to G. L. c. 231, s. 118 (first para.) seeking review of an order issued by a judge of the Superior Court denying its Motion to Deposit Money Into Court. Commerce contends that the Supreme Judicial Court outlined a procedure for an insurer to control its post-judgment interest obligations in situations where the insurer wishes to litigate its duty to indemnify after a judgment has been entered against its insured. That procedure, Commerce claims, is for the insurer to pay the policy limit (with accrued interest) into court. See Davis v. Allstate Insurance Co., 434 Mass. 174, n.13 (2001).

Upon review of the materials submitted with Commerce's petition, I conclude that Commerce has not shown that the Superior Court judge committed a clear error of law or an abuse of his discretion. See Jet-Line Services, Inc. v. Board of Selectmen of Stoughton, 25 Mass. App. Ct. 645, 646 (1988). Thus, there is no basis for reversing the order at issue at this time.

Nevertheless, it appears that this case presents extraordinary circumstances warranting an interlocutory appeal. See Long v. Wickett, 50 Mass. App. Ct. 380, 387-389 (2000) In Davis v. Allstate Insurance Co., supra, the Supreme Judicial Court wrote "If the insurer seeks to pursue an appeal that has merit, it may be able to control its post-judgment interest obligations by paying the policy limit is (with accrued interest) into court. We leave the availability of this procedure for another day because it is not involved in this case." Davis v. Allstate Insurance Co., 434 Mass. 174, n.13 (2001). Whether such a procedure is available to Commerce in the circumstances presented is an issue worthy of appellate review.

Moreover, given the disparity between the policy limit at issue and the potential post-judgment interest, without authorization to deposit the policy limit so as to avoid post-judgment interest, pursuing review could be economically unfeasible in this case. Thus, although Commerce did not request leave to pursue an interlocutory appeal, I grant leave to file, on or before October 4, 2017, a notice of appeal from the Superior Court judge's July 17, 2017 order. See Foreign Auto Import, Inc. v. Renault Northeast, Inc., 367 Mass. 464, 470 (1975) (Single justice of the Appeals Court authorized to permit full appeal from interlocutory order). (Vuono, J.). Notice/attest/Tucker, J.

Very truly yours,

The Clerk's Office

Dated: September 19, 2017

To: John P. Graceffa, Esquire
John F. Hurley, Jr., Esquire

Lawrence M. Slotnick, Esquire
Jody B. Schwab, Esquire
Kathryn A. Toomey, Esquire
E. John Anastasi, Esquire
Sonja Anastasi, Esquire
Michael K. Gillis, Esquire
Michael P. Patnaude, Esquire
Joseph I. Rogers, Esquire
Worcester Superior Court Dept.

If you have any questions, or wish to communicate with the Clerk's Office about this case, please contact the Clerk's Office at 617-725-8106. Thank you.