Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

SJC NO. FAR-

AC NO. 2017-P-0393

JOHANNA LIEF-SOCOLOW & OTHERS,
PLAINTIFFS-APPELLANTS,

v.

PLYMOUTH ROCK ASSURANCE CORPORATION,
DEFENDANT-APPELLEE.

PLAINTIFFS-APPELLANTS' APPLICATION FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

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Dated: April 16, 2018

I. REQUEST FOR FURTHER APPELLATE REVIEW

NOW COME the Plaintiffs-Appellants, Johanna Lief-Socolow, John M. Socolow, Jake Socolow, Alison Socolow and Samuel Socolow (hereinafter and collectively "Plaintiffs"), and hereby submit this Application to the Supreme Judicial Court for Further Appellate Review ("Application").

As reasons therefor, and as set forth below, Plaintiffs respectfully submit that the grounds proposed below warrant a grant of further appellate review pursuant to Rule 27.1 of the Massachusetts Rules of Appellate Procedure. Mass. R. App. P. 27.1.

The Trial Court's decision was not clearly erroneous and contrary to law. The Appeals Court failed to consider the Trial Court's detailed findings.

II. STATEMENT OF PRIOR PROCEEDINGS

On December 21, 2010, Plaintiffs filed a Complaint against Plymouth Rock Assurance Corporation (hereinafter "PRAC" or Defendant"), and its insureds, Annette Liquori and Nicola Liquori (hereinafter and collectively "PRAC Insureds"), in the Hampden Superior Court, which included a single count against PRAC for violation of Chapter 93A.

On February 11, 2011, PRAC filed a motion to sever the count against it from the counts against the PRAC Insureds and stay discovery as to that sole count. Plaintiffs opposed PRAC's motion, but it was allowed by

the Trial Court. On or about March 15, 2013, the parties eventually agreed to arbitrate the claims against the PRAC Insureds. On July 29, 30, and 31, the parties arbitrated the action against the PRAC Insureds with David O. Burbank, Esq., of Burbank Mediation Services (hereinafter "Arbitrator").

The Arbitrator issued his decision on August 12, 2013, awarding $905,000.00 in favor of Plaintiffs.[1] On September 23, 2013, the Trial Court allowed Plaintiffs' Motion to Lift Stay as to Count VIII of the Complaint against PRAC.

A bench trial for the claim against PRAC occurred during the first week of December 2015. On July 11, 2016, the Trial Court (Sweeney, J.) issued its twenty-six page Memorandum of Decision (hereinafter "Trial Court Decision") as to Plaintiffs' claim for violation of G.L. c. 93A, § 2, and c. 176D, § 3(9)(d) and (f), against PRAC. (R.A. at V.II-29-54). Briefly, the Court found that Defendant had violated G.L. c. 93A, §§ 2 and 9, and stated that "[i]n light of the egregiousness of PRAC's conduct, this court trebles that amount…." The Trial Court also awarded Plaintiffs their reasonable attorneys' fees and costs, and directed Plaintiffs to file an affidavit of attorneys' fees and costs within

[1] PRAC'S Insureds' exposure was limited to $250,000, which was the maximum amount the Plaintiffs could recover in their personal injury action.

thirty days of the issuance of the Memorandum of Decision. (Appendix 3).

On September 9, 2016, judgment entered. On September 30, 2016, Plaintiffs filed a Motion to Alter or Amend Judgment with PRAC's opposition. (Dkt. Nos. 72, 72.1, 72.2, 72.3, 72.4, 72.5). On October 5, 2016, the Court denied the Motion to Alter or Amend Judgment. (Appendix 5).

PRAC filed a Notice of Appeal on October 5, 2016. (Dkt. No. 75). Plaintiffs filed a Notice of Appeal on October 18, 2016. (Dkt. No. 80).

The parties argued the appeal on February 7, 2018. On March 28, 2018, the Appeals Court issued a decision pursuant to Rule 1:28 reversing the Trial Court Decision.

On April 10, 2018, Plaintiffs filed a Petition for Rehearing pursuant to Mass. R. App. P. 27 with the Appeals Court on these same issues.

III. STATEMENT OF FACTS RELEVANT TO THE APPEAL

This claim for violation of Chapter 93A arises from a motor vehicle accident that occurred on August 19, 2009. Johanna was operating a vehicle and traveling south on Main Street in Agawam, Massachusetts, with her Children (and four other passengers) in the vehicle, when she was struck by a vehicle operated and owned by the PRAC Insureds.

To provide a full account of the remaining facts found by the Trial Court is difficult in the limited amount of space allotted for this section. Of the twenty-six pages of the Trial Court Decision, nine pages were set aside solely for findings of fact, and the conclusions of law section contained an equal number of additional facts relating to the issues presented in this appeal.

Briefly, and referring to and incorporating the Trial Court Decision, the Court found that the injuries suffered by Johanna as a result of the motor vehicle accident of August 19, 2010, were objective and significant. (R.A. at V.II-30.[2]) The Trial Court found that the medical evidence, which consisted not only of her treatment records but also records pertaining to her own multiple independent medical and neuro-psychological evaluations (hereinafter "IME" or "IMEs"), and the expert testimony presented on her behalf, supported no other conclusion than that Johanna had suffered a significant and cognizable injury. (R.A. at V.II-33-48). The Trial Court also concluded, after several days of trial, that the "experts" and attorney "relied" on by PRAC did not materially controvert the medical evidence. (*Id.*).

[2] Plaintiffs shall refer to the record appendix as "R.A. at Vol. ___", which refers to the volume of the record appendix and specific page number(s).

More specifically, the Trial Court provided an exhaustive and detailed account of how PRAC's medical expert, Dr. Levine, did not conduct an IME, did not review diagnostic images (which images showed evidence of a brain shearing injury), and mischaracterized the medical treatment records of Johanna.[3] Dr. Levine also made assertions, such as the one regarding Johanna's alleged malingering and a B12 deficiency, that were not supported by any medical evidence, did not explain the conclusions of the other medical professionals and actually had no basis in fact. (R.A. at V.II-42-45).

Similarly, the Trial Court concluded that PRAC's reliance on the attorney, who was a PRAC employee (as opposed to an independent, outside counsel), was not reasonable because he, too, failed to secure sufficient information to address Johanna's claims that would have otherwise been required in the ordinary course of an investigation. (R.A. at V.II-40, 50). This included requesting Rule 35 examinations, seeking evidence to support Dr. Levine's unsupported assertion that Johanna was malingering, and other tasks that PRAC was obligated to complete in the ordinary course of its investigation. In sum, the Trial Court concluded that

[3] Although he may be a neurologist, Dr. Levine's area of specialty is tinnitus, a medical condition not at issue in this case. He has no relevant experience in cases involving traumatic brain injury, and there is nothing in the record showing that PRAC attempted to confirm his qualifications.

PRAC unreasonably hid behind the advice of their "expert" and attorney. (R.A. at V.II-44-50).

With respect to the offers made by PRAC, the Trial Court cited to many of the same facts and concluded that the offers did not have any correlation to the PRAC Insureds' liability, and harm suffered by Johanna. (R.A. at V.II-50-53). Moreover, the offers of $9,000, $16,000 and $35,000 occurred, respectively, in June 2010, October 2010, and years later in March 2013, this last "offer" being contingent upon the parties arbitrating the matter. These offers also did not take into account the allegations of harm above and beyond mere medical expense, not to mention the claims made by the four other claimants-Plaintiffs.

Again, Plaintiffs implore the Court to review the Trial Court Decision for a complete recitation of the facts found by the Court.

IV. A STATEMENT OF THE POINTS WITH RESPECT TO WHICH FURTHER APPELLATE REVIEW OF THE DECISION OF THE APPEALS COURT IS SOUGHT

Further appellate review is required because the Appeals Court erred when it failed to consider the detailed findings of fact of the Trial Court relating to PRAC's investigation, including the reliance on its medical expert and its employee/attorney, and PRAC's settlement offers.[4]

[4] Plaintiffs are not applying for further appellate review of the measure of damages.

With respect to the investigation, the Appeals Court cited to PRAC's receipt of medical records with conflicting opinions, that PRAC obtained three IMEs, and relied on the expertise of the neurologist. The Appeals Court ignored the Trial Court's findings that any conflicting opinions had been refuted and resolved by medical specialists in Johanna's favor by mid-2010 [The point of this is to establish when liability was reasonably clear; as written, it is consistent with Judge Sweeney's decision] and that regardless of the fact that she did not immediately treat her condition had become objectively symptomatic shortly thereafter. The Appeals Court mischaracterized events in such a way as to be critical of the fact that Johanna did not immediately go to the emergency room on the day of the accident (ignoring not only the context in which decisions were made at the time, but also the fact that brain injuries, such as hers, do not always immediately manifest themselves). The Appeals Court credited PRAC with obtaining three IMEs, but PRAC did nothing of the sort; in fact, PRAC neither obtained nor requested any IME's. The IMEs were conducted at the request of Johanna's own insurer. PRAC did, however, cherry-pick information from these IMEs while ignoring their detailed findings. The Appeals Court credited PRAC with staying in touch with John, when their only actions were in response to information John provided. The

Appeals Court also ignored the Trial Court's findings regarding Dr. Levine, and how he was not qualified to provide an opinion, and that his opinion could not be objectively relied on because it was not based on sufficient information. Finally, the Appeals Court completely ignored the Trial Court's findings regarding Plaintiff's highly qualified expert, as well as PRAC's attorney.

With respect to the offers, the Appeals Court did not make any findings regarding the timing of the offers or how they correlated to the damages asserted by Johanna and her family as supported by the objective medical evidence. Rather, the Appeals Court relied only on the amount of the medical bills without any discussion of the objective value of the loss of one's cognitive abilities, and without any discussion of the fact that the amount of medical bills considered by PRAC did not take into account that Johanna's treatment was ongoing, or that additional medical expense continued to be incurred up to and including the date of the arbitration. Indeed, the record is devoid of any evidence that PRAC made any inquiries into how such a loss could be valued before making its offers.

V. A STATEMENT WHY FURTHER APPELLATE REVIEW IS APPOPRIATE

Further appellate review is appropriate and necessary because the Appeal Court's decision will

allow insurers to avoid liability pursuant to Chapter 93A or Chapter 176D (1) for failing to conduct reasonable investigations by simply claiming reliance on purported experts despite objective deficiencies in the qualification of the expert and/or the bases of their opinions; and (2) for failing to make reasonable settlement offers by making late, arbitrary offers years too late and/or an offer contingent on an adversarial and costly arbitration process. The precedent contained in the Appeals Court decision, while only a Rule 1:28 decision, does not further the public policies of either Chapters 93A or 176D, nor should a Trial Court's detailed findings of fact be so easily dismissed. Indeed, the current decision will only embolden insurers to deny claims or litigate them even when liability is more than reasonably clear.

A. The Appeals Court's Decision Violates The Standard Of Review For Reviewing Trial Court Decisions.

Preliminarily, it is settled law that an appellate court "'review[s] a judge's findings of fact under the clearly erroneous standard and [her] conclusions of law de novo. … A ruling that conduct violates G. L. c. 93A is a legal, not a factual, determination[,] … [a]lthough whether a particular set of acts, in their factual setting, is unfair or deceptive is a question of fact….' (quotations and citations omitted)." *Klairmont v. Gainsboro Rest., Inc.*, 465 Mass. 165, 171

(2013), *quoting*, *Casavant v. Norwegian Cruise Line Ltd.*, 460 Mass. 500, 503 (2011). Indeed, the Appeals Court has noted in other similar cases that "[t]he judge presided over a ten-day bench trial at which ten witnesses testified, and he then made detailed findings of fact based on the totality of evidence presented, which included oral testimony, documentary evidence, and evidence not in the appellate record. We accept the judge's findings of fact because they are not clearly erroneous." *Anderson* v. *National Union Fire Ins. Co.*, 88 Mass. App. Ct. 1117, *11-12 (2015), *rev'd on other grounds*, 476 Mass. 377 (2017).

Here, the Trial Court made exhaustive findings of fact, which were based on a four day trial consisting of five fact witnesses and two experts, and hundreds of pages of exhibits, followed by extensive and detailed post-trial briefs. And yet, the Appeals Court's decision flatly contradicts these factual findings, and also fails to fully consider or apply the findings when reviewing its conclusions of law. *See, e.g.*, *Rass Corp. v. The Travelers Cos., Inc.*, 90 Mass. App. Ct. 643, 649 (2016) ("[W]e are bound by the trial judge's findings of fact, including all reasonable inferences, that are supported by the evidence."). The Trial Court Decision was based on a multi-day trial in which live testimony was offered to the judge to hear and see, and reinforced by an earlier arbitration decision that made

similar findings as to the timing of Johanna's damages and the uncontroverted evidence in support thereof.

These facts, however, were glossed over or even ignored in violation of the above standard, and not included in any analysis of the conclusions of law. Moreover, the Appeals Court appears to have ignored the timing of offers and the findings regarding what PRAC knew and when. Such evidence cannot be ignored for purposes of determining whether an investigation or offer was reasonable, even in a *de novo* review of the Trial Court's conclusions.

B. This Court Should Review The Appellate Court's Bases For Finding That The Trial Court Erred In Concluding PRAC Did Not Conduct A Reasonable Investigation.

Chapter 176D of the General Laws was enacted to deter unfair settlement practices within the insurance industry. G.L. c. 176D *et seq. See Schwartz v. Travelers Indem. Co.*, 50 Mass. App. Ct. 672, 675 (2000). "Massachusetts law permits a third-party claimant … to sue the insurer of another party when the claimant alleges, as does [plaintiff] here, that he or she has been injured or his or her rights have been adversely affected by the insurer's violation of G. L. c. 93A, which incorporates the provisions of G. L. c. 176D, § 3(9)." *Clegg v. Butler*, 424 Mass. 413, 427 (1997) (O'Connor, J., dissenting); see also *Schwartz*, 50 Mass. App. Ct. at 675. "The success of such a claim,

of course, is contingent on the claimant's proof of injury or an adverse effect on his or her rights resulting from the insurer's conduct…." *Clegg*, 424 Mass. at 427.

Chapter 176D prohibits an insurer from refusing to pay a claim without conducting a reasonable investigation. G.L. c. 176D, § 3(9). PRAC and the Appeals Court principally relied on *Silva v. Norfolk & Dedham Mut. Fire. Ins. Co.*, 91 Mass. App. Ct. 413 (2017), a case where the Appeals Court affirmed a finding that the insurer did not violate c. 93A liability because the trial judge found that the insurer attempted to obtain information regarding Silva's injuries, but was rebuked by Silva's automobile insurance and workers' compensation carriers, and engaged experts to review the claim. *Id.* at 414-415. The Appeals Court also noted that there was no evidence at trial identifying any specific steps that the insurer should have taken but did not take in investigating Silva's bodily injury claim. *Id.* at 416.

In stark contrast to *Silva*, PRAC had access to Johanna's medical records, though it relied on John to provide them, but did not take adequate steps to fully examine them. The Trial Court Decision also detailed the specific steps PRAC should have taken (but did not) to investigate Johanna's bodily injury claim, including engaging the appropriate expert, requesting all

relevant diagnostic images and actually having them reviewed by an appropriate expert, and conducting an IME. *See* Mass. R. Civ. P. 35; *Commonwealth v. Poissant*, 443 Mass. 558, 566 (2005) (noting the imbalance of one party having an expert and the other not when determining whether to allow an examination).[5] Moreover, the Trial Court detailed how PRAC communicated its distrust of Johanna's damages claims, especially since it did not contest liability, but did not then reasonably act by requesting Johanna submit to an IME of PRAC's choosing so that it, too could assess her damages claims. Compare with *Silva*, 91 Mass. App. Ct. at 417-418.

Further, the Appeals Court cited only to PRAC's own in-house attorney's twenty years of experience as grounds for reasonable reliance, rather than the scope of information that was sought to justify any defense.

Based on this evidence, the Trial Court did not err when it correctly determined that PRAC did not conduct an adequate investigation, and the Appeals Court's decision should be reversed and the Trial Court's decision regarding violation of Ch. 93A should be reinstated.

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[5] As outlined in the decision of the arbitrator, and later the Superior Court, the PRAC Insureds could not rebut Johanna's evidence about her condition. (R.A. at V.I-182-189; V.II-29-50). It was more than a simple strategic mistake to fail to conduct a proper investigation.

C. This Court Should Review The Appellate Court's Bases For Finding That The Trial Court Erred In Concluding PRAC's Settlement Offers Were Reasonable.

An insurer has violated Chapter 93A when it fails to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear. G.L. c. 176D, § 3(9)(f); *see, e.g.*, *Clegg*, 424 Mass. at 421; *Van Dyke v. St. Paul Fire & Marine Ins. Co.,* 388 Mass. 671, 677-678 (1983). The "standard for examining the adequacy of a defendant's response to a demand for relief under c. 93A, § 9, is 'whether, in the circumstances, and in light of the complaint's demands, the offer is reasonable.'" *Klairmont*, 465 Mass. at 184 (*quoting Calimlim v. Foreign Car Ctr., Inc.*, 392 Mass. 228, 234 (1984)). The insurer has the burden to prove that its settlement offer was reasonable, and a plaintiff need not prove that he or she would have accepted a reasonable offer. *See Bobick v. United States Fid. & Guar. Co.*, 439 Mass. 652, 662-663 (2003). Also, an "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. See *Hopkins v. Liberty Mut. Ins. Co.*, 434 Mass. 556, 567 (2001); *Metropolitan Prop. & Cas. Ins. Co. v. Choukas*, 47 Mass. App. Ct. 196, 200 (1999). Whether an insurer's settlement proposal was reasonable or made in bad faith is a question of fact. *See Parker v. D'Avolio*, 40 Mass. App. Ct. 394, 395-396 (1996).

In response to demands of $250,000 and $300,000, PRAC made offers of $9,000 and $16,000 in July 2010, and October 2010, respectively. (R.A. at V.II-39; V.XVI-17-18, 94).[6] These offers failed to recognize that liability was not at issue; they also were not based on any reliable medical evidence or data, but were arbitrary amounts based on the unsupported assessments of PRAC employees or worse, factors that had nothing to do with what an offer should be based on under Chapter 176D, e.g., the perception of the family. (R.A. at V.II-52-53; V.XVI-17-18, 94). The offers did not account for the severity of Johanna's injuries, and the effect that her injuries would have on her life moving forward. (R.A. at V.II-52-53; V.XVI-17-18, 94).

The offers also failed to take into account the exposure of the PRAC Insureds to the claims of John and the children.[7] Again, liability was not an issue, nor was the issue of whether Johanna was harmed. (R.A. at

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[6] It was not until negotiating the binding arbitration agreement in 2013 that Plaintiffs received an "offer" of $35,000 (the "low" in a high-low agreement), which was contingent on engaging in binding arbitration. Regardless, this offer was made on the eve of trial, more than two years after the demand letter. *See Hopkins v. Liberty Mut. Ins. Co.*, 434 Mass. 556, 562 (2001).

[7] Claims for loss of consortium or companionship and society are supported by proof that a tortious act caused the spouse or parent personal injury. *See, e.g.*, *Sena v. Commonwealth*, 417 Mass. 250, 264 (1994); *Diaz v. Eli Lilly & Co.*, 364 Mass. 153, 158-159 (1973); *Angelini v. OMD Corp.,* 410 Mass. 653, 662 (1991); *Gottlin v. Graves*, 40 Mass. App. Ct. 155, 161 (1996).

V.II-29-30, 33). Even on PRAC's best day, Johanna had suffered an injury caused solely by the PRAC Insureds. Johanna's damages were significant, and the effect of her injuries on her husband and three young children were also significant. And yet, PRAC did not take into account their damages at all when making any offer.

Unlike the facts in *Silva*, where there was a "legitimate" difference of opinion as to the extent of the insured's liability, here there was no good faith basis for disagreement. *Silva*, 91 Mass. App. Ct. at 418. The Trial Court provided a succinct chronology of Johanna's treatment, noting that PRAC was provided with documents to support the treatment and the opinions of the medical providers, and that the medical records showed that Johanna had suffered an identifiable injury that would have lasting effects on her cognitive functioning. (R.A. at V.II-32-37). Unlike the insurer in *Silva*, PRAC did not have or create any good faith basis for disagreement about damages. *See Rivera v. Commerce Ins. Co.,* 84 Mass. App. Ct. 146, 148 (2013) (noting that trial judge had admonished adjuster for cherry-picking favorable facts and ignoring unfavorable aspects of the medical expert's report).

PRAC's failure to base its offers on any legitimate assessment of the irrefutable data supporting Johanna's injuries, or the claims of John

and the Children, supports the Trial Court's conclusion that the offers violated Chapters 93A and 176D.

The Appeals Court's reliance on *Parker v. D'Avolio*, 40 Mass. App. Ct. 394 (1996), is disconcerting. First, *Parker* states that "[w]hether the defendants' settlement proposal was an unreasonable refusal or made in bad faith was a question of fact." *Id.* at 395. Here, the Trial Court, citing to the evidence and testimony, issued an exhaustive opinion which identified facts as to why the offers were not sufficient, and concluded that the offers were not made in good faith. This was not a numbers game, but a careful review of the evidence.[8] PRAC knew all of Johanna's injuries, knew it could not refute them, and did not learn any new information at the arbitration. Applying this Court's case law, therefore, should have resulted in the opposite conclusion.

[8] The Appeals Court's comparison of the last offer and the $35,000 low of the arbitration agreement is arbitrary. Indeed, to arbitrate would require a significant outlay of time and money as it also required Plaintiffs to pay for their experts and to testify at the arbitration. The low of the agreement, at best, only protected them from the exposure of those expenses, and was not tied to any value of the claim.

CONCLUSION

As set forth above, Plaintiffs respectfully submit that their Application sufficiently establishes the grounds for further appellate review pursuant to Rule 27.1 of the Massachusetts Rules of Appellate Procedure and request that their Application be allowed.

Respectfully submitted,

THE PLAINTIFFS-APPELLANTS
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Dated: April 16, 2018

ADDENDUM

93 Mass.App.Ct. 1104
Unpublished Disposition
Only the Westlaw citation is currently available.
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN THE REPORTER.
Appeals Court of Massachusetts.

Johanna LIEF–SOCOLOW & others [1]

v.

PLYMOUTH ROCK ASSURANCE CORPORATION & others. [2]

17–P–393

Entered: March 28, 2018

By the Court (Trainor, Blake & Lemire, JJ. [3])

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** This case arises from a motor vehicle accident in which the plaintiffs sued defendant Plymouth Rock Assurance Corporation (PRAC) and its insureds, defendants Annette and Nicola Liquori. The parties agreed to arbitrate the tort claims. The arbitration agreement included so-called "high/low" amounts, established interest provisions, and specifically excluded the G. L. c. 93A claims against PRAC. The voluntary arbitration resulted in an award of $905,000, well in excess of the high limit of $250,000 agreed to by the parties. PRAC paid the $250,000 within the required time frame. The plaintiffs then moved to confirm the $905,000 award, which motion was denied. The remaining G. L. c. 93A claim was tried before a judge of the Superior Court, where the plaintiffs again sought to confirm the $905,000 award. The judge found that PRAC had violated G. L. c. 93A and trebled the damages, using the base measure of $250,000 as damages. She also confirmed the previously satisfied $250,000 award. Both parties filed posttrial motions objecting to the judgment, which were denied. This cross appeal followed. [4]

The plaintiffs claim error in the judge's findings as to the measure of damages for the purpose of assessing damages under G. L. c. 93A. PRAC claims that the plaintiffs did not prove that its investigation and settlement offers violated G. L. c. 93A, that they did not prove PRAC wilfully and knowingly violated G. L. c. 93A so as to warrant multiple damages, and that the judge erred in calculating the damages award pursuant to G. L. c. 93A. We reverse.

Background. On August 19, 2009, Johanna Lief–Socolow's (Johanna's) [5] Toyota vehicle was struck by an Acura vehicle operated by the defendant-insured, Annette Liquori. While Johanna did not seek medical treatment at the time, [6] she began to experience headaches, insomnia, and back pain shortly thereafter. The nature of her injuries was not easily diagnosable or apparent. However, over time it became clear that Johanna became increasingly forgetful, disorganized, irritable, and less intelligent than she was prior to the accident. On the eve of the arbitration proceedings, Johanna's medical bills totaled more than $12,000. Prior to the agreement to arbitrate, in June, 2010, PRAC offered $9,000 to settle the claim based on the information it had at the time. John M. Socolow, Johanna's husband and the family's attorney, demanded $250,000 and, subsequently, $300,000, where his demand remained. In October, 2010, PRAC made another offer, this one in the amount of $16,000. Finally, in December, 2010, PRAC offered $35,000 to resolve the claim. Unable

to settle the claim, the parties submitted to voluntary arbitration with a low of $35,000 and a high of $250,000, the policy limit. The arbitrator, who by agreement was not aware of the high/low, awarded the plaintiffs $905,000. PRAC then promptly paid $250,000 to the plaintiffs.

***2** Discussion. 1. Confirmation of arbitration award. We review a judge's decision to confirm an arbitration award de novo. Massachusetts Hy. Dept. v. Perini Corp., 79 Mass. App. Ct. 430, 436 (2011). The plaintiffs argue that the judge erred in failing to confirm the full arbitration award of $905,000. PRAC claims that it was error to confirm the arbitration award at all, as it was satisfied in full. We agree with PRAC.

The purpose of confirming an arbitration award is to "enable a plaintiff to collect an unsatisfied award." Murphy v. National Union Fire Ins. Co., 438 Mass. 529, 532 (2003). However, if the award is satisfied, confirmation of the award becomes moot. Id. at 533. A trial court has no jurisdiction to hear an action to confirm an arbitration award if it has been fully satisfied. Diaz v. Cruz, 76 Mass. App. Ct. 773, 774 (2010). Here, PRAC promptly paid the $250,000 after the arbitrator's decision issued. As such, confirmation of the arbitration award was already moot when the judge confirmed the award. [7] Confirmation of the award was error.

2. General Laws c. 93A claim. PRAC claims that it was error for the judge to find that it violated G. L. c. 93A in two respects: (1) that PRAC refused to pay the claim without conducting a reasonable investigation, and (2) that it failed to effectuate a prompt, fair, and equitable settlement when liability became reasonably clear. We agree.

"General Laws c. 93A, § 2(a), states that '[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are ... unlawful.' " Bobick v. United States Fid. & Guar. Co., 439 Mass. 652, 658 (2003). General Laws c. 176D, § 3, bans "unfair or deceptive acts or practices in the business of insurance," including "[u]nfair claim settlement practices." G. L. c. 176D, § 3, inserted by St. 1972, c. 543. "The former statute incorporates the latter, and [accordingly] an insurer that has violated G. L. c. 176D, [§ 3(9)], ... by definition, has violated the prohibition in G. L. c. 93A, § 2, against the commission of unfair or deceptive acts or practices." Hopkins v. Liberty Mut. Ins. Co., 434 Mass. 556, 564 (2001). Moreover, "[a]n insurer's duty to settle arises when liability has become reasonably clear." O'Leary–Alison v. Metropolitan Property & Cas. Ins. Co., 52 Mass. App. Ct. 214, 217 (2001) (quotation omitted).

a. Reasonable investigation. Here, the judge found that PRAC did not perform any meaningful prelitigation investigation into Johanna's injuries. We disagree. PRAC was in regular communication with John, who initially was serving as the family attorney. PRAC received from John multiple medical records with conflicting opinions about the existence of Johanna's injuries. Thereafter, PRAC obtained three independent medical examination (IME) reports. It also engaged the services, and relied on the expertise, of a neurologist, who opined that Johanna did not suffer any neurological damage. PRAC could rely on independent medical advice from a neurologist when both the extent of the injuries as well their nexus to the accident are unclear. See id. at 217–218. Indeed, PRAC had reason to be skeptical as to the extent of Johanna's injuries. See Silva v. Norfolk & Dedham Mut. Fire Ins. Co., 91 Mass. App. Ct. 413, 417 (2017). Johanna did not report any injuries at the scene of the accident and did not receive care at the emergency department. Her injuries were also not readily apparent or diagnosable at the initial stages of the investigation. PRAC's decision to hire a neurologist for a medical records review after obtaining three IME reports fulfilled PRAC's investigatory obligation. To find otherwise was error.

***3** PRAC also relied on the experience and opinion of its attorney, with whom PRAC had worked for twenty years. "A plausible, reasoned legal position that may ultimately turn out to be mistaken—or simply ... unsuccessful—is outside the scope of the punitive aspects of the combined application of c. 93A and c. 176D." Guity v. Commerce Ins. Co., 36 Mass. App. Ct. 339, 343 (1994). PRAC's reliance on seasoned counsel was justified and did not constitute an unreasonable investigation.

b. Reasonableness of settlement offers. In a claim for violation of G. L. c. 93A, the standard for assessing PRAC's settlement offer is "whether, in the circumstances, and in light of the complaint's demands, the offer is reasonable." Klairmont v. Gainsboro Restaurant, Inc., 465 Mass. 165, 184 (2013) (citation omitted). The standard is an objective one, and the reasonableness of the offer is determined at the time it is made. Heller v. Silverbranch Constr. Corp., 376 Mass. 621, 628 (1978).

At the time the case went to arbitration, Johanna's medical bills totaled more than $12,000. Thus, based on the information that PRAC had at the time, it was reasonable for it to offer $9,000, then $16,000, and finally $35,000 prior to arbitration. Moreover, the plaintiffs negotiated and accepted the high/low arbitration parameters thereby agreeing to settle the claim for an amount between $35,000, PRAC's highest offer, and $250,000, the insured's policy limits. The difference between the offer made and the amount awarded did not violate G. L. c. 93A where PRAC relied on medical expert opinions that contested damages. See Parker v. D'Avolio, 40 Mass. App. Ct. 394, 401–402 (1996). To find otherwise was error. [8]

The judgment is reversed. A new judgment shall enter in favor of PRAC.

So ordered.

Reversed.

All Citations

Slip Copy, 93 Mass.App.Ct. 1104, 2018 WL 1513159 (Table)

Footnotes

1 John M. Socolow, individually and as parent and next friend of Jake Socolow, Alison Socolow, and Samuel Socolow.

2 Annette Liquori and Nicola Liquori. The Liquoris are not parties to this appeal.

3 The panelists are listed in order of seniority.

4 The plaintiffs appeal from the judgment and the order denying their motion to alter or amend the judgment. PRAC appeals from the judgment and the order denying its motion for new trial and/or for remittitur.

5 We use first names as the plaintiffs share a surname.

6 Johanna accompanied her friend, who was a passenger, to the emergency department where her friend was treated. However, the plaintiff did not seek treatment herself. Afterward, Johanna, her friend, and their six children took a taxicab to Six Flags and spent the day there.

7 The plaintiffs argue that Murphy is inapplicable as the claim there arose from an underinsured motorist where arbitration was mandated, and did not address the so-called "interplay" between G. L. c. 93A and G. L. c. 251. This argument is without merit. Regardless of whether an arbitration is mandated, when an arbitration award is satisfied, confirmation of the award becomes moot. Murphy v. National Union Fire Ins. Co., supra. Moreover, Murphy addressed this interplay as the case resolved whether the plaintiffs there were entitled to a "judgment" confirming their arbitration award for the purpose of doubling or trebling damages under a G. L. c. 93A claim. Id. at 532–533.

8 Because we conclude that it was error to find that PRAC violated G. L. c. 93A, we need not reach the measure of damages claims.

CERTIFICATE OF SERVICE

I hereby certify that on this sixteenth day of April 2018, I have served the Plaintiffs-Appellants' Application for Leave to Obtain Further Appellate Review via the Massachusetts Tyler Host electronic filing system upon:

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