SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0293-16T3

SHARON SEAMON,

Plaintiff-Respondent,

v.

STATE FARM INSURANCE COMPANY,

Defendant-Appellant.

Submitted November 8, 2017 – Decided December 14, 2017

Before Judges Reisner and Gilson.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-3172-14.

Soriano, Henkel, Biehl & Matthews, attorneys for appellant (Thomas W. Matthews, of counsel and on the briefs).

Clark Law Firm, PC, attorneys for respondent (Stephanie Tolnai, of counsel and on the brief).

PER CURIAM

This appeal arises from a dispute between an injured plaintiff and the insurance company that provided her with underinsured

motorist (UIM) coverage. Defendant State Farm Insurance Company (State Farm) appeals from a June 13, 2016 order, entering a $375,733.36 judgment in favor of its insured, plaintiff Sharon Seamon. The judgment reflected a jury verdict for injuries plaintiff suffered in an auto accident caused by an underinsured tortfeasor. State Farm also appeals from an August 25, 2016 order, denying its motion to mold the judgment down to the UIM policy limits, and awarding plaintiff $37,500 in counsel fees under the offer of judgment rule, R. 4:58-2.

We hold that the trial court erred in refusing to mold the judgment to reflect State Farm's UIM policy limits of $100,000, and prematurely determined that State Farm acted in bad faith. As the trial court correctly held earlier in the case, plaintiff is entitled to file a new complaint seeking additional damages for State Farm's alleged bad faith refusal to settle her claim. See Wadeer v. N.J. Mfrs. Ins. Co., 220 N.J. 591, 610 (2015). We therefore vacate the June 13, 2016 judgment insofar as it reflects a non-molded verdict, and reverse the August 25, 2016 order insofar as it denies the application to mold the verdict.

We agree with the trial court that plaintiff is entitled to fees and costs under the offer of judgment rule. However, because plaintiff's fee application was insufficiently specific, we vacate the $37,500 award and remand for further proceedings to determine

the amount of the award. Following those proceedings on remand, the trial court shall enter one amended final judgment in this case, which shall include the molded damages award, plus interest, and the award of fees and costs. As previously indicated, plaintiff may also file a new complaint to pursue her bad faith claim.

The underlying facts are straightforward and uncontested. In 2012, plaintiff was injured in an accident. She settled with the other driver for his $15,000 policy limits, and filed a UIM claim with State Farm. When the claim could not be settled, she filed suit against State Farm. Each party filed an offer of judgment, with State Farm offering $30,000 and plaintiff offering $85,000. The jury returned a verdict of $375,000.

After subtracting the $15,000 plaintiff recovered from the tortfeasor, the trial court entered judgment for plaintiff for $360,000 plus interest, without prejudice to either party's right to file a post-judgment motion for molding or other relief. State Farm filed a motion to mold the verdict. Plaintiff filed a motion to amend the complaint to add a bad faith claim, and sought counsel fees under the offer of judgment rule. State Farm contended that plaintiff's offer of judgment must be compared to the judgment after molding, thus defeating her right to recover fees under the Rule. State Farm opposed the motion to amend, but asserted that

the entire controversy doctrine would not preclude plaintiff from filing a new complaint asserting bad faith.

On June 14, 2016, the trial court denied plaintiff's motion to amend but held that she could file a new complaint asserting the bad faith claim. However, in later addressing State Farm's motion, the trial court held that it had discretion not to mold the verdict, and stated, without further factual findings, that molding was inappropriate in this case because State Farm had engaged in a "scorched earth" approach to settlement. The trial court awarded fees under the offer of judgment rule, based on the non-molded verdict.

We first address the issue of molding. Because we owe no deference to a trial court's legal interpretations, our review is de novo. Zaman v. Felton, 219 N.J. 199, 216 (2014). We conclude that the trial court misconstrued Taddei v. State Farm Indemnity Company, 401 N.J. Super. 449 (App. Div. 2008), and Wadeer v. New Jersey Manufacturers Insurance Company, as giving the trial court discretion to decline to mold the verdict. Taddei made clear that molding was required, and Wadeer did not disturb that holding. Taddei recognized that molding is appropriate in uninsured motorist (UM) and UIM cases, because the claims are based on an insured's contract rights under the policy:

> UM and UIM cases are first-party contract claims against insurers, but they are generally tried as if they were third-party tort actions with the insurer standing in for the uninsured or underinsured tortfeasor . . . . Thus, courts have appropriately recognized the need to mold jury verdicts in these cases to reflect the rights and duties of the parties under the insurance policy.
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> [Id. at 464 (citations omitted).]

The trial court's obligation to mold a UIM verdict was not at issue in Wadeer. However, the Court acknowledged that the Appellate Division had "specifically rejected plaintiff's arguments disputing the trial court's molding of the verdict . . . following Taddei," and stated that the Court affirmed our decision. Wadeer, 220 N.J. at 596. The Court then addressed whether, for purposes of Rule 4:58-2, a plaintiff's offer of judgment should be compared to the molded judgment or the jury's verdict. Id. at 610-12. That portion of the opinion was not concerned with whether the verdict should be molded, but whether molding should affect a plaintiff's right to recover fees under Rule 4:58-2. Id. at 611. We do not construe any language in Wadeer as disapproving Taddei or as giving a trial court discretion not to mold a UIM damages verdict.

Moreover, even if there were discretion not to mold the verdict, the trial court erred in resting its decision on State Farm's alleged bad faith. Unlike Wadeer, plaintiff here did not

raise the bad faith issue in her complaint, and under the holding in Wadeer, she had the right to file a new complaint asserting that claim. Wadeer, 220 N.J. at 610. The trial court should not have decided the bad faith issue without requiring plaintiff to file the complaint and without giving both sides a full and fair opportunity to litigate that issue.

Although we reverse on the molding issue, we agree with the trial court that plaintiff was entitled to counsel fees under the offer of judgment rule. When Wadeer was decided, the then—current version of Rule 4:58-2(a) provided relief "[i]f the offer of a claimant is not accepted and the claimant obtains a money judgment, in an amount that is 120% of the offer or more . . . ." Pressler & Verniero, Current N.J. Court Rules, R. 4:58-2(a) (2015) (emphasis added). The Court noted "the latent ambiguity" in that language, stating that "the rule, as currently written, does not explicitly provide whether the jury's verdict is the trigger for the sanctions and remedies of Rule 4:58-2 or, conversely, whether the molded judgment controls." Wadeer, 220 N.J. at 611.

The Court reasoned that evaluating a plaintiff's offer in light of a molded UIM or UM judgment, instead of comparing it to the jury's verdict, gives an insurer no incentive to settle and thus defeats the Rule's purpose:

> [W]e find that the current construction of Rule 4:58-2 provides no incentive for such carriers to settle. Rather, under the current rule, carriers are prone to take their chances at trial where the offer of judgment is somewhat near their policy limits because they have relatively little to lose in doing so. Thus, the rule's required reduction of a monetary jury award artificially to the policy limits renders moot any reasonable offer of settlement by the insured below the 120% threshold; unless an insured makes an offer of judgment that is unreasonably below its policy limits, it is unlikely that an insurance carrier will choose to settle the respective claim. In light of this, we conclude that the aims of Rule 4:58-2, "to encourage, promote and stimulate early out-of-court settlement," are ill-achieved in the UM/UIM context under the rule's current construction.
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> [Id. at 611 (quoting Crudup v. Marrero, 57 N.J. 353, 357 (1971).]

For that reason, the Court tasked the Civil Practice Committee with drafting appropriate amendments. Ibid. The Committee did so, and the Court adopted the amendments on August 1, 2016, effective September 1, 2016. R. 4:58-2(b); Pressler & Verneiro, Current N.J. Court Rules, note to R. 4:58-2 (2017).[1]

The amended Rule specifically addresses UM and UIM claims and bases the right to relief on the "monetary award by jury or non-jury verdict," adjusted only for comparative negligence. R. 4:58-

[1] The order in this case was issued on August 25, 2016, about three weeks after the Rule was adopted and a week before it took effect.

2(b). Thus, the amended Rule implements the Court's policy concerns as expressed in Wadeer and corrects what the Court noted was an ambiguity in the old Rule. Because the newly-adopted Rule 4:58-2(b) is curative and represents a clarification of the old Rule, it should be applied in this case. See Kendall v. Snedeker, 219 N.J. Super. 283, 287-88 (App. Div. 1987) (Curative acts can be applied retroactively where they are designed to remedy a perceived imperfection in or misapplication of a statute and "not to alter the intended scope or purposes of the original act."). Consequently, although we disagree with the trial court's reasoning, we agree that plaintiff was entitled to a fee award under the offer of judgment rule.

However, although plaintiff was entitled to fees, we are constrained to remand because the fee application was deficient. We understand that the attorney who handled the trial has retired, and the firm probably represented plaintiff on a contingent fee basis. However, a fee application must "be supported by an affidavit of services addressing the factors enumerated by RPC 1.5(a)" and must include a specific enumeration of the services performed and the hours spent. R. 4:42-9(b). See Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 366-68 (1995). The fee application here did not contain that information. Nor did the trial court set forth the factors it considered in making the

award. See RPC 1.5. On remand, plaintiff's counsel must submit a conforming fee application, so that the trial court can make the appropriate findings in determining the award.

Affirmed in part, reversed in part, vacated and remanded in part. We do not retain jurisdiction.