SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0854-15T3

NANCY PALMER, as assignee
of KALEENA KOVACS,

Plaintiff-Appellant,

v.

NEW JERSEY MANUFACTURERS
INSURANCE COMPANY,

Defendant-Respondent.

Argued November 27, 2017 – Decided December 14, 2017

Before Judges Sabatino, Ostrer and Whipple.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-3977-07.

Richard A. Gantner argued the cause for appellant (Cleary Giacobbe Alfieri Jacobs, LLC, attorneys; Richard A. Gantner, on the brief).

Daniel J. Pomeroy argued the cause for respondent (Pomeroy, Heller & Ley, LLC, attorneys; Daniel J. Pomeroy and Karen E. Heller, on the brief).

PER CURIAM

This case involves a claim of bad faith on the part of an automobile driver's insurance carrier based on its failure to negotiate a settlement with the injured plaintiff, both before the jury issued a verdict in plaintiff's favor exceeding the policy limits, and afterwards on appeal. After a seven-day non-jury trial on the bad faith claims, the trial court issued a detailed written opinion concluding that the preponderance of the evidence did not establish the insurer handled the claim in bad faith. We affirm.

In April 2000, the vehicle of plaintiff Nancy Palmer was struck by a car driven by Kaleena Kovacs. At the time of the accident, Kovacs had an automobile insurance policy with New Jersey Manufacturers Insurance Company ("NJM"), with a $300,000 policy limit.

Palmer claimed to have suffered neck and back injuries as a result of the accident. She missed two days of work. She received five months of chiropractic treatment, but had lingering neck and back symptoms, for which she took non-prescription medication. Post-accident MRI results revealed four disc bulges along Palmer's cervical and lumbar spine. She did not undergo surgery.

Palmer was subject to the lawsuit limitation threshold under the Automobile Insurance Cost Reduction Act ("AICRA"), N.J.S.A. 39:6A-1.1 to -35. As of the time of her injuries, which occurred

before the Supreme Court's opinion construing AICRA in DiProspero v. Penn, 183 N.J. 477 (2005), in order to recover non-economic damages, plaintiff was required to prove both a permanent objective injury resulting from the accident, as well as a serious negative subjective impact on her daily life activities.[1] Plaintiff filed suit against Kovacs in the Law Division, seeking damages under AICRA. Pursuant to the terms of its policy, NJM assigned an attorney to defend Kovacs in that case.[2]

Prior to filing suit, Palmer's attorney made a settlement demand of $40,000, to which NJM responded via letter stating that it was not going to make any settlement offers, in light of plaintiff's burden of proof under AICRA and the pertinent facts. After filing suit, plaintiff made an offer of judgment to defense counsel of $20,000. Plaintiff later made a reduced offer of judgment for $10,000.[3] Meanwhile, an arbitrator made a non-binding award of $22,500, which NJM rejected, thereafter demanding a trial de novo.

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[1] The Court in DiProspero ultimately ruled that this so-called "second prong" of AICRA is inconsistent with the terms and intended meaning of the statute. Id. at 491-506.

[2] The trial attorney is now deceased.

[3] The fee-shifting impact of these successive offers of judgment was resolved in this court's published opinion in Palmer v. Kovacs, 385 N.J. Super. 419, 426-27 (App. Div.), certif. denied, 188 N.J. 356 (2006).

Prior to the jury trial, the court granted plaintiff's motion for partial summary judgment on liability. The defense made no pretrial settlement offers. NJM had confidence that plaintiff was unlikely to surmount the lawsuit limitation threshold, a position consistent with its orthopedic expert's opinion that plaintiff had not sustained a permanent significant injury from the accident and had a favorable prognosis. Internally, however, adjusters within NJM placed a $9,500 reserve on the file, which was later raised to $20,000.

After a three-day trial in August 2004 on damages only, the jury found that plaintiff had surmounted the threshold. It awarded her $460,000 for her past and future pain and suffering, an amount exceeding Kovacs' $300,000 policy limits with NJM.

Still represented by counsel assigned by NJM, Kovacs appealed the jury award on a variety of grounds. During the appeal, defense counsel requested the court to reduce the amount of the supersedeas bond.[4]

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[4] In the unpublished portion of our ultimate opinion in May 2006, we questioned, but did not decide, whether that request posed a conflict of interest between Kovacs and NJM as her insurer. We defer to the trial court's determination that this alleged conflict was not a subject properly within the scope of the bench trial on bad faith. In any event, even if conflicts concerning the bond existed, that would only be collateral proof of a failure to advance Kovacs' interests. See Gonzalez v. Silver, 407 N.J. Super. 576, 594 (App. Div. 2009). The thrust of plaintiff's claims here

In February 2006, we issued the first of two opinions on Kovacs' appeal. In that initial opinion, we upheld the trial court's denial of Kovacs' pretrial motion for summary judgment and remanded the matter to the trial judge for amplification. Palmer v. Kovacs, Nos. A-0956-04T5 & A-1257-04T5 (Feb. 6, 2006). While that remand was pending, the parties each considered whether the case could be settled. Palmer and NJM sharply dispute whether NJM made an offer to settle during this time interval. However, the court in the non-jury case factually determined that NJM indeed had made an offer to plaintiff's counsel to settle the case within the policy limits, an offer which plaintiff did not accept.

This court issued its second opinion in May 2016 upholding the trial court's judgment in all respects and finding that Palmer was entitled to fee-shifting for attorney time accrued after the initial $20,000 offer of judgment, as well as the $10,000 reduced offer of judgment. Palmer v. Kovacs, Nos. A-0956-04T5 & A-1257-04T5 (May 16, 2006) (complete unpublished version). The Supreme Court denied Kovacs' subsequent petition for certification. Thereafter, NJM made a payment to Palmer of $434,169.48, representing the remaining balance on the policy limits, plus fees, interest, and other charges. The trial court entered an

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revolve around NJM's failure to negotiate settlement within the policy limits, not the quantum of the supersedeas bond.

amended final judgment of $187,139.97 in November 2006, representing the difference between the post-appeal amounts paid by NJM and the unpaid balance on the excess judgment.

Kovacs assigned to Palmer her right to bring a bad faith claim against NJM. Palmer, as assignee, then brought the present lawsuit. Extensive discovery took place, including document production and depositions concerning the attorneys' discussions of and NJM's internal evaluation of the claim. The bad faith issues were initially presented in a jury trial in 2012 that resulted in a mistrial. The parties thereafter agreed to have the case tried anew in a non-jury trial, which was presided over by Judge Katie A. Gummer.

On August 31, 2015, Judge Gummer issued a forty-six-page comprehensive written opinion. The judge concluded that Palmer had failed to sustain her burden as Kovacs' assignee in proving bad faith by NJM, either in its conduct before the jury verdict or afterwards. The judge made detailed credibility findings in support of her decision.

After carefully considering the proofs, the judge found plaintiff failed to establish that before the jury trial, NJM had acted in bad faith by failing to engage in settlement negotiations. The judge noted in this regard that "[e]very documented pre-trial valuation of the case indicated the likelihood of a verdict

substantially below the policy limits[.]" With respect to the post-verdict phase, Judge Gummer likewise found no bad faith. She concluded that "[t]he weight of the evidence" from the non-jury trial "demonstrates" that defense counsel did make a post-verdict offer to Palmer to settle the case for the remaining policy limits, plus fees and interest.

The judge rejected Palmer's argument that the timing of that post-verdict offer was in bad faith. In particular, the judge found no duty of the insurer to make such an offer "immediately" after the excess verdict was announced. The judge found it permissible for the insurer to instead make such an offer once the trial judge had issued his amplification. In addition, the judge detected no compensable damages flowing from the post-verdict timing of the offer.

On appeal, Palmer variously argues that: (1) NJM's claims handling activities violated its duty to exercise due care in protecting an insured, here Kovacs, from personal liability beyond the policy limits, (2) NJM failed to employ proper expertise in evaluating the claim, and in not taking the initiative to attempt to negotiate a settlement; (3) NJM violated case law by taking an appeal of the verdict without a reasonable probability of reversal; (4) NJM failed to place the insured's interests first; (5) NJM should have aggressively pursued all available avenues to settle

the case within the policy limits; and (6) Judge Gummer misinterpreted the law and misconstrued the evidence.[5]

Having fully considered these arguments and the advocacy of both counsel, we affirm the trial court's decision, substantially for the cogent and well-supported reasons articulated in Judge Gummer's comprehensive written opinion. We afford considerable deference to the judge's credibility findings and her overall determinations of fact, including her critical finding that NJM did convey an offer to settle the case for the policy limits while the appeal of the jury verdict was still pending.

We concur with the judge that the large jury verdict in plaintiff's favor was not reasonably anticipated and was not reflective of plaintiff's own, much-lower, pretrial settlement positions. Moreover, we accept the judge's finding that the insurer's delay in making the post-verdict offer was neither reflective of bad faith nor that it produced appreciable prejudice to Kovacs, the insured, beyond the happenstance of the excess verdict itself. In addition, we are unpersuaded that the judge

[5] Notably, Palmer has not argued to this court that the insurer's failure as a fiduciary to negotiate settlement sooner, once it received an offer from Palmer to settle within the policy limits, created strict liability for the excess verdict, an argument the Supreme Court majority rejected decades ago in Radio Taxi Service, Inc. v. Lincoln Mutual Ins. Co., 31 N.J. 299, 312 (1960), with a dissent by two justices on somewhat different grounds.

misapplied the applicable case law on bad faith. See Rova Farms, supra, 65 N.J. at 493, Bowers v. Camden Fire Ins. Assoc., 51 N.J. 62, 70-72 (1968), Radio Taxi, supra, 31 N.J. at 312. We reach this conclusion mindful that "the application of the good faith test must be more exacting at the appeal stage of the proceedings than before or during trial." Bowers, supra, 51 N.J. at 72. Nor has Palmer shown the judge misconstrued or misunderstood the extensive evidence adduced at the bench trial.

As Judge Gummer aptly wrote on the last page of her opinion, "[i]n hindsight, perhaps it was a mistake in judgment [for NJM] not to accept the Offers to Take Judgment or to file the trial de novo after the arbitration. However, a mistake is not bad faith and the perfect vision of hindsight is not the lens through which our courts assess compliance with good-faith obligations. Radio Taxi, [supra,] 31 N.J. at 312." That said, it is lamentable that it took nearly seventeen years — through no apparent fault of the parties or their counsel — for the successive litigation concerning this 2000 automobile accident to reach its final conclusion. Perhaps there are better ways to adjudicate such marathon and expensive disputes, but that is a topic the Supreme Court may or may not choose to examine prospectively.

Affirmed.