JOSH RABASSA[1] vs. MARGARET CERASUOLO, individually & as trustee,[2] & another;[3] NORTHERN SECURITY INSURANCE CO., INC., third-party defendant.

No. 19-P-243.

Middlesex. March 9, 2020. - July 6, 2020.

Present: Green, C.J., Hanlon, & Neyman, JJ.

Lead Poisoning. Insurance, Coverage. Estoppel. Evidence, Expert opinion. Practice, Civil, New trial, Instructions to jury, Verdict.

Civil action commenced in the Superior Court Department on November 3, 2011.

The case was tried before S. Jane Haggerty, J., and following a motion for judgment notwithstanding the verdict or for a new trial that was heard by her, the case was tried before Kenneth J. Fishman, J.

Peter C. Kober for Northern Security Insurance Company, Inc.

Michael B. Bogdanow (Peter J. Ainsworth also present) for Margaret Cerasuolo & another.

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[1] By his mother and next friend, Maria Rabassa.

[2] Of the John Cerasuolo Trust of November 24, 1972.

[3] John Cerasuolo.

GREEN, C.J. Together with his wife, Margaret Cerasuolo, defendant John Cerasuolo acquired an apartment building in 1972, and rented apartment units to tenants in the years that followed.[4] In 1992, concerned about the possibility of liability for lead poisoning, John took steps to obtain insurance coverage against the risk. After learning, in 2010, that the plaintiff, a young child, had sustained lead poisoning from residing in one of the apartment units, the Cerasuolos filed an insurance claim with the third-party defendant, Northern Security Insurance Company, Inc. (Northern), which Northern denied. In the lawsuit that followed, the Cerasuolos claimed that Northern was estopped to deny coverage, by virtue of its silence in the face of documentation showing that John believed that he had satisfied Northern's requirements to obtain coverage for lead poisoning claims. In each of two trials in Superior Court, juries agreed that Northern was estopped to deny coverage and awarded damages to the Cerasuolos.[5] We conclude that the jury verdicts finding

[4] After acquiring their apartment building, John and Margaret placed it in the John Cerasuolo Trust of November 24, 1972, of which Margaret is the trustee. We refer to John and Margaret, individually, by their first names and to John, Margaret, and the trust, collectively, as the Cerasuolos.

[5] After the jury returned their verdict in the first trial, the first trial judge allowed Northern's motion for a new trial, after deciding that she had erroneously instructed the jury on an element of estoppel.

Northern liable find adequate support in law and fact, but that the first trial judge erred in allowing Northern's motion for a new trial. We accordingly vacate the judgment in the second trial, reverse the order granting a new trial, and direct reinstatement of the verdict in the first trial.

Background. We briefly summarize the evidence in the light most favorable to the Cerasuolos, reserving some facts for our discussion of the issues.[6] See Evans v. Lorillard Tobacco Co., 465 Mass. 411, 417 (2013). In the early 1990s, John became concerned about the possibility of lead poisoning claims and reached out to Gus Doukakis at Doukakis Corsetti Insurance Agency, Inc. (DCIA),[7] an authorized agent for Northern.[8] John specifically inquired about obtaining coverage for lead poisoning claims arising out of the Cerasuolos' ownership of the

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[6] Because we direct reinstatement of the verdict in the first trial, our summary of the facts draws from the record of that trial. The evidence in both trials was largely consistent, though the Cerasuolos were permitted in the second trial to introduce certain evidence concerning insurance industry practices that the first trial judge excluded.

[7] The Cerasuolos also brought claims against DCIA, but those claims have settled and DCIA is not part of this appeal.

[8] In each of the two trials, the jury were properly instructed that, if DCIA acted as an authorized agent for Northern, then DCIA's conduct and knowledge is imputed to Northern, even if that knowledge was not in fact passed on to Northern. See Guerrier v. Commerce Ins. Co., 66 Mass. App. Ct. 351, 357 (2006).

apartment building. Doukakis advised John that the Cerasuolos would have to obtain letters of compliance in order to obtain such coverage.[9] Doukakis did not further explain what a letter of compliance was, or how to obtain one.

In the meantime, John, who was a carpenter, attended a course to become a licensed deleader. During that course, John learned that he could not conduct a lead inspection of his own property and thus hired a third-party lead inspector. Following the inspection of the apartment building by a third-party lead inspector, John received several letters (deleading letters) -- each one for a different unit -- labeled "LETTER OF LEAD PAINT (RE)OCCUPANCY (RE)INSPECTION CERTIFICATON UNAUTHORIZED DELEADING." The deleading letters all stated as follows:

> "This letter certifies that on 6-15-92, no violations of the Lead Law exist in the interior of the dwelling unit, relevant common areas and exterior. NO FINAL LETTER OF LEAD ABATEMENT COMPLIANCE WILL ISSUE ON THIS PROPERTY DUE TO UNAUTHORIZED DELEADING."

Believing that the deleading letters were letters of compliance, John submitted them to DCIA. DCIA then submitted them to Northern, which marked them as "pertinent underwriting information" and issued business owner's policies (policies)

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[9] There was evidence at trial, however, that the Cerasuolos could have obtained coverage for lead poisoning claims for an additional premium, even without obtaining letters of compliance.

year after year without following up with the Cerasuolos.[10] John believed that the policies all provided the requested coverage for lead poisoning claims. The policies, however, provided that Northern would provide coverage for liability arising out of an occurrence of lead poisoning only "for each 'unit' on [the] premises for which you have either a 'Letter of Interim Control' or a 'Letter of Compliance.'"[11] And it is undisputed that none of the deleading letters was a letter of compliance (or the alternative letter of interim control).

The plaintiff's family moved into the Cerasuolos' apartment building around 2007 and lived there until 2010. In 2010, the plaintiff's family informed John that the plaintiff had high levels of lead in his system. John notified DCIA, and DCIA in turn notified Northern of the plaintiff's potential lead poisoning claim. By a letter dated March 16, 2011, Northern

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[10] At least some of the policies were technically issued by an entity affiliated with Northern, Vermont Mutual Insurance Company (Vermont Mutual). Because the parties refer to both companies interchangeably and because Vermont Mutual is not a named party, we refer to both companies as Northern to avoid confusion.

[11] The first two policies, which were issued in 1992 and 1995 and had three-year policy periods, used slightly different language and required "a Letter of Initial Inspection Compliance or a Letter of Abatement Compliance." The differences between the first two policies and the subsequent policies are immaterial to our discussion.

informed the Cerasuolos that it would not defend or indemnify them with respect to the plaintiff's lead poisoning claim.

The plaintiff filed an action against the Cerasuolos, which the Cerasuolos settled for $250,000.[12] Following settlement of the plaintiff's claim, the Cerasuolos pursued their third-party claims against Northern. After an order for partial summary judgment determined that the policies unambiguously did not provide coverage for lead poisoning claims, only the Cerasuolos' claim against Northern for estoppel remained. As explained in our introduction, juries in two successive trials concluded that Northern was estopped to deny coverage.[13] Before us are Northern's appeal from the judgment that it is liable, and the Cerasuolos' cross appeal claiming error in the allowance of Northern's motion for a new trial after the first jury verdict.

Discussion. 1. Northern's appeal. We begin by addressing Northern's contention that it was entitled to a judgment that it is not liable because estoppel cannot create coverage. In other words, Northern contends that it had no duty to speak and that the Cerasuolos' reliance on Northern's silence was not reasonable.

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[12] The Cerasuolos also incurred $45,000 in legal fees defending the action.

[13] The first jury awarded damages in the amount of $295,000. The jury in the second trial awarded damages in the amount of $180,000.

a. Can estoppel "create coverage?" Northern's argument relies on the general rule that "the doctrines of waiver and estoppel will not operate to change the risks covered or insurance extended by a policy so as to create, enlarge, or expand the coverage of the policy" (footnote omitted).[14] 46 C.J.S. Insurance § 1155, at 28-29 (2018). The general rule, however, has exceptions. "One exception to the general rule that the doctrine of estoppel is not available to create or extend the scope of insurance coverage is when an insurer misrepresents the extent of coverage to an insured, thereby inducing the insured to purchase coverage which does not in fact cover the disputed risk." Id. at 30. See, e.g., Jet Line Servs., Inc. v. American Employers Ins. Co., 404 Mass. 706, 713 (1989) (defendant estopped to deny claim for explosion, which occurred after renewal, where manner in which defendant treated prior claim for explosion before renewal induced plaintiff to believe that such claims were covered).

The facts of this case, as found by the jury, fall comfortably within the exception to the general rule. John specifically requested coverage for lead poisoning claims. Northern, through its silence when (as explained below) it had a duty to speak, misrepresented that the policies provided the

[14] We do not address whether Massachusetts has adopted this general rule.

requested coverage. So induced, the Cerasuolos purchased the policies, only to find out years later that the policies did not provide the requested coverage. "These circumstances justify application of the traditional equitable principle of estoppel." Jet Line Servs., Inc., 404 Mass. at 713.

b. Northern's duty to speak. The evidence at trial supported a conclusion by the jury that, incident to his efforts to obtain an insurance policy from Northern, John expressed his desire to obtain coverage for lead poisoning risks and thereafter provided information in response to the requirement for such coverage communicated to him by Northern's agent. In such circumstances, the question is whether Northern had an obligation to inform John that the documentation he provided was inadequate to satisfy the requirement for the coverage he had expressed a desire to obtain. The scope of Northern's obligation to respond in such circumstances was a proper subject of expert testimony regarding standard practices in the industry.[15] See, e.g., Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co., 439 Mass. 387, 402 (2003). The Cerasuolos offered the expert testimony of Thomas E. Quinn, an insurance professional with extensive experience. He testified that the words

[15] Northern acknowledges that it owed a legal duty to the Cerasuolos that met the standard of care of the average insurance company.

"pertinent underwriting information" stamped on a document indicate that "an underwriter would use [the document] in making underwriting decisions." He also testified that when an underwriter receives such a document, the underwriter is "obligated to tell the insured through the agent or direct[ly] whether [the] document [is] sufficient or not."[16] This testimony and the circumstances surrounding Northern's receipt of the Cerasuolos' application for insurance provided a sufficient basis for the jury to conclude that Northern had a duty to inform the Cerasuolos that the documents they submitted for the purposes of meeting the requirements for lead poisoning coverage were in fact inadequate to do so. See, e.g., Nota Constr. Corp. v. Keyes Assocs., Inc., 45 Mass. App. Ct. 15, 19 (1998).

c. Was the Cerasuolos' reliance reasonable? Whether the Cerasuolos reasonably relied on Northern's silence was a

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[16] Relying on excerpts of Quinn's testimony at the second trial during which Quinn referred to "best practices," Northern argues that "[b]y phrasing [the] purported 'standard' in terms of 'best practices' without any reference to the duty of care of the average underwriter, however, Quinn applied the wrong 'standard' of care." Because we conclude that the first trial judge erred in allowing Northern's motion for a new trial, we need not consider the argument. To the extent Northern challenges Quinn's testimony on the ground that he could not identify anything documenting the standard of care to which he testified, the argument goes to the credibility and weight of Quinn's testimony, which were matters for the jury to decide. See Ferragamo v. Massachusetts Bay Transp. Auth., 395 Mass. 581, 592 n.13 (1985). See also Palandjian v. Foster, 446 Mass. 100, 108 (2006).

question of fact for the jury to decide. See Nova Assignments, Inc. v. Kunian, 77 Mass. App. Ct. 34, 39 (2010) (summary judgment should not have been entered where reasonableness of reliance was question of fact for jury to decide). We must uphold the jury verdict as long as "anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the plaintiff" (citation omitted). Dobos v. Driscoll, 404 Mass. 634, 656, cert. denied, 493 U.S. 850 (1989).

Northern contends that it was unreasonable for the Cerasuolos to believe that they had coverage for lead poisoning claims based on two pieces of evidence. First, Northern notes that the deleading letters John submitted to Doukakis unambiguously stated that "no final letter of lead abatement compliance will issue." Second, Northern points to John's testimony regarding his limited review of the deleading letters and the policies.

There was other evidence, however, that supported the jury verdict. John told the lead inspector that he was trying to obtain letters of compliance for insurance purposes. The lead inspector gave John the deleading letters, which stated the language quoted above but also that "no violations of the Lead Law exist." John, who had a limited formal education and who had not been told what a letter of compliance was, believed that

he had received the necessary letters of compliance.[17] Members of the insurance industry, including Northern's agent Doukakis, who were much more knowledgeable than John regarding letters of compliance and who were aware of John's purpose in obtaining and submitting the deleading letters, reviewed them and did not correct him. Based on this evidence, the jury could have found that the Cerasuolos reasonably believed that they had coverage for lead poisoning claims.

2. The Cerasuolos' cross appeal. We next turn to the Cerasuolos' cross appeal, in which they argue that the first trial judge erred in allowing Northern's motion for a new trial. We will not vacate a judge's order granting a new trial unless we conclude that she abused her discretion. See Kassis v. Lease & Rental Mgt. Corp., 79 Mass. App. Ct. 784, 787 (2011). "A judge acts within [her] discretionary authority in granting a new trial when [she] does so upon a 'proper determination that [her] instructions to the jury were prejudicially incorrect.'" Id. at 788, quoting Galvin v. Welsh Mfg. Co., 382 Mass. 340, 343 (1981). "Our inquiry, accordingly, is whether the original instructions were erroneous as a matter of law and, if so,

[17] John testified that he has dyslexia and that he did not attend school beyond the eighth grade. While Northern places much emphasis on his attendance at a course to become a licensed deleader, the weight attached to that evidence was for the jury to determine.

whether the result in the first trial might have been different absent the error." Kassis, supra.

The first trial judge instructed the jury that there are four elements of estoppel: (1) a representation, which she instructed could be "silence if there [was] a duty to speak," (2) "that [the Cerasuolos] reasonably relied on the . . . representation of Northern," (3) detriment, and (4) damages. As to the first element, the first trial judge further instructed that "mere standing in silence does not work an estoppel unless [Northern] had a duty to speak" and that it was for the jury "to say, first, whether there was a duty to speak and, secondly, whether [Northern] failed in that duty, if there was a duty." Following the jury verdict in the Cerasuolos' favor, the first trial judge concluded that she also should have instructed the jury that the Cerasuolos had to prove that Northern knew or had reasonable cause to know that the Cerasuolos would rely on Northern's silence to their detriment.

We note that the additional instruction regarding Northern's knowledge or reasonable cause to know would usually be required. It is well established that "[e]quitable estoppel arises when one by the person's acts, representations, or admissions, or by silence when the person ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies

and acts on such belief, so that the other will be prejudiced if the former is permitted to deny the existence of such facts" (emphasis added). 31 C.J.S. Estoppel and Waiver § 74, at 416 (2019). See Pagliarini v. Iannaco, 57 Mass. App. Ct. 601, 603, S.C., 440 Mass. 1032 (2003) (plaintiff had to show that defendant knew or had reasonable cause to know that consequence would follow from defendant's statements).

We must decide, however, whether the absence of the additional instruction was erroneous in the context of this case and all of the instructions given. See DaPrato v. Massachusetts Water Resources Auth., 482 Mass. 375, 386 (2019) (we "consider[] the adequacy of the instructions as a whole" [quotation and citation omitted]). As discussed above, the first trial judge properly instructed the jury that silence does not work an estoppel unless Northern had a duty to speak. The sole basis for that duty offered throughout trial was the expert testimony of Quinn,[18] who opined that it would have been the accepted insurance underwriting practice to inform the Cerasuolos that the deleading letters were not letters of compliance.[19] Assuming

[18] As the Cerasuolos' counsel stated during closing arguments, Quinn was "the only one who spoke about duty."

[19] Northern sought to rebut much of Quinn's testimony on the topic through the testimony of Mary Gray, who was the Northern underwriter who handled the Cerasuolos' application for insurance. Gray testified that nothing in that application

that was the accepted insurance underwriting practice, Northern had reasonable cause to know that the Cerasuolos would rely on Northern's silence. Put another way, if Northern had a duty, that duty existed only because Northern knew or should have known that the Cerasuolos sought to obtain coverage for lead poisoning claims[20] and that Northern therefore had reasonable cause to know that the Cerasuolos would rely on Northern's silence. The accepted insurance underwriting practice to inform the Cerasuolos that the documents they submitted did not suffice to provide coverage could have had no other purpose. Thus, in instructing the jury that they had to find whether Northern had a duty to speak, the first trial judge implicitly instructed the jury that they had to find whether Northern had reasonable cause to know that the Cerasuolos would rely on Northern's silence.[21]

Conclusion. For the foregoing reasons, we vacate the judgment in the second trial, reverse the order granting a new

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indicated to her that the Cerasuolos wanted coverage for lead poisoning claims.

[20] There was abundant evidence that Northern's agent Doukakis knew that the Cerasuolos wanted coverage for lead poisoning claims, and Doukakis's knowledge is imputed to Northern. See note 8, supra.

[21] For the same reasons, if the first trial judge's instructions were erroneous, we conclude that they were not prejudicially erroneous. We do not think the jury, having found that Northern had a duty to speak, could have found that Northern did not have reasonable cause to know that the Cerasuolos would rely on Northern's silence.

trial, and remand with instructions to reinstate the verdict from the first trial and enter judgment accordingly.

So ordered.