19-P-1437 Appeals Court

GEORGE ANTONIADIS vs. WALTER BASNIGHT & another.[1]

No. 19-P-1437.

Middlesex. October 22, 2020. - February 5, 2021.

Present: Massing, Singh, & Grant, JJ.

Insurance, Fire, Homeowner's insurance, Amount of recovery for loss, Subrogation. Subrogation. Evidence, Income from collateral source, Insurance. Negligence, Fire. Practice, Civil, Instructions to jury.

Civil action commenced in the Superior Court Department on March 27, 2013.

The case was tried before Christopher K. Barry-Smith, J.

John A. Donovan, III, for the plaintiff.
Brian C. Newberry for the defendants.

SINGH, J. George Antoniadis's house caught fire while undergoing renovations. Antoniadis's homeowners insurance company, Amica Mutual Insurance Company (Amica), paid

[1] Basnight, Buckingham & Partners.

Antoniadis's insurance claim and then brought this subrogation action against some of the renovation contractors, including architect Walter Basnight and Basnight's firm (collectively, defendants),[2] alleging that the renovation contractors were responsible for the fire. Amica originally filed the complaint in its own name but then substituted Antoniadis as the plaintiff. The trial judge, however, fully informed the jury of the insurance context of the case and allowed matters of insurance to be introduced in evidence. Amica now appeals from the judgment following a jury verdict in the defendants' favor.[3] Concluding that the trial judge abused his discretion in the extent to which he allowed matters of insurance to permeate the trial, and further erred in declining to instruct on the voluntary assumption of a duty, we vacate the judgment and remand for a new trial.

Background. Around 2011, Antoniadis decided to renovate his house in Belmont and hired the defendants to provide architectural services. On Basnight's introduction, Antoniadis later hired carpenter Leandro Machado, and Machado, in turn,

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[2] Amica's claims against the other contractors settled prior to trial.

[3] While the plaintiff-appellant is nominally Antoniadis, where Amica was treated as the plaintiff below, we refer to Amica as the plaintiff to avoid confusion.

recommended Shine Star Painting (Shine Star) to work on the hardwood floors. On the evening of May 31, 2012, one of Shine Star's employees left oil-soaked rags in a bucket, which spontaneously ignited and caused the house fire.[4]

After settling Antoniadis's insurance claim, Amica brought this subrogation action in its own name. Amica later substituted Antoniadis as the plaintiff, as permitted under Mass. R. Civ. P. 17 (a), 461 Mass. 1401 (2011). The trial judge, however, denied Amica's motion in limine to exclude evidence of insurance. As the judge explained, "I do not want a plaintiff on the stand with a multimillion-dollar loss and [to] allow the testimony to create the impression that he is out for that entire loss." The judge informed the jury that because Amica paid the insurance claim, Amica "stands in the shoes of the homeowner . . . and can seek recovery from persons that they believe are responsible." The defendants emphasized this point by establishing on cross-examination of Antoniadis that he was the plaintiff and by arguing in closing that Antoniadis actually had no interest in the trial.[5] In addition, the precise amount

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[4] The defendants attempted to dispute the cause of the fire at trial but do not do so for purposes of this appeal.

[5] On cross-examination, Antoniadis denied being the plaintiff, but the judge explained to the jury and to Antoniadis that he was the plaintiff. In his summation, counsel for the defendants argued, "[Counsel for Amica] mentioned during his opening statement [that Antoniadis] had been waiting a long time

of money that Amica paid Antoniadis -- roughly four million dollars -- was admitted in evidence, as were statements Antoniadis made to Amica in the course of settling the insurance claim.

Amica's theory at trial was that the defendants had a duty to supervise other contractors, that the defendants did not provide the Shine Star employee with any instructions regarding the disposal of the oil-soaked rags, and that the defendants' negligent supervision caused the fire. The primary issue was whether the defendants had a duty to supervise the other contractors. While there was no signed agreement between Antoniadis and the defendants for supervisory services, Amica offered the following other evidence: (1) Antoniadis expected Basnight to oversee the renovations, (2) a building permit authorized Basnight to act on Antoniadis's behalf with respect to the project, and (3) Basnight gave instructions to other contractors, processed invoices, and reported back to Antoniadis

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for this trial, his day in court, and I would suggest to you quite the opposite. . . . He certainly spent as little time in this courtroom as possible, and, frankly, I don't blame him. His memory, I would say, of events from seven years ago wasn't very good either. Again, I don't fault him. . . . If you had spent all that time and that money into your dream home and then watched it literally go up in smoke as it neared completion, and then had to spend two years fighting with an insurance company to get your money back, you probably would want to block it out of your memory, too."

on the status of the project. In addition, Amica's construction expert opined that where Basnight billed for spending twenty to thirty hours per week on the project, much of that on site, he was performing an "on-site supervisory role."

The defendants countered by arguing that Antoniadis himself was overseeing the renovations and that Basnight, who was an architect and not a contractor, had no responsibility for supervising the other contractors.[6] In particular, the defendants cross-examined Antoniadis on his prior negotiations with Amica, in which Antoniadis took the position that he did the work of a general contractor himself and was entitled to the typical markup paid to general contractors.[7] The defendants also offered evidence that it was Antoniadis -- not Basnight -- who hired Shine Star and last saw the Shine Star employee working on the evening of May 31, 2012.

Discussion. 1. Introduction of insurance in evidence. Amica argues that it was unfairly prejudiced by the many references to insurance at trial, including the judge's instructions to the jury regarding subrogation. The defendants argue that the introduction of insurance in evidence was a

[6] Amica's construction expert, however, testified that architects sometimes serve as construction supervisors.

[7] Amica ultimately paid Antoniadis the typical general contractor markup.

matter left to the judge's sound discretion, and that he did not abuse his discretion where the defendants needed to cross-examine Antoniadis on his prior statements -- made to Amica -- that he did the work of a general contractor. The defendants further argue that references to insurance were necessary for the jury to understand damages. Even assuming, however, that the defendants had at least some need to reference insurance, the extent to which matters of insurance were allowed to be introduced and referenced at trial exceeded the bounds of appropriate judicial discretion.

We start with the principle that a party's insurance coverage is inadmissible as a general rule. See Mass. G. Evid. § 411 & note (2020). The principle is typically applied where a defendant's loss in a tort action is covered by insurance. Thus, a plaintiff may not show that a defendant has insurance coverage because such evidence "is not itself probative of any relevant proposition and is taken to lead to undeserved verdicts for plaintiffs and exaggerated awards which jurors will readily load on faceless insurance companies supposedly paid for taking the risk." Goldstein v. Gontarz, 364 Mass. 800, 808 (1974). See Carrel v. National Cord & Braid Corp., 447 Mass. 431, 448-449 (2006). In addition, under the so-called "collateral source rule," "a defendant may not show that the plaintiff has received other compensation for his injury, whether from an accident

insurance policy . . . or from other sources." Goldstein, supra at 808-809. "Again the information is irrelevant," yet "jurors might be led by the irrelevancy to consider plaintiffs' claims unimportant or trivial or to refuse plaintiffs' verdicts or reduce them, believing that otherwise there would be unjust double recovery." Id. at 809. See Bunker Hill Ins. Co. v. G.A. Williams & Sons, Inc., 94 Mass. App. Ct. 572, 575 n.7 (2018).

This case, however, involved a different dilemma: how to avoid the prejudice associated with insurance coverage when the real party in interest is an insurance company that is seeking to recover from possible tortfeasors for money the insurance company paid to an insured. Massachusetts Rules of Civil Procedure 17 (a) (rule 17 [a]) resolves this dilemma by providing that "[a]n insurer who has paid all or part of a loss may sue in the name of the [insured] to whose rights it is subrogated." In much the same way that the general rule regarding the inadmissibility of insurance safeguards against the risk that juries will be swayed by the existence of insurance coverage, rule 17 (a) "allows an insurer to avoid any prejudice which a jury might harbor toward a plaintiff-insurance company." J.W. Smith & H.B. Zobel, Rules Practice § 17.3 (2d ed. 2006).

Lastly, we note that the general rule regarding the inadmissibility of insurance is based on the premise that

whether a party has insurance coverage "is not itself probative of any relevant proposition." Goldstein, 364 Mass. at 808. There may be times, however, when information regarding insurance is probative of a specific issue. See id. at 812. When that is the case, a judge should weigh the information's probative value against its prejudicial effect. See id. at 812-813.

With these principles in mind, we review the trial judge's evidentiary ruling for an abuse of discretion or error of law. See Zucco v. Kane, 439 Mass. 503, 507 (2003). In assessing whether there has been an abuse of discretion, we ask whether "the judge made a clear error of judgment in weighing the factors relevant to the decision, . . . such that the decision falls outside the range of reasonable alternatives." Hlatky v. Steward Health Care Sys., LLC, 484 Mass. 566, 586-587 (2020) (Gants, C.J., concurring in part and dissenting in part), quoting L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014). We do not disturb the trial judge's ruling "simply because [we] might have reached a different result." Bucchiere v. New England Tel. & Tel. Co., 396 Mass. 639, 641 (1986).

The judge noted two specific issues on which he thought information regarding insurance was probative, neither of which withstands scrutiny. First, the judge noted that it appeared likely that the defendants "will seek to introduce relevant

evidence of Antoniadis'[s] statements during negotiations with Amica." However, the defendants could have cross-examined Antoniadis on his prior statements without revealing that Antoniadis had made them to Amica or in the course of an insurance claim, as Amica suggested.[8] See Goldstein, 364 Mass. at 814 (recognizing necessity, where possible, of minimizing references to insurance).

The trial judge also noted that Amica would prove damages through "documentation of Amica's payments." As an initial matter, Amica could have proved damages through other means. Regardless, to the extent Amica chose to prove damages through documentation of its payments, the parties could have redacted that documentation to avoid references to Amica -- as Amica requested. Cf. Scott v. Garfield, 454 Mass. 790, 801 (2009). Moreover, the amount of damages was not seriously disputed. Indeed, at the final trial conference, counsel for the defendants conceded, "I don't really have much to contest the dollar amounts." Despite the low, if any, probative value and high prejudicial effect of the fact that Amica paid Antoniadis

[8] If, however, the insurance context was critical, as argued by the defendants, it could have been explored on cross-examination, followed by appropriate limiting instructions. See Corsetti v. Stone Co., 396 Mass. 1, 20-21 (1985). This, however, would not have required wholesale disclosure to the jury of the subrogation nature of the case or the insurance settlement.

for his loss, the judge declined to exclude this unnecessary evidence.

The judge's ruling was rooted in his concern that he did not want "the testimony to create the impression that [Antoniadis] [was] out for [the] entire loss." Thus, in addition to allowing evidence that Amica paid Antoniadis for his loss, the judge informed the jury of this fact at the outset. Whether Antoniadis was out for the entire loss, however, was not material to any issue at trial, and the judge's concern was antithetical to the reason why a party's insurance coverage is inadmissible as a general rule. As discussed above, the rules regarding the inadmissibility of insurance exist so that juries will not be swayed by the fact that a deep-pocket insurance company has paid or will pay for the loss. The judge's instructions that Amica paid Antoniadis for his loss created the precise problem that the rules regarding the inadmissibility of insurance seek to avoid: the jury, knowing that Amica paid Antoniadis for his claim -- and that Amica was the real party in interest -- may have been led to consider the claims unimportant or trivial. See Goldstein, 364 Mass. at 808-809. See also Scott, 454 Mass. at 800; Bunker Hill Ins. Co., 94 Mass. App. Ct. at 575 n.7.

Nor do we think the judge's instructions were necessary to provide general context. The defendants argue that the jury had

to be informed that Amica was the real party in interest because Antoniadis "clearly respected" the defendants, and because the jury thus otherwise would have wondered why Antoniadis was suing the defendants. "One can only guess at what the jurors [would] have assumed" absent the judge's instructions that Amica was the real party in interest. Shore v. Shore, 385 Mass. 529, 531 (1982) (rejecting argument that in action by parents against adult son, parents were entitled to introduce fact of son's insurance coverage where jury otherwise may have assumed that parents were seeking to deplete son's assets). The jurors may have assumed that Antoniadis respected the defendants but was "ungraciously seeking to deplete the[] [defendants'] assets" anyway. Id. Regardless what the jurors may have assumed, nothing about Antoniadis's relationship with the defendants was so unique that it warranted repeated instructions and reminders that Antoniadis was not the real party in interest. See id. at 530-532.

In these circumstances, where the judge's decision was not based on a valid evidentiary need, but was instead based on a legally irrelevant concern that the jury would think Antoniadis was out for the entire loss, "we conclude the judge made a clear error of judgment in weighing the factors relevant to the decision, . . . such that the decision" to broadly allow matters of insurance to be introduced in evidence and otherwise

referenced at trial fell "outside the range of reasonable alternatives." Hlatky, 484 Mass. at 586-587, quoting L.L., 470 Mass. at 185 n.27.

2. Voluntary assumption of a duty. At trial, Amica requested that the judge instruct on the voluntary assumption of a duty and include a question on the special verdict questionnaire regarding that duty. Amica argued that the evidence allowed the jury to find the defendants liable on two alternative theories: (1) Antoniadis and the defendants implicitly agreed that the defendants would supervise other contractors, or (2) there was no such agreement, but the defendants nonetheless voluntarily assumed the duty of supervising other contractors. The judge instructed on the first theory but declined to instruct on the voluntary assumption of a duty.[9] This was error.

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[9] As to the first theory, the judge instructed, "[I]t turns on all the facts and circumstances, particularly, the agreement between the parties as to what services would be performed. . . . [Y]ou must determine whether [Amica] has proven by a preponderance of the evidence that [the] defendants agreed to supervise or manage all construction activities at [Antoniadis's] home." The defendants argue that this instruction was sufficient to cover the topic of the voluntary assumption of a duty because the distinction between "agreeing" and "voluntarily assuming" is "a distinction without a difference." We disagree. The judge's instructions implied that there had to be a contractual meeting of the minds for the jury to find a duty to supervise. Such a meeting of the minds is not necessary to prove the voluntary assumption of a duty. See, e.g., Evans v. Lorillard Tobacco Co., 465 Mass. 411, 446 (2013).

A judge need not instruct the jury on the legal effects of facts "not decisive of the issue" (citation omitted). McCormick v. B. F. Goodrich Co., 8 Mass. App. Ct. 885, 887 (1979). But if an instruction bears on a material issue, it is error for a judge to refuse to give the substance of the requested instruction. See J.R. Nolan & B. Henry, Civil Practice §§ 35.6, 35.11 (3d ed. 2004). See, e.g., Investment Prop. Corp. of New England v. Whitten, 356 Mass. 491, 493-494 (1969).

Here, whether the defendants voluntary assumed a duty was a material issue. As counsel for Amica acknowledged in his opening statement at trial, "there was no signed contract" between Antoniadis and the defendants for supervisory services. Nonetheless, there was evidence that Basnight was on site a significant number of hours every week, giving instructions to other contractors, processing invoices, and reporting back to Antoniadis. This evidence, coupled with the building permit authorizing Basnight to act on Antoniadis's behalf, could have given rise to Antoniadis's expectation that Basnight was overseeing the renovations. The jury could have concluded, had they been so instructed, that the defendants voluntarily assumed the duty of supervising contractors working on the renovations, even if they did not specifically agree to do so. See Evans v. Lorillard Tobacco Co., 465 Mass. 411, 446 (2013) (scope of voluntarily assumed duty was fact-specific inquiry that turned

on company's communications with customers and customers' reasonable understanding, based on those communications, of what duties company had assumed). Amica was entitled to the requested instruction.

Conclusion. We vacate the judgment entered in the defendants' favor and remand for a new trial.

So ordered.