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SJC-13209

VERMONT MUTUAL INSURANCE COMPANY vs. PAUL POIRIER & others.[1]

Middlesex. April 4, 2022. - July 6, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Insurance, Liability insurance, Coverage, Construction of policy. Consumer Protection Act, Attorney's fees, Insurance. Declaratory Relief. Practice, Civil, Declaratory proceeding, Attorney's fees, Costs.

Civil action commenced in the Superior Court Department on July 23, 2012.

The case was heard by Kathe M. Tuttman, J., on motions for summary judgment, and entry of separate and final judgment was ordered by her.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Peter E. Heppner for the plaintiff.

Timothy P. Wickstrom (Edward J. Reynolds & Kathleen R. Daigneault also present) for Phyllis Maston.

Laura A. Foggan, of the District of Columbia, & Harry P. Cohen, for American Property Casualty Insurance Association & another, amici curiae, submitted a brief.

[1] Jane Poirier; and Phyllis Maston, individually and as executrix of the estate of Douglas Maston.

KAFKER, J. Paul and Jane Poirier's commercial liability insurance policy covered "sums that the insured becomes legally obligated to pay as damages because of 'bodily injury.'" This appeal requires us to determine whether that includes the Poiriers' liability for attorney's fees under G. L. c. 93A, § 9 (4), in an action for breach of warranty resulting in bodily injury. The Poiriers' insurer, Vermont Mutual Insurance Company (Vermont Mutual), paid the substantive damages on the claim and brought the present declaratory judgment action to determine whether it was also responsible for attorney's fees. On the parties' cross motions for summary judgment, a judge of the Superior Court held that the policy did cover attorney's fees and entered judgment in favor the insureds. Because we conclude that attorney's fees under G. L. c. 93A are not awarded as "damages because of 'bodily injury,'" and are not "costs taxed against the insured," we reverse.[2]

1. Background. a. The underlying action. The Poiriers operated a cleaning business, doing business as Servpro of Fitchburg-Leominster (Servpro). Vermont Mutual issued an insurance policy for the business, effective from December 17,

[2] We acknowledge the amicus brief submitted by the American Property Casualty Insurance Association and the Complex Insurance Claims Litigation Association.

1998, to December 17, 2001. The policy included a "Businessowners Liability Coverage Form," which provided that Vermont Mutual would "pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury,' 'property damage,' 'personal injury' or 'advertising injury' to which this insurance applies."[3] It also provided that Vermont Mutual had "the right and duty to defend the insured against any 'suit' seeking those damages."

After setting out the agreement's substantive liability coverage, the policy continues: "No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Coverage Extension -- Supplementary Payments." The Supplementary Payments provision itself states: "In addition to the Limit of Insurance we will pay, with respect to any claim we investigate or settle, or any 'suit' against an insured we defend," certain expenses related to the claim or suit covered by the policy. Among these expenses are "[a]ll costs taxed against the insured in the 'suit.'"

In June 1999, during the term of the policy, Douglas and Phyllis Maston hired the Poiriers' company, Servpro, to clean up a sewage spill in their basement. According to the findings of

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[3] Quotations are in the original and indicate a defined term.

the trial judge in the underlying action, Servpro workers removed contaminated material, cleaned the basement, and applied disinfectants. Although they warned Phyllis to stay out of the basement while they applied the products, they did not warn her that being in the basement could be dangerous until the disinfectants dried. Phyllis continued cleaning the basement in the days following the application of the disinfectants. Shortly after, she developed ongoing respiratory problems, which her doctors determined was caused by exposure to chemicals that were used in Servpro's cleaning products.

The Mastons sued the Poiriers for breach of contract, negligence, and violations of G. L. c. 93A based on breaches of the warranty of merchantability and the warranty of fitness for a particular purpose. Shortly before trial, the Mastons waived their contract and negligence claims and proceeded to a bench trial on the c. 93A claims alone. The trial judge found that Servpro had committed an unfair or deceptive act by committing a breach of the implied warranty of merchantability, although he did not find that it had acted knowingly or willfully and therefore did not award multiple damages. Based on Phyllis's injuries, he found damages for diminished earning capacity, medical expenses, and pain and suffering totaling $267,248.67, and loss of consortium damages for Douglas Maston totaling $5,000.

Having established a violation of G. L. c. 93A, § 2, the judge also imposed liability for costs and attorney's fees. Applying the lodestar method, the judge found that the Mastons were entitled to $215,328.00 in fees and $15,447.61 in costs.[4] The Appeals Court affirmed both the substantive findings and the award of attorney's fees and costs, and imposed further appellate attorney's fees of $21,600 and appellate costs of $1,970,35. See Maston v. Poirier, 81 Mass. App. Ct. 1131 (2012).

b. The present action. In July 2012, Vermont Mutual paid the Mastons $696,669.48, which represented all of the Poiriers' liability in the underlying action except for attorney's fees and interest thereon. Vermont Mutual then commenced the present declaratory judgment action, naming both the Poiriers and the Mastons as defendants,[5] and requesting that the court "[d]eclare that the policy issued by Vermont Mutual to Paul and Jane Poirier does not provide coverage for the attorney fee award in the underlying judgment," and that "Vermont Mutual has paid all

[4] In evaluating the work done by the prevailing attorneys, the judge noted that "[d]ue in no small part to the very capable defense presented by defendants' counsel, the plaintiffs' counsel had to work long and hard to overcome numerous hurdles and to build their case."

[5] Phyllis Maston was named both in her individual capacity and as executrix of her husband's estate, as Douglas Maston had passed away in the intervening years.

amounts due under its policy, with respect to the underlying judgment."[6]

The parties filed cross motions for summary judgment and stipulated to having the legal issues related to the interpretation of the insurance policy decided on agreed-upon facts.[7] The motion judge held that the award of attorney's fees fell into the policy's coverage for "sums that the insured becomes legally obligated to pay as damages because of 'bodily injury,'" and therefore denied Vermont Mutual's motion and granted the cross motion. She did, however, reject the alternative argument that attorney's fees are covered by the provision in the policy authorizing the payment of costs. Upon joint motion, the judge entered separate and final judgment on the policy interpretation issue in favor of the defendants. Vermont Mutual appealed, and we transferred the case from the

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[6] Both the Mastons and Poiriers asserted counterclaims against Vermont Mutual for violation of G. L. c. 93A and G. L. c. 176D, which arose from the insurer's conduct of the underlying action rather than the refusal to pay attorney's fees. These counterclaims were not addressed in the motions for summary judgment or the judge's entry of final and separate judgment.

[7] In their briefing below, the Poiriers raised factual issues related to their argument that Vermont Mutual was estopped from denying coverage for the award of attorney's fees. The parties agreed to delay considering these issues until after the judge had decided the scope of the policy. As with defendant's counterclaims, we do not address these arguments and limit our analysis to the terms of the policy.

Appeals Court sua sponte.

2. Discussion. a. Standard of review. We review a grant of summary judgment de novo. American Family Life Assur. Co. v. Parker, 488 Mass. 801, 804 (2022). The only issue presented on appeal is the proper interpretation of the Poiriers' insurance policy, which "is a matter of law to be decided by a court." Boazova v. Safety Ins. Co., 462 Mass. 346, 350 (2012).

b. The Poiriers' policy. "If the language of an insurance policy is unambiguous, then we construe the words in their usual and ordinary sense" (alteration omitted). Green Mountain Ins. Co. v. Wakelin, 484 Mass. 222, 226 (2020), quoting Boazova, 462 Mass. at 350. "[I]f the policy language is ambiguous, doubts as to the intended meaning of the words must be resolved against the insurance company that employed them and in favor of the insured" (quotation and citation omitted). Green Mountain Ins. Co., supra. "[A] term is ambiguous where 'it is susceptible of more than one meaning and reasonably intelligent persons would differ as to which meaning is the proper one.'" Dorchester Mut. Ins. Co. v. Krusell, 485 Mass. 431, 437 (2020), quoting Citation Ins. Co. v. Gomez, 426 Mass. 379, 381 (1998).

"When in doubt as to the proper meaning of a term in an insurance policy, we 'consider what an objectively reasonable insured, reading the relevant policy language, would expect to be covered.'" Dorchester Mut. Ins. Co., 485 Mass. at 437,

quoting Metropolitan Prop. & Cas. Ins. Co. v. Morrison, 460 Mass. 352, 362 (2011). Our interpretation must attempt to "giv[e] full effect to the document as a whole" (citation omitted). Given v. Commerce Ins. Co., 440 Mass. 207, 209 (2003). See Dorchester Mut. Ins. Co., 485 Mass. at 437 ("We assume that every word in an insurance contract serves a purpose, and must be given meaning and effect whenever practicable" [quotation and citation omitted]).

As noted above, the primary term at issue is the clause providing liability coverage, which states: "[Vermont Mutual] will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury,' 'property damage,' 'personal injury' or 'advertising injury' to which this insurance applies." "Bodily injury" is defined somewhat circularly in the policy as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." The policy also provides that "[d]amages because of 'bodily injury' include damages claimed by any person or organization for care, loss of services or death resulting at any time from the 'bodily injury.'"

There is no disagreement that the attorney's fees are "sums that the [Poiriers became] legally obligated to pay." Likewise, there is no dispute that the attorney's fees themselves are not "bodily injury," either under the definition in the policy or

according to the plain meaning of the term. Allstate Ins. Co. v. Diamant, 401 Mass. 654, 656 (1988) ("'Bodily injury' . . . is a narrow term that encompasses only physical injuries to the body and the consequences thereof"). The disagreement stems from the words connecting the two -- whether the insureds were liable for the attorney's fees "as damages because of" Phyllis's bodily injury.

c. Damages and awards of attorney's fees under G. L. c. 93A. General Laws c. 93A, § 2, outlaws "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Section 9 provides a private right of action for any person "injured" by a violation of § 2. A claimant's "recovery" is defined in G. L. c. 93A, § 9 (3):

> "[R]ecovery shall be in the amount of actual damages or twenty-five dollars, whichever is greater; or up to three but not less than two times such amount if the court finds that the use or employment of the act or practice was a willful or knowing violation of said [§ 2] or that the refusal to grant relief upon demand was made in bad faith with knowledge or reason to know that the act or practice complained of violated said [§ 2].

General Laws c. 93A, § 9 (4), provides that if the petitioner establishes a violation, he or she shall "in addition to other relief provided for by this section and irrespective of the amount in controversy, be awarded reasonable attorney's fees and costs incurred in connection with said action."

What constitutes reasonable attorney's fees "is a

multifactor assessment of 'the nature of the case and the issues presented, the time and labor required, the amount of damages involved, the result obtained, the experience, reputation and ability of the attorney, the usual price charged for similar services by other attorneys in the same area, and the amount of awards in similar cases.'" Blake v. Hometown Am. Communities, Inc., 486 Mass. 268, 284-285 (2020), quoting Berman v. Linnane, 434 Mass. 301, 303 (2001). As in the underlying action, this often involves application of the "lodestar method," which attempts to approximate a "fair market rate for time reasonably spent preparing and litigating a case." Fontaine v. Ebtec Corp., 415 Mass. 309, 326 (1993).

d. Attorney's fees provided by G. L. c. 93A are not "damages because of bodily injury." We begin with the plain language of the insurance contract and the common understanding of damages and attorney's fees. Given, 440 Mass. at 209. On its face, damages caused by bodily injury refer to the physical injuries and the money damages required to compensate them. As this court, quoting Black's Law Dictionary, explained in 116 Commonwealth Condominium Trust v. Aetna Cas. & Sur. Co., 433 Mass. 373 (2001), damages are defined as "[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury." Id. at 377 n.3, quoting Black's Law Dictionary 393 (7th ed. 1999). The court also referred to Webster's Third New

International Dictionary, which "similarly defines the term ["damages"] as "the estimated reparation in money for detriment or injury sustained." 116 Commonwealth Condominium Trust, supra, quoting Webster's Third New International Dictionary 571 (1993).

Attorney's fees expended to pursue a c. 93A claim are different. They reflect the cost of bringing suit to recover the c. 93A relief requested. Under the American rule, parties are ordinarily responsible for paying their own attorney's fees, even if they succeed. LaChance v. Commissioner of Correction, 475 Mass. 757, 763 (2016). Had the plaintiffs sued only in tort or for breach of warranty, they would have been responsible for their own attorney's fees in pursuing these causes of action.

There are, however, fee-shifting provisions, including G. L. c. 93A, § 9 (4), which is the cause of action at issue in the instant case. Courts may thus award both damages and attorney's fees, but that does not mean they award attorney's fees as damages.[8] General Laws c. 93A, § 9, itself

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[8] There is one exception, which is not relevant here: "If a c. 93A violation forces someone to incur legal fees and expenses that are not simply those incurred in vindicating that person's rights under the statute, those fees may be treated as actual damages in the same way as other losses of money or property." Siegel v. Berkshire Life Ins. Co., 64 Mass. App. Ct. 698, 703-704 (2005) (attorney's fees incurred in litigation against third party caused by c. 93A violation subject to multiplication). See, e.g., Columbia Chiropractic Group v. Trust Ins. Co., 430 Mass. 60, 63 (1999) (plaintiff's lawsuit against insurer to collect on fraudulent claims was unfair act or practice under

differentiates the two. "[R]ecovery shall be in the amount of actual damages or twenty-five dollars, whichever is greater." G. L. c. 93A, § 9 (3). That amount may be doubled or trebled for willful violations. Id. "[I]n addition to other relief," § 9 (4) provides that attorney's fees shall also be awarded. It does so "irrespective of the amount in controversy." The provision for attorney's fees is thus "a separate form of relief distinct from the award of damages." Barron v. Fidelity Magellan Fund, 57 Mass. App. Ct. 507, 517 (2003). It is also not doubled or trebled. Rex Lumber Co. v. Acton Block Co., 29 Mass. App. Ct. 510, 522 (1990).[9]

Consequently, even under G. L. c. 93A, damages and attorney's fees for pursuing the c. 93A action are decoupled and treated differently. They serve two different purposes -- damages are to compensate for the injury, and awards of

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G. L. c. 93A, and therefore attorney's fees spent in defense could be recovered and multiplied as c. 93A counterclaim); Tech Plus v. Ansel, 59 Mass. App. Ct. 12, 21 (2003) ("A plaintiff . . . may not show that she has suffered a loss of money or property within the meaning of [G. L. c. 93A, § 11,] merely by showing that she has incurred attorney's fees and other costs in bringing an action under the statute. Rather, she must show that she was forced to incur such expenses as a result of the defendants' initiation of litigation which itself constituted a violation of the statute" [citation omitted]).

[9] We note that petitioners cannot recover "attorney's fees and costs which are incurred after the rejection of a reasonable written offer of settlement made within thirty days of the mailing or delivery of the written demand for relief required by this section." G. L. c. 93A, § 9 (4).

attorney's fees are to deter misconduct and recognize the public benefit of bringing the misconduct to light. See Barron, 57 Mass. App. Ct. at 517-518. See also Commonwealth v. Fall River Motor Sales, Inc., 409 Mass. 302, 316 (1991). This court has characterized certain fee-shifting statutes, including G. L. c. 93A, § 9 (4), as serving two purposes:

> "First, they act as a powerful disincentive against unlawful conduct. Second, they often provide an incentive for attorneys to provide representation in cases that otherwise would not be financially prudent for them to take on, and in that sense they help to assure that claimants who might not be able to afford counsel, or whose claims are too small to warrant an expenditure of funds for counsel, will be represented"

Ferman v. Sturgis Cleaners, Inc., 481 Mass. 488, 493 (2019), quoting Commonwealth v. Augustine, 470 Mass. 837, 842 (2015).

We therefore conclude that the insurance policy provision covering damages caused by bodily injury does not cover the award of attorney's fees under G. L. c. 93A. Damages and attorney's fees are conceptually different, and are so recognized under that chapter. The insurance contract here only provides for the recovery of "damages." Therefore, attorney's fees awarded pursuant to G. L. c. 93A are not recoverable as damages under the insurance contract.

e. Costs taxed against the insured. The defendants make an alternative argument, rejected by the motion judge, that, even if the award of attorney's fees is not covered by the

general insuring clause, it is covered by the "Coverage Extension -- Supplementary Payments" provision, which includes "[a]ll costs taxed against the insured in the 'suit.'"

We conclude that this provision does not cover statutory awards of attorney's fees. As the Appeals Court in Styller v. National Marine & Fire Ins. Co., 95 Mass. App. Ct. 538, 544 (2019), explained: "The word 'costs,' as applied to proceedings in court, ordinarily means only legal or taxable costs, and does not include attorneys' fees." Applying this rule, the court disallowed the recovery of attorney's fees in the context of an insurance policy covering "costs taxed against the insured" and a c. 93A verdict providing for attorney's fees. Id. at 540-541, 545-546. In so holding, the court correctly recognized that G. L. c. 93A itself distinguishes between costs and attorney's fees. Id. at 545.[10] As in Styller, the language in the relevant

[10] Like the Appeals Court, we are not persuaded by the reasoning of Mutual of Enumclaw v. Harvey, 115 Idaho 1009, 1013 (1989), which describes itself as applying the "plain, ordinary and popular" meaning of "costs." See Styller, 95 Mass. App. Ct. at 543 n.6. Mutual of Enumclaw, supra at 1011, 1013, does not address the fact that the policy language covers not "costs," but "costs taxed," a clearly technical term that lacks a "plain, ordinary and popular" meaning.

Even conceding that the word "costs" could be expansively interpreted to cover attorney's fees in some other context, the "mere existence of multiple dictionary definitions of a word, without more, [does not] suffice to create an ambiguity, for most words have multiple definitions." Citation Ins. Co., 426 Mass. at 381. For the reasons noted above, this alternative

policy refers to costs "taxed" against the insured in the suit, conveying the narrower, technical meaning of court-related or nominal costs recoverable as a matter of course to prevailing parties, governed under Massachusetts law by G. L. c. 261 and Mass. R. Civ. P. 54 (d), as appearing in 382 Mass. 821 (1980). See Waldman v. American Honda Motor Co., 413 Mass. 320, 322 (1992). Such costs do not include attorney's fees. Styller, supra at 544, citing Burrage v. County of Bristol, 210 Mass. 299, 300 (1911).[11]

3. Conclusion. The Poiriers' policy does not cover the Mastons' award of attorney's fees under G. L. c. 93A. We therefore reverse the grant of summary judgment to the defendants and remand for proceedings consistent with this opinion.

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interpretation of "costs" is not a reasonable one when it is read in conjunction with the rest of the clause.

[11] The Mastons point out that, after the relevant policy was issued, the Insurance Services Office amended the Supplemental Payments provision to expressly provide that the payments for costs "do not include attorneys' fees or attorneys' expenses taxed against the insured." We recently dealt with a similar argument in Verveine Corp. v. Strathmore Ins. Co., 489 Mass. 534, 545-547 (2022). As we explained in that case, the primary inquiry is whether a claim is "included within the coverage afforded by the insuring clause." Id. at 546, quoting Inns by the Sea v. California Mut. Ins. Co., 71 Cal. App. 5th 688, 709 (2021). "[A]bsence of an express exclusion does not operate to create coverage," even if other policies contain an express exclusion. Verveine Corp., supra, quoting Given, 440 Mass. at 212.

So ordered.