COMMONWEALTH OF MASSACHUSETTS

Appeals Court

No. 2018-P-1034

WORCESTER COUNTY

JUSTINA M. SZAFAROWICZ,
PLAINTIFF-APPELLEE,

v.

MATTHEW S. PADOVANO, STEPHEN PADOVANO AND
KONA ENTERPRISES, INC.,
DEFENDANTS-APPELLEES,

and

COMMERCE INSURANCE COMPANY,
INTERVENOR/APPELLANT.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT

BRIEF FOR THE INTERVENOR/APPELLANT,
COMMERCE INSURANCE COMPANY

JOHN P. GRACEFFA, ESQ.
BBO #205920
LAWRENCE M. SLOTNICK
BBO #549734
MORRISON MAHONEY LLP
250 Summer Street
Boston, Massachusetts 02210
(617) 439-7500
lslotnick@morrisonmahoney.com

Dated: September 27, 2018

CORPORATE DISCLOSURE STATEMENT

The Commerce Insurance Company is a wholly owned subsidiary of MAPFRE U.S.A. Corp., a privately held Massachusetts corporation, which is a wholly owned subsidiary of MAPFRE Internacional S.A., a privately held company organized under the laws of Spain. MAPFRE Internacional S.A. is a wholly owned subsidiary of MAPFRE S.A., a publicly traded company organized under the laws of Spain. MAPFRE S.A. is traded on the Madrid and Barcelona Stock Exchanges.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

RULES:

OTHER AUTHORITIES:

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Superior Court erred when it overruled "Commerce Insurance Company's Objection To Proposed "Miller Shugart" Settlement" (Written objection docketed as #76.1; objection overruled in open court on December 19, 2016);

2. Whether the Superior Court erred when it denied Commerce's Emergency Motion To Stay All Proceedings In The Underlying Action And To Conduct The Trial Of The Insurance Declaratory Judgment Action Prior To Any Further Proceedings In The Underlying Action (Motion docketed as #37 in the consolidated case 1485CV00125; denial dated November 19, 2016, in the consolidated case 1485CV00125); and

3. Whether the Superior Court erred when it denied Commerce's Motion To Conduct The Trial Of The Insurance Declaratory Judgment Action Prior To The Trial In The Underlying Action (Motion docketed as #44; denial dated November 18, 2016).

STATEMENT OF THE CASE

The present wrongful death case arose out of an incident which occurred outside of the Captain's Lounge bar in Leominster, Massachusetts, on August 3, 2013. On that night, defendant Matthew Padovano and his girlfriend Sandra Gabis got into a dispute with defendant David Szafarowicz inside the Captain's Lounge bar. The dispute escalated such that the Captain's Lounge staff

intervened and asked both parties to leave. Mr. Padovano and Ms. Gabis returned to Padovano's Jeep car and chose a route that brought them back in front of the Captain's Lounge. When Padovano reached the front of the Captains' Lounge, he saw Mr. Szafarowicz standing in the parking area. Mr. Szafarowicz walked in front of Mr. Padovano's car and apparently gestured toward Mr. Padovano. In response, Mr. Padovano accelerated his car and ran over Mr. Szafarowicz. Mr. Padovano dragged Mr. Szafarowicz for 40 to 50 feet, killing Mr. Szafarowicz.[1]

Mr. Padovano was promptly arrested and charged with first degree murder. Eventually, Mr. Padovano pled guilty to the lesser included offense of manslaughter and was sentenced to 15 to 20 years in the state prison (as noted by the Trial Court at *R.A. V.I:72*).

The Estate of Mr. Szafarowicz filed this wrongful death lawsuit within a month after the incident (this lawsuit is hereinafter referred to as "the wrongful death lawsuit" to distinguish it from the insurance coverage

---

[1/] The present case was never tried to a jury, so the facts as recited here have never actually been determined by a Court. The related insurance coverage dispute was tried to a Justice of the Superior Court in July of 2018. As of the time of writing of this brief, the Superior Court has not issued a decision, meaning that these facts have not been judicially determined in the coverage action, either. However, the general sequence of events is not disputed by the parties, and the precise facts of the incident are not dispositive to the legal issues presented in this appeal. For example, the events are summarized by the Estate at *R.A. V.I:131 - 2*. In this brief, citations to the Three Volume Record Appendix are in the format "*R.A. [Volume]:[Page#]*".

action arising from the same dispute). *See R.A. V.I:293 to V.II:16* for exemplar of the Complaint in the Declaratory Judgment Action. In this wrongful death lawsuit, the Estate of Mr. Szafarowicz sued Matthew Padovano (the driver), Stephen Padovano (Matthew's father and the owner of the vehicle involved in the accident) and the Captain's Lounge.[2] At the time of the incident, the vehicle driven by Matthew Padovano was insured by appellant Commerce Insurance Company. Commerce promptly assigned counsel to defend Matthew and Stephen Padovano pursuant to a reservation of rights. *See R.A. V.II:69 – 72* for example of counsel identifying their respective roles.

On January 21, 2014, (about four months after the wrongful death lawsuit was filed) Commerce filed a declaratory judgment lawsuit seeking a judicial determination of its coverage obligations to Matthew and Stephen Padovano (as noted in the Trial Court's decision, *R.A. V.I:183*). In the declaratory judgment action, Commerce (as auto insurer for the Padovanos) argued that it did not have a duty to indemnify either Matthew Padovano or his father Stephen Padovano under the Optional Bodily Injury coverage of the policy for two reasons: (1) because the death of Mr. Szafarowicz was

[2/] The Captain's Lounge settled out of the underlying lawsuit prior to trial and is not a party to this appeal.

not an "accident" within the meaning of a standard Massachusetts Auto Insurance Policy; and (2) because Matthew Padovano was a "customary operator" of the vehicle in question, yet was not listed as a customary driver on the policy as was required by the terms of the policy. This wrongful death lawsuit and the declaratory judgment lawsuit were consolidated for discovery. *R.A. V.I:184*. During the joint pendency of these two lawsuits, Commerce filed a series of motions, each of which requested, in essence, that the Superior Court take notice of Commerce's legitimate rights and take appropriate steps in consequence.

In its first motion, Commerce sought to intervene in the present wrongful death case, consistent with the Supreme Judicial Court's instructions to "participate" in Liquor Liab. Joint Underwriting Ass'n of Massachusetts v. Hermitage Ins. Co., 419 Mass. 316, 323 (1995). *R.A. V.I:55 – 70*. At that time, the concern raised by Commerce was that the wrongful death case would be tried by the parties in such a way as to lead to a judgment that would compel coverage. Judge Davis acknowledged the possibility that the existing parties had similar interests with respect to insurance coverage, and that they might refrain from providing the jury the full evidence regarding the incident so as to make the claim appear to be a covered claim even if it wasn't. *R.A. V.I:71 - 81*. Judge Davis referred to this

practice as "underlitigation". Judge Davis technically denied Commerce's motion to intervene, but put in place a mechanism which would prevent the parties in the wrongful death case from "underlitigating" the case and protect Commerce if they did. Judge Davis established a standard, stating that if the case was not "fairly litigated" by the parties, Commerce would be free to re-try the relevant issues in a declaratory judgment action.

Commerce next moved that the Superior Court try the insurance case before the wrongful death case. *R.A. V.I:114 – 129*. The gist of Commerce's argument was that this wrongful death case could never be "fairly litigated" because both the Estate and the Padovanos had the identical interest, which was to try the case in a way that ensured insurance coverage. Among other things, Commerce noted in this motion that by trying the wrongful death case first, the Court would create an issue with respect to post-judgment interest which would unfairly prejudice Commerce. That prediction has come true, and the post-judgment interest issue is now the subject of a separate appeal presently pending in this Court (See footnote 12).

Shortly after Commerce's Motion to Try The Insurance Case First was denied, *R.A. V.I:217, line 20*, the Estate and the Padovanos entered into agreements in which the Padovanos agreed to waive their defenses to liability (and permit the Court to "assess damages") in

exchange for a release from the Estate to the Padovanos extinguishing any personal liability for the Padovanos. R.A. *V.II:146 – 153*. The Padovanos also agreed to cooperate with the Estate in any subsequent insurance coverage litigation. Commerce immediately filed an emergency motion to stay all proceedings in the underlying action and to conduct the trial of the insurance declaratory judgment action prior to any further proceedings in the underlying action. *R.A. V.I.225 – 251*. The gist of Commerce's emergency motion was that the consent/assignment agreements changed the nature of the proceeding such that it was unfair to Commerce to try the wrongful death case first. Commerce noted that the wrongful death case had become, essentially, a sham proceeding because the result of the proceeding – a judgment against the Padovanos – would never be enforced against anyone. Rather, the point of the "assessment of damages" was to create a judgment that might be used by the Estate to disadvantage the Commerce Insurance Company. Since the point of the proceedings were now focused entirely on insurance issues, it made sense to address those issues straight away.

The Superior Court justice denied Commerce's emergency motion and permitted the "assessment of damages" to proceed. *Transcript of Motion Hearing at V.II:68 – 137*. Prior to the actual "assessment of

damages" hearing, Commerce filed a formal written objection to the settlement agreement setting forth in detail why the "consent/assignment" agreements were improper under Massachusetts law. *R.A. V.II:138 – 145*. The Superior Court accepted and docketed Commerce's objection (over the oral objection of the Estate's attorney) but overruled the objection and allowed the case to proceed. *R.A. V.II:166 (Court noting that Commerce had filed every possible motion to assert its rights, at lines 5 – 15).*

The "assessment of damages" hearing went forward on December 19, 2016, resulting in a judgment for the Estate of $5,617,510. *"Assessment" Hearing Transcript at R.A. V.II:154 – 524*; *Decision at R.A.V.II:525 – 537*. To this amount, pre-judgment interest and post-judgment interest were added. The judgment remains unsatisfied as the parties litigate the insurance coverage issue. However, as expected, Commerce has been faced with repeated demands from the Estate's counsel for payment in excess of the policy limits, generally based on an argument that Commerce is responsible to pay post-judgment interest (irrespective of the results of the coverage case), solely because a non-adversarial "judgment" was arranged by the Estate's counsel.

In this appeal, Commerce contends that the "consent/assignment" agreements were improper as a matter of law. Because these agreements rendered the

wrongful death case non-justiciable, the Superior Court's refusal to hear the insurance case first was an abuse of discretion. As a result, the "judgment" entered in this case should be vacated and the matter returned to the Superior Court for proceedings consistent with this Court's opinion.

SUMMARY OF THE ARGUMENT

Prior to the "assessment of damages" hearing in this case, the Estate and the Padovanos entered into an agreement (drafted by the Estate) in which the Estate released the Padovanos from all liability and, in exchange, the Padovanos (1) stipulated to negligence; (2) waived a substantial comparative negligence defense; (3) waived their right to a jury trial; (4) agreed to a non-adversarial "assessment of damages" hearing, in which the plaintiff's case was not vigorously contested; and (5) agreed to assign any rights against Commerce to the Estate. *R.A. V.II:146 – 153.* The propriety of this type of agreement has never been litigated in Massachusetts, but these agreements have been extensively litigated elsewhere. Several states do not permit these types of agreements at all. Those that do permit them, do so with various safeguards and restrictions. Amazingly, the "consent/assignment" agreements concocted by the Estate violates every single public policy argument, procedural safeguard, and legal norm discussed in the cases around the United States.

For example:

- This agreement was made even though Commerce honored its duty to defend and did not leave its insured defenseless.
- This agreement was made before a judgment was entered (and yet the case was permitted to continue in the absence of adversarial parties and after a full release was already granted).
- This agreement included a stipulation of negligence, which is a legal conclusion that cannot legally be part of a stipulation.
- This agreement was not limited to policy limits, as these types of agreements are supposed to be.
- This agreement did not include a specific settlement amount that was reviewed by the appropriate court and found to be reasonable.
- This agreement was made without the consent of the insurer who was its primary target.
- This agreement resulted in a non-adversarial proceeding to reach a judgment, a tactic which is generally not permitted by case law.

These agreements then tainted the entire proceeding that led to the judgment that is on appeal today. Once these agreements were signed, the wrongful death case should have been stayed and the insurance case should

have proceeded to judgment. In this appeal, Commerce is asking this Court to (a) vacate the "judgment" entered after the non-adversarial "assessment of damages" (pages 11 – 45); (b) hold that the Superior Court abused its discretion in not hearing the insurance case first (pages 46 – 49); and (c) remand the wrongful death case to the Superior Court for proceedings consistent with this Court's opinion (pages 49 – 50).

ARGUMENT

I. PRE-TRIAL SETTLEMENT/ASSIGNMENT AGREEMENTS SHOULD BE PRECLUDED ENTIRELY OR CAREFULLY RESTRICTED IN CASES WHERE A LIABILITY INSURER HAS HONORED ITS DUTY TO DEFEND.

A. Standard Of Review.

Commerce believes that the procedural issues regarding the sequence of trials should be reviewed for an abuse of discretion. The question regarding the legal effect of the "consent/settlement" agreement is a legal question of first impression and Commerce believes, therefore, that this Court's review of this issue is *de novo*.

B. The Superior Court Erred by Giving Legal Effect to the "Consent/Assignment" Agreements Signed by The Padovanos in this Case.

On December 15, 2016, several days before the scheduled trial in the wrongful death case, the Estate and the Padovanos entered into "consent/assignment agreements" (*R.A. V.II:146 – 153*) which dramatically changed the nature of the proceedings before the trial

court. In these agreements, the Estate released the Padovanos from all liability and, in exchange, the Padovanos (1) stipulated to negligence; (2) waived a substantial comparative negligence defense; (3) waived their right to a jury trial; (4) agreed to participate in a sham[3] "assessment of damages" hearing, in which the plaintiff's case was not vigorously contested; and (5) agreed to assign any rights against Commerce to the Estate. After signing these agreements, the parties then proceeded to an "assessment of damages" hearing. However, at the moment these agreements were signed, the Padovanos no longer had any interest whatsoever in the outcome of the case. At the "assessment" hearing, the Padovanos (not surprisingly) presented no witnesses, offered no tangible evidence, called no experts to rebut the Estate's expert on a critical point, and offered only mild cross-examination and meek argument[4] which did not address the claims made by the Estate.

In this appeal, Commerce contends that the "consent/assignment agreements"[5] are invalid as a matter

---

[3/] Commerce refers to this hearing as a "sham" because it resulted in a "judgment" which the parties (and the Superior Court) knew ahead of time would never be paid.

[4/] See, for example, "Assessment" Transcript at *R.A. V.II:380* where defense counsel did not object to the Estate's attorney's repeated references to large damage awards in other cases, even though that information was not in evidence and would not be admissible or relevant.

[5/] Commerce uses the term "settlement/assignment" agreement to refer to the more common agreement where

of law, leading to a tainted judgment which must be vacated. Commerce also contends that Commerce was the target of these agreements, and yet the trial court failed to consider Commerce's interests when deciding on the order of the proceedings. Commerce asks this Court to hold that the judgment rendered as a result of these agreements be set aside and that the wrongful death case be remanded to the Superior Court for proceedings consistent with the Court's opinion.

1. The Propriety Of Pre-Trial Settlement/Assignment Agreements Is An Issue Of First Impression In The Commonwealth Of Massachusetts.

When the Superior Court permitted the wrongful death case to proceed as an "assessment of damages", it gave legal effect to the various provisions of the "consent/assignment" agreements, including the waiver of defenses, the waiver of jury trial rights, and the release. This issue – the propriety of a pre-trial "settlement/assignment" (sometimes called a "consent judgment") in an insurance case -- has never been addressed in previous Massachusetts cases. *See* Polaroid

---

the parties agree upon a settlement within policy limits, and then assign the insurance case to the plaintiff to litigate. Commerce uses the term "consent/assignment" agreement to refer to the unusual and improper agreement concocted by the Estate in the present case where the insured defendant attempted to consent to a judgment against him. Throughout this brief, Commerce uses the term "the plaintiff" to refer to the plaintiff in the wrongful death lawsuit (in this case, the Estate), and the term "the defendant" to refer to the defendant in the wrongful death lawsuit (in this case, the Padovanos).

Corp. v. Travelers Indem. Co., 414 Mass. 747, 766 (1993)(Noting in footnote 23 that "[w]e have left unanswered the case of a collusive settlement between the insured and the plaintiff in the underlying action, where each would normally hope to place the claim within the coverage of the policy.") Although the issue is, in this sense, an issue of first impression in the Commonwealth, it is not a novel issue nationally. It has been extensively litigated in other jurisdictions and there are many cases addressing similar or related issues. *See* Douglas R. Richmond, The Consent Judgment Quandary of Insurance Law, 48 Tort Trial & Ins. Prac. L. J. 537, Winter 2013)(recent survey of cases throughout the United States dealing with this topic).

Commerce wishes to begin by distinguishing two situations which are legally distinct from the present case, and are therefore irrelevant to the matter at hand. First, Commerce wishes to distinguish those cases where the liability insurer has breached its duty to defend and left the insured helpless in the underlying lawsuit. There are numerous cases which hold that an insured who has been abandoned by its insurer is free to negotiate a reasonable deal to protect their interests. Berke Moore Co. v. Lumbermens Mut. Cas. Co., 345 Mass. 66, 70 (1962)(permitting an insured to enter into a reasonable settlement when a liability insurer denied both the duty to defend and the duty to indemnify). Commerce expresses

no opinion as to the propriety of a stipulated settlement in a situation where the insurer has breached its duty to defend, and it is not asking this Court to re-visit the Berke Moore case or to rule on that issue.

Commerce also wishes to distinguish this case from those where the insurer has acted in bad faith and, by so doing, exposed its insured to an excess judgment. *See* Gore v. Arbella Mut. Ins. Co., 77 Mass. App. Ct. 518 (2010)(example of a case where an insured stipulated to a judgment in response to an insurer's bad faith). In the present case, there is no "bad faith" or G.L. c.93A/176D claim asserted against Commerce, nor is there any basis to assert one. Commerce is not asking this Court to consider the propriety of "settlement/ assignment" agreements in "bad faith" case, or to overturn any rulings in Gore, *supra*.

The situation presented in the present case concerns a "settlement/assignment" agreement entered into before a trial on the merits, in a case where the insurer has not breached its duty to defend (or any other duty). This issue (as distinguished from Berke Moore and Gore) is an issue of first impression in the Commonwealth. Commerce preserved this issue for appeal by filing a timely written objection to the settlement alerting the Court to the issues raised in this appeal. *R.A. V.II:138 - 145*.

2. The Historical Basis for Pre-Trial "Settlement/Assignment" Agreements.

"Settlement/assignment" agreements address a specific situation in liability insurance law: When an insurer perceives a coverage issue and defends under a reservation of rights, that insurer might not engage in settlement discussions because it believes that its coverage defenses will ensure that it will not have to pay any eventual judgment. At the same time, the plaintiff might wish to settle to avoid the risk of recovering nothing at trial, and the insured defendant might wish to settle to avoid the risk of an excess judgment at trial but cannot do so without the insurer's money. How, then, to break this logjam?

Parties have used "settlement/assignment" agreements to break this logjam. In a typical settlement/assignment agreement, the plaintiff and the insured defendant agree on a reasonable settlement amount within policy limits, with the amount to be paid only if the insurer loses the coverage case. The insurer is informed of the proposed settlement, and the matter is placed before the Court for review. If, after hearing from the plaintiff, the defendant, and the insurer, the Court finds the settlement reasonable, the settlement is accepted. Upon execution of the agreement, the underlying case is dismissed (not tried), the insured assigns his or her rights vis-à-vis the insurer to the plaintiff, and the coverage case is litigated.

Two well-known cases exploring the propriety of this type of settlement are Miller v. Shugart, 316 N.W.2d 729 (Minn. 1982) and United Servs. Auto. Ass'n v. Morris, 154 Ariz. 113 (1987). In Miller v. Shugart, the plaintiff and the insured defendant attempted to confess to a judgment which would then be binding on the insurer in a subsequent coverage action. The Supreme Court of Minnesota held that (1) the "stipulated judgment" was really just a settlement, not a true judgment; (2) the amount of the settlement was not immediately binding on the insurer; and (3) the plaintiff had the burden of proving that the settlement amount (within policy limits) was "reasonable and prudent". The determination of "reasonable and prudent" was made in the coverage case, with the insurer given an opportunity to be heard.

In United Servs. Auto. Ass'n v. Morris, the Supreme Court of Arizona reviewed a similar agreement. The Arizona Court noted an obvious problem: If settlement/ assignment agreements are permitted without limitations, every claimant in a reservation of rights situation would enter into such an agreement, and would accede to any terms proposed by the plaintiff. As the Court in Morris explained:

> "Permitting the insured to settle with the claimant presents a great danger to the insurer. To relieve himself of personal exposure, the insured may be persuaded to enter into almost any type of agreement or stipulation by which the claimant hopes to

> bind the insurer by judgment and findings of fact."

Morris, *supra* at 119-20. The Morris Court held that the plaintiff and insured could enter into a settlement agreement and litigate only the insurance case, but that the amount of the settlement was not binding on the insurer unless the insured proved that the settlement "was not fraudulent or collusive and was fair and reasonable under the circumstances". Morris, *supra* at 121. Numerous other states have also considered the propriety of "settlement/assignment" agreements, with different results.

3. Massachusetts Should Adopt The Rule That Pre-Trial Settlement/Assignment Agreements Are Not Permitted In Cases Where The Insurer Has Honored Its Duty To Defend.

Several states do not permit "Settlement/ assignment" agreements at all in cases where the insurer has honored its duty to defend. These states note that an insurer who defends under a reservation of rights has done nothing wrong,[6] and therefore there is no basis to allow an insured to breach the cooperation and "no action" clauses[7] of a typical insurance policy. In the absence of any breach or wrongdoing by the insurer, there

---

[6] This is the law in the Commonwealth of Massachusetts. Metro. Prop. & Cas. Ins. Co. v. Morrison, 460 Mass. 352, 358-59 (2011).

[7] In the standard Massachusetts Automobile Insurance Policy at issue in the present dispute, the relevant provision states that "If any person covered under this policy settles a claim without our consent, we will not be bound by that settlement."

is simply no legal basis to allow the insured to force the insurer to settle a defensible case. Massachusetts should adopt this rule and preclude pre-trial "settlement/assignment" agreements in cases where the liability insurer has honored its duty to defend.

One example of this line of cases is State Farm Fire & Cas. Co. v. Gandy, 925 S.W.2d 696, 720 (Tex. 1996). In Gandy, the Supreme Court of Texas described in detail how a "settlement/assignment" agreement prolongs, rather than shortens litigation, and how it confuses and distorts litigation by altering the adversarial relationships of the existing parties. As a result, the Supreme Court of Texas listed the criteria where a "settlement/assignment" agreement is **not** valid. An agreement is not valid if:

> (1) it is made prior to an adjudication of plaintiff's claim against defendant in a fully adversarial trial, (2) defendant's insurer has tendered a defense, and (3) either (a) defendant's insurer has accepted coverage, or (b) defendant's insurer has made a good faith effort to adjudicate coverage issues prior to the adjudication of plaintiff's claim.

State Farm Fire & Cas. Co. v. Gandy, 925 S.W.2d 696, 720 (Tex. 1996). Interestingly, the agreement in the present cases suffers from every single infirmity noted by the Texas court: It was made prior to adjudication, it prevented a fully adversarial trial, Commerce provided a defense at all times, and Commerce made multiple

efforts to adjudicate the coverage issues prior to the adjudication of the Estate's wrongful death claim.

Other states also limit the use of "settlement/ assignment" agreements to situations where the liability insurer has done something wrong, either by failing to defend, or committing bad faith, or acting unilaterally rather than filing a declaratory judgment action. *See, e.g.,* State Farm Mut. Auto. Ins. Co. v. Freyer, 372 Mont. 191, 312 P.3d 403 (2013) and Associated Wholesale Grocers, Inc. v. Americold Corp., 261 Kan. 806, 846 (1997)("We endorse the *Snodgrass* rationale that an insurance company should not be required to settle a claim when there is a good faith question as to whether there is coverage under its insurance policy.").

The rationale behind these rulings is instructive in the present case. For example, the Freyer Court noted that an insured who enters into a pre-trial stipulated judgment has no incentive to minimize the damages that will next be asserted against the insurer. This is evident in the present case, where the Padovanos waived their comparative negligence defenses, which were significant as the deceased was arguably the aggressor who precipitated the incident.[8] The Padovanos also

[8/] Commerce's contention that a murder victim may be comparatively negligent is not fanciful. *See* Guzman v. Pring-Wilson, 81 Mass. App. Ct. 430 (2012)(example of murder case where victim was found by Superior Court judge to be 50% at fault), with further facts recited at Fire Ins. Exch. v. Pring-Wilson, 831 F. Supp. 2d 493, 498 (D. Mass. 2011) (insurance case arising out of the

waived their jury trial rights in a case where their defense may have resonated with a jury. The Freyer Court also noted that an insurer who follows the procedures outlined by the Courts with respect to prompt declaratory judgment actions should not be penalized by a consent judgment that it did not agree to. All of these considerations are equally true in the present case.

Commerce believes that Massachusetts should adopt the rule that a pre-trial "consent/assignment" agreement is not permitted in a case where the liability insurer has defended under a reservation of rights and filed a prompt declaratory judgment action. Such a rule would be fair to insureds because the Court can hear the insurance case first, thereby removing the uncertainty that impeded settlement in the first place. It is fair to insurers because they will not be subject to settlement "agreements" which attempt to unfairly manipulate the legal process.

4. In The Alternative, If The Massachusetts Courts Permit Pre-Trial "Settlement/ Assignment" Agreements In Cases Where The Insurer Has Honored Its Duty To Defend, It Should Employ The Same Standards That Are Employed By Other Courts In Similar Cases.

Even if this Court decides to permit pre-trial "settlement/assignment" agreements in cases where the liability insurer has honored its duty to defend, this

---

same incident) and Com. v. Pring-Wilson, 448 Mass. 718 (2007) (appeal of criminal case from the same incident).

Court should employ the same essential standards that are employed by other courts in similar cases. In those jurisdictions which permit pre-trial "settlement/ assignment" agreements, certain common standards emerge from a review of the cases dealing with these agreements. The four key standards are: (1) the settlement must be reasonable; (2) the insurer has the right to be heard on the issue of reasonableness; (3) the settlement must be within policy limits; and (4) the settlement is not a judgment on the merits that binds the insurer in the subsequent coverage litigation or other ancillary proceedings.

a. The Settlement Must Be Reasonable.

Perhaps the most basic common element in states that permit pre-trial "settlement/assignment" agreements in cases where the insurer has provided a defense is that the settlement must be reasonable. Miller v. Shugart, 316 N.W.2d 729 (Minn. 1982)(settlement must be "reasonable and prudent") and United Servs. Auto. Ass'n v. Morris, 154 Ariz. 113 (1987)(settlement must be "fair and reasonable under the circumstances") and Kelly v. Iowa Mut. Ins. Co., 620 N.W.2d 637 (Iowa 2000)(settlement must be "fair and reasonable") and Besel v. Viking Ins. Co. of Wisconsin, 49 P.3d 887, 891 (2002)("A carrier is liable only for reasonable settlements that are paid in good faith") and Black v. Goodwin, Loomis & Britton, Inc., 239 Conn. 144, 155 (1996)(insurer can challenge

reasonableness of settlement) and Phillips v. Phillips, 298 P.3d 1137 (Kan. Ct. App. 2013) and Nunn v. Mid-Century Ins. Co., 244 P.3d 116, 123 (Colo. 2010), as modified on denial of reh'g (Jan. 10, 2011) (reasonableness required even when insurer acted in bad faith). Even in cases where the insurer has declined to defend its insured, a settlement must still be reasonable. Berke Moore Co. v. Lumbermens Mut. Cas. Co., 345 Mass. 66, 71 (1962). This standard appears to be universal.

To determine whether a settlement is reasonable, courts typically review the reasonableness of the proposed settlement. The amount of a reasonable settlement must take into account the possibility that the defendant might prevail, or that the plaintiff's verdict will be reduced by comparative negligence; it cannot simply be an assessment of damages.[9] For example, in Guillen ex rel. Guillen v. Potomac Ins. Co. of Illinois, 785 N.E.2d 1 (2003) the Supreme Court of Illinois noted:

> [W]ith respect to the insured's decision to settle, the litmus test must be whether, considering the totality of the circumstances, the insured's decision "conformed to the standard of a prudent uninsured." (Emphasis added.) *Rhodes v. Chicago Insurance Co.*, 719 F.2d 116, 120 (5th Cir.1983). Similarly, with

[9] Contrast the argument at the "Assessment" hearing at *R.A. V.II:376 – 381* in which the Estate's counsel makes it clear that he is seeking full and maximum value for the case, and not a determination of the reasonable settlement value.

> respect to the amount of damages agreed to, the test "is what a reasonably prudent person in the position of the [insured] would have settled for on the merits of plaintiff's claim." *Miller v. Shugart*, 316 N.W.2d 729, 735 (Minn.1982). This involves a commonsense consideration of the totality of "facts bearing on the liability and damage aspects of plaintiff's claim, as well as the risks of going to trial." *Miller*, 316 N.W.2d at 735. We note that the burden of proving reasonableness is properly placed upon the plaintiff.

Guillen, *supra* at 14. Similarly, in Phillips v. Phillips, 298 P.3d 1137 (Kan. Ct. App. 2013) the Supreme Court of Kansas noted that, before any consent judgment is entered, the plaintiff must present proof sufficient to allow the Court to make an independent evaluation of the reasonableness of the settlement. The reviewing Court is required to consider the following factors:

> [T]he releasing person's damages; the merits of the releasing person's liability theory; the merits of the released person's defense theory; the released person's relative faults; the risks and expenses of continued litigation; the released person's ability to pay; any evidence of bad faith, collusion, or fraud; the extent of the releasing person's investigation and preparation of the case; and the interests of parties not being released."

Phillips, *supra* at 1137. Even the Berke Moore case required a broad consideration of factors in assessing the reasonableness of a settlement for a defense-defaulting insurer. Berke Moore, *supra*, at 70–71, 185 N.E.2d 637, 639 (1962).

b. The Insurer Must Be Permitted To Participate In The Determination Of Reasonableness.

The second common standard is that the reasonableness of a settlement must be determined in a proceeding where the insurer is itself a party and has an opportunity to be heard. The rationale for this is obvious: Once the plaintiff and insured defendant agree to settle the dispute, the insured defendant has no incentive to argue for a fair settlement (or for any settlement at all). Since it is only the insurer who may ultimately have to pay the settlement amount, it is the insurer who must be heard on this issue.

Cases from various jurisdictions accomplish this goal in different ways. For example, in some states the reasonableness of the settlement is determined in the subsequent coverage dispute. *See* Miller v. Shugart, *supra*. This appears to be the rule in Massachusetts already. Berke Moore, *supra* (in case dealing with a defense-defaulting insurer, the reasonableness of the settlement was determined in litigation between the insured and the insurer). In one state, the insurer is required to be a party to the agreement itself. *See* Old Republic Ins. Co. v. Ross, 180 P.3d 427, 432 (Colo. 2008)("We find no jurisdiction that would enforce a pretrial stipulated judgment against an insurer who was not a party to the underlying settlement agreement unless the insurer acted in bad faith, denied coverage, or

refused to defend the claim on behalf of the insured."). The particular procedural device is not as important as the principle itself: The insurer must be a party to the reasonableness hearing.

c. The Settlement Must Be Within Policy Limits.

The third common element in states that permit pre-trial "settlement/assignment" agreements in cases where the insurer has provided a defense is that the settlement must be within policy limits. Any attempt to create a judgment in excess of policy limits is not permitted. The reasons for this rule are rooted in the underlying purpose of the agreement itself, discussed at the outset of the brief. The purpose of a "settlement/assignment" agreement is not to punish an insurer (which, if it has defended as Commerce has done in the present case, has done nothing wrong), but, rather, to provide the insured with a way of provisionally accessing its policy limits in a reservation of rights situation. Typical of these cases is Kelly v. Iowa Mut. Ins. Co., 620 N.W.2d 637, 645 (Iowa 2000), holding that an insurer who reserves its right to contest coverage thereby gives up its right to control (and reject) settlement offers, but that any settlement offer arranged by an insured must be within policy limits. Kelly, *supra*, at footnote 6. *See also* Guillen ex rel. Guillen v. Potomac Ins. Co. of Illinois, 203 Ill. 2d 141, 164 (2003)(implying that a settlement

in excess of policy limits would not be reasonable) and Babcock & Wilcox Co. v. Am. Nuclear Insurers, 131 A.3d 445, 463 (2015)(footnote 18, noting that insured would have to prove insurer bad faith to agree to a settlement in excess of policy limits). Commerce is not aware of any case which has permitted a "settlement/assignment" agreement which fixed damages in excess of policy limits (through any mechanism) in a situation where the insurer has defended under a reservation and there is no finding of bad faith.

d. The settlement is not a judgment on the merits which binds the insurer in any subsequent declaratory judgment action or for any other purpose.

The fourth common standard is that a settlement/ assignment agreement cannot bind the insurer (who was not a party to the agreement) in any subsequent coverage litigation, or for any other purpose beyond setting an amount for payment if coverage exists. This appears to be the law in Massachusetts already. Polaroid Corp. v. Travelers Indem. Co., 414 Mass. 747 (1993). The reason for this rule is that the insured (who is being released) has no incentive to bargain for fair terms, nor to contest any further proceedings. Since the insured can freely agree to most anything, there is obvious potential for great mischief in these sorts of agreements if they are intended to affect third parties. To prevent this, the Courts uniformly invalidate agreements that confess

liability but leave damages to be tried, or take advantage in other ways.

Courts have uniformly rejected any attempt to parlay a "settlement/assignment" agreement into something that resembles a judgment that can be used to bind an insurer. For example, in Great Divide Ins. Co. v. Carpenter ex rel. Reed, 79 P.3d 599, (Alaska 2003), the Supreme Court of Alaska rejected an attempt by the plaintiff to have the insured defendant confess to negligence and have damages determined by an arbitrator. In Great Divide, the liability insurer disclaimed coverage and was found to have breached its duty to defend its insured. The insured then entered into a settlement/assignment agreement similar to the agreement executed by the Padovanos in the present case. In Great Divide, the agreement called for the case to be presented to a neutral arbitrator (rather than to a court) on an "assessment of damages". The Supreme Court of Alaska still found this procedure to be wanting, noting:

> Although the settlement agreement in the present case was combined with an arbitration proceeding that at least superficially resembled a contested trial, the fact that the judgment in Carpenter v. Gowdy was entered by arbitration rather than by agreement does not eliminate the applicability of the requirement that covenant settlement agreements must be found to be reasonable before they may be given effect. The arbitration proceeding was not truly adversarial since Carpenter had already agreed not to execute against the Gowdys at the time that the proceeding took place. Further, the arbitrator was chosen solely by Carpenter's counsel, and the parties agreed to

> exclude considerations of comparative fault. These factors prevent the Carpenter v. Gowdy judgment from being accorded unquestioned acceptance.

Great Divide, *supra*, at 614.

The similarities between the Great Divide case and the present case are illustrative. In both cases, the agreements were entered before the supposedly adversarial procedure, and the Alaska Court recognized that no procedure is truly adversarial in this setting. Also, in both cases the insured waived comparative negligence defenses, further compromising the validity of the supposedly fair proceeding. For the same reasons noted by the Supreme Court of Alaska, Commerce requests that this Court hold that the contrivance of submitting the case to the Court on an "assessment of damages" is impermissible as a matter of law.

Similarly, in Patrons Oxford Ins. Co. v. Harris, 905 A.2d 819, 827 (2006), the Supreme Judicial Court of Maine rejected an attempt to parlay a "settlement/ assignment" agreement into something more by stipulating to negligence and submitting the matter to the Court for an assessment of damages. The Court in Patrons concluded:

> that the insurer should not be liable for an unchallenged amount judicially determined after an uncontested hearing on damages, or an amount not judicially determined to which its insured agrees because the insured could agree to settle for an inflated amount in exchange for a release from liability. **Thus, the damages arising from a settlement such as the one seen here is binding on the insurer only**

> to the extent that the insured or the claimant can show that it is reasonable, and only after coverage is deemed to exist.

Patrons, supra, at 827. In Patrons, an attempt to create something more than a simple settlement, within policy limits, was restricted by the Supreme Judicial Court of Maine, just as Commerce is seeking restrictions on the scheme concocted by the Estate in the present case.

In Gainsco Ins. Co. v. Amoco Prod. Co., 53 P.3d 1051 (Wyo. 2002) the Supreme Court of Wyoming rejected a pre-trial "settlement/assignment" agreement because the insured agreed to waive a valid third party claim which, if successful, would have reduced the damages payable by the insured. In short, courts have uniformly rejected any "settlement/assignment" agreement that attempts to create an excess judgment, or waive a valid defense, or otherwise adversely affect the rights of the insurer.

The rationale for this standard was noted by the Minnesota Court in Miller v. Shugart, *supra*. There, the Court noted that entire purpose of a pre-trial "settlement/assignment" agreement is to settle (not litigate) the underlying case, and not to create a judgment enforceable against third parties:

> Plainly, the "judgment" does not purport to be an adjudication on the merits; it only reflects the settlement agreement. It is also evident that, in arriving at the settlement terms, the defendants would have been quite willing to agree to anything as long as plaintiff promised them full immunity. The effect of the settlement was to substitute the

> claimant for the insureds in a claim against the insurer. Thus on this appeal we see only the plaintiff claimant and the defendants' insurer in dispute, with the insureds taking a passive, disinterested role. Moreover, it is a misnomer for the parties to call plaintiff's judgment a "confessed" judgment. If this were truly a confessed judgment or even a default judgment, it is doubtful that it could stand. It seems more accurate to refer to the judgment as a judgment on a stipulation.
>
> In these circumstances, while the judgment is binding and valid as between the stipulating parties, it is not conclusive on the insurer.

Miller, *supra* at 735. Commerce requests that this Court adopt the same standards in the present case, and rule that any attempt to use the pre-trial "consent/assignment" agreement to create a judgment binding on Commerce is improper.

e. The Particular Pre-Trial "Consent/Assignment" Agreement Concocted By The Estate In The Present Case Violates Every Standard Normally Required For These Types Of Agreements.

The particular pre-trial "consent/assignment" agreement concocted by the Estate in the present case violates every standard normally required for these types of agreements, and should therefore be declared null and void. In the present case, there was no settlement at all (just an assessment of damages), and, hence, no determination of reasonableness of the settlement. Because the matter was presented as an "assessment of damages" after the insureds confessed to negligence, questions of liability and comparative negligence were not considered by the Superior Court.

The resulting "judgment" was not a determination of the fair settlement value of the case (after considering all relevant factors). Instead, it was simply the court's assessment of the full value of the damages, without regard to any of the considerations that normally inform a settlement.

The second standard, which requires the insurer to participate in the reasonableness determination, was also not met in the present case. Not only was there no settlement (and, therefore, no reasonableness determination), the attorneys for Commerce did not even get to participate in the assessment of damages. Commerce anticipates that the Estate will argue that the "defense" at the "assessment of damages" hearing was presented by an attorney originally chosen by Commerce, and that this fact proves that Commerce participated in the "assessment of damages" hearing. This argument overlooks both law and fact. Under Massachusetts law, once Commerce reserved its right to disclaim coverage, the Padovanos (and not Commerce) had the right to control the defense to ensure that their interests were not compromised. Safety Ins. Co. v. Day, 65 Mass. App. Ct. 15, 24 (2005). Moreover, in this case, both Matthew and Stephen Padovano had their own personal attorneys who filed appearances in the wrongful death lawsuit and

controlled the defense.[10] Personal counsel for the Padovanos negotiated and signed the "consent/assignment" agreements, and directed the course of the defense at the "assessment of damages" hearing.

By law, Commerce had no right to control the proceedings at the assessment, and did not do so. It did not present evidence, cross-examine witnesses, or make arguments to the Court. The fact that Commerce may have initially selected the defense counsel is irrelevant to that counsel's loyalty to the insured. *C.f.* Salonen v. Paanenen, 320 Mass. 568, 574 (1947)(noting that an insured who receives a "reservation of rights" letter may acquiesce in an insurer's choice of counsel without being said to have given up control of the case), and Magoun v. Liberty Mut. Ins. Co., 346 Mass. 677, 685 (1964)(expressing the converse position that if the insured does not acquiesce in the counsel proposed by the insurer, the insurer must accept the counsel proposed by the insured). In the present case, both Padovanos were also represented by counsel of their own choice in addition to the attorneys

---

[10/] Matthew Padovano was ably represented by Attorney Jack Kozlowski and Stephen Padovano was ably represented by Attorney Katie Toomey. Both attorneys appeared at all depositions, court hearings, and the "assessment of damages", and they controlled the direction and course of the defense for their respective clients. Commerce did not control the defense. See, for example, *R.A. V.I:267 – 269 and V.I:270 – 273* for examples of Attorneys Kozlowski and Toomey filing papers for their respective clients in this case.

paid for by Commerce.[11] Critically, however, the duty of loyalty ran from all counsel to the Padovanos, not from counsel to Commerce, irrespective of who paid the legal bill. Mass.R.Prof.C. 5.4 ("A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."). Commerce had its own attorneys advocating for its interests, which is why Commerce (and not the Padovanos) is the appellant in this appeal. *C.f.* Buysse v. Baumann-Furrie & Co., 448 N.W.2d 865, 872 (Minn. 1989)(Counsel appointed by insurer owes duty of loyalty to insured, not insurer; fact that insurer objected to Miller-Shugart stipulation demonstrated that insurer-appointed defense counsel's assent to stipulation did not bind the insurer). Commerce did not participate in the "assessment of damages" hearing.

The "consent/assignment" agreement in the present case violated the third standard because it was not limited to policy limits. Instead, the Estate intentionally sought to do the opposite and create an excess verdict which the Estate is now trying to use for further claims against Commerce. *R.A. V.II:102 – 103* (Court noting at 102, line 15 that Estate is attempting

[11/] Both Padovano defendants required their own personal counsel to respond to the declaratory judgment action promptly filed by Commerce.

to create a judgment for use in a 93A claim). The agreement in the present case is also invalid because the Estate is improperly attempting to create a "judgment" that is binding against Commerce. This concern is not merely theoretical. In the present case, the Estate is seeking to hold Commerce responsible for accruing post-judgment interest on the full amount of this contrived "judgment", citing to the term in the standard Massachusetts Automobile Insurance Policy which requires insurers to pay post-judgment interest on cases that they defend.[12] Interestingly, other courts have taken notice of this issue, and declined to allow "consent/assignment" agreements to be used in this way.

For example, in Old Republic Ins. Co. v. Ross, 180 P.3d 427 (Colo. 2008), a liability insurer contested the amount of available coverage for an aviation injury claim. Like Commerce, the insurer defended its insured and filed a prompt declaratory judgment action. The underlying aviation claim was concluded with a settlement/assignment agreement setting damages at $5.3 million. In contrast, the declaratory judgment action was concluded with a judicial determination that $1.7 million in coverage was all that was available. Also

[12/] At present, the Estate is trying to use the "judgment" as the lodestar for a claim of post-judgment interest under the policy, which is the subject of a concurrent appeal in Commerce v. Padovano, Docket No.: 2018-P-0789. It is precisely this type of mischief that informs the rule that a "settlement/assignment" agreement must be within policy limits.

similar to the present case, the claimants sought to use the stipulated $5.3 million "judgment" as the basis for post-judgment interest, which was also covered under the policy. In Ross, the Supreme Court of Colorado concluded that:

> under the facts of this case, where the insurer has conceded coverage and defended its insured, and where there has been no finding of bad faith against the insurer, a stipulated judgment entered before trial, to which the insurer is not a party, cannot be enforced against the insurer. Because we affirm the court of appeals' conclusion that the stipulated judgment is unenforceable, the trial court's garnishment order for postjudgment interest on that unenforceable judgment cannot stand.

Ross, *supra*, at 434. The purpose of a pre-trial "settlement/assignment" agreement is to allow the insured to provisionally access their insurance policy limits when coverage is legitimately in dispute. The purpose is to settle, not litigate, the matter in dispute. The purpose is not to artificially create judgments that are used to prejudice an insurer that has done absolutely nothing wrong. Because the pre-trial "consent/assignment" agreement concocted by the Estate in the present case violates every standard normally required for these types of agreements, the agreement should be declared null and void, and the judgment entered in consequence should be vacated.

f. The Pre-Trial "Consent/Assignment" Agreement In The Present Case Is Also Improper Because It Contained An Impermissible Stipulation Of Negligence.

The "consent/assignment" agreement drafted by the Estate is unusual (perhaps unique) and improper for yet another reason: The agreement involved a stipulation of negligence by the Padovanos (coupled with a waiver of comparative negligence defenses and an agreement to proceed to an "assessment of damages" hearing). This concession of negligence is legally problematic in the Commonwealth.

Under settled Massachusetts law, parties may stipulate to facts, but they cannot stipulate to legal conclusions such as negligence. The applicable principles were laid out in Goddard v. Goucher, 89 Mass. App. Ct. 41, 45 (2016) where this Court stated:

> There is, of course, a significant difference between factual and legal stipulations. "Nothing is more common in practice or more useful in dispatching the business of the courts than for counsel to admit undisputed facts." *Brocklesby v. Newton*, 294 Mass. 41, 43, 200 N.E. 351 (1936). Generally, such stipulations are binding on the parties, see *Kalika v. Munro*, 323 Mass. 542, 543, 83 N.E.2d 172 (1948), and respected by the courts, unless a court determines that to do so would be "improvident or not conducive to justice." *Loring v. Mercier*, 318 Mass. 599, 601, 63 N.E.2d 466 (1945). See *Huard v. Forest St. Hous., Inc.*, 366 Mass. 203, 208–209, 316 N.E.2d 505 (1974) (stipulation that omitted "seemingly significant information" set aside and matter remanded to trial court); *Stuart v. Brookline*, 412 Mass. 251, 254–255, 587 N.E.2d 1384 (1992) (statement of agreed facts was binding where party failed to show that facts were "omitted, misstated or inadvertently

> included"). See generally Mass. G. Evid. § 611(g)(1) (2015).
>
> In contrast, stipulations regarding "the legal effect of admitted facts" require a different consideration "since the court cannot be controlled by agreement of counsel on a subsidiary question of law." *Swift & Co. v. Hocking Valley Ry. Co.*, 243 U.S. 281, 289, 37 S.Ct. 287, 61 L.Ed. 722 (1917). "Parties may not stipulate to the legal conclusions to be reached by the court." *Texas Instruments Fed. Credit Union v. DelBonis*, 72 F.3d 921, 928 (1st Cir.1995), quoting from *Saviano v. Commissioner of Int. Rev.*, 765 F.2d 643, 645 (7th Cir.1985). "Issues of law are the province of courts, not of parties to a lawsuit, individuals whose legal conclusions may be tainted by self-interest." Ibid. We therefore do not hold ourselves "bound to accept, as controlling, stipulations as to questions of law." *Estate of Sanford v. Commissioner of Int. Rev.*, 308 U.S. 39, 51, 60 S.Ct. 51, 84 L.Ed. 20 (1939).

If the Estate and the Padovanos wished to settle their case, and report that settlement to the Court, that would, of course, be permitted. If the Estate and the Padovanos wished to stipulate to certain facts, that, to might be permitted (though not binding on Commerce as a non-participant). But a stipulation to the legal conclusion of negligence is not permitted under Massachusetts law. *See* Cass v. Collins, 91 Mass. App. Ct. 1101 (2017)(Rule 1:28 opinion affirming the trial court's ruling that a party cannot stipulate to negligence).

In the present case, the Estate required the Court to accept a legal conclusion that was foisted upon the Court purely for the Estate's self-interest. This is clearly improper, and it should have been rejected by

the Court at that time. Similarly, the waiver of comparative negligence defenses is improper. Because every aspect of this particular "consent/assignment" agreement was improper, this Court should declare it null and void, and vacate the "judgment" entered in consequence.

Commerce wishes to stress the somewhat limited nature of the relief that it is requesting in this portion of its brief. Commerce is asking this Court to rule that this particular pre-trial "consent/assignment" agreement is invalid, and not that every single pre-trial "consent/assignment" agreement is improper. As Commerce has detailed in this brief, a pre-trial "consent/assignment" agreement which meets the generally accepted standards can be enforced without undue unfairness to insurers. This particular agreement, however, did not meet those standards and was created with an improper purpose. Commerce alerted the Court to these issues, in writing, at the time that the agreements were entered, thereby properly preserving the issue for review. This Court should therefore hold that the particular agreement at issue in the present case is invalid, and vacate the judgment entered in consequence.

C. The Superior Court Abused Its Discretion When It Denied Commerce's Motion To Stay The Wrongful Death Case After The Pre-Trial "Consent/Assignment" Agreements Were Signed.

Commerce has also appealed the Superior Court's denial of its motion to stay the wrongful death case after the "consent/assignment" agreements were signed. *R.A. V.I:225 – 251*. Commerce recognizes that decisions regarding the order of proceedings are generally within the sound discretion of the trial court. However, for both legal and practical reasons, Commerce believes that the Court's decision to hear the "assessment of damages" after these agreements were signed was an abuse of discretion.

Once the Padovanos were released as part of the "consent/assignment" agreement, the wrongful death case was no longer justiciable. Because of the agreement, no money would exchange hands as a result of the Court's "judgment". The "judgment" was nothing more than one person's opinion of what the damages in the case were worth, without further direct consequence for the parties before the Court. *R.A. V.II:101* (where the Court itself described the "assessment" as "an exercise in nothingness in some ways").

To the extent that the assessment had any legal effect, it was essentially a declaratory judgment – a declaration of certain "rights" of the parties. However, even declaratory judgment actions have certain

requirements for justiciability. As the Supreme Judicial Court has explained

> An actual controversy arises under our law where there is "a real dispute caused by the assertion by one party of a legal relation, status or right in which he has a definite interest, and the denial of such assertion by another party also having a definite interest in the subject matter, where the circumstances attending the dispute plainly indicate that unless the matter is adjusted such antagonistic claims will almost immediately and inevitably lead to litigation."

Libertarian Ass'n of Massachusetts v. Sec'y of Com., 462 Mass. 538, 546–47 (2012). In the present case, the Estate had no legal interest in the assessment of damages because it has released the defendants from liability and cannot gain a recovery by virtue of the judgment. Similarly the Padovanos lacked a definite interest (or any interest at all) in the proceeding because they had been released. Once the release was signed, the proceeding lacked the requisites for adjudication.

Analogously, the United States District Court has noted:

> In order for a case to be justiciable and not an advisory opinion, two criteria must be met. First, there must be an actual dispute between adverse litigants. See United States v. Johnson, 319 U.S. 302, 304, 63 S.Ct. 1075, 87 L.Ed. 1413 (1943). Second, there must be a substantial likelihood that a federal court decision in favor of a claimant will bring about some change or have some effect. See Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113–14, 68 S.Ct. 431, 92 L.Ed. 568 (1948).

Giese v. Pierce Chem. Co., 43 F. Supp. 2d 98, 111 (D. Mass. 1999). When the release was executed, there was no longer a dispute between the Estate and the Padovanos. That dispute was extinguished by the release. Similarly, the decision of the court had no effect on either party: The Estate received no money in consequence, and the Padovanos paid no money. Nothing changed for either party. Under the analogous federal court standards, this case should never have been "adjudicated" once the release was signed.

Commerce anticipates that the Estate will argue that there was a consequence to the assessment of damages: It affected how much Commerce might have to pay in post-judgment interest (see footnote 12) or in some as-not-yet-filed G.L. c.93A claim. *See, e.g.,* Murphy v. Nat'l Union Fire Ins. Co., 438 Mass. 529, 533 (2003)(litigant attempted to "confirm" an arbitration award after it was paid, solely to create a "judgment" to use a basis for multiple damages in a 93A claim). This argument essentially makes Commerce's larger point: If Commerce was the only party affected by the "assessment of damages", then Commerce should have been the party at the proceedings. If Commerce was the affected party, then it should have been allowed to present its case to the Court, as it requested in its various motions to intervene, to stay proceedings, to try the insurance case first, etc. If Commerce was the

affected party, then it was clear error to permit proceedings to go forward without giving Commerce the opportunity to be heard, as it repeatedly requested.

D. The Superior Court Abused Its Discretion When It Denied Commerce's Motion To Try The Insurance Case First.

Commerce also appeals the Superior Court's denial of its motion to try the insurance case before the wrongful death case. *R.A. V.I:217, line 20*. Even with matters clearly within the trial court's discretion, the trial court cannot "turn a deaf ear" to a serious claim of prejudice by a litigant. *See* U. S. Tr. Co. of New York v. Herriott, 10 Mass. App. Ct. 313, 316 (1980)(abuse of discretion to turn a deaf ear to a request to stay because of a claim of privilege associates with an ongoing criminal case).

The Court's ruling on Commerce's Motion to Try the Insurance Case First was a simple "The Court declines to overturn Judge Davis's position that the declaratory judgment action won't come first". *R.A. V.I:201*. However, Judge Davis' decision focused on the possibility of "underlitigation"[13] at the trial of the wrongful death case. However, once the Padovanos entered into the "consent/assignment" agreement, the issue of

[13] "Underlitigation", as described by Judge Davis, refers to "a plaintiff's choice to plead and prove negligence rather than or in addition to intentional tort theories when, absent insurance considerations, the plaintiff would either frame the case solely as an intentional tort claim or emphasize the intentional tort claim."

"underlitigation" in the wrongful death case became moot. Instead, it was replaced by non-litigation – an agreement admitting to negligence without any trial at all. Commerce argues simply that, once the "consent/ assignment" agreement was signed, the case moved beyond concerns of "underlitigation" and the procedural issues had to be considered anew. By simply referencing Judge Davis' decision (without considering the vastly different circumstances), the court turned a deaf ear to Commerce's legitimate concerns. It is the vastly changed circumstances, coupled with the Court's refusal to even consider them, that constitutes an abuse of discretion.

CONCLUSION

For the foregoing reasons, intervenor, appellant, Commerce Insurance Company requests that this Court hold that the "consent/assignment" agreement entered into by the Estate and the Padovanos be declared invalid and that the judgment entered as a result of this agreement be vacated. Commerce further requests that this case be remanded to the Superior Court for further proceedings consistent with this Court's decision

Respectfully submitted,

The Intervenor, Appellant,
COMMERCE INSURANCE COMPANY,

By its attorneys,
MORRISON MAHONEY, LLP

/s/ *Lawrence M. Slotnick*

JOHN P. GRACEFFA, ESQ.
BBO #205920
LAWRENCE M. SLOTNICK, ESQ.
BBO #549734
250 Summer Street
Boston, Massachusetts 02210
(617) 439-7500
lslotnick@morrisonmahoney.com

Dated: September 27, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this twenty-seventh day of September 2018, I have served the Brief and Appendix in Appeals Court No. 2018-P-1034 via the Massachusetts Tyler Host electronic filing system and by email upon:

Michael K. Gillis, Esquire
Gillis & Bikofsky, P.C.
1150 Walnut Street
Newton, MA 02461
mgillis@gillisandbikofsky.com

Kathryn A. Toomey, Esquire
Law Office of Kathryn A. Toomey
303 Main Street
Worcester, MA 01608
katie@toomeylawoffice.com

John C. Koslowsky, Esquire
Law Office of John C. Koslowsky
424 Adams Street
Milton, MA 02186
JohnKoslowsky@aol.com

John E. Anastasi, Esquire
Anastasi & Associates, P.C.
245 Main Street
Oxford, MA 01540
eja@anastasilaw.com

Stimpson B. Hubbard, Esq.
Finnegan, Underwood, Ryan & Tierney
22 Batterymarch Street
Boston MA 02109
(617) 348-9200
sbh@furtlaw.com

George E. Clancy, Esq.
Fuller, Rosenberg, Palmer & Beliveau, LLP
339 Main Street, Suite 100
Worcester, MA 01608
(508) 755-5225
gclancy@frpb.com

/s/ Lawrence M. Slotnick
LAWRENCE M. SLOTNICK, ESQ.

CERTIFICATE OF COMPLIANCE

This brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

/s/ Lawrence M. Slotnick

LAWRENCE M. SLOTNICK, ESQ.