COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1842

CHARLES MUNDELL[1]

vs.

THE COMMERCE INSURANCE COMPANY.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, Charles Mundell, was injured in an automobile accident caused by Matthew Vierthaler, who was insured by the defendant, The Commerce Insurance Company (Commerce). Mundell received a judgment in excess of Vierthaler's coverage and filed a complaint pursuant to G. L. c. 93A against Commerce claiming unfair settlement practices. After a bench trial, a judge of the Superior Court dismissed Mundell's complaint against Commerce because he did not prove that Commerce violated c. 93A and G. L. c. 176D with respect to its handling of his underlying personal injury claim. We affirm.

[1] As assignee of Matthew Vierthaler.

Background. The relevant facts are not in dispute. On November 17, 2015, Mundell was involved in an automobile accident with a vehicle driven by Vierthaler. Vierthaler's Commerce automobile insurance policy had bodily injury liability limits of $20,000 per person and $40,000 per accident. On November 24, 2015, Mundell's counsel informed Commerce that he was submitting a claim on Mundell's behalf. Commerce assigned the matter to James White, an adjuster who was still in his one-year training period.

On December 30, 2015, Mundell's counsel sent Commerce a letter demanding the policy limits of $20,000 to settle the claim. Under the terms of the letter, if Commerce failed to offer the $20,000 policy limits within thirty days, Mundell would withdraw his demand and seek excess damages from Vierthaler.[2] White received the demand letter on January 6, 2016, and discussed it with his supervisor, Daniel O'Brien. White was directed to further evaluate the claim in light of the letter and accompanying medical bills. On January 11, 2016, during a telephone call with Mundell's counsel, White explained that Commerce was accepting liability on behalf of Vierthaler. White also relayed the same message to Mundell's underinsurance

[2] At the time the demand letter was sent, Mundell had incurred in excess of $20,000 in damages as a result of the accident. Mundell carried $50,000 in underinsured coverage with Safety Insurance Company.

carrier. About two weeks later, on January 25, 2016, White again spoke with Mundell's counsel and informed him that he completed the evaluation of the case and was awaiting settlement authority from O'Brien.

The thirty-day deadline in the demand letter expired on February 5, 2016. On that date, without receipt of the $20,000 policy limits, Mundell filed suit against Vierthaler. White was authorized to settle the claim for $20,000 on February 12, 2016, and he communicated the offer to Mundell on February 16, 2016 -- forty days after receiving the demand letter. Mundell rejected the offer. Mundell's case against Vierthaler eventually proceeded to a jury trial. A Superior Court jury awarded Mundell $50,000 in damages on June 1, 2017.[3] Commerce made a payment of $20,510, partially satisfying the judgment, on August 9, 2017.

Mundell obtained an assignment of rights from Vierthaler in exchange for Mundell's agreement that he would not seek to collect from Vierthaler under the judgment. On December 12, 2017, Mundell sent Commerce a c. 93A letter demanding the amount of the excess judgment. Mundell alleged that Commerce acted in bad faith by failing to offer the $20,000 policy limits within the thirty-day time period prescribed by Mundell's December 30,

[3] Judgment entered in the amount of $52,781.53 on August 25, 2017.

2015 settlement demand letter, which ultimately exposed Vierthaler to an excess judgment in the jury trial. Commerce denied liability under c. 93A and c. 176D.

Mundell then commenced the present action alleging violations of c. 93A and c. 176D with respect to Commerce's handling of Mundell's underlying personal injury claim. Following a jury waived trial, the court dismissed Mundell's complaint. The court rejected Mundell's claim that because Commerce failed to respond to his unilaterally imposed thirty-day deadline, Commerce exposed its insured to liability in excess of the policy limits. The court reasoned:

> "To accept that argument, without more, would mean that an insurer would be in violation of c. 176D, § 9 and potentially liable for [c.] 93A damages to its insured whenever it did not make a settlement offer within the deadline set by a claimant, regardless of how unreasonable or arbitrary that deadline might be."

The court concluded that Commerce did not act unreasonably by offering the policy limits in forty days, with the ten-day delay a result of a "misstep in communication" between White and O'Brien.

However, the court concluded that Commerce engaged in bad faith by (1) failing to inform Vierthaler that Mundell had rejected the settlement offer, instead indicating that it was waiting for more information; and (2) asking Vierthaler to personally contribute to a potential settlement offer.

Nevertheless, because this bad faith conduct occurred after Mundell rejected the belated offer, it was not the cause of Vierthaler's exposure to an excess judgment and, therefore, not a violation of c. 176D. This appeal followed. We will set forth additional facts as necessary to our discussion.

On appeal, Mundell claims that Commerce violated c. 93A and c. 176D when it (1) negligently failed to settle his claim within thirty days and subsequently refused to pay the excess judgment in the underlying action; and (2) misrepresented material facts to Vierthaler after failing to settle Mundell's claim. We do not agree.

Discussion. 1. Standard of review.

> "We accept the judge's findings of fact in a bench trial unless they are clearly erroneous. . . . On the other hand, to ensure that the ultimate findings and conclusions are consistent with the law, we scrutinize without deference the legal standard which the judge applied to the facts. Thus, the clearly erroneous standard of appellate review does not protect findings of fact or conclusions based on incorrect legal standards" (quotations and citation omitted).

Makrigiannis v. Nintendo of Am., Inc., 442 Mass. 675, 677-678 (2004). "A ruling that conduct violates G. L. c. 93A is a legal, not a factual, determination[,] . . . [a]lthough whether a particular set of acts, in their factual setting, is unfair or deceptive is a question of fact" (quotation and citation omitted). Klairmont v. Gainsboro Restaurant, Inc., 465 Mass. 165, 171 (2013).

2. The failure to settle within thirty days. Mundell first argues that Commerce's refusal to pay the excess judgment against Vierthaler constituted a c. 93A violation because Commerce failed to timely settle the underlying claim after receiving Mundell's December 30, 2015 settlement demand. Commerce contends that the evidence supported the finding that its offer of settlement within forty days of receiving the December 30 letter was reasonable.

Under G. L. c. 176D, § 3 (9) (f), an insurer commits an unfair claim settlement practice by "[f]ailing to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear." "[A]ny person whose rights are affected by another person violating the provisions of [G. L. c. 176D, § 3 (9) (f)] is entitled to bring an action to recover for the violation under G. L. c. 93A, § 9" (quotation omitted). Rhodes v. AIG Dom. Claims, Inc., 461 Mass. 486, 494 (2012). "Together, the[se] statutes require an insurer . . . promptly to put a fair and reasonable offer on the table when liability and damages become clear . . . ." (citation and quotation omitted). Bobick v. United States Fid. & Guar. Co., 439 Mass. 652, 659 (2003).

We conclude that the time in which Commerce offered the $20,000 policy limits in response to Mundell's demand letter was reasonable. While that offer was not tendered within the

unilaterally requested thirty-day deadline, the facts found by the trial judge indicate that Commerce met its obligation of effectuating a prompt, fair, and equitable settlement. To be sure, the judge credited the following additional evidence. Within five days of receiving the settlement demand, White informed Mundell's counsel that Commerce accepted liability and that he was seeking settlement authority from his supervisor. White evaluated the claim within the period set forth in Commerce's internal guidelines -- twenty-five days. After completing the timely evaluation, White recommended to O'Brien that Commerce tender the policy limits. Due to an "internal transmittal glitch," however, O'Brien was not made aware of the completed evaluation until February 12, 2016. The $20,000 was offered the next business day. Although Mundell contends that Commerce should have more expediently tendered the policy limits so as to avoid an excess judgment, we cannot, under these circumstances, conclude that the ten-day delay amounted to a violation of c. 176D, § 3 (9) (f).[4] See Bolden v. O'Connor Cafe of Worcester, Inc., 50 Mass. App. Ct. 56, 67 (2000), quoting

[4] Contrary to Mundell's argument, because Commerce did not unreasonably tender the policy limits of $20,000, it is not liable to Mundell under c. 93A for failing to pay the excess judgment on behalf of Vierthaler. See Gore v. Arbella Mut. Ins. Co., 77 Mass. App. Ct. 518, 532-533 (2010) (insurer's c. 93A violation resulted in doubling or tripling of excess damage award).

Peckham v. Continental Cas. Ins. Co., 895 F.2d 830, 835 (1st Cir. 1990) ("So long as the insurer acts in good faith, the insurer is not held to standards of omniscience or perfection").

3. Commerce's subsequent bad faith conduct. Finally, Mundell claims that he is entitled to a determination that Commerce violated c. 176D, § 3 (9) (a) on the basis of its factual misrepresentations to Vierthaler.[5] Commerce suggests an alternative ground for affirmance, namely, that Mundell's c. 93A demand letter was inadequate because it did not reference c. 176D, § 3 (9) (a), or Commerce's letter to Vierthaler dated March 23, 2016, which served as the basis for the trial judge's conclusion that Commerce engaged in bad faith.[6]

The following additional facts are relevant to our consideration of this claim. On March 23, 2016, Commerce wrote to Vierthaler informing him that Mundell's injuries exceeded the $20,000 policy limits. Commerce stated that it had offered Mundell $20,000 and was "attempting to obtain a signed release from [Mundell] on [Vierthaler's] behalf." Further, Commerce acknowledged that the offer would likely be rejected, and that

[5] Chapter 176D, § 3 (9) (a), prohibits an insurer from "[m]isrepresenting pertinent facts or insurance policy provisions relating to coverages at issue."

[6] Commerce also claims that the evidence supported the judge's conclusion that Mundell was not harmed by its c. 176D, § 3 (9) (a), violation. In light of our conclusion in part 3 of this memorandum and order, we need not address this claim.

Mundell may seek additional recovery from Vierthaler. Commerce also provided Vierthaler with an option to personally contribute to a settlement offer with Mundell.

Although not expressly referenced by the trial judge, the March 23, 2016 letter appeared to be the basis on which Commerce's bad faith was predicated. The judge stated:

> "In March 2016, Commerce notified [Vierthaler] that there was potential excess exposure resulting from [Mundell's] bodily injury claim. Commerce did not inform him that [Mundell] had rejected Commerce's offer, but instead indicated that it was awaiting additional information. Commerce also did not inform him that the settlement demand was conditioned on a thirty day response deadline that had expired before Commerce made the $20,000 offer."

The judge concluded that these misrepresentations would have amounted to a violation of c. 176D, § 3 (9) (a), had they occurred prior to the delayed response to the settlement demand. Because they occurred after that delayed response, they were not the cause of the excess judgment.

A c. 93A demand letter:

> "does not require claimants to set forth every specific statutory or regulatory violation alleged, so long as it fairly notifies the prospective respondent of the actions or practices of the respondent and the injury suffered by those actions. 'Chapter 93A requires claimants to set out specifically any activities in their demand letter as to which they seek relief.' Specificity is required to describe the practices complained of, not the legal basis for the claim."

Casavant v. Norwegian Cruise Line, Ltd., 460 Mass. 500, 506 (2011), quoting Clegg v. Butler, 424 Mass. 413, 423 (1997).

Here, the c. 93A demand letter did not fairly notify Commerce that Mundell was pursuing recovery as a result of its misrepresentations to Vierthaler. Rather, the letter's purpose was to apprise Commerce of potential c. 93A liability with respect to its failure to settle the underlying claim within thirty days. No part of Mundell's c. 93A demand letter specified c. 176D, § 3 (9) (a), or mentioned the March 23, 2016 letter from Commerce to Vierthaler. While the letter was not required to specifically reference c. 176D, § 3 (9) (a), we do not discern where Mundell made any claim therein concerning Commerce's misrepresentations. Indeed, the letter contains no discussion of Commerce's communication with Vierthaler. Cf. Cohen v. Liberty Mut. Ins. Co., 41 Mass. App. Ct. 748, 756 (1996).

"It is well established that, on appeal, [this court] may consider any ground apparent on the record that supports the result reached in the lower court." Gabbidon v. King, 414 Mass. 685, 686 (1993). We therefore affirm the conclusion that Commerce's bad faith conduct did not harm Vierthaler on the alternative ground that the c. 93A demand letter inadequately

informed Commerce of potential liability resulting from a violation of c. 176D, § 3 (9) (a).

Judgment affirmed.

By the Court (Green, C.J., Desmond & Lemire, JJ.[7]),

Joseph F. Stanton

Clerk

Entered: December 1, 2020.

[7] The panelists are listed in order of seniority.