SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4782-15T3

CHRISTOPHER J. GATELY and
BEATRICE GATELY,

Plaintiffs-Respondents,

v.

STATE FARM INDEMNITY COMPANY,

Defendant-Appellant.

Argued November 28, 2017 – Decided December 13, 2017

Before Judges Carroll and Leone.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-5272-14.

Carl Mazzie argued the cause for appellant (Foster & Mazzie, LLC, attorneys; Carl Mazzie, on the briefs).

John Tierney argued the cause for respondents (The Tierney Law Group, attorneys; John Tierney, on the brief).

John E. Molinari argued the cause for amicus curiae New Jersey Association for Justice (Blume, Forte, Fried, Zerres & Molinari, PC, attorneys; John E. Molinari, on the brief).

PER CURIAM

This appeal involves application of the Offer of Judgment Rule (OJR), Rule 4:58-2, prior to its recent amendment, in the context of an underinsured motorist (UIM) claim. Specifically, we address whether the OJR is triggered by measuring the amount of plaintiff's offer of judgment against the jury's damages award (adjusted to reflect any comparative negligence), or against the judgment entered by the court as molded to account for a prior tortfeasor payment.

Plaintiff,[1] Christopher J. Gately, was injured on July 8, 2012, when his car was hit from behind by a car driven by Martin F. Smith. Plaintiff was struck again by Smith's vehicle when he exited his car to exchange information with Smith.

At the time of the accident, plaintiff maintained an automobile insurance policy with State Farm Indemnity Company (State Farm). That policy provided UIM coverage with a limit of $100,000.

Plaintiff settled with Smith for the $20,000 limit of Smith's liability insurance policy. Plaintiff then filed suit against State Farm seeking $80,000 in UIM benefits, representing the

[1] Beatrice Gately also filed a consortium claim in this case but the jury did not award her any damages. Plaintiff as used in this opinion solely refers to Christopher J. Gately.

balance of the $100,000 UIM policy limit after crediting the $20,000 settlement payment from Smith.

Before trial plaintiff submitted an offer to take judgment in the amount of $54,000, pursuant to Rules 4:58-1 and -2. State Farm declined the offer and the case proceeded to a jury trial.

On April 22, 2016, the jury awarded plaintiff $75,000, but attributed ten percent comparative negligence to him, thereby reducing the verdict to $67,500. After the jury verdict plaintiff moved to enter judgment against State Farm, including an award of sanctions pursuant to Rule 4:58-2. Following argument on the motion, the trial court molded the verdict to $47,500, "tak[ing] into account $20,000 paid on behalf of Martin Smith by his insurer."

The trial court then stated "the issue . . . is whether to use the [$47,500] molded verdict or the [$67,500] unmolded verdict to make a dispositive ruling as to whether or not the [Rule] 4:58-2 sanctions apply." Citing the Supreme Court's recent decision in Wadeer v. New Jersey Mfrs. Ins. Co., 220 N.J. 591, 611 (2015), the trial court noted the then-existing version of the OJR did not specifically address whether a jury's verdict or a molded judgment would trigger sanctions under the rule.

Drawing guidance from Wadeer and Gonzalez v. Safe & Sound Security Corp., 185 N.J. 100 (2005), the trial court concluded the

jury verdict should serve as the triggering amount. Because the $67,500 jury verdict exceeded 120% of the $54,000 offer of judgment, the court found the sanctions of Rule 4:58-2 applied. The court then entered judgment against State Farm on May 27, 2016, for $47,500, together with interest of $3608.23, costs of $6250.99, and attorneys' fees of $61,390, resulting in a total judgment of $118,749.22.

On appeal, State Farm contends the trial court erred in imposing sanctions pursuant to the OJR. It argues the court should have measured the $54,000 offer of judgment against the $47,500 monetary judgment entered by the court rather than the $67,500 jury verdict. We agree.

When plaintiff made the offer of judgment and the case was tried, the OJR provided:

> If the offer of a claimant is not accepted and the claimant obtains a money judgment, in an amount that is 120% of the offer or more, excluding allowable prejudgment interest and counsel fees, the claimant shall be allowed, in addition to costs of suit: (1) all reasonable litigation expenses incurred following non-acceptance; (2) prejudgment interest of eight percent on the amount of any money recovery from the date of the offer or the date of completion of discovery, whichever is later, but only to the extent that such prejudgment interest exceeds the interest prescribed by R. 4:42-11(b), which also shall be allowable; and (3) a reasonable attorney's fee for such subsequent services as are compelled by the non-acceptance.

[R. 4:58-2(a) (2010) (emphasis added).]

The OJR as then framed expressly referenced "money judgment" rather than the amount of the jury verdict. Indeed, the word "verdict" was present in prior versions of the OJR but was stricken in 2006 in favor of "money judgment." Compare, e.g., R. 4:58-2(a) (2004) with R. 4:58-2(a) (2006). Analogizing to general principles of statutory construction, the plain language and ordinary meaning of the rule controls our decision in construing Rule 4:58-2. See DiProspero v. Penn, 183 N.J. 477, 492 (2005). Guided by this principle, it is the money judgment, not the jury verdict, which controls.

In reaching a contrary result, the trial judge relied in part on the Supreme Court's decision in Gonzalez. However, Gonzalez referenced the earlier version of Rule 4:58-2 that expressly used the word "verdict" as one of the bases for comparison to the offer. Gonzalez, supra, 185 N.J. at 124. In contrast, in the version that was in effect when the present case was decided, only "money judgment" was used and "verdict" had been deleted. R. 4:58-2(a) (2010).

The trial judge also drew guidance from Wadeer, which discussed the OJR in the context of an uninsured motorist (UM) claim. In Wadeer the Court discussed, but did not directly decide,

whether the jury's verdict or the molded judgment serves to trigger the sanctions and remedies of Rule 4:58-2. The Court concluded:

> the molding of a monetary jury award is appropriate when done to conform with and reflect allocation of liability. However, in the UM/UIM context, where reduction is based not on a tortfeasor's comparative negligence but instead on the policy limits of a given carrier, we find that the current construction of Rule 4:58-2 provides no incentive for such carriers to settle.
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> [Wadeer, supra, 220 N.J. at 611.]

The Court found the rule's aims were "ill-achieved in the UM/UIM context under the rule's current construction," and "refer[red] Rule 4:58-2 to the Civil Practice Committee to consider and recommend an appropriate amendment addressing this infirmity." Ibid. The Committee and the Court amended the rule, effective September 1, 2016, to instead look to whether "the claimant obtains a monetary award by jury or non-jury verdict (adjusted to reflect comparative negligence)" greater than 120% of the offer. Thus, as amended, the OJR now contains a new subparagraph that provides:

> In cases involving actions against automobile carriers for uninsured/underinsured motorist benefits, if the offer of a claimant is not accepted and the claimant obtains a monetary award by jury or non-jury verdict (adjusted to reflect comparative negligence, if any) in an amount that is 120% of the offer or more, excluding allowable prejudgment interest and counsel fees, the claimant shall be allowed, in addition to the cost of suit: (1) all reasonable litigation expenses incurred

> following non-acceptance; (2) prejudgment interest of eight percent on the amount of any money recovery from the date of the offer or the date of the completion discovery, whichever is later, but only to the extent that such prejudgment interest exceeds the interest prescribed by R. 4:42-11(b), which also shall be allowable; and (3) a reasonable attorney's fee for such subsequent services are compelled by the non-acceptance.
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> [R. 4:58-2(b) (2016).]

Thus, Wadeer did not define the then-existing version of the OJR but rather called for it to be changed. The 2016 amendment acts not to clarify but to correct the infirmity that existed in the prior version of the OJR, and changes the focus of the rule's triggering event in post-amendment UM/UIM cases from the money judgment to the verdict.

In any event, the perceived unfairness inherent in the settlement practice in UM/UIM cases due to policy coverage limits, which caused the Court concern in Wadeer, did not inure to plaintiff's detriment here. In Wadeer, the plaintiff submitted an offer to take judgment against his insurance carrier, New Jersey Manufacturers Insurance Company (NJM), in the amount of $95,000. Wadeer, supra, 220 N.J. at 596. The jury rendered a verdict in the plaintiff's favor for $255,175, which vastly exceeded NJM's $100,000 policy limit. Ibid. The trial court then molded the verdict to $100,000, before adding attorneys' fees, costs, and

pre-judgment interest. Ibid. As a result of the molded verdict, the plaintiff received far less than the jury verdict, and NJM had little to lose by rejecting the offer of judgment if the sanctions provision of Rule 4:58-2 did not apply.

In the present case, however, the $67,500 jury verdict, as adjusted for plaintiff's contributory negligence, fell within State Farm's UIM policy limit. In contrast to the plaintiff in Wadeer, plaintiff here was made whole by the $20,000 settlement he received from Smith and the $47,500 molded verdict State Farm was obligated to pay.

More importantly, the underlying goals of the OJR are not subverted by the result we reach in this case. "The aims of Rule 4:58-2, [are] 'to encourage, promote, and stimulate early out-of-court settlement[.]'" Wadeer, supra, 220 N.J. at 611 (quoting Crudop v. Marrero, 57 N.J. 353, 357 (1971)). At least implicitly, then, the OJR is designed to sanction recalcitrant litigants who fail to accept realistic settlement offers that stand to be eclipsed at trial.

Such was not the end result in this litigation. At oral argument before us, plaintiff and defendant agreed that plaintiff's offer of judgment sought a payment from State Farm for $54,000 in addition to the $20,000 plaintiff had already received from the tortfeasor. Similarly, plaintiff acknowledges in his

brief that, "[i]n the UIM context, the [o]ffer of [j]udgment is technically $74,000" and "there is no dispute that . . . defendant is entitled to a $20,000 credit for the settlement received from the tortfeasor pursuant to N.J.S.A. 17:28-1.1(e)."[2] Thus, plaintiff's $54,000 offer of settlement contemplated achieving a $74,000 verdict, following adjustment for any comparative negligence. However, the adjusted jury verdict was $67,500, which did not equal or exceed 120% of plaintiff's offer. On these facts then, under the then-existing version of the OJR, State Farm should not be compelled to pay sanctions.

In summary, the trial judge anticipated the change in the OJR that was foreshadowed by the Court's pronouncement in Wadeer. Nonetheless, in fairness, we are bound to apply the version of Rule 4:58-2 that was in effect when plaintiff made the offer of judgment and the case was tried. That was the version on which the parties relied in making and rejecting the offer of judgment. We therefore reject plaintiff's request to apply the 2016 version of the rule retroactively. We agree with State Farm that the judgment of $47,500 controlled over the amount of the jury verdict. In this respect, the trial judge erred in using the

[2] Plaintiff also acknowledges he did not object "to molding of the verdict by the trial court based upon comparative negligence allocated to plaintiff or based on the prior settlement."

jury's adjusted verdict of $67,500 as the trigger for the sanctions and remedies under Rule 4:58-2. Moreover, even if the $67,500 verdict was the proper measuring event, it did not exceed the contemplated $74,000 verdict amount upon which plaintiff's offer of judgment was in reality based, so that plaintiff was not entitled to sanctions in any event. Accordingly, we reverse the award of sanctions, and remand to the trial court to enter an amended judgment absent those sanctions.

Reversed and remanded. We do not retain jurisdiction.