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1999 Survey of Rhode Island Law: Cases: Insurance

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Insurance Law. *Asermely v. Allstate Insurance Co.*, 728 A.2d 461 (R.I. 1999). An insurance company's fiduciary obligation extends not only to the insurer's policyholders but also parties to whom the insureds have assigned their rights. In addition, the insurance company must go beyond acting in good faith and must consider any reasonable offer to settle within the insureds' policy limits. Failure to seriously consider a reasonable settlement puts the insurance company at risk of having to accept the judgment awarded at trial, even if the judgment amount is greater than the policy limits.

FACTS AND TRAVEL

This lawsuit stems from an automobile accident that took place on July 9, 1984, when Michelle Asermely (Asermely) rear-ended a vehicle operated by Mark Rendine (Rendine).¹ The car, owned by Julianne Bernier (Bernier), was insured through Allstate Insurance Company (Allstate), with a policy having a \$50,000 limit.² Asermely commenced suit against both Rendine and Bernier. In September of 1989, a court-annexed arbitrator awarded Asermely \$47, 557.37, finding that Asermely was 25% at fault.³ Asermely accepted this award through an attorney's letter to the arbitrator, but Allstate rejected the result and went forward to trial.⁴

At the jury trial, Asermely was found to be sixty percent at fault, and Allstate's insured was found to be forty percent at fault.⁵ Asermely was awarded \$86,333.57, representing an award of \$47,408.56 plus interest and \$50 in costs.⁶ Allstate issued a check to Asermely for \$50,000 on January 9, 1990 "with a statement indicating it was a final settlement of any and all claims arising from bodily injury and property damage caused by accident on 7/9/84."⁷

1. See *Asermely v. Allstate Ins. Co.*, 728 A.2d 461, 462 (R.I. 1999).

2. See *id.*

3. See *id.*

4. See *id.*

5. See *id.*

6. See *id.* at 461 n.1.

7. *Id.* at 462-63.

Asermely refused to accept this check and subsequently filed an action for debt on the judgment in superior court.⁸ At this point, Rendine and Bernier assigned their rights to Asermely.⁹ A second check for \$50,000 was issued to Asermely on May 24, 1991, which Asermely then negotiated.¹⁰ Thereafter, Asermely brought a five-count complaint against Allstate.¹¹ Allstate moved for summary judgment, which the trial court granted with respect to counts one, three, and four.¹² Asermely appealed.¹³

ANALYSIS AND HOLDING

Count One

Count one of Asermely's claim alleged she was owed interest on the judgment in excess of the policy limits pursuant to Rhode Island General Laws section 27-7-2.2.¹⁴ The trial judge held that Asermely's letter to the arbitrator did not satisfy the requirements of section 27-7-2.2 because the language of the letter was vague and not "definite in its terms to constitute an offer."¹⁵ Testimony by Asermely's attorney that he intended the wording of his letter to mean acceptance of the offered award plus interest further propelled the trial judge to find it ambiguous and unclear.¹⁶ Consequently, he granted Allstate's motion for summary judgment.¹⁷

8. *See id.* at 463.

9. *See id.*

10. *See id.*

11. *See id.*

12. *See id.* Count two, alleging that "the defendant breached its duty to exercise good faith in handling of plaintiff's claim" and count five, alleging a breach of contract, are not at issue on appeal. *Id.*

13. *See id.*

14. *See id.* Section 27-7-2.2 of the Rhode Island General Laws provides: in any civil action in which the defendant is covered by liability insurance and in which the plaintiff makes a written offer to the defendant's insurer to settle the action in an amount equal to or less than the coverage limits on the liability policy in force at the time the action accrues, and the offer is rejected by the defendant's insurer, then the defendant's insurer shall be liable for a interest due on the judgment entered by the court even if the payment of the judgment and interest totals a sum in excess of the policy coverage limitation. This written offer shall be presumed to have been rejected if the insurer does not respond in writing within a period of thirty (30) days."

R.I. Gen. Laws § 27-7-2.2 (1956) (1998 Reenactment).

15. *Asermely*, 728 A.2d at 463.

16. *See id.*

17. *See id.*

The supreme court, reviewing the case de novo, held that the trial judge erred by granting summary judgment because the question of whether Asermely's letter was a written offer to settle within the purview of section 27-7-2.2 raised a genuine issue of material fact.¹⁸ The supreme court vacated summary judgment in regards to this count and remanded to the trial court for further determination of the status of the letter.¹⁹

Count Three

Count three alleged that "defendant made fraudulent misrepresentations, with the intention of deceiving and inducing the Plaintiff to sign said settlement check."²⁰ The court indicated that fraudulent misrepresentation or deceit exists only when the defendant not only intended to deceive the plaintiff, but the plaintiff, to his detriment, relied on the deceit.²¹ The Rhode Island Supreme Court found that Asermely did not allege or present any evidence indicating a detrimental reliance on fraudulent misrepresentation by Allstate.²² Accordingly, the court affirmed the trial court's grant of summary judgment with regard to count three.²³

Count Four

Count four of Asermely's complaint claimed that Allstate acted in bad faith, disregarding its duty to its insured.²⁴ The supreme court applied the rule of *Rumford Property and Liability v. Carbone*,²⁵ pointing out that it is well established that "there cannot be a showing of bad faith when the insurer is able to demonstrate a reasonable basis for denying benefits."²⁶ Moreover, if the claim of bad faith is in any way debatable, liability in tort does not exist.²⁷ Since it was clear that the trial justice had enough evidence at trial

18. *See id.*

19. *See id.* at 463-64.

20. *Id.* at 464.

21. *See id.* (citing *Guglielmi v. Rhode Island Hosp. Trust Fin. Corp.*, 573 A.2d 687, 690 (R.I. 1990); *LaFazia v. Howe*, 575 A.2d 182, 185 (R.I. 1990)).

22. *See id.*

23. *See id.*

24. *See id.*

25. 590 A.2d 398 (R.I. 1991).

26. *See Asermely*, 728 A.2d at 464 (quoting *Rumford Property and Liability*, 590 A.2d at 400).

27. *See id.* (citing *Rumford Property and Liability*, 590 A.2d at 400 (quoting *Bibeault v. Insurance Co.*, 417 A.2d 313, 319 (R.I. 1980))).

to determine that a debatable claim existed, summary judgment was the appropriate resolution.²⁸

Although the supreme court concluded that the trial justice properly granted summary judgment with regard to count four, it also promulgated a new rule governing an insurance company's duty to consider reasonable offers for settlement. The court noted that insurance companies have a fiduciary obligation to act in the best interest of the insured, and may not subjugate the insured's interests to the insurance company's financial interests.²⁹ Where an insured assigns his or her rights, this obligation is owed to the assignee.³⁰

Applying this principle to the general circumstances of the present case, the court stated that the obligation goes beyond a duty to act in good faith, and requires an insurance company "to consider seriously a plaintiff's reasonable offer to settle within the policy limits."³¹ Thus, the insurer must consider all reasonable offers to settle within the policy limits where there is adequate notice given to the insurer and the offer is in writing.³² Where the insurer refuses to accept such an offer, and the judgment exceeds the policy limits, the insurer must pay for the amount of the judgment exceeding the policy as well as interest.³³ In addition, the court stated that a good faith belief that the insurer has a legitimate defense will not relieve the insurer from this obligation if the plaintiff is awarded a judgment.³⁴

CONCLUSION

In *Asermely v. Allstate Insurance Co.*, the Rhode Island Supreme Court promulgated a new rule governing insurance companies. An insurer owes a duty to its insured or its insured's assignees to seriously consider any reasonable offer of settlement made by a plaintiff. If the insurance company fails to do so and proceeds to trial, it does so at the risk of having to pay any damages awarded to the plaintiff in excess of the policy limits. An in-

28. *See id.*

29. *See id.* (citing Medical Malpractice Joint Underwriting Assoc. of Rhode Island v. Rhode Island Ins. Insolvency Fund, 703 A.2d 1097, 1102 (R.I. 1997)).

30. *See id.*

31. *Id.*

32. *See id.*

33. *See id.*

34. *See id.*

surer can escape this obligation only by demonstrating that the insured or the insured's assignee was unwilling to accept an offer of settlement from the insurance company.

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Insurance Law. *Skaling v. Aetna Insurance Co.*, 742 A.2d 282 (R.I. 1999). In an action by an insured against his Uninsured Motorist (UM) carrier, the insured was entitled to pre-judgment interest when the UM carrier breached its duty to the plaintiff by failing to cover his damages. The court also found that defendant, the UM carrier, refused to arbitrate the coverage dispute, and therefore found defendant liable for pre-judgment interest even beyond the policy limits.

FACTS AND TRAVEL

On October 20, 1995, Shaun Menard (Menard) and Marty Webber (Webber) attempted to drive Menard's Jeep over a narrow, abandoned railroad trestle that crossed sixty to seventy feet above the Moosup River in Western Coventry, Rhode Island.¹ Menard and Webber managed to get the Jeep stuck on the trestle at an awkward angle.² They then decided to leave the Jeep there and began to drink a few beers.³ When the two returned to the Jeep, Webber fell off the bridge.⁴ Menard ran to the nearby home of the plaintiff, Robert Skaling, (Skaling) in order to get help.⁵ Skaling admitted that he had consumed five or six drinks by the time Menard arrived at his house.⁶ Skaling retrieved a blanket and drove to the bridge, where he attempted to cross it in order to find Menard and Webber.⁷ As he passed the Jeep, Skaling fell off the bridge, and sustained serious injuries.⁸

Skaling made a claim for damages against Menard, claiming that Menard's negligence was the proximate cause of his injuries.⁹ Menard's liability carrier settled for the full limits of the policy, which was \$25,000.00.¹⁰ Skaling then sought recovery from the defendant, his UM carrier.¹¹ Aetna denied the claim, on the grounds that plaintiff had not established that his injuries were

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1. See *Skaling v. Aetna Ins. Co.*, 742 A.2d 282, 285 (R.I. 1999).
 2. See *id.*
 3. See *id.* at 286.
 4. See *id.*
 5. See *id.*
 6. See *id.*
 7. See *id.*
 8. See *id.*
 9. See *id.*
 10. See *id.*
 11. See *id.*

caused by Menard's use of the Jeep.¹² Aetna also refused plaintiff's attempts to submit the issue of coverage to arbitration.¹³ Plaintiff then filed suit in superior court, seeking a determination of coverage under the UM policy.¹⁴ After all of the evidence had been submitted, Aetna filed a motion for judgment as a matter of law, on the grounds that plaintiff had failed to establish that Menard had proximately caused his injuries.¹⁵ The jury returned a verdict for Skaling, and found that his damages were \$1,174,500.00, which they then reduced by 10% due to the plaintiff's contributory negligence.¹⁶ After the jury verdict, the trial judge denied Aetna's motion for judgment as a matter of law.¹⁷

Skaling then moved for addition of pre-judgment interest, which motion was denied.¹⁸ Aetna filed a motion for a new trial.¹⁹ The trial judge denied these motions and awarded the plaintiff \$300,000.00, representing the limits under the UM policy.²⁰ From the denial of their respective motions, the parties filed cross appeals.²¹

ANALYSIS AND HOLDING

The Rhode Island Supreme Court, in a unanimous opinion written by Justice Lederberg, held that the trial court properly denied pre-judgment interest on the entire damage award, but erroneously denied pre-judgment interest on the actual \$300,000.00 recovery.²² Skaling argued that section 27-7-2.2 of the Rhode Island General Laws entitled him to pre-judgment interest on the jury's entire damage award.²³ Section 27-7-2.2 provides that in any case in which the defendant is covered by liability insurance, and the liability insurer refuses to settle after a written offer is made, the plaintiff is entitled to recover interest from the liability

12. *See id.*

13. *See id.*

14. *See id.*

15. *See id.*

16. *See id.* at 286-87.

17. *See id.* at 287.

18. *See id.*

19. *See id.*

20. *See id.*

21. *See id.*

22. *See id.* at 290-92.

23. *See id.* at 290.

insurer on the entire judgment, regardless of whether such figure exceeds the policy limits.²⁴

The court disagreed with Skaling's argument, however, and found instead that the plain language of the statute renders it applicable only to situations in which the defendant tortfeasor is covered by the liability insurer.²⁵ This case, on the other hand, involved a liability insurer itself as the defendant, rather than one who is covered by liability insurance. The court found the statute to be limited, by its plain terms, to situations involving tortfeasors covered by a liability insurer, not plaintiffs suing their own UM carriers.²⁶ Thus, the court denied Skaling's argument for interest on the entire damage award.

Skaling's second argument was that section 9-21-10 of the Rhode Island General Laws permitted him to recover pre-judgment interest on the actual \$300,000.00 recovery granted under the terms of the UM policy.²⁷ Section 9-21-10 permits recovery of interest, calculated at 12 % per annum "[i]n any civil action in which a verdict is rendered or a decision made for pecuniary damages."²⁸

The court concluded that Aetna had breached its contract with Skaling by refusing to cover his damages up to the policy limits.²⁹ The court found that Skaling had demanded arbitration of the coverage dispute, and that Aetna refused to participate.³⁰ Even though the UM contract did not require arbitration, the court found that Aetna could have limited its damages by engaging in arbitration, in which case it would have amounted to a mutual modification of the contract, and Aetna would then not have been

24. *See id.* The pertinent section of the law reads:

In any civil action in which the defendant is covered by liability insurance and in which the plaintiff makes a written offer to the defendant's insurer to settle the action in an amount equal to or less than the coverage limits on the liability policy in force at the time the action accrues, and the offer is rejected by the defendant's insurer, then the defendant's insurer shall be liable for all interest due on the judgment entered by the court even if the payment of the judgment and interest totals a sum in excess of the policy coverage limitation.

R.I. Gen. Laws § 27-7-2.2 (1956) (1998 Reenactment).

25. *See Skaling*, 742 A.2d at 290-91.

26. *See id.* at 291.

27. *See id.*

28. *Id.* (quoting R.I. Gen. Laws § 9-21-10 (1956) (1997 Reenactment)).

29. *See id.* at 292.

30. *See id.*

liable beyond the policy limits.³¹ Based on Aetna's refusal of coverage to the plaintiff, and its corresponding refusal to arbitrate, the court held that the situation was covered by the terms of section 9-21-10, and that Aetna was liable for pre-judgment interest on the \$300,000.00 policy limits.³²

The court also found that its decision was supported by policy considerations, in that by denying an insurer's liability beyond the policy limits, there would be no incentive for insurers to attempt to reach a speedy and just resolution of claims.³³ If the maximum pay-out an insurer could make was the policy limits, it would be most advantageous for the insurer to squarely deny every claim.³⁴ The court held that this outcome would violate the legislative intent behind sections 9-21-10 and 27-7-2.2 of the Rhode Island General Laws, which is to encourage speedy resolution of claims.³⁵ Thus, the court granted Skaling pre-judgment interest even beyond the \$300,000.00 policy limits.

CONCLUSION

In *Skaling v. Aetna Insurance Co.*, the Rhode Island Supreme Court determined that pre-judgment interest does not accrue pursuant to section 27-7-2.2 of the Rhode Island General Laws when the defendant is a liability insurer. However, the court held that where the insurer breaches its contract with the insured, pre-judgment interest accrues pursuant to section 9-21-10 of the Rhode Island General Laws. Thus, the court granted Skaling pre-judgment interest, even beyond the UM policy limits, in order to encourage speedy settlements, and to discourage insurers from denying every claim under the assurance that their maximum liability would be the policy limits.

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31. *See id.*

32. *See id.*

33. *See id.*

34. *See id.*

35. *See id.*

Insurance Law. *Textron, Inc. v. Aetna Casualty and Surety Co.*, 723 A.2d 1138 (R.I. 1999). When considering a motion for summary judgment in a suit against an insurer involving a trigger-of-coverage issue, the court must consider not only whether the damage existed and was discovered during the period of coverage, but also whether it could have been, in the exercise of due care, discoverable during the coverage period.

FACTS AND TRAVEL

The plaintiff, Textron, Inc. (Textron), owned and operated a manufacturing facility in North Carolina, known as the Gastonia facility.¹ The facility was managed by Textron's Homelite Division (Homelite).² Various degreasing solvents were necessarily used at the facility, including trichloroethylene (TCE), trichloroethane (TCA), and methyl ethyl ketone (MEK).³ The Gastonia facility maintained underground and above-ground facilities to contain these organic liquids, as well as other metal waste materials.⁴

In 1986, North Carolina's Department of Natural Resources and Community Development (NCDNRCD) contacted all underground storage users in an effort to ensure compliance with impending state and federal regulations on underground storage tanks.⁵ The notice from the NCDNRCD prompted Homelite's Director of Facilities Planning to suggest the removal of the Gastonia tanks, in order to avoid the risk of contamination by accidental spillage or leakage.⁶ An excavation and extraction plan was then established, pursuant to which the tanks were removed in 1988.⁷

Upon the removal of the tanks, it became obvious that the storage tanks were porous and that solvents percolated into the surrounding soil, causing contamination.⁸ Analysis of samples revealed the presence of volatile organic compounds (VOCs), which resulted in the necessary removal of approximately 1,500 cubic yards of contaminated soil.⁹ Homelite contacted the state's Envi-

1. See *Textron, Inc. v. Aetna Cas. and Sur. Co.*, 723 A.2d 1138, 1140 (1999).

2. See *id.*

3. See *id.*

4. See *id.*

5. See *id.*

6. See *id.*

7. See *id.*

8. See *id.*

9. See *id.*

ronmental Management Department and off-site tests were performed to determine to what extent the contamination had spread to the subsurface environment.¹⁰ In April of 1988, VOCs were discovered in off-site wells, and further testing revealed some contamination of private wells.¹¹ Homelite then installed a temporary water line to provide water to the residents who were affected by the contamination.¹²

Textron sought reimbursement from the defendant insurance carriers for the millions of dollars it allegedly spent in connection with the contaminated Gastonia site.¹³ The insurance carriers refused to pay Textron's claim, and Textron commenced this suit.¹⁴ The trial judge determined Textron had presented insufficient evidence to raise a material issue of fact and granted summary judgment on behalf of the insurance carriers.¹⁵

BACKGROUND

In *CPC International, Inc. v. Northbrook Excess & Surplus Insurance Co.*,¹⁶ plaintiff CPC International (CPC) was a packaging and manufacturing corporation in New Jersey, which had a \$25 million excess-liability policy from defendant Northbrook Excess & Surplus Insurance Co.¹⁷ The policy was effective from July of 1979 to July of 1980.¹⁸ One of CPC's subsidiaries experienced a massive perchloroethylene spill at its Rhode Island plant in 1974.¹⁹ At the time of the spill, CPC denied the resulting contamination of nearby water supplies, but in 1979, during the Northbrook policy period, it was discovered that there was contamination of wells in the surrounding area.²⁰ Northbrook denied liability under the policy, arguing that the property damage had not occurred during the policy period, and therefore, coverage was not triggered.²¹ CPC sued

10. *See id.*

11. *See id.*

12. *See id.*

13. *See id.*

14. *See id.*

15. *See id.* at 1140-41.

16. 668 A.2d 647 (R.I. 1995).

17. *See CPC Int'l*, 668 A.2d at 647.

18. *See id.*

19. *See id.* at 648.

20. *See id.*

21. *See id.*

Northbrook for indemnity, to include cleanup costs and other damages.²²

The United States District Court for the District of Rhode Island granted Northbrook's motion for judgment as a matter of law, adopting the position that the appropriate trigger-of-coverage was when the damage actually occurred, and held that coverage was not triggered because the triggering event occurred before the policy period.²³ On appeal, the First Circuit certified the question of when the coverage was triggered under Rhode Island law to the Rhode Island Supreme Court.²⁴ The Rhode Island Supreme Court answered that an "occurrence" causing property damage takes place "when property damage . . . manifests itself or is discovered or in the exercise of reasonable diligence, is discoverable."²⁵

ANALYSIS AND HOLDING

In *Textron*, the supreme court held that the answer it provided in *CPC* is the appropriate standard that the trial judge should have applied to determine whether a genuine issue of material fact existed to defeat a summary judgment motion in a trigger-of-coverage case.²⁶ The court explained that although *CPC* specifically dealt with a situation in which the damage was discovered during the period of coverage, *CPC* does not stand for the proposition that the damage must actually be discovered during the insured period to trigger coverage.²⁷ Rather, the court explained that *CPC* sets forth three situations that trigger coverage: when the property damage manifests itself; when the damage is discovered; and when the damage is, in the exercise of reasonable diligence, discoverable.²⁸ The trial justice below considered only whether the damage was discovered during the coverage period and found no evidence that the damage was actually discovered before 1988.²⁹ The supreme court reasoned that the trial justice erred in failing to

22. *See id.*

23. *See id.* at 648-49.

24. *See id.* at 649.

25. *Id.*

26. *See Textron*, 723 A.2d at 1143.

27. *See id.* at 1142.

28. *See id.* at 1143 (citing *CPC Int'l*, 668 A.2d at 649).

29. *See id.*

consider whether the damage was, with reasonable diligence, discoverable before 1988.³⁰

The supreme court concluded that the evidence presented below, in the light most favorable to the nonmoving party, raised a genuine issue of material fact.³¹ While the motion for summary judgment was being heard, Textron argued to the trial justice that although the damage was not actually discovered during the period of coverage, it could have been discovered during the policy period with the exercise of due diligence.³² The trial justice invited Textron to produce an affidavit from an expert saying that the damage was discoverable.³³ Approximately three months later, Textron produced an affidavit from an expert which indicated that research revealed the damage had existed and was discoverable from the 1950's through the date of actual discovery.³⁴

The supreme court noted, however, that Textron had the burden of not only showing that the contamination was present during the policy period, but also that it could have been discovered during that period in the exercise of reasonable diligence.³⁵ Textron attempted to meet this burden by presenting three affidavits from current and former employees of the Gastonia facility who had personal knowledge of overflow and leaks of solvents at the site.³⁶ The supreme court reasoned that the known leaks and spillage would have put Textron on notice of the possible contamination, and that a person exercising reasonable diligence would have tested for and discovered the soil and groundwater contamination.³⁷ The supreme court concluded that in the light most favorable to the nonmoving party, the affidavits provided by Textron raised a genuine issue of material fact as to whether the contamination was discoverable with the exercise of due diligence during the policy period.³⁸ The court therefore held that the trial court erred in granting the motion for summary judgment on the issue of trigger-

30. *See id.*

31. *See id.* at 1144.

32. *See id.* at 1143.

33. *See id.*

34. *See id.* at 1143-44.

35. *See id.* at 1144 (citing *CPC Int'l*, 668 A.2d at 649).

36. *See id.*

37. *See id.*

38. *See id.*

of-coverage.³⁹ The judgment was vacated and the case was remanded.⁴⁰

CONCLUSION

In *Textron, Inc. v. Aetna Casualty and Surety Co.*, the Supreme Court of Rhode Island clarified the *CPC* standard. The court held that the proper test for determining trigger-of-coverage in actions against insurers is whether the property damage manifests itself or is discovered, or is discoverable in the exercise of reasonable diligence, during the period of coverage. The court explained that when considering a motion for summary judgment, a judge must consider whether an issue of material fact exists as to each part of this three-part test, rather than simply considering when the damage was actually discovered.

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39. *See id.*

40. *See id.*