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July 29, 2016

Honorable Philip L. Paley, J.S.C.
Middlesex County Superior Court
56 Paterson Street
New Brunswick, New Jersey 08903

RE: Seamon vs. State Farm, et al.
Docket No. MID-L-3172-14
Our File No. SF 3254
Motion Date: August 5, 2016

Dear Judge Paley:

I represent State Farm Indemnity Company in this litigation. I filed a motion seeking to mold the judgment entered in this matter. That motion was originally returnable on July 22, 2016. The motion was carried until August 5, 2016, at the request of counsel for the plaintiff. I received a notice of cross motion from counsel for the plaintiff, and a letter brief. Please be advised that I will be out of state the week of August 5, 2016 and thus I ask the Court to schedule oral argument with respect to these applications at some time after August 5, 2016. Please be advised that I will similarly be unavailable on August 11, 2016 and August 12, 2016.

On July 27, 2016 at 5:57 p.m. I received an 18 page fax transmission from counsel for the plaintiff, including a letter dated July 26, 2016, the cross motion and the letter brief. On July 28, 2016, I received in my office a copy of those documents. These documents were not timely filed and/or served to be heard on August 5, 2016, which is another reason why the motion should not be scheduled for that date.

As indicated, my motion seeks to mold the judgment previously entered by the Court to be consistent with the terms of the policy of insurance issued by State Farm that provided underinsured motorist benefits to Sharon Seamon. In the motion papers submitted I establish that the law requires that the verdict be molded to the extent of the available insurance coverage. In her brief counsel does not specifically address this issue, but instead repeats the arguments espoused by plaintiff for several months now that State

Farm acted in bad faith, and for that reason the jury verdict, and not the extent of the insurance coverage, should be the judgment entered in favor of the plaintiff. Unfortunately, counsel has not submitted any legal support for this proposition. Counsel is essentially asking the Court to make a determination with respect to the bad faith claims of the plaintiff, and to enter a judgment as if the Court has made a determination that there was, in fact, bad faith on the part of State Farm. Counsel seems to believe that there is a strict liability theory of bad faith any time an excess judgment is returned by a jury, which is not what our law is. The bad faith issues can be addressed when and if plaintiff files a new suit against State Farm. Based upon the law as it exists at the present time, it is clear and uncontroverted that the judgment must be molded to the sum of $85,000.

In her cross motion counsel seeks to be awarded counsel fees and other costs pursuant to the Offer of Judgment Rule, R.4:58-1. The facts with respect to the offer of judgment are not disputed. An offer of judgment in the amount of $85,000 was made by the plaintiff prior to trial. However, R.4:58-2(a) requires the claimant to obtain a "money judgment, in an amount that is 120% of the offer or more...", in order to be entitled to the benefits of the rule. The money judgment that should be entered in favor of the plaintiff is $85,000, the amount of the offer of judgment. Since plaintiff has not obtained a money judgment in excess of that amount, the offer of judgment rule does not apply.

In her brief in support of the application counsel suggests what the law should be, and notes that the Supreme Court, in Wadeer v. New Jersey Mfrs. Ins. Co., 220 N.J. 591 (2005), recognized some inherent problems with the offer of judgment rule in a UM/UIM setting. Counsel also refers to a proposed change to the rule. Counsel implicitly agrees that the state of the law that existed at the time the offer of judgment was made, and at the time the verdict was entered, does not permit the awarding of counsel fees, costs and interest in this litigation.

Counsel's reliance on McMahon v. New Jersey Mfrs. Ins. Co., 364 N.J. Super. 188 (App. Div. 2003) is not only misplaced, it supports the position espoused by State Farm. In that case the plaintiff had a $300,000 UM/UIM policy with NJM. The plaintiff collected $125,000 from the liability defendant, meaning there was a $175,000 exposure on the UIM claim. Plaintiff submitted an offer of judgment in the amount of $129,000, obviously less than the available UIM coverage. The jury returned a verdict in the amount of $500,000. The plaintiff, recognizing the law, and recognizing the terms of the policy of insurance, moved to enter judgment against NJM in the amount of $175,000, the extent of the remaining coverage available. As the offer of judgment of $129,000 was less than the $175,000 judgment entered in favor of the plaintiff,

plaintiff sought the remedies available under the rule. NJM argued that it was only obligated to pay the remainder of the policy limits, $175,000, and could not be required to pay any amount beyond that. The Court rejected that argument, and required NJM to pay the $175,000, plus $16,715.41 for interest, attorneys fees and litigation expenses. In this case, State Farm has not argued the position argued by NJM. State Farm argues that, under the clear wording of the rule, the plaintiff is not entitled to any remedies under the rule since the money judgment does not exceed the amount of the offer of judgment.

Attached for review by the Court is an unpublished opinion in Ciechanowski v. New Jersey Manufacturers Insurance Company, decided by the Appellate Division on July 31, 2009. The plaintiff in that case made similar arguments to the arguments made by the plaintiff is this case concerning the entitlement to offer of judgment remedies. However, the Court reviewed the specific language of the rule, noted that a plaintiff pursuing a claim for UIM benefits at trial "comprehends that she will not recover any more than that provided for by the contract of insurance", and held that the offer of judgment must be contrasted with the molded verdict, or the extent of remaining policy limits available to the plaintiff. This is exactly the position of State Farm.

Although I do not believe the Court will get to the merits of the offer of judgment application I am constrained to point out that the certification submitted by counsel contains hearsay, and is unsupported. Counsel describes the legal background of trial counsel. Counsel asserts that there is an "amount due" for counsel fees, "support staff services" and "actual costs of litigation", without submitting any support for any of those claims. Without knowing the amount of hours allegedly performed by counsel, and the expenses allegedly incurred, it is impossible to address whether those claims are either reasonable, or for necessary expenses. For that reason the application should fail as well.

Thank you for your consideration of the above. Please advise counsel, at your earliest convenience, if oral argument will be entertained on these applications and, if so, the date of the argument.

Respectfully submitted,

THOMAS W. MATTHEWS

TWM/oac

cc: Cathleen J. Christie, Esq.

2009 WL 2341548
Only the Westlaw citation is currently available.

Superior Court of New Jersey,
Appellate Division.

Jennifer CIECHANOWSKI and George Ciechanowski, husband and wife,
Plaintiffs-Appellants/Cross-Respondents,
v.
NEW JERSEY MANUFACTURERS INSURANCE COMPANY,
Defendant-Respondent/Cross-Appellant.

Argued Dec. 17, 2008.
|
Decided July 31, 2009.

West KeySummary

1 **Costs**
⇐Effect of Offer of Judgment or Pretrial Deposit or Tender
Interest
⇐Torts; Wrongful Death

Under the offer of judgment rule, providing for recovery of prejudgment interest and attorney fees if offer of claimant is not accepted and claimant obtains a judgment which is 120% of the offer or more, an insured motorist's offer of judgment had to be measured not against the jury verdict or the limits of her underinsured motorist (UIM) coverage, but against the money judgment she was entitled to recover as a result of the trial. R. 4:58-2(a).

Cases that cite this headnote

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-2444-06.

Attorneys and Law Firms

R.C. Westmoreland argued the cause for appellants/cross-respondents (Westmoreland, Vesper & Quattrone, attorneys; Dara A. Quattrone, on the brief).

Chad M. Sherwood argued the cause for respondent/cross-appellant (Youngblood, Lafferty & Sampoli, P.A., attorneys; Mr. Sherwood, on the brief).

Before Judges PARRILLO, LIHOTZ and MESSANO.

Opinion

PER CURIAM.

*1 We are required to interpret the offer of judgment rule, *R.* 4:58-1 to -5 (the *Rule*), in the context of plaintiffs', Jennifer and George Ciechanowski, first-party claim for underinsured motorist (UIM) benefits under their automobile insurance policy with defendant, New Jersey Manufacturer's Insurance Company (NJM). The issue arose in the following context.

Plaintiff was injured in an automobile accident on September 30, 2003.[1] The other driver's insurance policy contained a liability limit of $100,000, and plaintiff's policy with NJM contained a UIM limit of $300,000. After notifying NJM as required by *Longworth v. Van Houten,* 223 *N.J.Super.* 174, 538 A.2d 414 (App.Div.1988), plaintiff settled her claim with the tortfeasor for his policy limits, and proceeded to UIM arbitration in accordance with the terms of NJM's policy. That proceeding resulted in an award to plaintiff of $365,000, less $100,000 plaintiff received by way of her settlement.

NJM refused to pay the award, and plaintiff filed suit. On June 8, 2006, she also served an offer of judgment upon NJM in the amount of $185,000.[2] After discovery, the matter was arbitrated again pursuant to *Rule* 4:21A, resulting in an award in plaintiff's favor of $375,000. NJM rejected that award, and requested a trial de novo. After a four-day trial, the jury found in plaintiff's favor and determined her damages to be $510,000, which, in response to specific interrogatories, the jury apportioned as $275,000 for pain, suffering, and disability, and $235,000 as economic loss.

Plaintiff moved for entry of final judgment on August 23, 2007, and requested the judgment include an award of pre-judgment interest pursuant to *Rule* 4:42-11(b), and

interest, costs and fees also pursuant to the *Rule.* Defendant opposed the motion, arguing the *Rule* did not apply, and cross-moved, seeking to mold the verdict to its $200,000 policy limits. On January 10, 2008, the judge entered two orders, as well as a short written opinion containing the reasons for his decision. He concluded that the jury's verdict should be molded to the limits of NJM's policy, i.e., $200,000. As a result, plaintiff's "money judgment," *R.* 4:58-2, was not more than 120% of her offer of judgment. Therefore, the judge concluded she was not entitled to an award of counsel fees, enhanced interest, or litigation expenses under the *Rule* because it simply "d[id] not apply." The judge calculated pre-judgment interest pursuant to *Rule* 4:42-11(b) on the molded judgment amount, awarding plaintiff $12,701.37. He entered final judgment in plaintiff's favor against NJM in the amount of $212,701.37, plus taxed costs.

Plaintiff argues before us that the judge erred in using the policy limits to mold the verdict into a judgment, and then in using the amount of that judgment to determine whether plaintiff should recover under the *Rule.* Instead, plaintiff contends that the jury verdict of $510,000 should be used to determine whether she "obtain[ed] a money judgment, in an amount that [wa]s 120% of [her] offer or more[.]" *R.* 4:58-2(a). NJM contends that the judge correctly molded the verdict to the limits of its policy, and, since that was the "money judgment" plaintiff recovered, her offer of judgment did not trigger the provisions of the *Rule* at all. Additionally, NJM cross-appeals from the judge's award of pre-judgment interest. It contends that pursuant to *Rule* 4:42-11(b), plaintiff was entitled to interest only on the non-economic damage portion of her recovery, i.e., based upon the jury's assessment, 53.9% of the molded verdict. NJM seeks reduction of the judgment from $212,701.37 to $206,828.32.

*2 We have considered these arguments in light of the record and applicable legal standards. We affirm.

The Supreme Court has repeatedly

> described the *[R]ule* as being "designed particularly as a mechanism to encourage, promote, and stimulate early out-of-court settlement of ... claims that in justice and reason ought to be settled without trial." The *[R]ule* was intended to penalize a party who rejects a settlement offer that turns out to be more favorable than the ultimate judgment.
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> [*Wiese v. Dedhia,* 188 *N.J.* 587, 593, 911 A.2d 479 (2006) (quoting *Gonzalez v. Safe & Sound Sec. Corp.,* 185 *N.J.* 100, 125, 881 A.2d 719 (2005) (internal quotation omitted).]

By its terms, the *Rule* is applicable to all causes of action, "[e]xcept [ ] a matrimonial action," but only if "the relief sought by the parties in the case is exclusively monetary in nature." *R.* 4:58-1(a). Although a "UIM claim is a contractual one, arising out of the insurance policy issued to plaintiff by h [er] own insurer," *Bardis v. First Trenton Ins. Co.,* 199 *N.J.* 265, 275, 971 A.2d 1062 (2009), we have specifically held the *Rule* applicable to such claims. *McMahon v. N.J. Mfrs. Ins. Co.,* 364 *N.J.Super.* 188, 191, 834 A.2d 1074 (App.Div.2003).

The *Rule* "serves the unique and particular purpose of imposing financial consequences on parties who unwisely reject an offer of settlement and insist on a trial." *Wiese, supra,* 188 *N.J.* at 593, 911 A.2d 479; *Schettino v. Roizman Dev., Inc.,* 158 *N.J.* 476, 482, 730 A.2d 797 (1999). The penalties imposed by the *Rule* are mandatory. *Wiese, supra,* 188 *N.J.* at 592, 911 A.2d 479; *McMahon,* 364 *N.J.Super.* at 194, 834 A.2d 1074; Pressler, *Current N.J. Court Rules,* comment 2 on *R.* 4:58 (2009).

As currently enacted, *Rule* 4:58-2(a) provides,

> 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 ... 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, which shall belong to the client, for such subsequent services as are compelled by the non-acceptance.
>
> (Emphasis added.)

The highlighted language reflects part of a series of amendments to the *Rule* adopted in 2006.[3] Prior thereto, the *Rule* provided that penalties would be imposed if "the claimant obtain[ed] *a verdict or determination at least as favorable as the rejected offer or, if a money judgment, in an amount that is 120% of the offer or more* [.]" *R.* 4:58-2 (2004) (Emphasis added). This language reflected yet another change from the *Rule's* operative provisions as they existed prior to 2004. At that time, the *Rule* drew distinctions between a claim for liquidated and unliquidated damages, providing that a claimant could recover if she

*3 obtain[ed] a *verdict or determination at least as*

> *favorable as the rejected offer* .... In an action for unliquidated damages, however, no allowances under this rule shall be granted to the offeror unless *the amount of the recovery* is in excess of 120% of the offer.
>
> [*R.* 4:58-2 (2002) (emphasis added).]
>
> Regardless of the exact language used, "[i]nducement to settlement has remained the fundamental purpose of the *[R]ule* as it has evolved." Pressler, *supra,* comment 1 on *R.* 4:58.

At least two cases interpreting the pre-2006 *Rule* definitively held that the limits of the defendant's insurance policy had no effect upon whether the plaintiff was entitled to recover the penalties provided. In *McMahon, supra,* the plaintiff brought suit seeking to recover the difference between the tortfeasor's policy limits already obtained in settlement, i.e., $125,000, and her UIM policy limits of $300,000. 364 *N.J.Super.* 190. She tendered an offer of judgment for $129,000, which the defendant rejected, resulting in a trial at which the jury returned a verdict in the plaintiff's favor for $500,000. *Ibid.* The plaintiff contended that she was entitled to an award of interest, attorney's fees, and litigation expenses under the *Rule,* while the defendant argued that any award, when combined with the judgment amount of $175,000, would exceed its contractual liability under its policy limits. *Id.* at 191. We rejected the defendant's argument, however, concluding that the plaintiff's UIM claim sought "unliquidated damages," and that the defendant's "policy limits ... [we]re not so sacrosanct to afford protection ... where it chooses not to participate, despite having the opportunity and ability to do so, in the activity fostered by the *[R]ule* to avoid the very sanction imposed for non-participation." *Id.* at 193; *see also Negron v. Melcchiore, Inc.,* 389 *N.J.Super.* 70, 96, 911 A.2d 88 (App.Div.2006) (considering and "reject[ing]" under the 2006 *Rule,* "[the] defendant's argument that ... the limits of his liability policy [should be considered] in determining whether the sanctions ... should be enforced"), *certif. denied,* 190 *N.J.* 256, 919 A.2d 849 (2007).

In *Gonzalez, supra,* 185 *N.J.* at 112, 881 A.2d 719, the plaintiff tendered an offer of judgment for $800,000. The defendant, who was in bankruptcy at the time, maintained a liability insurance policy with a limit of $1,000,000. The Bankruptcy Court lifted its stay to permit the plaintiff's personal injury action to proceed, limiting any recovery to the policy limits. *Id.* at 123-24, 881 A.2d 719. After settling with one defendant for $100,000 paid from the defendant's liability policy, the plaintiff subsequently obtained a multi-million dollar verdict against the defendant, and sought the penalties provided under the *Rule. Id.* at 124, 881 A.2d 719.

The defendant contended "that in light of the bankruptcy court's decree limiting any recovery against [it] to its insurance coverage, the rejected offer should have been measured against the $900,000 remaining on the policy. By that standard, ... [the] plaintiff did not recover more than 120% of its settlement offer." *Ibid.* However, the Court rejected this argument, holding

> *4 The fee-shifting provisions of *Rule* 4:58-2 are triggered by a "verdict" or "determination." Here, the *verdict* in favor of plaintiff far exceeded 120% of plaintiff's offer. The language, structure, and policy rationale of the rule do not support the notion that plaintiff's offer should be measured against the insurance coverage rather than the verdict.
>
> [*Id.* at 124-25, 881 A.2d 719 (emphasis in original).]

NJM's argument in this case focuses on the effect of the 2006 amendment to the *Rule.* It contends that the previous language that defined when the penalties of the *Rule* were triggered, i.e., upon a plaintiff obtaining a favorable "determination or verdict," or "if a money judgment, in an amount that is 120% of the offer or more," was amended so that a plaintiff may now obtain the *Rule's* benefits only if she "obtains a money judgment" in excess of 120% of her offer. Defendant claims plaintiff could only obtain a money judgment of $200,000, regardless of the verdict the jury returned. That amount was never going to be greater than 120% of plaintiff's $185,000 offer. Thus, plaintiff is not entitled to any enhanced interest award, attorney's fees, or litigation expenses under the *Rule.*

The importance of this change in the *Rule's* language has been addressed tangentially in two of our recent opinions. In *Taddei v. State Farm Indem. Co.,* 401 *N.J.Super.* 449, 462 n. 8, 951 A.2d 1041 (App.Div.2008), a case involving a plaintiff's claim for UM benefits under his policy, but not involving an offer of judgment, we did not address the issue directly because it was "not ... before us." Nevertheless, we noted "a sensible reading of 'judgment' in *Rule* 4:58-2(a) in this context would probably be to deem it the jury's verdict."[4] *Ibid.*

In *Malick v. Seaview Lincoln Mercury,* 398 *N.J.Super.* 182, 940 A.2d 1221 (App.Div.2008), another panel of our colleagues considered the issue in the context of a "high-low" settlement. There, plaintiff's offer of judgment, $650,000, was made prior to trial, during which the parties negotiated an agreement with $175,000 as the "low," and $1,000,000 as the "high" figure. *Id.* at 184-85, 940 A.2d 1221. The jury returned a verdict in excess of $5 million, and the plaintiff sought penalties under the

Rule, including pre-judgment interest calculated upon the amount of the jury verdict. *Id.* at 185, 940 A.2d 1221. The panel concluded that based upon the plaintiff's acceptance of the high-low agreement, "the verdict was molded to a $1 million judgment. That is the amount on which the *Rule* 4:58-2 interest ... is to be calculated." *Id.* at 191, 940 A.2d 1221. In a footnote, however, citing *Gonzalez, supra,* 185 *N.J.* at 124, 881 A.2d 719, the panel noted that even under the "version of the *Rule* in effect prior to [the] 2006 amendments [,]" " 'verdict' meant the resulting judgment *after the verdict was molded by the trial court.*" *Malik, supra,* 398 *N.J.Super.* at 191 n. 4, 940 A.2d 1221 (emphasis added).

*5 When interpreting the *Rule,* the Court has instructed

> [W]e ordinarily apply canons of statutory construction. Accordingly, as with a statute, the analysis must begin with the plain language of the rule. The Court must ascribe to the [words of the rule] their ordinary meaning and significance ... and read them in context with related provisions so as to give sense to the [court rules] as a whole.... If the language of the rule is ambiguous such that it leads to more than one plausible interpretation, the Court may turn to extrinsic evidence.
>
> [*Wiese, supra,* 188 *N.J.* at 592, 911 A.2d 479 (internal quotations and citations omitted).]

The term "money judgment" is clear and unambiguous. It differs from prior iterations of the *Rule* that used terms such as "verdict or determination at least as favorable as the rejected offer," or "recovery ... in excess of 120% of the offer[,]" as the triggering mechanisms for imposition of penalties. Construing those prior versions of the *Rule,* we have said that "the words 'verdict,' 'determination,' and 'recovery' as used in *R.* 4:58-2 must be viewed in the same context and must receive the same interpretation-i.e., 'the jury's assessment of the value of plaintiff's claim expressed in dollar terms.' " *Gonzalez v. Safe and Sound Sec. Corp.,* 368 *N.J.Super.* 203, 213, 845 A.2d 700 (App.Div.2004) (quoting *Lobel v. Trump Plaza Hotel & Casino,* 335 *N.J.Super.* 319, 322-23, 762 A.2d 305 (App.Div.2000)), *rev'd on other grounds,* 185 *N.J.* 100, 881 A.2d 719 (2005).

The term "judgment," however, means something else, because it is "the final decretal act of the court." *Lobel, supra,* 335 *N.J.Super.* at 322, 762 A.2d 305 (citing *R.* 4:47(a)). That rule provides in relevant part

> [J]udgment shall be entered ... [u]nless the court otherwise orders, [by] the clerk ... without awaiting further direction by the court: (1) upon a general verdict of a jury; (2) upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied; and (3) upon a special verdict or general verdict accompanied by answers to interrogatories which is forthwith convertible by the court into a money judgment or a judgment that relief shall be denied.
>
> [*R.* 4:47(a).]

In the case at hand, the jury's "general verdict" could not be transformed into a judgment until the judge made his decision, under applicable law, that plaintiff could recover only "a sum certain," i.e., her contractual policy limits, and molded the verdict accordingly.

There are clearly other contexts in which the jury's "verdict" or "determination" of the value of a plaintiff's case does not translate automatically into the measure of a defendant's financial liability. For example, in the context of a UM/UIM case, any award must be reduced by plaintiff's comparative negligence, and if that is greater than 50%, plaintiff would not be entitled to any recovery at all under her policy of insurance. *See Krohn v. N.J. Full Ins. Underwriters Ass'n,* 316 *N.J.Super.* 477, 483, 720 A.2d 640 (App.Div.1998) (the UIM plaintiff's "legal entitlement to damages for the ... underinsured driver's negligence 'imports into the [uninsured or underinsured motorist's] policy all of the normal rules governing tort liability and damages[ ]' ") (quoting *Montedoro v. City of Asbury Park,* 174 *N.J.Super.* 305, 308-09, 416 A.2d 433 (App.Div.1980)), *certif. denied,* 158 *N.J.* 74 (1999). Depending upon the jury's response to special interrogatories, the actual award of damages would be "forthwith convertible by the court into a money judgment or a judgment that relief shall be denied[.]" *R.* 4:47(a)(3). In such circumstances, whether a plaintiff is entitled to the penalties provided for by the *Rule* is not determined solely by the amount of damages the jury assessed.

*6 Similarly, in circumstances where a plaintiff settled her claim with one tortfeasor, but proceeded to trial against another, the jury's verdict would not automatically trigger an award of penalties under the *Rule.* Instead, assuming the non-settling defendant was entitled to an apportionment finding on liability, *Young v. Latta,* 123 *N.J.* 584, 597, 589 A.2d 1020 (1991), whatever damages the jury awarded would be reduced by the settling defendant's percentage of negligence. Plaintiff's offer of judgment tendered against the non-settling defendant would be measured against the final "money judgment" that was molded as a result of the jury's answers to special interrogatories, not based solely upon the jury's assessment of the quantum of damages. *R.* 4:47(a)(3).

Plaintiff argues that the 2006 amendments were not intended to be of any "great moment," noting the lack of any commentary by Judge Pressler on the subject. She also contends that the construction that we and the trial judge have placed upon the *Rule* is "illogical and flout[s][ ] legal precedent while undermining the *Rule.*" We disagree.

First, in her commentary, Judge Pressler specifically noted, "The September 2006 amendments addressed ... the difficulty of comparing an offer *with a judgment actually rendered* where non-monetary relief is sought ... and is granted." Pressler, *supra,* comment 1 on *R.* 4:58 (emphasis added). The result was a change in *Rule* 4:58-1, "permit[ting] an effective offer [of judgment] to be made only if, when it is made, the relief sought is exclusively monetary." *Ibid.* In discussing the amendments to *Rules* 4:58-2 and 4:58-3, Judge Pressler commented, "Both rules provide[ ] that *if the judgment is within a 20 percent margin of error,* the party whose offer was rejected is entitled to" the *Rule's* penalties. *Pressler, supra,* comment 2 on *R.* 4:58 (emphasis added). We acknowledge plaintiff's point, however, that Judge Pressler also noted, without specific reference to the 2006 amendatory language, that "[f]or purposes of determining which party prevails under this rule, it is the actual verdict that is compared to the offer." *Ibid.* (citing *Gonzalez, supra,* 185 *N.J.* at 123-25, 881 A.2d 719). The commentary, taken as a whole, is ambiguous, and does not address the specific, unique circumstances of a UM/UIM trial.

The "legal precedent" upon which plaintiff places great reliance, specifically *McMahon* and *Gonzalez,* are both distinguishable from the case at hand. First, both cases were decided prior to the language change, when the *Rule's* triggering event was the "verdict or determination" of the factfinder. *Gonzalez, supra,* 185 *N.J.* at 124, 881 A.2d 719. Second, in *McMahon,* the amount of the jury's verdict was only tangentially relevant to the issue presented. In other words, plaintiff's offer of judgment in that case, $129,000, would have entitled her to the *Rule's* penalties even when measured against the molded judgment of $175,000. The defendant insurer conceded the *Rule* applied; the only issue presented was whether defendant's contractual liability limits precluded the award of the *Rule's* penalties. Thus, in the case at hand, had plaintiff's offer of judgment been $166,666, and had she obtained the same $510,000 verdict from the jury, she would be entitled to the *Rule's* penalties even though, when added to the molded judgment of $200,000, the total would have exceeded NJM's contractual responsibility. *McMahon's* holding requires nothing more.

*7 Third, *Gonzalez* is factually distinguishable because it involved a claim for damages that was theoretically unlimited. It was only the fortuitous intervention of the Bankruptcy Court, limiting plaintiff's recovery and possible judgment to the insurance policy limits, which served as the tether upon which the defendant attached its hopes to defeat the claim for penalties under the *Rule.* In other words, if the defendant was not bankrupt, the amount of its insurance policy would not have mattered. *See Gonzalez, supra,* 185 *N.J.* at 125, 881 A.2d 719 ("the available monies under the insurance policy" are not the measuring stick to determine whether plaintiff prevailed). But for the bankruptcy status, the balance of plaintiff's multi-million dollar judgment, i.e., the amount in excess of the policy of insurance, would have been docketed against the defendant until satisfied and discharged. In such circumstances, a plaintiff's right to recover the penalties provided by the *Rule* has no reasonable relationship to the limits of a defendant's insurance coverage.

However, such is not the case in a UIM lawsuit. As we earlier noted, "the UIM claim is a contractual one, arising out of the insurance policy issued to plaintiff by his own insurer." *Bardis, supra,* 199 *N.J.* at 275, 971 A.2d 1062. The plaintiff forced to pursue her claim for UIM benefits at trial comprehends that she will not recover any more than that provided for by the contract of insurance. The insurer, of course, knows the same thing. Regardless of the jury's verdict, the molded judgment entered against the insurer will not, in the first instance, exceed the amount of the policy.[5] To determine whether plaintiff has prevailed under the *Rule,* the quantitative relationship examined is that between plaintiff's offer and the actual judgment, as required by the *Rule* . Only because of the unusual circumstances of UM/UIM litigation is that quantitative relationship the same as that between plaintiff's offer, and the limits of her insurance policy.

In sum, we conclude that the language of the *Rule* requires plaintiff's offer of judgment to be measured not against the jury verdict *or* the limits of her UIM insurance coverage, but against the "money judgment" she was entitled to recover as a result of the trial. This interpretation still serves the salutary goal of promoting early settlement of most UM/UIM claims, though we acknowledge plaintiff's argument that the goal is potentially thwarted in cases where the reasonable value of settlement approaches the policy limit. In that universe of cases, early settlement through the use of the *Rule* is unlikely because an insurer, believing it had nothing to lose, might "gamble[ ]" on the "precarious hope that it might achieve a judgment better than plaintiff's offer [.]" *Gonzalez, supra,* 185 *N.J.* at 125, 881 A.2d 719. But, as

we have already noted in construing the *Rule* in other contexts, "Our role as an intermediate appellate court is to interpret and enforce the Rules promulgated by the Supreme Court, not to rewrite them when we detect in their application a disagreeable outcome." *Negron, supra,* 389 *N.J.Super.* at 96, 911 A.2d 88. We therefore affirm the trial judge's order denying plaintiff's request for penalties under the *Rule.*

*8 We find NJM's cross-appeal to be of insufficient merit to warrant extensive discussion in this opinion. *R.* 2:11-3(e)(1)(E). *Rule* 4:42-11(b) provides that "[p]rejudgment interest shall not ... be allowed on any recovery for future economic losses." The jury concluded that $235,000 of the total award of $510,000 was for "economic loss." NJM does not contend that all the damages were assessed as "future economic losses." Moreover, NJM provides no authority for the proposition that the molded verdict must reflect the jury's apportionment of economic loss, and non-economic damages, and our research has not yielded any precedent either.

Affirmed.

All Citations

Not Reported in A.2d, 2009 WL 2341548

Footnotes

1 George Ciechanowski's claim for per quod damages was entirely derivative of his wife's claim. Therefore, we use the singular, "plaintiff," throughout the opinion.

2 Plaintiff apparently served two offers of judgment, the first in the amount of $185,000, the second in the amount of $285,000. Both parties acknowledge that they understood plaintiff's offer would include a credit to NJM of $100,000 based upon plaintiff's settlement with the tortfeasor. In other words, the parties understood that plaintiff's offer, if accepted, would result in a $15,000 savings to NJM from the net $200,000 available to plaintiff under the policy.

3 Although the amendments became effective September 1, 2006, i.e ., after plaintiff tendered her offer, both parties have not contested the application of the amended language's application to the facts of this case.

4 To the extent plaintiff in this case argues that the trial judge erred in molding the verdict to the $200,000 policy limit, we reject the contention and find it to be clearly without merit. *R.* 2:11-3(e)(1)(E); *see Taddei, supra,* 401 *N.J.Super.* at 464, 951 A.2d 1041 (noting that "courts have appropriately recognized the need to mold jury verdicts in these cases to reflect the rights and duties of the parties under the insurance policy"); *see also Bardis, supra,* 199 *N.J.* at 277, 971 A.2d 1062 (noting that in a UIM trial, the judge must also "mold[ ] the verdict to account for the tortfeasor's coverage.").

5 In *Taddei,* however, we noted a plaintiff's "right to assert a claim against his UM carrier for breaching the covenant of good faith and fair dealing implied in the insurance contract.... [H]is measure of damages ... would be any foreseeable consequential damages. This might typically include ... costs of litigation, including expenses for experts and counsel fees, and prejudgment interest. However, such damages are not measured by the amount of damages determined by the jury for his injuries." 401 *N.J.Super.* at 461, 951 A.2d 1041. This serves as a counterweight to an insurer's bad faith assessment of a plaintiff's contractual claim.