Anderson v. Nat'l Union Fire Ins. Co.

Appeals Court of Massachusetts

December 18, 2015, Entered

14-P-1554.

Reporter
2015 Mass. App. Unpub. LEXIS 1156 *; 88 Mass. App. Ct. 1117; 42 N.E.3d 211

ODIN ANDERSON & others[1] *vs.* NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA & others[2].

Notice: SUMMARY DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS RULE 1:28, AS AMENDED BY 73 MASS. APP. CT. 1001 (2009), ARE PRIMARILY DIRECTED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, SUCH DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO RULE 1:28 ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT. SEE *CHACE V. CURRAN, 71 MASS. APP. CT. 258, 260 N.4, 881 N.E.2d 792 (2008)*.

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Subsequent History: Appeal granted by, in part *Anderson v. Nat'l Union Fire Ins. Co., 474 Mass. 1106, 2016 Mass. LEXIS 335, 50 N.E.3d 194 (2016)*

Superseded by *Anderson v. Nat'l Union Fire Ins. Co., 2017 Mass. LEXIS 25 (Mass., Feb. 2, 2017)*

Prior History: *Anderson v. Am. Int'l Group, Inc., 2014 Mass. Super. LEXIS 81 (Mass. Super. Ct., 2014)*

Disposition: Judgment dated April 8, 2014, as amended by amended judgment dated June 11, 2014, affirmed. Order denying plaintiffs' motion to enter judgment nunc pro tunc affirmed. Orders on remaining postjudgment motions affirmed.

Core Terms

insurer, settlement, negligence action, plaintiffs', attorney's fees, damages, reasonably clear, defendants', retrial, costs, postjudgment interest, documentary evidence, amended judgment, demand letter, nunc pro tunc, preparation, injuries, clearly erroneous, fact finding, comparative, deposition, prompt

Judges: Trainor, Grainger & Maldonado, JJ. **[*1]**

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

These are cross appeals from a judgment, amended judgment, and certain postjudgment orders entered in an action brought pursuant to *G. L. c. 93A, §§ 2* and *9*, and *G. L. c. 176D, § 3*, based on the failure of the defendants to effectuate a "prompt, fair and equitable settlement" of the plaintiffs' claims arising out of a 1998 accident. The accident occurred when a shuttle bus operated by Partners Health Care System, Inc. (Partners) struck plaintiff Odin Anderson. On appeal, Odin Anderson, his wife, Kerstin Anderson, and his

[1] Kerstin Anderson and Katarina Anderson, by her father and next friend, Odin Anderson.

[2] American International Group Technical Services, Inc., and American International Group Claim Services, Inc.

daughter, Katarina Anderson (collectively, the plaintiffs)[3] argue error in two of the judge's rulings. First, the plaintiffs contend that American International Group Technical Services, Inc. (AIGTS), and American International Group Claim Services, Inc., (AIGCS), should be independently liable for the damages awarded the plaintiffs under G. L. c. 176D and G. L. c. 93A. Second, the plaintiffs argue that the judge erred in denying their motion to enter the amended judgment nunc pro tunc to April 11, 2014.

National Union Fire Insurance **[*2]** Company of Pittsburgh PA (National Union), AIGTS, and AIGCS (collectively, the defendants) appeal from the judgment and amended judgment, arguing that a number of the judge's findings and rulings are clearly erroneous. First, the defendants argue that the judge erred in determining liability under G. L. c. 176D, § 3(9)(f), when he found that liability was reasonably clear because the defendants failed to effectuate prompt, fair, and equitable settlements. Second, the defendants challenge the judge's ruling that they failed to conduct a reasonable investigation, in violation of G. L. c. 176D, § 3(9)(d). Third, the defendants argue that there is no support for the judge's finding that the defendants employed "dishonest and highly improper" defense tactics. Fourth, the defendants contend that that the judge erred in finding their appeal in the underlying negligence action[4] violated G. L. c. 93A. Fifth, the defendants argue that the judge erred by including postjudgment interest in the amount of damages that was multiplied as part of the G. L. c. 93A award. Finally, the defendants argue that the judge erred when he ruled that the plaintiffs' demand letters reasonably described the defendants' G. L. c. 93A violations.

Background. On the afternoon of September 2, 1998, Odin was hit by a bus while attempting to cross Staniford Street in Boston. The bus was owned by Partners and was being driven by a Partners employee, Norman Rice. The bus collided with Odin in the left-most travel lane approximately two to three feet from the traffic island and just outside of the crosswalk. Rice left the scene of the accident before police arrived. He was eventually cited by the Boston police for hitting a pedestrian in a crosswalk.

As a result of the collision, Odin sustained severe injuries to his head and stopped breathing. A group of physicians, who were passengers on the bus, administered cardiopulmonary resuscitation to Odin until an ambulance arrived at the scene. Odin was brought to the intensive care unit of Massachusetts General Hospital (MGH) where he was diagnosed with a skull fracture and multiple resulting intracerebral hemorrhages. He remained at MGH from the date of the accident until September 11, 1998, when he was transferred to Braintree Hospital for rehabilitation. He was discharged **[*4]** from that facility eight days later but he continued to receive regular treatment for his injuries.

At all relevant times, Partners and Rice were insured under primary[5] and excess[6] automobile insurance policies issued by National Union. AIGCS assigned the claim to adjuster Steven Fulton, a lawyer and director in its complex casualty unit. An investigation was completed within a few months after the accident by Mark Peltz (Peltz). The investigation determined that (1) the accident happened through Rice's inattention; (2) the insureds' liability was reasonably clear; and (3) the insurers' exposure was large and undoubtedly exceeding the primary policy's limits. Fulton suggested waiting an appropriate time and then negotiating an out-of-court settlement. However, this negotiation never took place.

When the plaintiffs hired an attorney who was well known to the insurers for aggressively pursuing claims and pushing hard for high settlements, the insurers reexamined their earlier position as to liability and began to shift **[*5]** their defense strategy. In his findings and rulings, the judge described this as

> "a disturbing tale of irresponsible and overly-aggressive defense work on the part of AIGCS, Partners' primary insurer, AIGTS, Partners' excess insurer, and certain of the attorneys retained by AIGCS and AIGTS to resist the accident-related claims that eventually were asserted by Mr. Anderson and Members of his family. The improper conduct of AIGCS, AIGTS and their servants — all of which was either known to, or easily discoverable by AIGCS and AIGTS personnel — included the creation of an alternative, more-defensible accident

[3] We shall refer to the individual plaintiffs by their first names to avoid confusion.

[4] For clarity, the first and underlying case that **[*3]** was tried to determine the defendants negligence in the bus accident will be referred to as the negligence action.

[5] The coverage limit of Partners' primary automobile insurance policy through AIGCS was $1 million.

[6] The coverage limit of Partners' excess policy through AIGTS was $10 million.

> scenario based primarily on fictitious evidence and wishful thinking . . . ."[7]

The judge noted the improper conduct of AIGCS and AIGTS, including "the suppression of crucial evidence that ran contrary to the defense's carefully crafted alternative scenario,"[8] and "the impermissible manipulation of critical witness testimony for the benefit of the defense."[9]

In the negligence action, neither AIGCS nor AIGTS (which had assumed full control of the defense of the negligence action before trial) made any settlement proposals until the day before trial.[10] The jury returned a verdict of $2,961,000 in damages for Odin. However, the jury also found Odin forty-seven percent comparatively negligent. Additionally, the jury awarded $110,000 each to Kristen and Katarina. After the deduction for the jury's finding of comparative negligence against Odin and the addition of prejudgment **[*9]** interest, the total amount of the judgment came to $2,244,588.93.

The defense attorneys in the negligence action regarded the jury verdict as highly favorable and unlikely to be replicated if the case was retried.[11] The judge in that case met with the parties after trial to help foster a final resolution to the case. He advised defense counsel that there was no reason to think that the defendants would do any better at a retrial even if they were successful in their appeal from the judgment and order denying their motion for new trial. The judge also opined that it was unlikely that Lieutenant Stephen Benanti the

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[7] The evidence uncovered by the insurers' initial investigation overseen by Fulton was that Rice never saw Odin because Rice was looking the other way for opposing traffic, and the bus struck Odin while he was in the crosswalk near the **[*6]** center island. The insurers' trial theory was that Odin was instead "running" between "parked cars" and "darted" directly in front of the bus, thus giving Rice no time to react. The judge found that this new theory was "not supported by any real evidence."

[8] Although plaintiffs' counsel, during pretrial proceedings in the negligence action, repeatedly sought the insurers' initial investigation reports, witness interviews, and transcripts, the insurers insisted that none existed. It was only shortly before trial in June, 2003, through an inadvertent comment made in a deposition of the insurers' accident reconstruction expert, that the plaintiffs' counsel learned for the first time that these materials existed and were available. The judge in the negligence action ordered the production of the report on the first day of trial. These materials proved to be entirely inconsistent with the defense theory pursued in the negligence trial.

[9] Attorneys for the insurers in the negligence action purportedly "prepped" various witnesses, including Rice, at some considerable length, in the process getting the witnesses to change their stories. The judge in the instant case reviewed the videotaped "prepping" **[*7]** sessions and made the following findings:

> "The Court has reviewed the Mock Deposition Video in its entirety and finds it to be deeply disturbing. The video reveals multiple instances in which Attorney Mahoney and/or Attorney Hambelton inappropriately coached Mr. Rice to modify or completely change his testimony in material ways. Over the course of the four hour session, Attorney Mahoney and Attorney Hambelton succeeded in getting Mr. Rice to significantly revise his testimony on a range of critical issues.
>
> " . . .
>
> "The preparation techniques utilized by Attorney Mahoney and Attorney Hambelton during Mr. Rice's 'mock deposition' were not subtle and, in the eyes of this Court, crossed well over the line from ordinary witness preparation to impermissible witness manipulation."

Notwithstanding the defendants' assertion, in an unsolicited submission to this court following oral argument, that the judge erred in finding that Rice was coached for sixteen hours in order to provide questionable testimony, we note that this claim by the defendants is both misleading and wrong. In this submission, which we would ordinarily neither credit nor acknowledge, the defendants claim that a review of the **[*8]** record indicates that in the eight weeks prior to the June 2, 2002, deposition, the insurer was billed for just over eight hours of time in preparation for the deposition. This claim is substantially less than the amount of preparation time as found by the judge. However, we note that the defendants do not acknowledge the witness preparation billings slightly beyond the defendants' self-imposed, eight-week time frame. The record indicates that the insurer was billed for witness preparation time on 11/9/01; 11/20/01; 12/14/01; 2/11/02; 2/25/02; 3/11/02; 3/25/02; 3/28/02; 4/12/02; and 4/29/02. These additional dates, and the hours they represent, support the judge's findings.

[10] The plaintiffs' pretrial demand in the negligence action was $7.5 million. AIGTS made its first settlement offer in the amount of $800,000 (part of which was structured) before jury empanelment. The plaintiffs' rejected this offer. The parties engaged in a series of proposals while the trial was underway but no settlement was reached.

[11] Attorney McDonough, who represented the defendants in their appeal of the negligence action, described the comparative negligence finding against Odin as extraordinary and predicted that on retrial it would be conceivable that a lesser figure, around twenty-five to thirty percent, could be attributed to Odin's comparative negligence.

accident reconstruction expert whose testimony the judge believed was very influential to the jury, would be allowed to testify at a retrial. Even so, the defendants elected to appeal the judgment and order denying the motion for new trial to this **[*10]** court which was summarily affirmed in a decision issued pursuant to our rule 1:28. See *Anderson v. Rice, 72 Mass. App. Ct. 1114, 892 N.E.2d 838 (2008)*. The defendants' decision to appeal delayed the final resolution of the negligence action for five years. In December, 2008, AIGTS paid Odin the full amount of the Superior Court judgment entered five years earlier and ten years after the accident occurred.[12] The total amount of AIGTS's payment to Odin, including both prejudgment and postjudgment interest, was $3,252,857.80.

Discussion. I. *Factual findings*. The defendants argue that the judge's factual findings are not entitled to deference because they were based, in part, on documentary evidence. "On review of a jury-waived proceeding, we accept the judge's findings of fact unless they are clearly erroneous. . **[*11]** . . However, where . . . the judge's findings are not based on an assessment of witness credibility but 'solely on documentary evidence[,] we may draw our own conclusions from the record.'" *U.S. Bank Natl. Assn. v. Schumacher, 467 Mass. 421, 427, 5 N.E.3d 882 (2014)*, quoting from *Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609, 616, 405 N.E.2d 106 (1980)*. "A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *J.A. Sullivan Corp. v. Commonwealth, 397 Mass. 789, 792, 494 N.E.2d 374 (1986)*, quoting from *United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948)*.

Because the judge's findings were based on oral testimony, documentary evidence, and other evidence not in the appellate record, this court is not in the same position as the judge was to evaluate the evidence and make findings of fact. Compare *Berry v. Kyes, 304 Mass. 56, 57-58, 22 N.E.2d 622 (1939)* (findings of fact based wholly or partly upon oral testimony as well as documentary evidence will not be set aside unless plainly wrong) with *Commonwealth v. Hoyt, 461 Mass. 143, 148-149, 958 N.E.2d 834 (2011)* (deference to motion judge's findings of fact not given when only considering documentary evidence). Where evidence is not exclusively documentary, but both oral and documentary, it is settled that the clearly erroneous standard applies in these circumstances. *Cornwall v. Forger, 27 Mass. App. Ct. 336, 338, 538 N.E.2d 45 (1989)*. The judge presided over a ten-day bench trial at which ten witnesses testified, and he then made detailed findings of **[*12]** fact based on the totality of evidence presented, which included oral testimony, documentary evidence, and evidence not in the appellate record. We accept the judge's findings of fact because they are not clearly erroneous. See *Kendall v. Selvaggio, 413 Mass. 619, 620, 602 N.E.2d 206 (1992)*.

II. *General Laws c. 176D*. The defendants argue that the judge erred in determining liability under *G. L. c. 176D*. We disagree. AIGCS and AIGTS unjustifiably failed to settle the plaintiffs' claims prior to trial or for many years after the conclusion of trial.

General Laws c. 176D, § 3(9)(d), inserted by St. 1972, c. 543, *§ 1*, imposes liability for "[f]ailing to pay claims without conducting a reasonable investigation based on all available evidence." The insurer has an obligation to conduct a prompt and reasonable investigation based on all the available information. See *Schwartz v. Travelers Indem. Co., 50 Mass. App. Ct. 672, 676, 740 N.E.2d 1039 (2001)*. If an insurer intentionally conducts an investigation not based on all available information, the insurer has violated this duty. See *ibid.*

Based on the judge's findings, there are two reasons the investigation of Odin's accident by AIGCS and AIGTS was not based on all available evidence. First, the statement that Rice made to the insurers' investigators, which led Fulton to believe liability was clear in the fall of 1998, played very little or no part in the investigation **[*13]** or settlement process made by AIGCS or AIGTS after 2000. Second, AIGCS and AIGTS incorporated into their defense strategy a scenario in which Odin ran in between parked cars, which was not supported by *any* evidence.

General Laws c. 176D, § 3(9)(f), imposes liability for "[f]ailing to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear." However, an insurer's duty to settle does not arise until liability, which "encompasses both fault and damages," becomes reasonably clear. *Clegg v. Butler, 424 Mass. 413, 421, 676 N.E.2d 1134 (1997)*. See, e.g., *Van Dyke v. St. Paul Fire & Marine Ins. Co., 388 Mass. 671, 677-678, 448 N.E.2d 357 (1983)* (no damages where liability not reasonably clear); *Demeo v. State Farm Mut. Auto. Ins. Co., 38 Mass. App. Ct. 955, 957, 649 N.E.2d 803 (2001)* (defendant's liability not

[12] AIGTS had previously reached a settlement agreement with Kerstin and Katarina in which they each received $204,569.13.

reasonably clear). The test to determine when liability has become reasonably clear is an objective one. *O'Leary-Alison v. Metropolitan Prop. & Cas. Ins. Co., 52 Mass. App. Ct. 214, 217, 752 N.E.2d 795 (2001)*. The fact finder must determine "whether a reasonable person, with knowledge of the relevant facts and law, would probably have concluded, for good reason, that the insured was liable to the plaintiff." *Ibid.* (quotation omitted). Expert testimony may be admitted, but it is not required to establish the standard of reasonable conduct expected of an insurer when dealing with gross or obvious misconduct. See *Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co., 439 Mass. 387, 402-403, 788 N.E.2d 522 (2003)* ("Only where professional negligence is so gross or obvious that jurors can rely on their common **[*14]** knowledge to recognize or infer negligence may the case be made without expert testimony").

The judge properly ruled that the defendants did not effectuate prompt, fair, and equitable settlements of the plaintiffs' claims after liability had become reasonably clear in early 2001. The judge credited the testimony of the plaintiffs' expert witness, Richard G. Thorne, Jr..[13] Thorne testified that, no later than 2001, a reasonable claims professional would have assessed Rice's and Partners' chances of being held liable at 100 percent. Further, when Fulton determined, after learning the facts of the internal investigation by Peltz, that Partners had no viable defense and was much more likely to be found responsible for the accident than Odin, liability became reasonably clear to the defendants. Both the expert evidence and the internal investigation by Fulton establish that there was no legitimate dispute as to fault. The damages were also reasonably clear to the defendants by February, 2001, when Fulton received the plaintiffs' comprehensive settlement package. The settlement package made the defendants aware of the significant injuries Odin suffered as well as the affect the injuries had **[*15]** on his ability to practice law.

III. *Dishonest and highly improper defense tactics*. Similarly as stated above, the judge found at least three instances of dishonest and highly improper defense tactics. First, the defendants' suppressed the statements Rice made in the internal investigation in 1998 and then failed to provide these recorded statements despite several discovery requests by the plaintiffs. Second, the defendants' theory that Odin was "running between parked cars" was not based on any actual evidence. Finally, the defendants participated in improper manipulation of witness testimony. These findings were not clearly erroneous.

IV. *Underlying appeal as a violation of G. L. c. 93A*. The defendants argue that the judge erred in determining that their appeal in the negligence action violated *G. L. c. 93A*. "[A]n insurer's duty to defend generally encompasses an obligation to appeal from an adverse judgment against its insured, but only if reasonable grounds exist to believe that the insured's interest might be served by the appeal." *Davis v. Allstate Ins. Co., 434 Mass. 174, 180, 747 N.E.2d 141 (2001)*. A postjudgment failure to settle can result in *G. L. c. 93A* **[*16]** liability if it causes injury. *Rhodes v. AIG Domestic Claims, Inc., 461 Mass. 486, 499-500 & n.20, 961 N.E.2d 1067 (2012)*. An unjustified appeal can expose an insurer to additional liability under *G. L. c. 176D, § 3(9)(f)*,[14] because "a postjudgment refusal to settle promptly can cause the same injuries as a late pretrial settlement offer. The plaintiffs can continue to suffer the costs and frustrations of litigation, as well as the fear of financial ruin, during the appeal process." *Rhodes, supra at 500 n.20*.

There was no reasonable ground for AIGCS or AIGTS to believe that their interests would be better served by an appeal.[15] The judge in the negligence action stated that even if the defendants were successful on appeal and granted a new trial, it was unlikely they would achieve a better result on retrial. The judge also warned the defendants that Benanti, who he believed played a major role in the jury finding that Odin was comparatively negligent, would unlikely be allowed to

[13] Thorne was a veteran claims adjuster, claims manager, and underwriter with over thirty years of insurance industry experience.

[14] Chapter 176D contains no private enforcement mechanism. However, "recourse for an individual injured by an insurer's *G. L. c. 176D* violation is available through *G. L. c. 93A, § 9*." *Adams v. Liberty Mut. Ins. Co., 60 Mass. App. Ct. 55, 63 n.14, 799 N.E.2d 130 (2003)*.

[15] The defendants argue that their use of an objective evaluation regarding the merits of an appeal by experienced appellate counsel should shield them from a violation of *G. L. c. 93A*. We disagree. Although an objective evaluation of the merits of an appeal by experienced appellate counsel can be some evidence of good faith, it is not dispositive. Here, there was bad faith because **[*17]** the defendants were advised that even with a successful appeal, a retrial would unlikely be more successful. Therefore, the appeal was more like a process undertaken to "grind down" the plaintiffs. See *Rhodes, 461 Mass. at 500 n.20*.

testify on retrial. Moreover, defense counsel in the negligence action regarded the verdict as highly favorable and unlikely to be replicated on retrial.

V. *Postjudgment interest included in multiplier*. The judge properly included postjudment interest when calculating the damage amount to be trebled by the G. L. c. 93A claim. General Laws c. 235, § 8, as amended by St. 1983, c. 652, § 2, provides that "[e]very judgment for the payment of money shall bear interest from the day of its entry at the same rate per annum as provided for prejudment interest in such award, report, verdict or finding." As the Supreme Judicial Court stated in Boyer v. Bowles, 316 Mass. 90, 95, 54 N.E.2d 925 (1944):

> "[T]he meaning of the final decree is plain. Though not computed, the amount of interest to be paid was certain, on the principle that whatever can be made certain by mere arithmetic is already certain. Substantially the decree is as though the interest had been computed and stated, and added to the principal."

The amount of postjudgment interest becomes part of the amount of judgment. To determine the damages for a G. L. c. 93A award, the amount of the judgment in favor of the plaintiff is either doubled or trebled depending on the judge's finding regarding the egregiousness **[*18]** of the unfair or deceptive trade practices used. See Rhodes, 461 Mass. at 500-501.

VI. *Sufficiency of G. L. c. 93A demand letters*. The defendants argue that the demand letters sent by the plaintiffs were insufficient to satisfy an action arising under G. L. c. 93A, § 9(3). With just one paragraph and a footnote in the defendant's brief at page 44, this may not be sufficiently briefed within the meaning of Mass.R.A.P. 16(a)(4), as amended, 367 Mass. 921 (1975). See Commonwealth v. White, 358 Mass. 488, 492, 265 N.E.2d 473 (1970). In any event, we have considered this challenge and conclude that it is without merit.

An adequate demand letter is a prerequisite to an action under G. L. c. 93A, § 9(3). See Clegg v. Butler, 424 Mass. at 423. A complainant must state both the injuries suffered and relief demanded in a manner that provides the prospective defendants with an opportunity to review the facts and law and decide on a reasonable tender of settlement. See Spring v. Geriatric Authy. of Holyoke, 394 Mass. 274, 288, 475 N.E.2d 727 (1985). The four § 93A demand letters here[16] reasonably set forth the acts the plaintiffs' relied on and were sufficient to give the defendants an opportunity to review the facts and the law to determine if the requested relief should be granted and to make a reasonable settlement offer. See York v. Sullivan, 369 Mass. 157, 162, 338 N.E.2d 341 (1975); Piccuirro v. Gaitenby, 20 Mass. App. Ct. 286, 292, 480 N.E.2d 30 (1985).

VII. *Independent liability for multiple* ***[*19]*** *damages award*. The plaintiffs argue that AIGTS and AIGCS should be independently liable for the damages awarded under G. L. c. 176D and G. L. c. 93A. When there is a wilful violation of G. L. c. 93A against multiple wrongdoers, each must be assessed a penalty. See International Fid. Ins. Co. v. Wilson, 387 Mass. 841, 853-855, 443 N.E.2d 1308 (1983). See also Pepsi-Cola Metropolitan Bottling Co. v. Checkers, Inc., 754 F.2d 10, 19 (1st Cir. 1985). Stated another way, several liability is appropriate when "multiple 'defendants have contributed through their own individual acts in a single wrong.'" Augat, Inc. v. Aegis, Inc., 417 Mass. 484, 486, 631 N.E.2d 995 (1994), quoting from International Fid. Ins. Co. v. Wilson, supra at 858. When an entity acts wrongly through its agent, but does not act wrongfully independently and concurrently with its agent in an additional and wrongful act, several liability is not appropriate. See *ibid.* However, as the judge correctly found, AIGCS and AIGTS were both serving a single principal, National Union. AIGCS and AIGTS acted wrongfully at different times as agents of National Union, which did not act wrongfully independently and concurrently. AIGCS had control of the defense in the negligence action until shortly before trial, at which time AIGCS tendered its policy limits to AIGTS, which then assumed control of the defense. AIGTS retained the same trial counsel. Therefore, it was proper that damages be assessed against the defendants **[*20]** jointly and severally as a group. See *ibid.*

VIII. *Amended judgment nunc pro tunc*. The plaintiffs contend that the judge erred in denying their motion to enter the amended judgment nunc pro tunc to April 11, 2014. General Laws c. 235, § 4, as amended by St. 1973, c. 1114, § 218, provides that "[e]very judgment or order of the supreme judicial, superior or land court shall bear date of the year, month and day when entered; but the court may order it to be entered as of an earlier day than that entry." However, in order for a judgment to be entered nunc pro tunc, it must be a final judgment. What constitutes a final judgment for purposes of

[16] The four demand letters were sent on the following dates: April 5, 2001; July 30, 2002; February 28, 2007; and September 27, 2010.

Mass.R.Civ.P. 54(a) is determined by the characteristics of the judgment. A judge directing a judgment to be entered is not dispositive of the award being a final judgment. See Draper v. Town Clerk of Greenfield, 384 Mass. 444, 450, 425 N.E.2d 333 (1981), cert. denied sub. nom. *Draper v. Prescott, 456 U.S. 947, 102 S. Ct. 2016, 72 L. Ed. 2d 471 (1982)*. With that in mind, "[t]he test of the finality of a decision is whether it terminates the litigation on its merits, directs what judgment shall be entered, and leaves nothing to the judicial discretion of the trial court." Pollack v. Kelly, 372 Mass. 469, 476, 362 N.E.2d 525 (1977). Because the determination of attorney's fees was not made when the judge issued his initial ruling of double damages on April 11, 2014, it was not a final judgment.[17] As such, it did not trigger **[*21]** postjudgment interest. The determination of attorney's fees in accordance with G. L. c. 93A, § 9(4), was not made until the judge issued his June 10, 2014, order which also included the revised damage award. Accordingly, the judge did not err in determining that June 10, 2014, is the date on which postjudgment interest begins on the award and denying the plaintiffs' motion.

IX. *Plaintiffs' request for appellate attorney's fees and costs*. The plaintiffs have requested appellate attorney's fees in connection with the G. L. c. 93A claim. "The language of G. L. c. 93A, § 9(4), leaves no doubt as to the right to recover attorney's fees without any suggestion that fees for the appeal are excluded." Yorke Mgmt. v. Castro, 406 Mass. 17, 19, 546 N.E.2d 342 (1989). A prevailing plaintiff is entitled to appellate attorney's fees in an action under G. L. c. 93A, § 9, because "[t]he statutory provisions for a 'reasonable attorney's fee' would ring hollow if it did not necessarily include a fee for the appeal." *Ibid.* The plain language of G. L. c. 93A, § 9(4), provides that "if the court finds in *any action* commenced hereunder that there has been a violation of section two, the petitioner *shall*, in addition to other relief provided **[*22]** for by this section . . . be awarded reasonable attorney's fees and costs" (emphasis added).

Accordingly, the plaintiffs may recover reasonable attorney's fees and costs expended in connection with the defendants' cross appeal.[18] The plaintiffs may file with the clerk of this court materials detailing and supporting their request for such fees and costs within fourteen days of the issuance of the rescript in this case. The defendants will be allowed fourteen days from receipt of said filing to respond, and this court will then enter an appropriate order. See Fernandes v. Attleboro Hous. Authy., 470 Mass. 117, 132, 20 N.E.3d 229 (2014).

Judgment dated April 8, 2014, as amended by amended judgment dated June 11, 2014, affirmed.

Order denying plaintiffs' motion to enter judgment nunc pro tunc affirmed.

Orders on remaining postjudgment motions ***[*23]*** *affirmed*.

By the Court (Trainor, Grainger & Maldonado, JJ.[19]),

Entered: December 18, 2015.

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[17] Unlike the determination of interest, which is certain, attorney's fees still needed to be determined by the judge. See Boyer v. Bowles, 316 Mass. at 95.

[18] The plaintiffs will not recover attorney's fees and costs associated with time spent on the independent liability of AIGCS and AIGTS, see section VII, supra, as well as time spent in connection with the appeal from the order denying their motion to enter the judgment nunc pro tunc, see section VIII, supra. The plaintiffs will, however, be able to recover reasonable attorney's fees and costs for the claims they successfully defended on appeal, see sections I-VI, supra.

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