STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. OXF-25-134

Carissa Daniels,

Plaintiff-Appellee,

v.

Patrick O'Brien, *et al.*,

Defendants-Appellants

On Appeal from Oxford County Superior Court (Civil Docket)

BRIEF OF APPELLANTS

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APPELLANTS' BRIEF

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INTRODUCTION

This case arises in the context of timber trespass, and involves tension in the tripartite relationship among the claimant, an alleged trespassing neighbor insured under both homeowner and umbrella policies, and that insured's insurer. This case presents the principal question as to whether the trial court's dismissal of the claimant's claim over the insured's objection on the basis of a settlement unilaterally concluded by the insurer is supported by sufficient evidence of the reasonableness of the settlement and fairness to the insured. Secondarily, the case presents the question as to whether the scope of an insurer's right to settle a claim over its insured's objection is absolute and unlimited wherein the insurer is defending its insured under a reservation of rights.

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY.

A. Facts.

Defendants-Appellants Patrick R. O'Brien and Linda S. Labas (hereinafter collectively "O'Brien") own residential property situated on Dunn Road, Norway, Maine, purchased in May of 2021. Plaintiff-Appellee Carissa Daniels (hereinafter "Daniels") is the owner of adjoining residential property acquired by her in July of 2020.

In July of 2022, O'Brien initiated cutting along the parties' common boundary. Complaint ¶12; Appendix ("App.") 024. This cutting occurred after a May 2022 site walk along the parties' common boundary lines in which both O'Brien (Patrick only) and Daniels, together with O'Brien's logger, participated. Answer, Aff. Def. # 1, 3, 4; O'Brien Aff. ¶¶ 4a, c; App. 040, 042. During that site walk, Daniels gave explicit permission for the cutting that occurred in July of 2022. *Id*. Daniels denies giving consent to the cutting. Complaint ¶9; App. 024. An assessment by a Maine Forestry Service officer set the market value of the cut trees at $1,625.00 based on an official stump count. O'Brien Aff. ¶12; App. 045-046.

The following year, in April 2023, O'Brien reported Daniels to local authorities after seven occasions of Daniels' dogs running loose on

O'Brien's property, and advised Daniels of such reporting. O'Brien Aff. ¶¶ 2, 4b; App. 039, 040-041. In May of 2023, O'Brien sustained serious injury in an assault perpetrated by one among Daniels' workmen. This assault occurred on O'Brien's own land. *Id.* at App. 041. The following day, Daniels contacted the Maine Forestry Service, claiming that the cutting undertaken in July 2022 was a trespass. *Id.*

B. Procedural History.

In July of 2023, Daniels filed a timber trespass complaint against O'Brien. O'Brien tendered the defense of the complaint to O'Brien's insurer,[1] MMG Insurance Company (hereinafter "MMG"), who agreed to provide a defense under a reservation of rights. Fowler Aff. ¶¶ 7, 8; App. 095, 096. While the reservation of rights letter reserved to MMG the rights to: (i) deny coverage for any liability that may be incurred to a claimant under either policy on several grounds; (ii) bring a "separate action to resolve issues regarding insurance coverage"; and (iii) "to withdraw from any defense at any time that would be appropriate", the letter did not reserve any purported right to withdraw the reservation of rights without

[1] MMG insured O'Brien under both an Elite Homeowners Policy, and a Personal Umbrella Policy.

agreement of, or reasonable notice to, O'Brien. Fowler Aff. ¶8, Ex. A; App. 096, 097-105.

Subsequently to initiation of discovery, the parties convened for alternative dispute resolution under M.R.Civ.P. 16B before mediator Robert C. Hatch, Esq., on January 4, 2024. Mehalic Aff. ¶4, Ex. B; App. 192, 195-196; O'Brien Aff. ¶14; App. 047. Attending that Zoom format mediation were the Plaintiff and her counsel, Nelson J. Larkins, Esq., O'Brien and their MMG-assigned counsel, Paul S. Douglass, Esq., MMG's liability adjuster, MMG's Senior Claims Examiner and MMG's own counsel. Fowler Aff. ¶11; App. 096. O'Brien remained isolated in a virtual breakout room during this proceeding, frustratingly unable to participate. O'Brien Aff. ¶14; App. 047. *See also*, motion of [MMG-assigned counsel] Paul S. Douglass, Esq. to withdraw found in the Record. App. 006. No agreement was reached at that mediation session. Fowler Aff. ¶12; App. 096.

On January 10, 2024, MMG abruptly rescinded its reservation of rights, advising O'Brien's counsel of that event. Mehalic Aff. ¶3, Ex. A; App. 192, 193-194; Fowler Aff. ¶13; App. 096. The next day, MMG's coverage counsel and Daniels' counsel settled Daniels' claim for $25,000.00. Mehalic Aff. ¶4, Ex. B; App. 192, 195-196; Fowler Aff. ¶14; App. 096.

Neither O'Brien nor his MMG-assigned counsel participated in those negotiations. *Id.* Upon learning of this settlement, O'Brien vigorously objected, the fact and basis of that objection being known to MMG, its counsel, the parties' respective counsel, and the mediator. *Id.*; App. 096. The same day, counsel assigned by MMG to defend O'Brien moved to withdraw in light of O'Brien's objection to the settlement and the conflict of interest O'Brien asserted existed from MMG's assignment of Douglass to represent O'Brien, an order on that motion issuing February 12.[2] App. 034; O'Brien Aff. ¶¶ 14, 15, Ex. E; App. 047-048, 070-072. A Settlement Release and Indemnification Agreement (hereinafter "the Release") drafted solely for Daniels' signature was signed by Daniels the next day, on February 13, 2024. Mehalic Aff. ¶5, Ex. C; App. 192, 197-200. O'Brien never saw that Release before Daniels signed it. Transcript ("Tr.") p. 25, l. 2-4; App. 015.[3]

The Release provided, in relevant part:

> "....It is understood and agreed by Releasor that Releasees reserve and retain any and all of their claims, causes of action, rights, remedies, and defenses, whether at law or in equity, and

[2] After MMG-assigned counsel for O'Brien moved to withdraw, MMG did not, at any time, assign successor counsel to defend O'Brien, nor offer to do so.

[3] The transcript contains a large body of text erroneously attributing argument of O'Brien's counsel to MMG's coverage counsel appearing for Intervenor MMG; see 8/28/2024 Motion Hearing Tr. p. 10 l. 22 – p. 13 l. 19.

> this Agreement does not impliedly effect an estoppel for an accord and satisfaction on them. Releasor understands that this Agreement does not release, waive, or otherwise extinguish any claims Releasees may have against Releasor pertaining to anything and occurring at any time. Releasor agrees that neither this settlement nor the proceedings in Docket No. SOPC-RE-2023-20 shall have any res judicata or collateral estoppel effect in any subsequent proceeding(s) between Releasor and Releasees.
>
> Releasor further agrees and acknowledges:
> ....
> (9) if a court of competent jurisdiction rules that any provision of this Agreement is invalid, illegal, or unenforceable, then the validity, legality and enforceability of the remaining provisions shall not be affected or impaired thereby, and the offending provision shall be redrafted by the parties or otherwise deemed to be replaced by a valid, legal, and enforceable provision that is most nearly coextensive with the offending provision as is consistent with governing law, and this Agreement shall be enforced as thereby amended;"
> ....

Mehalic Aff. ¶5, Ex. C; App. 192, 197-200.

The day following that, the Court also issued an order granting leave for O'Brien's other counsel of record[4] to withdraw, that order also provided:

> "It is further ORDERED that all Scheduling Order deadlines are hereby enlarged by 60 days;

[4] O'Brien's personal counsel representing O'Brien at O'Brien's expense who had filed an Answer on behalf of O'Brien prior to MMG-assigned counsel appearing. That counsel's motion to withdraw and proposed order were not objected to by the Plaintiff. App. 006.

> It is further ORDERED that action on any Motion to Dismiss filed prior to the date of this Order, or within 60 days after the date of this Order, is HEREBY stayed pending (i) entry of an appearance by successor counsel for Defendants, or (ii) expiration of the 60-day period after the date of this Order."

Order dated February 14, 2024; App. 035-036.

Despite the trial court's February 14 order modifying the Scheduling Order and explicitly staying action on any such motion pending the stay, on February 26, 2024, Plaintiff's counsel filed a motion to dismiss Plaintiff's Complaint with prejudice, that motion being granted by order issued March 5, 2024. App. 011-012. The motion[5] was made at a time that O'Brien had no counsel representing their interest in the case, on account of the withdrawal orders issued two weeks earlier. App. 006, 034, 035-036. The motion to dismiss also made no mention of O'Brien's objection to the settlement. App. 011. In response, on March 13, 2024, still without counsel, O'Brien filed a document styled "Defendents (*sic*)... *Pro Se* Affidavit in

[5] Plaintiff's motion to dismiss made no mention of the Rule under which it was presented, but to all appearances, given the filing of the mediator's ADR report (that also made no mention of O'Brien's objection to settlement), the motion seems to have been filed under M.R.Civ.P. 41(a)(1), and acted on as such by the trial court. It should have been presented pursuant to M.R.Civ.P. 41(a)(2), with the trial court to consider it on terms and conditions that the court deemed proper after O'Brien had an opportunity to be heard.

Opposition to Plaintiff's Motion to Dismiss..."[6] App. 038-079. Responsively to that filing, the trial court vacated its dismissal order. *Order* dated March 14, 2024; App. 012.

Thereafter, MMG moved to intervene and in support of Daniels' motion to dismiss, while O'Brien moved to retain the case on the Court's docket. App. 080-200, 026-029. By notice dated July 11, 2024, the matter was set for an evidentiary hearing on August 28, 2024. App. 233. At that hearing, the trial court heard argument from counsel but declined O'Brien's reiterated request to take any testimony on the procedural events leading to the earlier dismissal.[7] The trial court accepted the parties' affidavits and other filings for its analysis. Tr. p. 24, 27-29; App. 014, 017-019.

Six months later, the trial court issued an order granting Daniels' motion to dismiss and denying O'Brien's motion to retain on the docket.

[6] This document, filed by a newly *pro se* litigant, was not signed pursuant to the rigors of an actual affidavit, as it lacked a jurat. The trial court, however, accepted it as a part of the documents to be reviewed and considered with the parties' respective motions, presumably in the nature of an offer of proof, if not an affidavit.

[7] The motions had been scheduled on a testimonial basis, parties and counsel to appear in person, witnesses only to be appearing via Zoom. App. 233. Accordingly, O'Brien appeared in person, with counsel, prepared to testify. Tr. p. 24, l. 19-20, p. 25 l. 1-4, p. 27 l. 1-24; App. 014, 015, 017.

Order dated February 26, 2025; App. 021. In the entirety, the trial court's Order contained the following findings of fact and conclusions of law:

> "....The Court finds that based on the language of the MMG Homeowners and Umbrella policies issued to Defendants expressly permits the insurers (*sic*) the right to settle any claim against the insured.
>
> In this case, the Court further finds that the settlement was reasonable and made in good faith. A settlement is permissible and enforceable even though the Defendants objected to the terms. In addition, the Defendants have not given up any claims they may have against the Plaintiffs (*sic*). Their rights are preserved, and they are free to litigate any claims on their own...."

Id. App. 021.

O'Brien timely moved pursuant to M.R.Civ.P. 52(b) for amended, specific and additional findings of fact and conclusions of law, submitting proposed findings of fact and conclusions of law therewith. App. 030-033, 207-216. The trial court summarily denied that motion. *Order* dated May 5, 2025; App. 022. O'Brien thereupon timely brought this appeal.

II. STATEMENT OF ISSUES PRESENTED FOR APPEAL.

1. Whether the trial court erred in failing to amend or make additional findings of facts pursuant to M.R.Civ.P. 52(b);

2. Whether the trial court's finding that "the settlement was reasonable and made in good faith" had sufficient evidentiary basis;

3. Whether the trial court's refusal to take testimony of O'Brien on the basis of his objection to MMG's settlement of Daniels' claim, and its granting of Daniels' Motion to Dismiss, amounts to a denial of due process;

4. Whether the trial court erred as a matter of law in concluding that the Release fully reserved O'Brien's claim of wrongful use of civil process;

5. Whether the trial court erred in concluding as a matter of law that MMG's right to settle is absolute and without limitation or qualification;

6. Whether the conduct of MMG towards its insured, O'Brien, precludes a finding that it settled Daniels' claim in good faith, specifically:

   a. Whether O'Brien's exclusion from negotiating at or subsequently to mediation, or as to the substance of the Release, amounts to bad faith;

b. Whether MMG's settlement of Daniels' claim over O'Brien's early and repeatedly asserted objection, with knowledge of O'Brien's wrongful use of civil process claim, amounts to bad faith;

c. Whether MMG's abrupt termination of the reservation of rights, and immediate settlement of Daniels' claim over O'Brien's known and repeated objection, without reasonable notice or reassignment to O'Brien of counsel pursuant to MMG's duty to defend, amounts to bad faith; and

d. Whether MMG's refusal or failure to allow O'Brien the opportunity to reject settlement and assume O'Brien's own defense with re-assigned counsel, amounts to bad faith.

III. STATEMENT OF JURISDICTION.

A. Jurisdiction.

The Superior Court's jurisdiction over this matter is based on Title 4 M.R.S. §105.

IV. ARGUMENT.

A. The trial court erred in refusing to make adequate or additional findings of fact pursuant to M.R.Civ.P. 52(b).

1. The trial court's action.

The trial court dismissed Daniels' claim on Daniels' own motion, and then promptly vacated that order on O'Brien's objection made in the O'Brien *pro se* Affidavit. Six months later, the trial court entertained oral argument on Daniels' motion to dismiss, and O'Brien's objection thereto and motion to retain on the docket. Although the matter had been noticed for hearing on a testimonial basis, and O'Brien expressly sought to testify, the trial court declined to hear O'Brien's testimony. Six months after that oral argument, the trial court again dismissed Daniels' claim and denied O'Brien's motion to retain on the docket.

By the time O'Brien got an opportunity for mere oral argument, his MMG-assigned counsel had long since withdrawn, the unilaterally drafted Release had been signed, and settlement funds had been paid to Daniels by MMG, such that the trial court had substantial disincentive to unwind a matter that seemed to have settled. In the wake of that dismissal order, O'Brien timely filed a motion for amended, specific or additional findings

of fact and conclusions of law pursuant to M.R.Civ.P. 52(b), properly supporting that motion with proposed findings and conclusions. The trial court summarily denied that motion.

2. Standard of review.

When a trial court's findings of fact and conclusions of law appear within the court's decision, that court need not grant a request for findings of fact and conclusions of law. *Kleinschmidt v. Morrow*, 642 A.2d 161, 164 (Me. 1994). Denial of such a motion for findings of fact and conclusions of law is not error if the trial court's decision contains findings of fact and conclusions of law, and the party fails to move for specific findings of fact and conclusions of law. *Id*. Here, however, the trial court's factual findings were few in number and conclusory in nature. The court's factual findings consisted of the following:

> - [The subject] policies issued to [O'Brien] expressly permit [MMG] the right to settle any claim against [O'Brien]....
> - The settlement was reasonable and made in good faith....
> - [O'Briens] have not given up any claims they may have against the Plaintiff[].

Order dated February 26, 2025; App. 021.

Because the foregoing facts were conclusory and made without articulation of the foundational basis for the findings, O'Brien timely made

his Rule 52(b) filing. What O'Brien sought by his motion was the trial court's explicit factual findings based on the evidence in the record sufficient to support her dismissal order and to inform O'Brien, Daniels and MMG, and *this* Court, of the factual and legal basis for the trial court's approval of settlement (over O'Brien's objection to the existence, basis and terms of that settlement). *See, e.g.*, *Burrow v. Burrow*, 2014 ME 111, ¶20, 100 A.3d 1104, 1110. O'Brien's action was proper because when the trial court has entered its judgment, or here, an order on motions, and a party has thereafter filed a motion for findings, the trial court must make findings sufficient to support its order. Those findings must be based on evidence in the record, and be sufficient to support the trial court's order and inform the parties of the legal and factual basis for the decision embodied in that order. *Douglas v. Douglas*, 2012 ME 67, ¶26, 43 A.3d 965, 971; *Nadeau v. Nadeau*, 2008 ME 147, ¶33, 957 A.2d 108, 118.

Because the trial court denied O'Brien's motion for amended, specific or additional findings, this Court will review that denial based upon application of the standard of abuse of discretion. *Dalton v. Dalton*, 2014 ME 108, ¶21, 99 A.3d 723, 728. In considering whether the trial court abused its discretion, this Court will limit its review to the factual findings expressly

made by the trial court. *Bolduc v. Getchius,* 2025 ME 41, ¶10, ___ A.3d ___; citing *Sulikowski v. Sulikowski*, 2019 ME 143, ¶11, 216 A.3d 893, 897. This Court will examine the trial court's express factual findings to determine whether they are erroneous, and if not, whether they were sufficient in number to support the trial court's decision. *Id.* In doing so, this Court will not infer findings from the evidence in the record. *Id.; Douglas,* 2012 ME at ¶27. Here, the burden is upon the Appellant O'Brien to demonstrate that the trial court's factual findings are clearly erroneous, that is, either incorrect or insufficient. *O'Halloran v. Oechslie*, 402 A.2d 67, 69; *Interstate Industrial Uniform Rental Service, Inc. v. Couri Pontiac, Inc.*, 355 A.2d 913, 917 (Me. 1976).

3. Insufficient evidence exists in the record to demonstrate that the settlement was reasonable and made in good faith.

    a. The reasonableness prong.

O'Brien respectfully draws this Court's attention to the fact that the record is bereft of materials of evidentiary quality, *i.e.,* the value of the timber allegedly cut, to serve as a predicate to the trial court's finding (or conclusion) that a settlement by the parties to the case existed, and that the settlement was reasonable.

In *Patrons Oxford Insurance Company v. Harris*, 2006 ME 72, 905 A.2d 819, this Court stated that:

> ...The proper test for examining whether a settlement is reasonable and prudent "is what a reasonably prudent person in the insureds' position would have settled for on the *merits* of the claimant's case," taking into account the possibility of the insureds' liability, risk of an adverse verdict, and the damages portion of the claimant's case.

Id. at ¶18, citing *United Services Automobile Association v. Morris,* 154 Ariz. 113, 121, 741 P.2d 246, 254 (1987) (emphasis original in *Harris* opinion); *Cambridge Mutual Fire Insurance Company v. Perry,* 1997 ME 94, ¶11, 692 A.2d 1388, 1391; *Miller v. Shugart*, 316 N.W.2d 729, 735 (Minn. 1982).

Further, the burden of proving reasonableness of the settlement falls on the plaintiff, as claimant, and here, MMG, as the other proponent of the settlement. *Miller, id.* at 736; *United Services,* 154 Ariz. at 121.

The only suggestion of the value of the timber allegedly cut revealed by any of the record materials is that indicated by O'Brien — $1,625.00. O'Brien Aff. ¶12; App. 045-046. In absence of evidence in the record to support the existence of a settlement between the parties, and the substantial terms of that settlement, the trial court's denial of O'Brien's request for amended, specific and additional findings of fact and conclusions of law under M.R.Civ.P. 52(b) was an abuse of discretion, and

the trial court's factual finding of reasonableness of the settlement was clear error.

b. The trial court merely presumed, erroneously, the settlement to have been made in good faith.

The trial court's assessment that the settlement was made in good faith is conclusory, based upon the overall appearance involving a well-reputed mediator known to be skilled not only in mediation, but in insurance litigation matters, including timber trespass, Daniels' experienced litigation counsel, and representatives of MMG, including its coverage counsel, adjusters and assigned counsel to O'Brien, ostensibly representing the interest of MMG's insureds, albeit against a backdrop of the trial court's impression of an unassailably exclusive right to settle Daniels' claim. Against that tapestry, the trial court presumed that good faith and fairness to the insured had pertained. The trial court, in absence of taking testimony[8] at the hearing on the respective motions to dismiss or retain, or more carefully considering all facets of the limited record, simply assumed that the cast of actors involved had produced a result rooted in good faith.

[8] And in fact, specifically declining to entertain such testimony.

Because the trial court declined to take testimony, no deference by this Court to the trial court's "evaluation of the evanescent factors perceptible in the course of testimony" is applicable. *Qualey v. Fulton*, 422 A.2d 773, 776 (Me. 1980). Rather, because the trial court disposed of the matter in absence of an evidentiary hearing on the motions to dismiss or retain, this Court is left with a record demonstrating little more than that O'Brien was not given sufficient opportunity to be heard on his objection to the existence, circumstances and reasonableness of the settlement. The result was a denial of due process to O'Brien.

4. MMG's conduct toward its insured, O'Brien, precludes the trial court finding the settlement to have been made by MMG in good faith.

    a. MMG's conduct was reprehensible.

MMG accepted O'Brien's tender of the defense of Daniels' claim in August 2023. Upon doing so, MMG issued a unilateral Reservation of Rights letter to O'Brien reserving, *inter alia*, its ability to decline indemnification of O'Brien. Fowler Aff. ¶8, Ex. A; App. 096, 097-105. MMG's right to do so is not questioned by O'Brien. *The Traveler's Indemnity Company v. Dingwell*, 884 F.2d 629, 638-39 (1st Cir. 1989); *Patrons Oxford Insurance Company v. Harris*, 2006 ME 72, ¶15, 905 A.2d 819, 825. By so

doing, however, MMG relinquished control of the defense back to O'Brien. *United Services Automobile Association v. Morris,* 154 Ariz. 113, 119, 741 P.2d 246, ___ (1987). Over the succeeding four months leading up to mediation, O'Brien was vigorous in his efforts to control the defense, as his (and his wife, Linda's) email communications reveal. O'Brien Aff. ¶15, Ex. G; App. 047-048, 077-079. MMG *knew* its insured's stance on settlement, and the factual basis for O'Brien's opposition to settlement with Daniels. Knowing what it did, and the likely effect on negotiation in the mediation context, MMG kept its insured isolated in a Zoom virtual breakout room. *Id*. at ¶14; App. 047.

Just days after the unsuccessful mediation, MMG's coverage counsel and Daniels' counsel settled Daniels' claim in flat contravention to O'Brien's wishes and demands, MMG contemporaneously rescinding its Reservation of Rights. O'Brien never agreed to relinquish control of the defense back to MMG; rather, MMG simply seized it, giving its insured notice it had done so, albeit without reasonable opportunity for O'Brien to object or take meaningful action to protect their interests. O'Brien respectfully asserts that there is little meaningful difference between no notice, and notice without reasonable opportunity to react under these

circumstances, or without explication to the insured as to the implications of its rescission of the reservation of rights. *See, e.g., Erie Insurance Exchange v. Lobenthal,* 114 A.3d 832 (Pa.Super. 2015).

The next day, MMG's assigned counsel promptly moved to withdraw (as did O'Brien's private counsel shortly thereafter). App. 006, 034-036. MMG has never assigned to O'Brien successor counsel to represent its insureds through consummation of settlement, or the dismissal, or indeed, even to the event of O'Brien's instant appeal.

By so doing, MMG elevated its own interest in a quick, truncating and cost-effective (to it) settlement, giving little if any consideration to its insured's potent and exculpatory evidence, disregarding its insured's demands not to pay upon a bad faith "strike suit", ignoring fair assessment of value, in contravention of its insured's expressions of concern for their safety, well-being, and the continued viability of their wrongful use of civil process claim against Daniels. O'Brien Aff. ¶¶ 6, 7, 12, 13, Ex. G; App. 043-047, 077-079. MMG even went back on the offer to its insured to accept posting of a bond by its insureds with an agreement to indemnify MMG so as to release defense of the claim back to O'Brien. O'Brien Aff. ¶10, App. 044. When O'Brien agreed, MMG then declined to follow through,

consummating its settlement with Daniels instead. *Id.* Thereafter, MMG never offered O'Brien an opportunity to contribute to or approve of the substance of the Release.

Collectively, MMG's actions directed at its insured evince a cynical arrogance anchored in a mistaken impression of the invincible character of its discretion to settle, and its ability to arbitrarily seize back from its insured the control of defense over its insured's objection. In light of this behavior, the trial court cannot have found MMG's settlement of Daniels' claim to have been made in good faith.

b. MMG failed to consider other courses of action.

In the face of its insured, O'Brien's, forceful objection to settlement with Daniels, MMG had other courses of action available to it. First, MMG could have rested upon its relinquishment of defense of the case to O'Brien, and initiated a declaratory judgment action on the scope of its right to settle under the policy; second, MMG could have relinquished its reservation of rights and acknowledged coverage upon a claim which it tacitly acknowledged was easily within its policy limits and substantively defendable; third, MMG could have sought court approval of the proposed settlement on its merits, rather than simply working with Daniels to

steamroll it through over O'Brien's objection. *See, e.g., Berkley National Insurance Company v. Atlantic-Newport Realty LLC,* 93 F.4th 543, 551 (1st Cir. 2024).

B. <u>The unilaterally created and executed Release failed to fully protect O'Brien or to provide to O'Brien the intended benefit of the bargain between Daniels and MMG</u>.

1. <u>Standard of review</u>.

O'Brien respectfully suggests that the trial court's conclusion in its order to the effect that the language of the Release fully preserved O'Brien's claims (including the wrongful use of civil proceedings claim) is a question of law.

Broadly put within the context of this case, in dismissing Daniels' claim over O'Brien's objection based on a (i) purported settlement reached by MMG with Daniels, over O'Brien's objection known to MMG, and (ii) the use of a unilaterally drawn and executed Release, did the trial court properly apply judicially developed principles to sufficient facts in the record to conclude that, as a matter of law, the language of the Release fully protected O'Brien's interest and allowed O'Brien to pursue any and all claims against Daniels, including, in particular, a wrongful use of civil process claim? As a question of law, this is to be reviewed *de novo* by this

Court. *Interstate Industrial*, 355 A.2d at 917 (holding open to corrective judicial review the trial court's conclusions resulting from application of general legal principles to the facts of the case).

2. The Release.

The Release broadly purports to "reserve and retain any and all [O'Brien's] claims, causes of action, rights, remedies and defenses, whether at law or in equity...." Mehalic Aff. ¶5, Ex. C; App. 192, 197-200. While the Release on its face also precludes Daniels from asserting *res judicata* or collateral estoppel as defenses to any future claim brought by O'Brien, the assurance is cold comfort to O'Brien, as these doctrines could not, in any event, be successfully asserted in the context of this case. Therefore, the inclusion of that language within the Release gains O'Brien nothing.

a. The *res judicata* and collateral estoppel doctrines cannot apply to O'Brien's wrongful use of civil process claim against Daniels.

The doctrine of *res judicata* (or claim preclusion) asserted to bar relitigation of a claim involves three elements: (i) a prior final judgment by a court of competent jurisdiction; (ii) identity of claims; and (iii) identity of parties. *Machias Savings Bank v. Ramsdell*, 1997 ME 20, ¶11, 689 A.2d 595, 599. The related doctrine of collateral estoppel (or issue preclusion)

involves elements of: (i) a prior final judgment entered determining a particular factual issue; (ii) in a proceeding in which the party against whom the doctrine is sought to be applied had a fair opportunity and an incentive to litigate; and (iii) the identical factual issue in that proceeding. *Id.* at 599*; Macomber v. MacQuinn-Tweedie*, 2003 ME 121, ¶22, 834 A.2d 131, 138-39. Neither doctrine, in any event, could be successfully applied by Daniels because the dismissal order is not a final judgment on either Daniels' timber trespass claim, or O'Brien's wrongful use of civil process claim. Similarly, the dismissal order is not determinative as to any issue as to whether, for example, O'Brien wrongfully cut Daniels' trees, or Daniels asserted a trespass claim knowing she did so as a wrongful use of civil process. Thus, for O'Brien, these provisions of the unilateral Release were an empty sack, availing them nothing.

As to that portion of the Release stating that it "does not release, waive or otherwise extinguish any claims that [O'Brien] may have against [Daniels] pertaining to anything and occurring at any time..." that instrument, while perhaps contractually insulating O'Brien from assertion of certain defenses, does not and cannot excuse O'Brien, as the potential plaintiff in the future wrongful use of civil proceedings claim, from

meeting his burden of proof as to each element of that tort. As plaintiff, he would have that burden to affirmatively prove each element of that tort. The trial court's dismissal with prejudice, and the Release, effectively preclude him from doing so before his claim is even filed because he will be unable to meet one among its essential elements.

b. Elements of a wrongful use of civil proceedings claim.

This Court has considered the elements of the tort of wrongful use of civil proceedings in *Pepperell Trust Company v. Mountain Heir Financial Corp.*, 1998 ME 46, ¶13, 708 A.2d 651, 655. As a prefatory matter, this Court then held that such a claim, or related claim of malicious prosecution, cannot be brought as a counterclaim in the offending proceeding. *Id.* For that reason, O'Brien properly eschewed initiation of that claim in *this* case. The *Mountain Heir* court then set forth the elements of a wrongful use of civil proceedings claim:

> The tort of wrongful use of civil proceedings exists where (1) one initiates, continues, or procures civil proceedings without probable cause, (2) with a primary purpose other than that of securing the proper adjudication of the claim upon which the proceedings are based, and (3) the proceedings have terminated in favor of the person against whom they are brought.

Id.; RESTATEMENT (SECOND) OF TORTS §674.

c. The trial court's dismissal with prejudice is not a favorable determination as to O'Brien, and so does not preserve O'Brien's claim.

To be successful, a plaintiff, including O'Brien in any future proceeding asserting such a claim against Daniels, must satisfy each of the foregoing elements. The third element, "favorable termination of the offending proceeding" is an essential element of the claim. *Id*. at ¶16; *Federal Deposit Insurance Corporation v. S. Prawer & Co.,* 829 F. Supp. 439, 444 n.1. (D. Me. 1993); *Nadeau v. State*, 395 A.2d 107, 116 (Me. 1978). The issue of what constitutes a favorable determination is a question of law. *Palmer Development Corporation v. Gordon*, 1999 ME 22, ¶4, 723 A.2d 881, 883.

Palmer Development involved the successful use of a statute of limitations defense to dismiss the offending underlying claim. Analyzing whether such a dismissal satisfied the favorable termination prong of a wrongful use of civil proceedings claim, the court looked to the standard set by an earlier California case[9] that termination of an action on statute of limitations grounds "does not reflect on the *merits* of the underlying claim and cannot be the basis of a favorable termination in an action for malicious prosecution." *Id.* at ¶5 (emphasis supplied). Explaining, the Law

[9] *Lackner v. LaCroix*, 25 Cal.3d. 747, 159 Cal.Rptr. 693, 602 P.2d 393 (1979).

Court stated that a dismissal based on the asserted statute of limitations defense "is merely procedural or technical in nature, and is 'in no way dependent on nor reflective of the merits...in the underlying action.'" *Id.* at ¶11.[10]

As to voluntary withdrawal, or dismissal of the type now presented in *this* case, the Court stated:

> Malicious prosecution is a remedy for wrongs done to innocent persons, not a means to afford the guilty a bonus for failure of justice. *Gedratis v. Carroll*, 247 Mich. 141, 145, 225 N.W. 625, 626 (1929). To ensure that the guilty person is not awarded a bonus there is a requirement in the malicious prosecution action that the proceeding has terminated favorably to the plaintiff, and that favorable termination be on the merits, or at least reflect on the merits, of the action. *See, Bickford v. Lantay*, 394 A.2d 281, 283-84 (Me. 1978). This requirement carries over to the wrongful use of civil proceedings for the same reason. Society does not want litigants who committed the acts of which they are accused, but who were able to escape liability on a "technicality" or procedural device, to turn around and collect damages against their accuser. This reason justifies a requirement that the favorable termination of the underlying proceeding be *on the merits* or, in some way, reflect *on the merits*.

Palmer Development, 1999 ME at ¶10 (emphasis supplied).

The indispensable character of this element precludes, for O'Brien, the efficacy of this Release to preserve his wrongful use of civil proceedings

[10] The *Palmer Development* opinion set forth a number of cases from jurisdictions following the *Lackner* rationale. *See*, *id*. at ¶7.

claim against Daniels; that claim is the lynchpin of his objection to the settlement of what he maintains is a claim conceived, brought, and settled, in bad faith retaliation.

For the foregoing reasons, the trial court erred in concluding that, as a matter of law, the Release fully reserved O'Brien's claim of wrongful use of civil process by Daniels.

C. The trial court erred by declining to take O'Brien's testimony on the basis of his objection to the purported settlement.

1. Standard of review.

O'Brien asserts he was denied due process. The Law Court reviews *de novo* "whether an individual was afforded procedural due process...the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mitchell v. Krieckhaus*, 2017 ME 70, ¶¶ 16, 20, 158 A.3d 951, 956-57 (issue of manner of calculating child support omitted from the parties' settlement agreement negotiations).

2. The trial court erred in not taking testimony.

Confronted by O'Brien's vehement objection to the trial court's tacit approval of the Daniels—MMG settlement by a dismissal order entered on a motion filed by Daniels in flat contravention of the order staying action

on such a motion, and permitting withdrawal by O'Brien's counsel, the trial court vacated the initial dismissal. *Order* dated March 5, 2024; App. 011-012. At the hearing noticed thereafter on an evidentiary basis, O'Brien appeared ready and expecting to testify as to the fact and basis for his objection. Tr. p. 24, 27 – 29; App. 014, 017-019. Through counsel, he urged the trial court for the opportunity to testify as to the manner in which the Daniels—MMG settlement was reached, that he did not agree that it rightly existed or that it was reasonable, or with the substance of the unilateral Release, or the trial court's dismissal of the Daniels Complaint. *Id.* While expressing empathy, the trial court refused to take testimony from either party, and in so doing, deprived O'Brien of due process. *Id.*

As this Court has previously stated, a trial court "may not summarily enforce a purported settlement agreement if there is a genuinely disputed question of material fact regarding the existence or terms of that agreement" and must instead "take evidence to resolve the contested issues of fact." *Doe v. Lozano,* 2022 ME 33, ¶21, 276 A.3d 44, 51; *quoting, Malave v. Carney Hospital*, 170 F.3d 217, 220-22 (1st Cir. 1999).

In *Lozano*, the plaintiff sought to enforce a settlement agreement which the trial court incorporated into its judgment over the defendant's

objection based upon the circumstances of the formulation of the settlement agreement, and declined to take testimony to support the Court's action, despite the defendant's request, *as here*. The *Lozano* court found that the trial court had improperly reached conclusions on questions of fact, resulting in a denial of the defendant's rights to due process. As O'Brien does before this Court, the defendant in *Lozano* disputed the existence of an enforceable settlement reached outside the court's presence. *Id.* at ¶18.

Here, as in *Lozano*, O'Brien disputes the validity of the agreement's formation, and, additionally, the terms of that agreement. This is so because O'Brien maintains that the payment of $25,000.00 reflected by the Release, in the face of the Maine Forestry Service's evaluation of $1,625.00 timber value, to be an exorbitant and unreasonable windfall to Daniels. More so, because the claim was filed in bad faith retaliation for, *inter alia*, O'Brien's reporting of her dogs repeatedly trespassing on O'Brien's property.

In deciding *Lozano*, the Law Court plainly intended to apprise trial courts that "if a party raises a factual issue that goes to the validity of a settlement agreement's formation, an evidentiary hearing will ordinarily be

necessary on a motion to enforce the settlement, even if the written agreement otherwise appears to be a fully integrated contract."[11] On the basis of *Lozano*, *Mitchell*, and the cases cited therein, O'Brien has been deprived due process by the trial court's refusal to take testimony, and accordingly, this case should be remanded to the trial court for the taking of testimony on the existence of, basis for, reasonableness and terms of the settlement.

D. The trial court erred in concluding as a matter of law that MMG's right to settle is absolute and without limitation or qualification.

1. The policy language comprising the right to settle.

The trial court's order states: "The Court finds that based on the language of the MMG Homeowners and Umbrella policies issued to [O'Brien] expressly permits the insurers the right to settle any claim against the insured." *Order* dated February 26, 2025; App. 021.

Within the Homeowners' policy issued by MMG to O'Brien, the policy provision setting forth the so-called "right to settle" clause provided as follows:

[11] While the Release is a species of contract, O'Brien never approved or signed it, nor was he provided an opportunity to negotiate its terms, or even see it prior to the trial court's initial dismissal order.

SECTION II – LIABILITY COVERAGES

A. Coverage E – Personal Liability

If a claim is made or a suit is brought against an "insured" for damages because of "bodily injury" or "property damage" caused by an "occurrence" to which this coverage applies, we will:

1. Pay up to our limit of liability for the damages for which an "insured" is legally liable. Damages include prejudgment interest awarded against an "insured"; and
2. Provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent. We may investigate and settle any claim or suit that we decide is appropriate. Our duty to settle or defend ends when our limit of liability for the "occurrence" has been exhausted by payment of a judgment or settlement.

Tawfall Aff. ¶4, Ex. A p. 16 of 22; App. 106, 128.

Ostensibly, the trial court relied on that policy language "[w]e may[12] investigate and settle any claim or suit that *we decide is appropriate*." *Id*.

[12] The verb "may" is susceptible to at least two different meanings. One connotes possibility, while the other implies permission. The policy does not define which meaning is intended within the clause; the notion of exclusivity of the exercise is not suggested by both those meanings of "may". So, which meaning of "may" is necessarily used here?

(emphasis supplied). This "right to settle" clause is embedded within that portion of MMG's policy embodying its duty to defend.[13]

2. MMG's duty to defend.

The duty to defend is broad. *Howe v. MMG Insurance Company*, 2014 ME 78, ¶6, 95 A.3d 79, 81. Once a complaint against the insured has been filed and is tendered to the insurer for defense, "[i]f the allegations...are within the risks insured against and there is any potential basis for recovery, the insurer must defend the insurer regardless of the actual facts on which the insured's ultimate liability may be based." *Patrons Oxford Mutual Insurance Company v. Garcia,* 1998 ME 38, ¶6, 707 A.2d 384, 385, *quoting*, *Gibson v. Farm Family Mutual Insurance Company*, 673 A.2d 1350, 1352 (Me. 1996). Where there is any possible legal or factual basis for payment under the policy, the insurer's duty to defend must be decided summarily in favor of the insured. *Id*. With that responsibility to defend,

[13] This is one formulation of "right to settle" clauses that have taken various forms with similar construction. *See*, *Marginian v. Allstate Insurance Company,* 18 Ohio St.3d 345, 346, 481 N.E.2d 600, 602 (1985) ("may settle any claim or suit if we feel this is appropriate"); *New Hampshire Insurance Company v. Ridout Roofing Company, Inc.,* 68 Cal.App.4th 495, 501, 80 Cal.Rptr.2d 286 (1998) ("may investigate and settle any claim or 'suit' at our discretion"); *Western Polymer Technology, Inc. v. Reliance Insurance Company,* 32 Cal.App.4th 14, 19, 38 Cal.Rptr.2d 78 (1995) ("may make such investigation and settlement of any claim or suit as it deems expedient"); *Cash v. State Farm Mutual Automobile Insurance Company,* 137 N.C.App. 192, 203, 528 S.E.2d 372, 379 (2000) (insurer may settle or defend any suit "as it deems appropriate").

however, comes the ability to control the defense of the claim. *Shuster v. South Broward Hospital District Physicians' Professional Liability Insurance Trust,* 591 So.2d 174, 176-77 (Fla. 1992). As noted *supra*, however, once the insurer accepts tender of defense from the insured, but subject to a reservation of rights to later contest the duty to indemnify, as MMG did here, the insurer cedes control of the defense back to the insured. *Patrons Oxford Insurance Company v. Harris,* 2006 ME 72, ¶12, 905 A.2d 819, 828.

The trial court read the "right to settle" provision within the Homeowner policy issued to O'Brien by MMG to be *absolute* in its scope. The trial court's conclusion is *not* correct within the context of this case, as the developing case law shows.

3. Case precedent supporting the conclusion that MMG's right to settle is not absolute.

In a case involving a professional malpractice claim asserted against a podiatrist insured under a policy using the "deems expedient" formulation of right to settle clause, the insurer settled a claim over the insured's objection, relying on the "deems expedient" provision. *Bleday v. OUM Group,* 435 Pa. Super. Ct. 395, 399, 645 A.2d 1358, 1360 (1994). Responding to the insured's argument that, despite the "deems expedient" language, an

insurer has a duty to act in good faith in the handling of its claims, including settlement of claims within policy limits, the *Bleday* court observed:

> We conclude that, although judicial deference must be given to the decision of an insurance company to settle a claim *within* the policy limits, a claim for bad faith may, in certain limited circumstances, be asserted against the insurance company notwithstanding a "deems expedient" provision. A "deems expedient" provision in an insurance contract cannot be interpreted to convey to an insurance company an absolute right to settle a claim within the policy limits if such a settlement was contrary to the intent and expectation of the parties.[14]

Id. at 1361 (emphasis original).

As to that facet of the case involving settlement without the insured's consent, the court stated "the right given by contracts still requires that the insurer make an investigation, consider the desires or instructions of the insured and that the settlement not be made in bad faith." *Mitchum v. Hudgens,* 533 So.2d 194, 197 (Ala. 1988), (*quoting* 7C J. Appleman, Insurance Law and Practice, §4711 (3d ed. 1983)).

[14] One might ask — "What parties?" If MMG is deemed a party, then certainly the settlement was within the intent and expectation of MMG and Daniels; but it was certainly *not* within the intent or expectation of the party O'Brien.

The *Bleday* court cited to the *Shuster* opinion *supra,* identifying two specific instances where an insurer's discretionary settlement authority may necessarily be limited. Prefatorily, the *Shuster* court observed that "the discretion granted by a 'deems expedient' provision is not absolute." *Shuster*, 591 So.2d at 177; *Bleday*, 645 A.2d at 403. For example, a "deems expedient" clause will not protect an insurer who, in bad faith, indiscriminately settles with one or more of multiple claimants for the full policy limits, thereby leaving exposed the insured to an excess judgment from remaining claimants. *Id*.

Second, as in O'Brien's situation now before *this* Court, wherein an insurer acts in bad faith and without regard to the insured's interests (and unequivocally stated objectives) by settling a claim in a manner that bars the insured's counterclaim, the insurer's discretion cannot be held to be absolute. *Id*. In this context, when an insured has surrendered all control over the handling of a claim to the insurer, the insurer assumes "a duty to exercise such control and make such decisions in good faith and with due regard for the interests of the insured." *Id*. at 176, citing *Boston Old Colony Insurance Company v. Gutierrez*, 386 So.2d 783, 785 (Fla. 1980). This is so

because the duty of reasonable performance under the policy is distinct from the duty to defend.

Such prejudicial action toward its insured's interests was the basis of the court's holding in *Barney v. Aetna Casualty and Surety Company*, 185 Cal.App.3d 966, 230 Cal.Rptr. 215 (1986). In *Barney*, the court held that a "deems expedient" right to settle clause did not excuse the insurer from protecting the insured's interest in its counterclaim. In that case, the insured was involved in a vehicle collision, sustaining catastrophic injuries. As here, the insured advised her insurer of her claim. The insurer thereafter caused the other driver's claim to be settled and dismissed with prejudice without Barney's consent or knowledge. Barney's subsequently-filed claim as to her own injuries was dismissed on the basis that the dismissal of the other driver's action with prejudice operated as a retraxit barring Barney's own claim.

The subsequent litigation between Barney and her insurer established that Aetna had failed in its duty not to knowingly use its discretionary power under the policy to effectuate settlement with the other driver in a manner injurious to its insured's claim. *Id*. at 976-77. In so ruling, the court observed:

> An insured reasonably expects that the insurer, in using the authority granted under the policy, will not knowingly effect a settlement which works to the detriment of the insured. The insured can hardly be said to have received any benefit from the policy of insurance if that benefit is totally voided by a countervailing detriment imposed upon him by the insurer without his consent.
>
> ....
>
> The effect upon the insured and insured's reasonable expectations is the same whether the detriment is in the form of liability in excess of the policy limits, as in the more typical cases, or in the form of derogation of a collateral right, as in the instant case. The derogation of plaintiff's collateral right to counterclaim against [the other driver] deprived her of the policy's benefits as surely as if Aetna unreasonably had refused to indemnify, defend or settle at all; although plaintiff was relieved of $600.00 potential liability, she was at the same time denied all opportunity for redress of her own substantially greater injuries. Thus by virtue of its fiduciary relationship, Aetna had a duty not to knowingly use its discretionary power under the policy to effect a settlement in a manner injurious of plaintiff's rights.

Id. at 977-78.

As one court put it:

> An insurer cannot unreasonably refuse to settle within policy limits and thus gamble with its insured's money to further its own interests. Similarly, an insurer should not further its own interests by settling a claim within policy limits through the use of the insured's money without some form of consent by the insured.... [U]nder some circumstances a settlement arrangement by the insurer may adversely affect the insured's interests and constitute a breach of the duty of good faith.

Ridout Roofing, 68 Cal.App.4th at 503-04 (citations omitted).

4. MMG's exercise of a right to settle is subject to the implied covenant of good faith and fair dealing.

It is a longstanding principle that an implied covenant of good faith and fair dealing applies in contracts, including insurance policies. *Linscott v. State Farm Mutual Automobile Insurance Company,* 368 A.2d 1161, 1163 (Me. 1977). The notion that it should continue to apply in the context of the exercise of an insurer's discretion to settle is unsurprising. It is precisely what the reasonable expectation of an insured, like O'Brien, would be. The duty of adherence to this principle, and to which MMG is subject, "is not the requirement mandated by the terms of the policy itself – to defend, settle or pay. Rather, it is the obligation, deemed to be imposed by the law, under which the insurer must act fairly and in good faith in discharging its contractual responsibilities." *Security Officers Service, Inc. v. State Compensation Insurance Fund,* 17 Cal.App.4th 887, 894, 21 Cal.Rptr.2d 653, 656 (1993).

The covenant of good faith and fair dealing finds *particular* application in situations where one party is invested with a discretionary power affecting the rights of another. Thus, the insurer, when determining whether to settle a claim, must give at least as much consideration to the

welfare of its insured as it gives to its own interests. *Id.* at 657 (citations and interior quotes omitted). Put another way, when resolution of a claim may adversely affect the policy holder in the enjoyment of the policy's benefits and purposes, the insurer becomes obligated, by the implied covenant, to pursue defense and settlement with due, good faith regard to the insured's interest. *Id.*; 17 Cal.App.4th at 895; *accord*, *Western Polymer Technology, Inc. v. Reliance Insurance Company*, 32 Cal.App.4th 14, 38 Cal.Rptr.2d 78 (1995). In as much as these principles pertain and govern in the context of an insurer defending unconditionally, they are no less germane in the context of the issuance of a reservation of rights letter to the insured as in the case before *this* Court.

It is in that context that the Supreme Court of Texas observed that a unilateral reservation of rights letter (as for example, of the ilk that O'Brien received) cannot create rights not contained in the insurance policy. *Texas Association of Counties County Government Risk Management Pool v. Matagorda County,* 52 S.W.3d 128 (2000) (addressing an insurer's attempt to recover defense costs in the context of reservation of rights letters). The Texas court concluded that the insurer's effort to graft into its policy relationship with its insured a right to such reimbursement through the use

of its unilateral reservation of rights letter was not permissible. *Id.* Here, MMG attempts to do very much the same thing in its treatment of the right to control the defense, lawfully accepting it from O'Brien through the use of the reservation of rights letter received by O'Brien in August of 2023, and then unilaterally, unfairly wresting it from O'Brien on January 10, 2024, by abrupt recission of the reservation of rights. Mehalic Aff. ¶3, Ex. A; App. 192, 193-194. Neither the policy nor the reservation of rights letter reserves the right for the insurer to unilaterally defeat the right of the insured to participate in the control of the defense once the insurer has vested the insured with that right by issuing the reservation of rights. This is *not* a case of waiver by O'Brien, as O'Brien did not intentionally relinquish the known right of such participation in the defense of Daniels' claim once confirmed by issuance of MMG's reservation of rights letter. *Interstate Industrial,* 355 A.2d at 919.

By its conduct in plucking from O'Brien the right to control the defense, MMG essentially writes an after-the-fact policy provision that it can either relinquish or seize control of the litigation at any time, back and

forth, without regard to its insured's rights, interests or wishes.[15] *See also*, *Commerce & Industry Ins. Co. v. North Shore Towers Management Inc.*, 162 Misc.2d 778, 617 N.Y.S.2d 632 (1994) (notion that an insurer may be held liable for the breach of its duty of "good faith" in defending and settling claims over which it exercises exclusive control on behalf of its insured is an enduring principle, well settled in this state's jurisprudence) *quoting*, *Pavia v. State Farm Mutual Automobile Insurance Company,* 82 N.Y.2d 445, 452, 626 N.E.2d 24, 605 N.Y.S.2d 208 (1993). What MMG did is arbitrary, wholly self-serving and inconsistent with observance of the principle behind the covenant of good faith and fair dealing.

[15] These events took place contemporaneously with O'Brien's MMG-assigned defense counsel withdrawing due in part to O'Brien's opposition to the MMG-sponsored settlement. O'Brien had expressed directly to MMG's adjuster representative and MMG's assigned defense counsel their extreme trepidation about the divided loyalties inherent and appearing as the mediation proceeding loomed. O'Brien Aff. ¶15, Ex. G; App. 047-048, 077-079. This same dynamic featured in the discussion of the seminal opinion *San Diego Federal Credit Union v. Cumis Insurance Society, Inc.*, 162 Cal.App.3d 358, 208 Cal.Rptr. 494 (1984), wherein the Court observed:

> The Carrier is required to hire independent counsel because an attorney in actual trial would be tempted to develop the facts to help his real client, [the insurer], as opposed to the insured, for whom he will never likely work again. In such a case as this, the insured is placed in an impossible position; on the one hand the Carrier says it will happily defend him and on the other hand it says it may dispute paying any judgment, but trust us. The dictum in Gray flies in the face of reality of insurance defense work. Insurance companies hire relatively few lawyers and concentrate their business. A lawyer who does not look out for the Carrier's best interest might soon find himself out of work.....Although issues of coverage under the policy are not actually litigated in the third-party suit, this does not detract from the force of these opposing interests as they operate on the attorney selected by the insurer, who has a dual agency status. *Id.* at 364-65 (citations omitted).

Taken together, the foregoing cases reject the notion that "right to settle" clauses in contracts of liability insurance, of whatever formulation, are absolute in their nature.[16] The trial court's conclusion, or assumption, that MMG's discretion was absolute cannot be sustained in the context of MMG's treatment of its insured, O'Brien, whose objection to the settlement was well-founded, and vigorously and repeatedly communicated.

V. CONCLUSION AND PRAYER.

O'Brien respectfully requests this Court to conclude that the trial court abused its discretion by refusing to grant O'Brien's motion for amended, specific and additional findings of fact under M.R.Civ.P. 52(b), and that in so doing, it clearly erred in making and relying on erroneous and inadequate factual findings as the basis for tacitly approving the settlement, and dismissing Daniels' claim over O'Brien's objection. O'Brien further requests this Court to determine whether the trial court's conclusion that the Release fully and effectively reserves to O'Brien O'Brien's wrongful use of civil process claim against Daniels is correct as a matter of law. O'Brien further asks this Court to assign error as to the trial

[16] See, generally, 18 A.L.R.5th 474 (1994), *Liability of insurer to insured for settling third-party claim within policy limits resulting in detriment to insured*. (Epstein, J.D.)

court's factual findings as to the existence and reasonableness of the settlement between MMG and Daniels. Finally, in furtherance of conservation of judicial and party resources, O'Brien requests that, in aid of the trial court's analysis, that this Court determine whether MMG's discretion in exercising the right to settle clause contained in the duty to defend provision of its policy is absolute, and if not, whether MMG breached its duty of reasonable performance to its insured, O'Brien.

Date: _____ *__/s/ Jens-Peter W. Bergen, Esq.__*

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CERTIFICATE OF SERVICE

I, Jens-Peter W. Bergen, Esq., Attorney for Defendant-Appellants Patrick O'Brien and Linda Labas, hereby certify that on _____, 2025, I caused two copies of this Appellants' Brief to be delivered in-hand or by first-class U.S. mail, postage prepaid, and by email to the following:

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