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)

REPLY BRIEF OF APPELLANTS

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APPELLANTS' REPLY BRIEF

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I. REBUTTAL TO FACTS ASSERTED IN PLAINTIFF-APPELLEE'S AND INTERVENOR'S BRIEFS.

A. Defendants-Appellants' rebuttal to Plaintiff-Appellee's statement of facts and procedural history.

Defendants-Appellants Patrick O'Brien and Linda Labas (hereinafter collectively "O'Brien") respectfully offer this rebuttal, or clarification, to the factual recitation by Plaintiff-Appellee Carissa Daniels (hereinafter "Daniels") in her Brief. Daniels twice identifies Paul Douglass, Esq., as independent counsel for O'Brien. That is incorrect. Attorney Paul Douglass was counsel assigned by Intervenor MMG Insurance Company (hereinafter "MMG") for O'Brien. *Fowler Afft*. ¶9; App. 096. At the outset of the case, O'Brien retained Theodore Small, Esq., as independent counsel, and who, contrary to Daniels' statement in her Brief, was *not* present at the mediation. *Registry of Actions*; App. 005; *Fowler Afft*. ¶11; App. 096. Contrary to Daniels' identification of Matthew Mehalic, Esq., as O'Brien's independent counsel, Attorney Mehalic was, and is, MMG's coverage counsel and counsel of record as Intervenor in this proceeding. *Mehalic Afft*. ¶2, Exh. A; App. 192-193. Contrary to Daniels' statement that "terms and conditions of a complete and final resolution of all actions brought by Daniels" was reached at mediation, in fact, the case did not settle at

mediation. *Fowler Afft*. ¶12; App. 096. Finally, Daniels asserts in her Brief that "there was no contractual or other relationship between Daniels and MMG Insurance." To the contrary, Daniels was a party and signatory to the Settlement, Release and Indemnification Agreement (hereinafter "the Release"), and MMG caused the Release to be prepared and participated therein as a releasee. O'Brien was neither signatory to the Release, nor even afforded an opportunity to see it before its execution. *Mehalic Afft*. ¶5, Exh. C; App. 192, 197-200; *Transcript* ("Trans.") at p. 25; App. 015.

B. <u>Defendants-Appellants' rebuttal as to Intervenor MMG Insurance Co.'s statement of facts and procedural history</u>.

O'Brien respectfully offers this rebuttal, or clarification, to the factual recitation by MMG in its Brief. The January 10, 2024 rescission of the reservation of rights by MMG unequivocally stated its intention to settle. *Mehalic Afft*. ¶3, Exh. A; App. 192, 193. This articulation is made not as a mere possibility based on an unknown number, but a certainty allowing for MMG to "obtain releases of liability from Ms. Daniels....". Within twenty-four hours, settlement was confirmed between MMG and Daniels without reference to O'Brien, albeit with acknowledgment of O'Brien's fervent objection. *Id*.; App. 193-196.

The Release Daniels ultimately signed was not specific as to when payment was to be tendered, but the Mediator provided that payment was to be made within thirty days of defense counsel's receipt of the executed Release, thus, necessarily after Daniels' execution on February 13, 2024. *Id*., Exh. B, C; App. 195, 199. Therefore, MMG's duty to defend, and to maintain assigned counsel for the benefit of O'Brien, endured until some point thereafter. *Tawfall Afft*. ¶¶ 4, 6, Exh. A, B; App. 106, 128, 174. Daniels' Motion to Dismiss was signed February 26, 2024, by which date payment had presumably been made. App. 011. O'Brien was neither afforded the customary M.R.Civ.P. 7(c) twenty-one day period to object provided at the base of the motion, nor an opportunity to be heard. *Registry of Actions*; App. 006.

MMG never reassigned counsel to O'Brien in the wake of MMG-assigned counsel Paul Douglass's withdrawal. *O'Brien Afft*. ¶1; App. 038-039. Nowhere in the record is there evidence that erstwhile assigned counsel acted in furtherance of O'Brien's defense at any time subsequent to MMG's termination of the reservation of rights letter on January 10, 2024, through the trial Court's issuance of its withdrawal order on February 11, 2024. App. 193. Thus, MMG demonstrably, indisputably left its insured

utterly without assigned counsel after February 11, 2024, and arguably from significantly prior to that date, to the present.

II. ARGUMENT.

A. Standard of review.

Defendants-Appellants concur in MMG's articulation of the standards of review pertaining to the issues raised. Likewise, MMG would appear to concur in O'Brien's characterization of the applicable standards of review as to the issues presented.

B. The trial Court's Order for dismissal with prejudice should not be affirmed.

MMG opens its argument by oversimplifying the circumstances presented in this case. Absent from its articulation of "the simplest terms" O'Brien's appeal presents are the unstated facts that O'Brien did not have the full, contracted-for benefit of assigned counsel for which they had bargained with MMG by paying premiums, or proper opportunity to be heard, either as to the substance of the Release, or upon Daniels' Motion to Dismiss before the trial Court's dismissal order.

Drawing this Court's attention to M.R.Civ.P. 41(a)(2), Daniels argues that because Daniels sought to dismiss her claim with prejudice, the trial

Court should have granted her Motion "without much consideration at all...." *MMG Brief* at p.19.

The problem with MMG's argument is that the Rule explicitly prohibits dismissal "at the plaintiff's instance save upon order of the court *and upon such terms and conditions as the court deems proper*." M.R.Civ.P. 41(a)(2) (emphasis supplied). O'Brien posits: how can the trial Court determine "such terms and conditions as the court deems proper" without O'Brien being afforded an opportunity to be heard on either the substance of the Release, or Daniels' Motion to Dismiss? The essence of justice is the opportunity to be heard – exactly what O'Brien was denied by the process employed by MMG's and Daniels' respective counsel.

Neither Daniels nor MMG brought to the trial Court's attention within the body of Daniels' Motion to Dismiss the fact that O'Brien objected to dismissal. The notice at the base of Daniels' Motion made pursuant to M.R.Civ.P. 7(c) was made of no account, insofar as O'Brien was not given twenty-one days to file a formal objection and be heard.[1]

[1] Neither does the Motion contain a certificate of service evidencing service on O'Brien. *See*, M.R.Civ.P. 5(a).

Daniels makes much of the fact that her only choice, in light of her decision not to pursue her claim, was acceptance of MMG's offer. MMG's argument that O'Brien is forcing Daniels to pursue a timber trespass lawsuit that she does not want to now, or that O'Brien is doing so to "facilitate" a claim for wrongful use of civil proceedings, is a misrepresentation in order to redefine the situation. That is simply not so; Daniels could have eschewed MMG's proffered settlement while preserving her claim by dismissal *without* prejudice. Either way, an appropriate explanation to the trial Court should have been made, insufficient explanation for the need to take a dismissal being among factors examined by courts in determining whether to grant a Rule 41(a)(2) motion. *Doe v. Urohealth Systems, Inc.*, 216 F.3d 157, 160 (1st Cir. 2000).

Daniels mischaracterizes O'Brien's objective in preventing dismissal upon the basis sought and obtained by Daniels. O'Brien has steadfastly objected to the effect of the trial Court's dismissal as precluding O'Brien's later assertion of a wrongful use of civil proceedings claim; while that is important to O'Brien, it is incidental. The point for O'Brien is to have the actual facts play out, giving O'Brien an opportunity to be heard, whereupon Daniels' claim, in full sunlight, would be shown for what it is

— a strike suit grounded in malicious and retaliatory intent. Only then does O'Brien's claim for wrongful use of civil proceedings thereupon follow.

In confusing O'Brien's actual primary objective, being heard on the merits, with the anticipated effect of attaining that objective, MMG characterizes O'Brien's argument against dismissal as one intended simply to preserve a wrongful use of civil proceedings claim, calling it nonsensical. MMG supports this characterization with two hypotheticals that are completely inapt. The wrongs imagined in these two hypotheticals occur, in MMG's account, *after* initiation of suit. Rather, O'Brien seeks to have Daniels called to account for her tort committed by initiation of that suit in bad faith, prior to the imagined court order. O'Brien seeks to be heard on the merits of his claim that Daniels initiated her timber trespass Complaint in knowing bad faith.

Finally, MMG asserts that O'Brien has failed to proffer any evidence that they were damaged by Daniels' filing of the bad faith Complaint,

asserting that, in fact, O'Brien never sustained damage, and would only have sustained damage if MMG had not settled the case.[2]

To the contrary, Daniels' initiation of her bad faith Complaint has resulted in numerous elements of damage to O'Brien. These begin with the deductible. Second, O'Brien sustains the emotional and reputational impact and expenditure of time associated with any lawsuit, whether well-founded or, as here, initiated in bad faith. Third, O'Brien points to the wrongfully initiated protection from harassment case by Daniels in a remote venue. *O'Brien Afft.* ¶13; App. 046-047. *Most* concerning to O'Brien, however, is the incentivizing effect of the undeserved settlement Daniels obtained by assertion of her false claim. *Id*.; App. 045-046. Contrary to MMG's characterization of O'Brien's objective as one to "facilitate the creation of a cause of action for wrongful use of civil proceedings", O'Brien objects to the trial Court's order as insulating Daniels from the consequences of her retaliatory behavior toward O'Brien, aided by MMG's

[2] MMG correctly acknowledges that O'Brien offered to post a bond, agreed to indemnify MMG, and assume their own defense in light of their objection to the settlement. MMG asserts that it was necessary that Daniels agree to these circumstances, citing Title 24-A M.R.S. §2904. That section, and in particular, subsection 4 thereof, is no impediment to the arrangement O'Brien proposed to MMG; Daniels need not have assented under that provision.

trampling of its own insured.[3] At the core, O'Brien is rationally asking this Court for the opportunity to bring the circumstances into full sunlight and allow a moral correction for a legal violation of the justice process. O'Brien simply seeks to exercise their right to bring a tort claim against an individual that knowingly used the legal system for improper purposes.

C. Contrary to MMG's claim, O'Brien *did* seek to make an offer of proof at hearing before the trial Court.

O'Brien respectfully submits that he was precluded from offering testimony at hearing, or having his counsel make any substantive representations to the trial Court in the nature of an offer of proof to support the giving of testimony by O'Brien at that hearing. O'Brien further asserts that the transcript of the hearing supports that construction; the trial Court simply declined to accept any presentation other than limited oral argument by counsel.

M.R.E. 103 provides, in relevant part:

> "(a) **Preserving a claim of error**. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:

[3] MMG argues, based on remarks in the Restatement (Second) of Torts §674 cmt.j., that O'Brien's wrongful use of civil proceedings claim is still viable pursuant to the second articulated criterion pertaining to what constitutes "favorable termination". The Law Court, to O'Brien's understanding, has not yet expressly adopted such an interpretation. *See*, *Palmer Development Corp. v. Gordon*, 1999 ME 22, ¶4, 723 A.2d 881 (favorable termination to reflect on the *merits* of the underlying case).

....

> (2) If the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context."

M.R.E. 103.

First, the trial Court's refusal to allow O'Brien to testify prevented the trial Court from receiving evidence upon which to base her decision on the Motion to Dismiss. While O'Brien's counsel was permitted to argue, that argument was not evidence upon which she could base her decision as to: (i) the reasonableness of the settlement; (ii) whether it was made in good faith; (iii) the circumstances of the preparation and dissemination for review and approval of the Release; and (iv) the preservation, or not, of O'Brien's right to pursue a wrongful use of civil proceedings claim.

Second, O'Brien, through counsel, *did* seek to make an offer of proof to the trial Court as to numerous facts, including: (1) O'Brien did not see the Release before it was already signed; (2) their counsel had moved to withdraw the day following the MMG settlement with Daniels; (3) O'Brien's MMG-assigned counsel's withdrawal became effective before the Release was signed; (4) O'Brien's MMG-assigned counsel's withdrawal was because O'Brien was objecting to the settlement; and (5) what O'Brien's

motivation was for objecting to the settlement and dismissal. *Trans*. at p. 25, 27; App. 015, 017. This was an offer of proof, and if it was not, then the trial Court simply *refused* to entertain any further oral assertions from O'Brien or his counsel in furtherance of even making of an offer of proof.

Last, MMG's citation to *Anderson v. O'Rourke*, 2008 ME 42, ¶¶ 12-13, 942 A.2d 680, 683, and *Parker-Danner Company v. Nickerson, et al*., 554 A.2d 1193, 1195 (Me. 1989), is simply not on the mark. The circumstances before the trial Court in this case are more akin to those presented by *State of Maine v. Adams*, 2014 ME 143, ¶13, 106 A.3d 413, 417, wherein the court declined the proponent of evidence "any opportunity to present foundational evidence....". As in *Adams*, O'Brien properly requested the trial Court to permit him to make an offer of proof, but the trial Court declined. *Id*. The result was a violation of O'Brien's right to due process.

D. <u>The MMG policies are not free of ambiguity as relates to this case</u>.

MMG asserts its policies are unambiguous in all respects, although not responding to O'Brien's assertions as to the policies' use of the verb "may". Instead, MMG points to the clauses pertaining to the insured's duty under the policy: (i) to "cooperate with settlement"; and (ii) "help with settlement." App. 128, 174.

Neither of those terms, "cooperate" or "help", is defined by either the Homeowners or Umbrella policies. App. 113-114, 172-174. One thing is certain, however: the verb "cooperate" is not the equivalent of the word "agree", nor is the word "help" interchangeable with the word "agree". O'Brien had no duty to agree to settlement.

In entering into the contract of insurance with MMG, O'Brien never relinquished his right to not agree with the settlement, and therefore to be heard on the basis of an objection to the settlement reached by MMG and Daniels while O'Brien remained purposefully sidelined. Neither did O'Brien relinquish their right to weigh in on the substance of the Release. Construing the policy language to isolate and shackle an insured as MMG did here is simply unjust.

E. <u>MMG's discretion to settle Daniels' claim against O'Brien is not unbounded</u>.

MMG misapprehends O'Brien's position. MMG and O'Brien agree, an insurer does have discretion, or "the right", under the respective policies' language, to settle claims against its insured. O'Brien does not claim otherwise. Rather, the divide comes as to the characterization of the discretion. MMG makes much of the bare fact of reservation of that

discretion in the policies' language and the cases that construe them, be they of the "deems expedient" or "that we decide is appropriate" formulations. MMG does not address, however, those cases offered by O'Brien that decline to find such discretion or right to settle "absolute, unilateral or unlimited" in every respect. O'Brien relies on those cases offered in their opening Brief.[4] Those cases implicitly recognize the inherently unbalanced relationship and disparity of power between an insurer and its insured, and the resulting adhesive nature of the insurance contract. *Barney v. Aetna Casualty and Surety Company*, 185 Cal.App.3d 966, 968, 230 Cal.Rptr. 215 (1986). The context of settlement is not one justifying an immutably fixed discretion in favor of an insurance carrier.

MMG correctly frames O'Brien's argument, based upon *Patrons Oxford Insurance Company v. Harris*, 2006 ME 72, ¶15, 905 A.2d 819, 825-26, that MMG having relinquished the control of the defense by reason of its

[4] *Bleday v. OUM Group,* 435 Pa. Super. Ct. 395, 645 A.2d 1358 (1994); *Shuster v. South Broward Hospital District Physicians' Professional Liability Insurance Trust,* 591 So.2d 174 (Fla. 1992); *Boston Old Colony Insurance Company v. Gutierrez,* 386 So.2d 783 (Fla. 1980); *Barney v. Aetna Casualty and Surety Company,* 185 Cal.App.3d 966, 230 Cal.Rptr. 215 (1986); *Security Officers Service, Inc. v. State Compensation Insurance Fund,* 17 Cal.App.4th 887, 21 Cal.Rptr.2d 653 (1993); *Texas Association of Counties County Government Risk Management Pool v. Matagorda County*, 52 S.W.3d 128 (2000); *Western Polymer Technology, Inc. v. Reliance Insurance Company,* 32 Cal.App.4th 14, 38 Cal.Rptr.2d 78 (1995); *Commerce & Industry Ins. Co. v. North Shore Towers Management Inc.,* 162 Misc.2d 778, 617 N.Y.S.2d 632 (1994); *Cash v. State Farm Mutual Automobile Insurance Company,* 137 N.C.App. 192, 528 S.E.2d 372 (2000).

issuance of a reservation of rights letter to O'Brien, its right to settle was thereby affected. MMG's right to settle is but one facet of its right to control the defense. By electing to defend under a reservation of rights, its right to settle cannot then be treated as absolute.

If MMG maintains, in the current context of an insured's challenge to a settlement by the insurer, that its discretion is absolute, then it must follow that MMG asserts that O'Brien has no right to be heard on the matter. Thus, by unilateral withdrawal of its reservation of rights, MMG would, in its view, perfectly permissibly deny O'Brien an opportunity to be heard on the intended settlement. Nothing in O'Brien's actions leads to that result, and nothing in the *Harris* opinion leads to that conclusion. It is antithetical to the principle of affording due process at every critical juncture of the case, settlement certainly being one. *Id.* at ¶13, 905 A.2d at 825, *quoting*, *Michaud v. Mutual Fire, Marine & Inland Insurance Company*, 505 A.2d 786, 789 (Me. 1986) (the essence of due process is notice and an opportunity to be heard).

MMG closes that portion of its Brief in opposition asserting that although unnecessary, it pulled its reservation of rights and provided notice of such withdrawal to O'Brien's MMG-assigned defense counsel and

personal counsel prior to entering into the settlement with Daniels. An examination of the written communications reveals that MMG did so in a manner calculated to leave no reasonable reaction time to O'Brien. This process was calculated to brush O'Brien's known objection aside and was done by MMG with full knowledge of O'Brien's counsels' abrupt withdrawals. *Mehalic Afft*. ¶¶ 3, 4, Exh. A, B; App. 192-196. MMG further asserts that settlement of Daniels' claims having been unilaterally reached by MMG with Daniels, there was no longer a need or obligation for MMG to provide counsel to O'Brien. MMG's assertion reveals a cynical view toward the protection of its insured through continuity of counsel and the opportunity to be heard. MMG's obligation to provide counsel, or successor counsel, to O'Brien endured through full consummation of the settlement process, *i.e.,* payment, if not beyond, in the circumstances of this case. App. 128, 174.

F. <u>The trial Court did err in refusing to grant O'Brien's Motion for Amended, Specific and Additional Findings of Fact and Conclusions of Law</u>.

MMG maintains that the trial Court's order was wholly sufficient in its findings and conclusions. While a mere handful of findings were articulated in the trial Court's brief order, they were entirely non-specific

and conclusory. It is for precisely that reason that O'Brien sought augmentation of those by proper Rule 52(b) motion. The trial Court did not have amended, specific or additional findings of fact to offer in response to this *because* it had refused to take O'Brien's testimony despite repeated requests at hearing. That refusal by the trial Court is the foundation of its error in refusing O'Brien's later request to make specific findings.

G. <u>The trial Court lacked an evidentiary basis for determining the settlement to be reasonable</u>.

MMG claims that O'Brien ignores the portion of the trial Court's brief order supporting its finding (or conclusion) that the settlement was reasonable. That is incorrect; O'Brien does not ignore those portions of the trial Court's order, but rather characterizes them as being conclusory and non-specific to the point of not supporting the trial Court's finding. Indeed, evidence *does* exist within the record as to the value of the timber cut — $1,625. *O'Brien Afft*. ¶12; App. 045. No evidence exists in the record as to any other value of the subject timber, or for any professional or other costs associated with determining that purported timber value for MMG, and the trial Court, it was all far simpler to brush it aside with a dismissal that denied O'Brien the opportunity to be heard at the settlement stage of the

case, to weigh in or even simply review the Release, or to offer testimony to the trial Court at hearing on the motion to dismiss.

III. 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 proceedings claim against Daniels is correct as a matter of law. O'Brien further asks this Court to assign error as to the trial 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, this Court determine whether MMG's right to settle 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: August 21, 2025

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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' Reply 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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