2013 PA Super 174

THE BABCOCK & WILCOX COMPANY AND B&W NUCLEAR ENVIRONMENTAL SERVICES, INC.

APPELLEES

V.

AMERICAN NUCLEAR INSURERS AND MUTUAL ATOMIC ENERGY LIABILITY UNDERWRITERS AND OTHER INTERESTED PARTY: ATLANTIC RICHFIELD COMPANY

APPEAL OF: AMERICAN NUCLEAR INSURERS AND ATOMIC ENERGY LIABILITY UNDERWRITERS

AMERICAN NUCLEAR INSURERS AND MUTUAL ATOMIC ENERGY LIABILITY UNDERWRITERS,

APPELLANT

V.

THE BABCOCK & WILCOX COMPANY AND B&W NUCLEAR ENVIRONMENTAL SERVICES, INC., AND ATLANTIC RICHFIELD COMPANY

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 525 WDA 2012

Appeal from the Order Entered February 17, 2012
In the Court of Common Pleas of Allegheny County
Civil Division at No(s): GD99-16227 & GD99-11498

BEFORE: MUSMANNO, J., OLSON, J., and WECHT, J.

CONCURRING AND DISSENTING OPINION BY OLSON, J.:

FILED: JULY 10, 2013

I respectfully concur and dissent. I agree with the learned Majority's view that the jury's verdict and the trial court's judgment should be vacated because the court erred in applying ***Alfiero v. Berks Mutual Leasing Co.***, 500 A.2d 169 (Pa. Super. 1985) and ***United Servs. Auto Ass'n v. Morris***, 741 P.2d 246 (Ariz. 1987) to conclude that Appellants, American Nuclear Insurers and Mutual Atomic Energy Liability Underwriters (collectively, ANI), owed settlement costs to Appellees, The Babcock & Wilcox Company and B&W Nuclear Environmental Services (collectively, B&W), because the settlement agreements between B&W and plaintiffs in the federal personal injury litigation were found to be fair, reasonable, and non-collusive. I am unable to agree, however, with the Majority's conclusion that this case should be remanded for further proceedings consistent with the approach set forth in ***Taylor v. Safeco Insurance Co.***, 361 So.2d 743 (Fla. Ct. App. 1978). In my view, established and controlling Pennsylvania law compels the conclusion that since ANI tendered a defense subject to a reservation of its rights to contest coverage, B&W remained committed to observe its obligations under the consent-to-settlement clause in the parties' insurance contract unless B&W could establish bad faith on the part of ANI pursuant to our Supreme Court's decision in ***Cowden v. Aetna Casualty and Surety Co.***, 134 A.2d 223 (Pa. 1957).

As the Majority recognizes throughout its opinion, this case illustrates the tensions that can arise between an insurer and insured when the insurer

tenders a defense subject to a reservation of its right to challenge coverage for the underlying claim. The Majority also acknowledges that our Supreme Court's decision in ***Cowden*** supplies the applicable rule of decision when a court is asked to enforce a consent-to-settlement clause where an insurer provides a defense and advises its insured that it intends to contest indemnity. ***Cowden*** provides that a Pennsylvania court should enforce a consent–to-settlement clause unless an insured such as B&W can establish: 1) there was no real chance of a defense verdict; 2) there was little possibility of a verdict or settlement within policy limits; 3) the insurer's decision to reject settlement and go to trial was not based on a *bona fide* belief that there was a good chance of winning; and, 4) the insurer's decision to litigate rather than settle was made dishonestly. ***Cowden***, 134 A.2d at 228. Although some time has elapsed since ***Cowden*** was issued in 1957, our Supreme Court has not signaled any retreat from the decision and, in 2001, the Court reaffirmed its commitment to ***Cowden***'s holding. ***See Birth Center v. St. Paul Companies, Inc.***, 787 A.2d 376, 379 (Pa. 2001) (citing ***Cowden*** for the rule that an insurer breaches its duty of good faith when it refuses to settle a claim that could have been resolved within policy limits without a *bona fide* belief that there was a good possibility of winning).

Notwithstanding its acknowledgement of the foregoing principles as set forth in binding precedents handed down by our Supreme Court, the learned

Majority remands this matter for further proceedings consistent with the Florida court's decision in ***Taylor***. In so doing, the Majority alters the parties' insurance contract, bestowing upon the insured a new option, never before recognized under Pennsylvania law, to reject a defense offered pursuant to a valid reservation of rights clause in an insurance agreement.[1] Although the Majority discusses at length why ***Cowden* should not** be applied, it makes no effort to distinguish ***Cowden*** on legal or factual grounds or to explain why the framework set forth in that case **cannot** be applied here. Instead, the Majority reasons that ***Taylor*** represents a preferable approach because, in the Majority's view, the decision "best balances the interests of insurer and insured" and "does not consign the insured solely to the protection of our strictly-construed bad faith standard" set forth in ***Cowden***. ***See*** Majority Opinion at 33-34.

To be sure, the Majority's comprehensive review of relevant insurance case law illustrates that the approach articulated in ***Taylor*** has garnered widespread application. Nonetheless, as an intermediate appellate court, I

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[1] Not surprisingly, the parties, both before the trial court and on appeal, tailored their arguments to existing Pennsylvania law. B&W's contentions tracked the decision in ***Alfiero*** while ANI's position tracked ***Cowden***. In view of this, I believe that the Majority's alteration of well-established Pennsylvania insurance law will disturb the settled expectations of both insureds and insurers alike. By itself, this aspect of today's decision undermines the Majority's assertion that the ***Taylor*** approach will "better honor the binding nature of the insurance contract." Majority Opinion at 33-34.

do not believe that it is within our prerogative to sidestep binding Supreme Court authority in favor of rules that we may deem preferable or even broadly accepted. We recently observed:

> As an intermediate appellate court, th[e Superior Court] is obligated to follow the precedent set down by our Supreme Court. It is not the prerogative of an intermediate appellate court to enunciate new precepts of law or to expand existing legal doctrines. Such is a province reserved to the Supreme Court.

Sackett v. Nationwide Mut. Ins. Co., 4 A.3d 637, 641 (Pa. Super. 2010), *quoting* ***Moses v. T.N.T. Red Star Express***, 725 A.2d 792, 801 (Pa. Super. 1999).

In sum, while I agree that the jury's verdict and the trial court's judgment must be vacated, I cannot agree that this case should be remanded for further proceedings consistent with ***Taylor***. Because I believe that our Supreme Court's opinion in ***Cowden*** supplies the applicable rule of decision for the issues raised in this appeal, I would instruct the trial court to follow ***Cowden*** (consistent with its original inclination) in addressing the matters presently before us.