COMMONWEALTH OF MASSACHUSETTS

**BERKSHIRE, ss.** **SUPERIOR COURT**
**CIVIL NO. 13-095**

PETER PEDRONI and JULIA PEDRONI
Plaintiffs

v.

BALDWIN CARPENTERS & BUILDERS, LLC
and D.J. WOOLIVER & SONS, INC.
Defendants

# MEMORANDUM OF DECISION AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

## INTRODUCTION

This action arises out of a fire that consumed the home of Peter and Julia Pedroni[1] on April 7, 2010, while the home was under construction. The plaintiffs brought this action against Baldwin Carpenters & Builders, LLC ("Baldwin") alleging breach of contract, breach of warranty, vicarious liability, indemnity and violation of G. L. c. 93A. Baldwin was the general contract for the project. The claims against D.J. Wooliver & Sons, Inc. ("Wooliver"), a roofing subcontractor, are in negligence, breach of warranty and G. L. c. 93A. This matter is before the court on the cross-motions of the parties for summary judgment, pursuant to Mass. R. Civ. P. 56.[2]

The defendants argue they are entitled to judgment as a matter of law because the plaintiffs cannot prove that either of them caused the fire, that the plaintiffs impliedly waived their right to sue them for negligently causing the fire, and that they are not liable

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[1] Peter and Julia Pedroni will be referred to by their first names for the sake of convenience because they share the same surname.

[2] As often noted, summary judgment is appropriate when the material facts are undisputed and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56 (c); *Community Nat. Bank v. Dawes*, 369 Mass. 550,553-56 (1976). The moving party bears the burden of affirmatively demonstrating that there is no genuine issue of material fact on every relevant issue. *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991). If the opposing party fails to respond by offering admissible evidence establishing the existence of a genuine factual dispute, or if the parties agree that only a question of law is involved, the case is properly resolved on summary judgment. *Cassesso v. Commissioner of Correction*, 390 Mass. 419, 422 (1983). The party opposing summary judgment cannot defeat the motion simply by resting on the pleadings and mere assertions that there are disputed facts. *LaLonde v. Eissner*, 405 Mass. 207, 209 (1989).

for damages in the amount that the plaintiffs have already been compensated by their insurance policy. The plaintiffs argue that they are entitled to judgment as a matter of law on counterclaims brought by Wooliver and on affirmative defenses raised by the defendants.

## BACKGROUND

The facts are not in dispute and the parties have presented the court with issues of law to be resolved prior to trial.

By way of background, in October, 2009, Peter and Baldwin entered into a written contract for Baldwin to provide general services in the construction of a house for the plaintiffs ("Contract for Construction"). The Contract for Construction was drafted by the Plaintiffs' counsel. In the Contract for Construction, the plaintiffs promised to procure builder's risk insurance covering the interests in the property of the plaintiffs, Baldwin, and any subcontractors, insuring against the risk of fire.[3] In the Contract for Construction, Baldwin promised to indemnify the plaintiffs for any damages that resulted from its negligence or that of its subcontractors.[4] In the same contract, Baldwin also agreed to be responsible for supervision of all aspects of construction, including the work of subcontractors.[5] According to Wooliver's subcontract with Baldwin, the plaintiffs

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[3] Section 4.1 of the Contract for Construction provides: "[t]he Owner shall purchase and maintain builder's risk property insurance upon the insurable value of the Project. This insurance shall include the interests of the Owner, the Contractor and subcontractors in the Work and shall insure against the perils of fire and extended coverage and shall include 'all risk' insurance for physical damage including, without duplication of coverage, theft, vandalism, and malicious mischief. In the event of any damage or loss to the Project, the Contractor and its subcontractors shall fully cooperate with all insurers, and with the Owner as the case may be, in the adjustment of any claim and shall maintain all necessary accounting records while expediting repair and replacement work in accordance with this Contract."

[4] Section 4.4 of the Contract for Construction provides: "[t]he Contractor shall, to the fullest extent permitted by law, defend, indemnify and hold harmless the Owner . . . from any and all claims, damages, losses and expenses (including but not limited to attorneys' fees) resulting from, or directly or indirectly arising or alleged to arise out of the performance or the failure to perform the Work but only to the extent caused by the negligent acts or omissions or willful misconduct of the Contractor, or any subcontractor . . . or anyone directly or indirectly employed by them . . . . "

[5] Section 7.1 of the Contract for Construction provides: "[t]he Contractor shall at no additional cost to Owner be responsible for all supervision of the Work, and all construction means, methods, techniques and sequences. Contractor shall be responsible to Owner for the acts and omissions of Contractor's employees, any other persons performing or supplying portions of the Work, including without limitation, subcontractors, materialmen and vendors and their agents and employees. The Contractor shall be responsible for initiating, maintaining and superv[ising] all safety precautions and programs, including all those required by law in connection with the performance of the Contract. The Contractor shall use its best efforts to prevent damage, injury to loss to employees on the Work, the Work and materials and equipment to be incorporated therein and other property at the Project site or adjacent thereto. The Contractor shall promptly remedy damage and loss to property caused in whole or in part by the Contractor, or by anyone for whose acts the Contractor may be liable including without limitation, subcontractors, materialmen and vendors and their agents and employees."

were to "carry fire, tornado and other necessary insurance," although the plaintiffs were not parties to that contract.

The plaintiffs then purchased a builder's risk policy ("Policy") from Assurance Company of America, part of the Zurich Financial Services Group ("Zurich") insuring the parties' interests in the property for the period of October 20, 2009, to October 20, 2010. Both Peter and Baldwin are named as insured in the Policy, and as such their interests in the property were covered by the Policy. Wooliver was not named as an insured in the Policy, but the Policy covered the interests of subcontractors in the property.[6]

On April 7, 2010, when construction of the house was near completion, the house burned down. There is evidence that the fire was caused by Wooliver employees smoking at the jobsite. Matt Baldwin, son of Ron Baldwin, owner of the Baldwin business, had seen Wooliver employees smoking on the day of the fire. Ron Baldwin warned them about smoking that day and before the fire, after Matt Baldwin told him they were smoking. The Wooliver employees were installing a flammable roofing adhesive called Sarnacol 2170, which was left covered by a tarp at the end of the day. The plaintiffs' expert witness, Gary Pease, concluded that "the probable ignition source of the fire was smoking materials."

Both the plaintiffs and Baldwin filed claims with Zurich for their interests in the property destroyed by the fire. On or about July 16, 2010, Zurich paid the plaintiffs $414,287.80 in settlement of their claim. As part of the settlement, Zurich waived any subrogation rights it had against Baldwin and Wooliver. In other words, Zurich waived its right to stand in the shoes of the plaintiffs and sue the defendants, or to recover any proceeds from the plaintiffs if the plaintiffs sued the defendants on their own. See *Frost v. Porter Leasing Corp.*, 386 Mass. 425, 427 (1982) ("The doctrine of subrogation applies . . . to payments under policies of insurance. Upon payment, the insurer is entitled to share the benefit of any rights of recovery the insured may have against a tortfeasor for the same loss covered by the insurance. If the insured recovers from the tortfeasor, the insurer's right becomes a right to the proceeds in the hands of the insured" [internal citations omitted]).

On April 5, 2013, the plaintiffs brought this action, alleging negligence (Count I), breach of warranty (Count II), and G. L. c. 93A (Count III) claims against Wooliver, and breach of warranty (Count IV), breach of contract (Counts V-VII), and G. L. c. 93A (Count VIII) claims against Baldwin. The plaintiffs' theory is that Wooliver's employees caused the fire by negligently smoking at the job site. Baldwin is allegedly responsible based on contract language. The plaintiffs seek damages of $135,712.20 that were not covered by insurance, as well as the $414,287.80 in damages that were covered by insurance. Wooliver brought counterclaims against the plaintiffs alleging breach of

[6] Section E.11 of the Builder's Risk Coverage Form provides: "[w]e cover the interest, which your subcontractors, your sub-subcontractors and your suppliers have in the Covered Property, but only while such property is situated at construction sites you have reported to us. This condition does not impair any right of subrogation we would otherwise have."

contract and negligent misrepresentation on the theory that the plaintiffs breached their promise to procure insurance covering Wooliver's interests. On August 15, 2014, the parties filed cross-motions for summary judgment.

The defendants raise three arguments. First, they argue that the plaintiffs have presented no evidence proving that either of the defendants caused the fire. Second, they assert that when the plaintiffs entered into the Contract for Construction, they impliedly waived their right to sue Baldwin or Wooliver for damage due to fire, caused by Wooliver's negligence. Third, they argue that damages should be offset by the amount that the plaintiffs already received from Zurich. In support of the third argument, the defendants argue that the collateral source rule, a rule that funds received from an insurance policy or other collateral source cannot offset damages, does not apply in this case. See *Jones v. Town of Wayland*, 374 Mass. 249, 262 (1978) ("As a general rule, a tortfeasor's liability to an injured person shall not be reduced by the amount of compensation received by the injured person pursuant to an insurance policy").

The plaintiffs argue that there is sufficient evidence of causation to permit the case to be decided by the jury. The plaintiffs also assert that judgment should be entered against Wooliver's counterclaims as a matter of law and that this Court strike affirmative defenses raised by the defendants regarding the implied waived of their right to sue and that the collateral source rule does not apply.

## DISCUSSION

### *A. Whether there is Sufficient Evidence of Causation*

Although causation is generally an issue of fact, the defendants argue that the plaintiffs have not presented evidence that establishes causation. See *Mullins v. Pine Manor Coll.*, 389 Mass. 47, 58 (1983) ("The question of causation is generally one of fact for the jury. A plaintiff need only show that there was greater likelihood or probability that the harm complained of was due to causes for which the defendant was responsible than from any other cause. An expert's opinion based on facts in evidence is sufficient proof of causation" [internal citations omitted]).

The focus of this discussion is the proposed testimony of the plaintiffs' liability expert, fire investigator, Gary Pease.[7] The defendants argue that Pease's expert opinion does not a support a finding that either Baldwin or Wooliver caused the fire. The defendants argue that Pease is expected to testify that "smoking material or an electrical source have not been eliminated and are the two most likely causes for the fire." Since the electrical source would be attributed to Baldwin, and smoking to Wooliver employees, the plaintiffs' evidence would not establish a greater probability than not that either Baldwin or Wooliver caused the fire. See *Enrich v. Windmere Corp.*, 416 Mass. 83, 87 (1993) ("While a plaintiff need not show the exact cause of the accident or exclude all other possible causes, he must show that there is a greater probability than not that the accident resulted from the defendant's negligence").

[7] There is no issue regarding the qualification of Pease at this stage of the litigation.

In the plaintiffs' second supplemental answers to Wooliver's interrogatories, however, the plaintiffs state that "[e]valuation of all known potential ignition sources leads Mr. Pease to conclude that the probable ignition source of the fire was smoking materials." To be sure, in its first supplemental answers, the plaintiffs did not state that Pease reached a conclusion as to the most probable ignition source. The second supplemental answers, however, are sufficient to create a material issue of fact. See *Noble v. Goodyear Tire & Rubber Co.*, 34 Mass. App. Ct. 397, 402-403 (1993) (summary judgment denied where expert concluded defect in tire caused accident, despite "vigorous attack on the weight to be given to the [expert opinion]" by the moving party); *Marr Equipment Corp. v. I.T.O. Corp. of New England*, 14 Mass. App. Ct. 231, 235 (1982) ("A toehold . . . is enough to survive a motion for summary judgment").

Baldwin also argues that Pease's opinion is speculative because he does not specify whether the fire originated inside or outside the house. Notwithstanding his uncertainty over the exact place of origin of the fire, Pease's opinion is grounded in sufficient facts and is not speculative. See *Anderson v. Paulo*, 74 Mass. App. Ct. 635, 640 (2009) ("Our analysis of the evidence indicates that the expert's opinion, which was stated in terms of probabilities, was grounded on sufficient facts, was not speculative, and should have been admitted").

Pease is expected to testify that the probable area of fire origin was at or near the front-left (northwest) corner of the structure. He is expected to testify that Wooliver employees were smoking at or near the area of origin in violation of Baldwin's rules and adhesive manufacturer instructions, on the day of the fire and within two hours before the fire was observed. Pease is also expected to testify that there were adhesive containers left open and adhesive was left covered by a tarp after being applied to a second floor deck, in violation of adhesive manufacturer instructions, and that this could have contributed to the spread of the fire. Pease's uncertainty as to whether the fire started inside or outside the house may affect the weight of the evidence, but not its admissibility. *Commonwealth. v. DelValle*, 443 Mass. 782, 792 (2005) ("Where an expert's opinion is sufficiently grounded in the evidence, that certain facts were *unknown* to the expert . . . does not render the testimony inadmissible, but rather goes to the weight of the evidence" [quoting P.J. Liacos, M.S. Brodin, & M. Avery, Massachusetts Evidence § 7.6.4, at 390 (7th ed.1999)]).

The defendants' motions for summary judgment based on the failure of the plaintiffs to establish causation is DENIED.

### *B. Whether there was an Implied Waiver of the Plaintiffs' Right to seek Damages from the Agreement to Purchase Builder's Risk Insurance*

The defendants argue that when Peter agreed in the Contract for Construction to procure builder's risk insurance covering the interests of the plaintiffs, Baldwin, and subcontractors for damage to the property due to fire, the plaintiffs impliedly waived their right to sue the defendants for negligently causing a fire. As set forth in the case of *General Cigar Co. v. Lancaster Leaf Tobacco Co.*, 323 F. Supp. 931. 941 (D. Md. 1971),

"Where parties to a business transaction mutually agree that insurance will be provided as a part of the bargain, such agreement must be construed as providing mutual exculpation to the bargaining parties who must be deemed to have agreed to look solely to the insurance in the event of loss and not to liability on the part of the opposing party." Id. at 941.

Simply stated, if the parties to an agreement to provide them with the benefits of insurance that will protect them against the consequences of their own negligence and protect them regardless of the cause of the loss, then it is "implied" that they will only look to the insurance and not to each other for any losses.

This argument is supported by the majority of cases that have considered the issue. These out-of-state cases have held that a promise by an owner in a construction contract to procure property insurance covering the interests of the owner and contractor constitutes an implied waiver of the owner's right to recover damages from the contractor for insured against risks, when caused by the contractor's negligence. See e.g., *Tokio Marine and Fire Ins. Co. Ltd. v. Employers Ins. of Wausau,* 786 F.2d 101, 104-05 (2d Cir. 1986); *Acadia Ins. Co. v. Buck Const. Co.*, 756 A.2d 515, 518-519 (Me. 2000); *Berger v. Teton Shadows Inc.*, 820 P.2d 176, 178 (Wyo. 1991); *Housing Inv. Corp. v. Carris,* 389 So.2d 689, 689-690 (Fla. Dist. Ct. App. 1980); *Tuxedo Plumbing & Heating Co. v. Lie-Nielsen,* 262 S.E.2d 794, 795 (Ga. 1980); *South Tippecanoe School Bldg. Corp. v. Shambaugh & Sons. Inc.*, 395 N.E.2d 320, 332-333 (Ind. App. 1979); *Morsches Lumber, Inc. v. Probst*, 388 N.E.2d 284, 285-287 (Ind. App. 1979). But see; *Sears, Roebuck & Co. v. Poling*, 248 Iowa 582 (1957); *Winkler v. Appalachian Amusement Co.*, 79 S.E.2d 185 (1953); *Wichita City Lines, Inc. v. Puckett*, 295 S.W.2d 894 (1956).

In *Acadia Ins. Co.*, the Maine Supreme Judicial Court held that an agreement between an owner of property and a contractor that the owner would procure fire insurance operated as a waiver of the right of the owner to sue the contractor for damages resulting from fire. *Acadia Ins. Co.*, 756 A.2d at 518-520. The waiver prevented the insurance company, as subgrogee, from suing the contractor after it paid the owner's claim. *Id.* at 519. The court reasoned that when the parties agreed that the owner would purchase fire insurance, the parties impliedly agreed to allocate the risk of fire to the insurance policy, and to alleviate the parties of that risk. *Id.* Similarly, in *Morsches Lumber, Inc.*, the Indiana Appellate Court held that an owner's agreement with a contractor to procure fire and windstorm insurance operated as an implied waiver of the owner's right to sue the contractor for damage from fire. *Morsches Lumber, Inc.*, 388 N.E.2d at 285-287.

The courts in *Acadia Ins. Co.* and *Morsches Lumber Inc.* both reasoned that if the parties did not expect the contractor to be protected by insurance, there would have been no reason to include a provision requiring the owner to purchase insurance in the contract. *Acadia Ins. Co.*, 756 A.2d at 519; *Morsches-Lumber, Inc.*, 388 N.E.2d at 285-286. Accordingly, the reason why the provision was included is that both parties expected to be protected by the insurance, in the sense that the risk of loss by fire would be allocated to the insurance policy. *Acadia Ins. Co.*, 756 A.2d at 519; *Morsches Lumber, Inc.*, 388 N.E.2d at 285-287. The *Acadia Ins. Co.* court based its decision in part

on the rationale that "allocation of risk to insurers through waivers of subrogation are encouraged by the law and serve important social goals: encouraging parties to anticipate risks and to procure insurance covering those risks, thereby avoiding future litigation, and facilitating and preserving economic relations and activity . . . ." *Acadia Ins. Co.*, 756 A.2d at 520.

In *South Tippecanoe School Bldg. Corp.*, the court extended the implied waiver theory, reasoning that there was a waiver of subrogation in favor of a subcontractor who was not party to the construction contract. *South Tippecanoe School Bldg. Corp.*, 95 N.E.2d at 332-333. See also *Home Ins. Co. v. Bauman*, 684 N.E.2d 828, 831 (Ill. App. Ct. 1997) ("Section 17.3 of the Contract obligated the Slovins to purchase and maintain insurance on the Work that included the interest of the subcontractor. The Contract as a whole demonstrates the intent of the parties to place the risk of loss regarding the Work on insurance. The plain language of section 17.3 also clearly demonstrates that the contracting parties intended to confer this benefit directly upon nonparty subcontractors").

Accordingly, the implied waiver theory adopted in other states supports both Baldwin and Wooliver's arguments that the plaintiffs impliedly waived their right to sue them for the insured against risk of fire. Moreover, the rationale supplied by the Maine court in *Acadia Ins. Co.* of avoiding litigation and facilitating economic relations is supported in Massachusetts cases. See *Middleoak Ins. Co. v. Tri-State Sprinkler Corp.*, 77 Mass. App. Ct. 336, 339 (2010) ("the contractual provision for waiver of subrogation is an allocation of risk among insurers and not a surrender of rights against the contractor by an insured. This allocation comports with a strong public policy to encourage parties to anticipate risks and procure insurance covering those risks, thereby avoiding future litigation"); *Haemonetics Corp. v. Brophy & Phillips Co.*, 23 Mass. App. Ct. 254, 258 (1986) ("A waiver of subrogation is useful in such projects because it avoids disruption and disputes among the parties to the project. It thus eliminates the need for lawsuits, and yet protects the contracting parties from loss by bringing all property damage under the all risks builder's property insurance" [quoting *Tokio Marine & Fire Ins. Co.*, 786 F.2d at 104]).

Massachusetts has not explicitly weighed-in on this defense. In *Fortin v. Nebel Heating Corp.* 12 Mass. App. Ct. 1006 (1981), the Appeals Court recognized the issue but was not required to adopt the implied waiver theory. *Fortin* involved a construction contract between an owner and general contractor that, like the Contract for Construction, required the owner to purchase property insurance that covered the interests of the owner, contractor, and subcontractors. *Fortin*, 12 Mass. App. Ct. at 1006. The contract also contained an express waiver of the owner's right to sue the general contractor. *Id.* The *Fortin* court cited *Morsches Lumber, Inc.*, and other out-of-state cases that adopted the implied waiver theory, but held that the owner did not waive the right to sue the subcontractor where the subcontractor was not a party to the contract and the owner did not expressly waive the right to sue the subcontractor, and therefore, the insurer had the right to subrogate against the subcontractor. *Id.* at 1007.

In this case, the facts are in all relevant respects the same as *Fortin*. Wooliver was not a party to the Contract for Construction, the Contract for Construction required the owner to procure insurance covering the interests of subcontractors, and the owner did not expressly waive the right to sue any subcontractors.

Wooliver argues that *Fortin* is distinguishable because in this case, Wooliver's subcontract with Baldwin required the plaintiffs to insure Wooliver's interests. The lack of discussion of such a provision in *Fortin*, however, is immaterial to the *Fortin* holding. In *Fortin*, the court held that the owner did not waive the right to sue the subcontractor notwithstanding an express promise of the owner in the general contract to purchase insurance covering the interests of the subcontractor. *Id.* at 1006. There is no indication the result would have been different had the subcontractor required the owner to provide insurance in its contract with the general contractor.

Accordingly, I am bound by *Fortin* to rule that the plaintiffs did not waive their right to sue Wooliver.

Although *Fortin* forecloses the implied waiver theory with respect to Wooliver, it does not determine the question of Baldwin's liability for several reasons. First, the liability of the general contractor in *Fortin* was not at issue. *Id.* at 1006-1008. Second, unlike this case, the owner in *Fortin* expressly waived the right to sue the general contractor. *Id.* at 1007. Third, although the *Fortin* court cited out-of-state cases that adopted the implied waiver theory, and did not conclude there was an implied waiver with respect to the subcontractor not a party to the contract, it did not adopt or reject the implied waiver theory with respect to the general contractor that was a party to the contract. *Id.* Nevertheless, I do not need to decide whether the implied waiver theory should be adopted in Massachusetts with respect to parties to the contract, because under the indemnity clause, Baldwin expressly agreed to be liable for any "damages, losses and expenses" resulting from its negligence or that of subcontractors.[8]

Baldwin argues that the indemnity clause merely gives the plaintiffs the right to compel reimbursement from Baldwin in the event the plaintiffs are required to pay the liability of Baldwin. In support of this argument, Baldwin cites *Elias v. Unisys Corp.*, 410 Mass. 479 (1991), which discusses principles of common law indemnification. In that case the court held that "[I]ndemnity . . . allows someone who is without fault, compelled by operation of law to defend himself against the wrongful act of another, to recover from the wrongdoer the entire amount of his loss, including reasonable attorney's fees." *Elias*, 410 Mass. at 482. A contractual indemnification clause, however, can allow an indemnitee to recover directly from an indemnitor for damage caused by the indemnitor. *Methuen Construction Co., Inc. v. J & A Builders, Inc.*, 4 Mass. App. Ct. 397, 402-403 (1976) (holding that indemnity clause in contract covering " 'any loss . . . which may arise from the installation and construction' " imposed direct liability on indemnitor for expenses indemnitee incurred).

[8]If I am required to consider whether Massachusetts would accept the implied waiver theory, I would accept the view of the majority of out-of state case, as well as the language in *Nebel*, and rule that the appellate courts would accept such a theory.

However, the implied waiver theory does not apply when the parties express an intent to permit litigation against each other for such conduct. In this case, the parties have expressed such an intent in the contracts. Specifically, Section 7.1 of the Contract for Construction requires Baldwin, (among other things) to "be responsible to Owner for the acts and omissions of Contractor's employees, any other persons performing or supplying portions of the Work..." The Contractor shall also "promptly remedy damage and loss to property caused in whole or in part by the Contractor, or by anyone for whose acts the Contractor may be liable..." The parties have, indeed, expressed an intent, in writing, that Baldwin may be sued despite the procurement of insurance.

Moreover, in paragraph 5.1 of the Contract, Baldwin has expressly agreed to indemnify the Owner from any claims, damages or losses caused by the negligent acts or omissions or willful misconduct of the Contractor or any subcontractor, "regardless of whether such claim, damage, loss or expense is caused in party by a party indemnified hereunder." These provisions clearly express an intent by the parties to permit litigation between and among the owner, contractor and subcontractors.

Accordingly, the motions of both Wooliver and Baldwin for summary judgment on the implied waiver issue are DENIED. The corresponding motion of the plaintiffs for summary judgment on the implied waiver issue is ALLOWED.

*C. Collateral Source Rule*

Under the collateral source rule, "a tortfeasor's liability to an injured person shall not be reduced by the amount of compensation received by the injured person pursuant to an insurance policy" (internal quotation marks omitted). *Short v. Marinas USA Ltd. P'ship*, 78 Mass. App. Ct. 848, 857 (2011) (holding that damages for boat destroyed by fire could not be offset by insurance proceeds received by owner of boat).[9]

As noted in *Law v. Griffith*, 457 Mass. 349, 355-356 (2010), the "purpose of the collateral source rule is tort deterrence. The tortfeasor is required to compensate the injured party for the fair value of the harm caused, and is not to benefit from either contractual arrangements of the injured party with insurers or from any gifts from others intended for the injured party." Evidence of payment from such collateral sources is generally inadmissible. See *Corsetti v. Stone Co.*, 396 Mass. 1, 16-17 (1985). Exceptions to the collateral source rule permit introduction of such evidence to establish that a plaintiff is malingering or "crying poor." See Id. at 18-20. According to the

[9] The case of *Short v. Marinas USA Ltd. P'ship*, 78 Mass. App. Ct. 848, 857 (2011) is helpful. The plaintiff's boat was destroyed by a fire originating on a neighboring boat while both vessels were docked at the defendants' marina in Quincy. The plaintiff received $75,000.00 from its insurer, OneBeacon. OneBeacon retained its right to subrogate the claim. After a default judgment was entered against the defendants, the court awarded the plaintiff $83,250 in damages. The judge declined to offset the plaintiff's recovery by $75,000, the amount the plaintiff received from his insurer, OneBeacon pursuant to the Collateral source rule and this was affirmed by the Appeals Court.

collateral source rule, avoiding a windfall to a tortfeasor is preferable even if a plaintiff thereby receives an excessive recovery in some circumstances.

The *Griffith* court noted that many states have modified the traditional collateral source rule in the last twenty-five years, through legislative action. This includes Massachusetts with the enactment of G.L. c. 231, § 60G, establishing post-verdict procedure for reduction of awards of medical damages by judge through introduction of evidence of insurance payments and costs of obtaining insurance benefits. See also G.L. c. 90, § 34M (PIP payments). The SJC left "any further modifications of the collateral source rule's application to the Legislature."

The defendants argue that the collateral source rule should not apply in this case because Baldwin is an insured under the policy, the plaintiffs agreed to insure the interests of both Baldwin and subcontractors under the policy, and Baldwin and Wooliver negotiated their respective contracts in order to benefit from the insurance policy. Essentially, the defendants argue that they are so closely related to the insurance policy that compensated the plaintiffs, that the policy is not collateral to, or independent of them.

This argument fails because the plaintiffs alone paid the insurance premiums on the policy. Even if the defendants negotiated their respective contracts in order to benefit under the policy by having their interests insured, it would not follow that they can be credited with paying the insurance premiums that covered the plaintiffs' interests.

In any event, the collateral source rule, by it very terms, permits the plaintiffs to obtain a recovery in excess of their damages. The SJC's deference to legislation action to resolve this anomaly is clear and is the law in the Commonwealth.

Accordingly, the defendant' motions for summary judgment on the collateral source rule are DENIED. The corresponding motion of the plaintiffs for summary judgment on the collateral source issue is ALLOWED.[10]

*SO ORDERED*

NOV 14 2014

11/14/14
Date

John A. Agostini
Associate Justice, Superior Court

A True Copy
Attest: Deborah S. Cahill
Clerk

[10] I am mindful that the implied waiver defense and the collateral source offset are issues of law and should be revisited post-trial and at the appellate level. By allowing the jury to resolve all factual disputes at trial, these issues can be determined at any time without the need for a new trial. However, I did not factor this efficiency of court procedure in deciding these issues.