COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NO. SJC-11854

ROBERT M. DICARLO
Plaintiffs/Appellant
v.

SUFFOLK CONSTRUCTION CO., INC. AND WALKER BROOK CROSSING, LLC
Defendants/Third-Party Plaintiffs
v.

PROFESSIONAL ELECTRICAL CONTRACTORS OF CONNECTICUT, INC.
Third-Party Defendant
And

TWIN CITY INSURANCE COMPANY
Interested Party-Appellee

ON APPEAL FROM A JUDGMENT OF THE MASSACHUSETTS SUPERIOR COURT FOR SUFFOLK COUNTY

BRIEF OF *AMICUS CURIAE* MASSACHUSETTS ACADEMY OF TRIAL ATTORNEYS IN SUPPORT OF PLAINTIFF-APPELLANT

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STATEMENT OF THE AMICUS CURIAE

The Massachusetts Academy of Trial Attorneys ("MATA"), *amicus curiae*, is a voluntary, non-profit, state-wide professional association of attorneys in the Commonwealth of Massachusetts. MATA's mission is to preserve the American jury system; to protect the health and safety of Massachusetts families; to improve the quality of legal representation through education; to educate the public about consumer issues; to uphold the honor and dignity of the legal profession; and to uphold and defend the Constitution of the United States and of the Commonwealth of Massachusetts.

The Massachusetts Academy of Trial Attorneys offers its experience and perspective as *amicus curiae* to assist the Court in the resolution of the important issues raised by this appeal.

The Massachusetts Academy of Trial Attorneys, as *amicus curiae*, urges the Court to confirm the validity and correctness of the principles set forth in *Curry v. Great Am. Ins. Co.*, 80 Mass. App. Ct. 592, 596-597 (2011)and *DiCarlo v. Suffolk Constr. Co., Inc.*, 86 Mass. App. Ct. 589, 590-591 (2014).

MATA members represent injured workers in personal injury liability cases as well as workers' compensation cases, and consequently are acutely aware of the issues that arise in cases in which the two remedial systems overlap. The *Curry* decision, which, according to one expert commentator "settled" the

"debate" as to the treatment under G.L. c. 152, §15, *Nason, Koziol, and Wall, Workers' Compensation* §27.12, at 100 & n.9.50 (Supp. 2014), has greatly facilitated third party liability resolutions and taken the force out of insurer arguments that would deprive injured workers of a fair share of settlements or judgments which do not include fully collectable compensation for all damages.

FACTS AND PRIOR PROCEEDINGS

The amicus curiae agrees with Plaintiff-Appellant's Statement of Facts and Prior Proceedings.

ISSUE PRESENTED

Whether the Appeals Court is correct in recognizing that the "sum recovered", as used in G.L. c. 152, §15 governing reimbursement of workers' compensation benefits from the proceeds of a third-party liability case, includes only the categories of damages for injuries for which compensation is payable under the workers compensation statute?

ARGUMENT

I. AS A MATTER OF FIRST IMPRESSION, THE APPEALS COURT HAS PROMULGATED A FAIR, EQUITABLE AND PRACTICAL CONSTRUCTION OF G.L. C. 152, §15 THAT REFLECTS THE INTENT OF THE LEGISLATURE ALLOWING AN EMPLOYEE BOTH TORT AND C. 152 RECOVERIES WHERE APPLICABLE WHILE AVOIDING DOUBLE RECOVERY.

A. *Curry* And *DiCarlo* Do Not Conflict With This Court's Precedent.

The arguments of the workers' compensation insurers calling for the reversal of Appeals Court decisions in *DiCarlo v. Suffolk Construction Co., Inc.*, 86 Mass. App. Ct. 589 (2014) and its predecessor, *Curry v. Great American Insurance Co.*, 80 Mass. App. Ct. 592 (2011) rely upon the underlying proposition that G.L. c. 152, §15 has a single and unassailable established meaning.[1] Section 15 states that, in circumstances "Where the

[1] Whether casualty insurers take the same dim view is doubtful. The *Curry* rule facilitates settlement of liability cases by enabling parties to negotiate in reliance that a reasonable settlement, fairly

injury for which compensation is payable was caused under circumstances creating a legal liability in some person other than the insured to pay damages in respect thereof:"

> The sum recovered shall be for the benefit of the insurer, unless such sum is greater than that paid by it to the employee, in which event the excess shall be retained by or paid to the employee. For the purpose of this section "excess" shall mean the amount by which the gross sum received in payment for the injury exceeds the compensation paid under this chapter.

The insurers contend that until *Curry*, the term "sum recovered" had been assumed to be the totality of tort damages collected by or on behalf of the injured employee. However, this Court has never been called upon to determine whether the use of "sum" in §15 allows for differentiation in the category of damages or injury included within a tort recovery as between those for which compensation is payable and those that are outside the scope of workers' compensation payments. Prior decisions state only that such allocation cannot originate with the judge, and do not address directly the operation of §15 when a verdict or proposed settlement allocates damages between damages for injuries for which compensation is payable under the workers' compensation statute and damages for injuries (other than loss of consortium) which are not so compensable.

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allocated, will be approved and will not be thwarted by an overreaching workers compensation insurer.

In *Rhode v. Beacon Sales Co.*, 416 Mass. 14 (1993), the employee/workers compensation beneficiary argued that a judge had the discretion to create and enforce a fair allocation between the employee and insurer of an otherwise undifferentiated settlement amount.[2] This Court disagreed and held that "a judge has no discretionary power to review and to determine the fair allocation of proceeds between an insurer and the insured."

The Court further stated, "Until an 'excess' recovery exists, the entire recovery is for the insurer." *Rhode* at 19. This latter assertion was clearly dicta, unnecessary to the holding of the case, see, e.g., *Town of Dartmouth v. Greater New Bedford Reg'l Voc. Tech. High Sch. Dist.*, 461 Mass. 366, 381 (2012); *Evans v. Lorillard Tobacco Co.*, 465 Mass. 411, 427-428 (2013). Nonetheless, the workers' compensation insurers embrace it as a preemptive reversal of the later Appeals Court rulings in *Curry* and *DiCarlo*, without recognizing that the cases dealt

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[2] *Rhode* was further dissimilar from *Curry* and *DiCarlo* in that the employee did not seek differentiation and allocation among compensable and non-compensable categories of damages, but rather proposed a formula accounting for the amount of the collectable tort recovery in light of the full value of the entire case, and would have reduced the workers compensation carrier's recovery to the same proportion as the tort recovery bore to the overall tort damages.

with disparate issues.[3] *Curry* and *DiCarlo* do not contradict *Rhode* statement so much as they apply it in its proper context, recognizing that the insurer's primary right to be made whole operates within the sums recovered for compensable injuries.

The issue at hand is whether, when a judgment or settlement fairly allocates damages to injuries (such as pain and suffering) for which compensation is not payable, the subrogating workers' compensation insurer can nonetheless claim reimbursement for injuries beyond its risk, or whether c. 152, §15 and the subrogating insurer's reimbursement rights operate within the boundaries of the sums recovered for compensable injuries.

B. The Appeals Court's Conclusion That "Sum Recovered" As Used In G.L. c. 152, §15 Applies Only To The Amount Of Third- Party Liability Proceeds Applicable To The Types Of Benefits Payable Under Workers' Compensation, Effectuates The Legislative Intent To Allow An

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[3] The insurers cite *Rhode* as one of a trilogy of cases that purportedly conflict with the *Curry* and *DiCarlo* decisions. The other cases - *Lane v. Plymouth Restaurant Group*, 440 Mass. 469 (2003), *Bongiorno v. Liberty Mut. Ins. Co.*, 417 Mass. 396 (1994) - each repeat the *Rhode* dicta, but not in a context remotely essential to its holding. Neither decision has anything to do with the present issue. *Lane* stands only for the proposition that an insurer contesting the fairness of a settlement allocation has a right to cross examine testifying witnesses. 440 Mass. at 473. *Bongiorno* simply extends the insurer's §15 reimbursement rights to legal malpractice actions which encompass a §15 recovery.

Employee Both Workers' Compensation And Third-Party Tort Damages While Preventing Double Recovery.

In *Curry* and *DiCarlo*, the Appeals Court has interpreted §15 in a way that recognizes and respects the legislative policy of protecting workers' rights to third-party recovery for otherwise uncompensated harms and losses and the often competing[4] policy favoring reimbursement of insurers rather than permitting double recovery of damages. The insurer obtains reimbursement from sums recovered for injuries for which compensation was payable, and the employee and his or her family retain damages paid on account of injuries not compensated in the workers' compensation system.

If a worker's third-party settlement proceeds included payment for a property loss he suffered in connection with his injury, everyone would agree that the portion of the third-party settlement attributed to the property loss would not be available to the workers' compensation carrier as reimbursement. *Vellucci v. Miller*, 989 F. Supp. 2d 211, 215 n.4 (D.R.I. 2013). Pain and suffering damages, like loss of consortium damages,

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[4] If one assumes a full and fully collectable recovery, there is no tension; the policies are complementary. The tortfeasor pays full damages, the insurer is fully reimbursed, and the employee and his/her family are fully compensated for pain and suffering, loss of consortium and other damages outside of the workers' compensation system. See *Richard v. Arsenault*, 349 Mass. 521, 524 (1965).

belong on the same independent footing. This is logical and fair and consonant with the statute.

In 1971, the Legislature amended the workers compensation statute to enable an employee, "without election", to pursue both compensation under c. 152 and tort damages from a person other than the employer, who may have been liable for the injury. St. 1971, c. 808, §1. A reversal of the Appeals Court's position in *DiCarlo* and *Curry* frequently would strip away from the employee the added protections afforded by the Legislature in 1971.

In a great many cases, the amount of recovery is limited by insufficient liability insurance,[5] comparative negligence, and asset protection from good business planning. Moreover, the uncertainty of litigation outcome arising disputes as to fault, causation, and extent of harm lead to compromise settlements even where insurance coverage is plentiful and collectability is not an issue.[6]

As a practical matter, workers' compensation insurers often will cooperate with the employee to make a tort settlement

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[5] This is a particular problem with respect to work-related auto accidents in relatively depressed urban areas where compulsory minimum coverage ($20,000 per person) is prevalent.

[6] This Court has recognized a legislative interest in encouraging settlement. *Bishop v. Klein*, 380 Mass. 285, 294 (1980); see *Noyes v. Raymond*, 28 Mass. App. Ct. 186, 189 (1990).

assured and mutually beneficial. Particularly when the case has to go to trial, however, the workers' compensation insurer has no incentive to reduce its lien and a plaintiff verdict can be pyrrhic for the employee.

In recognizing that §15 allows for categorization of damages subject to the workers compensation carrier's lien, the Appeals Court has accommodated both the realities of third party practice and the legislative intent to broaden recovery rights for injured employees, while preserving insurers' reimbursement rights.

We cannot reverse history.[7] Even if the "sum recovered" was understood at one time to mean only the entirety of tort damages, in light of developing case law and responding legislation and regulatory action it no longer makes sense as an all-encompassing definition. *Eisner v. Hertz Corp.*, 381 Mass. 127 (1980) recognized that family members may be entitled to independent categories of damages, exempt from the clutches of the workers' compensation lien. "Section 15 does not require reimbursement for an injury (wife's loss of consortium) not compensable under c. 152." Id. at 133. *DiMartino v. Quality Indus. Propane, Inc.*, 407 Mass. 171 (1990) and *Lane v. Plymouth*

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[7] As a brief in a companion case (*Martin v. Angelini Plastering*, SJC-11853) put it, borrowing a phrase from *Goodridge v. Dept. of Public Health*, 440 Mass. 309 (2003), this is an "evolving paradigm."

Restaurant Group, 440 Mass. 469 (2003) provided procedural safeguards for insurer and family members respectively to assure fair allocation of settlement monies, but did not require examination of whether the employee remained harnessed to a definition of "sum recovered" that frequently could strip away tort remedies allowed under G.L. c. 152, §15. The Legislature responded to *DiMartino* by codifying both the rights of family members to pursue independent claims and the rights of insurers to guard against opportunistic allocation of settlement monies to such derivative claims in order to avoid reimbursing the workers' compensation insurer. St. 1991, c. 398, §39.

Yet even when legislating in response to *DiMartino*, the general court kept the same terms - "sum recovered" and "excess" - in the 1991 amendments.[8] Clearly, then, the "sum recovered" as contemplated by the amendments no longer could mean the total tort recovery because the total tort recovery, or the "gross sum received in payment for the injury" as used in the statutory definition of "excess", could not include certain portions of the recovery allocable to family members.[9] We begin then, to see

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[8] It did change, in the fourth sentence defining "excess", the term "total sum" to "gross sum".

[9] The insurers may attempt to distinguish *Eisner* by claiming that consortium was not part of the employee's damages, so it could be exempted from the "sum recovered". This would be inaccurate. This Court has considered the spouse to have been

a more fluid definition of "sum recovered modified by the predicate phrase of 'injury for which compensation is payable'."

In his concurring opinion in *DiCarlo,* Justice Agnes wrote:

> The language "[t]he sum recovered shall be for the benefit of the insurer," is not otherwise qualified or limited in §15 or elsewhere in G.L. c.152. This language has been part of our workers' compensation law since it was enacted in 1911. *Rhode v. Beacon Sales Co.*, 416 Mass. 14, 17 (1993) (*Rhode*). The phrase "the sum recovered" does not differentiate between the types of damages that may be recovered by or on behalf of an employee in a third-party action. In *Rhode*, the court observed that the language was designed to establish "an insurer's right to full reimbursement of benefits." Ibid.

DiCarlo v. Suffolk Const. Co., 86 Mass. App. Ct. 589, 595. This assumes an unbending definition, seized now by the workers compensation insurers, which cannot possibly prevail in light of *Eisner*, *DiMartino*, *Lane*, and the 1991 amendments to §15. Further, the concurrence fails to consider what happened, or did not happen, after *Curry:* 1) This Court declined further appellate review of the Appeals Court's decision; 2) From 2011

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encompassed within the concept of employee, but differentiated between consortium loss, not subject to §15, and widows' benefits under c. 152, which were subject to §15. *Eisner v. Hertz Corp.*, 381 Mass. 127, 133 (1980); see *Bongiorno v. Liberty Mut. Ins. Co.*, 417 Mass. 396, 404 and n.9 (1994) (discussing distinction between spouse's loss of consortium damages outside of §15 and so-called "inchoate rights" to which the §15 lien applies). Furthermore, the Legislature has never expanded upon the definition of employee to clarify the term "sum recovered" or the definition of "excess", either pre-*Eisner* or post-*Eisner*, pre-1991 amendment or post-1991 amendment.

until now, the Legislature has not altered the section construed by the Appeals Court as allowing for different categories of damages subject to or not subject to workers' compensation insurers' reimbursement; 3) Meanwhile, the Department of Industrial Accidents immediately embraced the ruling in *Curry* and incorporated it into its inter-active §15 petition for approval of third-party settlement. The broader understanding of "sum recovered" adopted by the Appeals Court in 2011 has become an accepted part of the fabric of resolving third-party claims and fairly apportioning the recovery between injured employees and workers' compensation insurers.

II. IF *RHODE* CARRIES THE MEANING ASSIGNED BY THE INSURER, THE CASE WAS INCORRECTLY DECIDED AND SHOULD BE OVERRULED.

It is not necessary to reverse the holding in *Rhode* because the case did not involve the issue decided in *Curry* or *DiCarlo*. However, to the extent *Rhode* is susceptible to the broad reading urged by the insurers, the decision should be reconsidered. "Adherence to the principle of stare decisis provides continuity and predictability in the law, but the principle is not absolute. No court is infallible, and this court is not barred from departing from previous pronouncements if the benefits of so doing outweigh the values underlying stare decisis." *Stonehill College v. Mass. Comm'n Against Discrimination, 441* Mass. 549, 562 (2004); see *Sheehan v. Weaver*, 467 Mass. 734,

740-741 (2014) (overruling prior interpretation of G.L. c. 143, §51).

Even before the 1991 legislative amendment to §15 in light of *DiMartino*, §15 provided that "both the insurer and the employee [must be afforded an opportunity] to be heard on the merits of the settlement and on the amount, if any, to which the insurer is entitled out of such settlement by way of reimbursement which amount shall be determined at the time of such approval" [emphasis added]. *DiMartino v. Quality Industrial Propane Inc.*, 407 Mass.171, 175 (1990). In the context of the issue presented to it, the *Rhode* decision limited a reviewing judge's authority to considering the allocation of a tort recovery between the primary injured employee and the derivative claims of family members. As between the employee and the workers compensation insurer, the Supreme Judicial Court indicated that the employee's recovery, even if it did not reflect the full value of the liability case, fell into the straightjacket of reimbursing the insurer unless and until there was an excess. *Rhode* was addressing the statutory changes that added language giving a reviewing judge power to make determinations "on the fair allocation of amounts payable to the employee and the employee's spouse, children, parents and any other member of the employee's family or next of kin." The Supreme Judicial Court found the expanded statutory language to

allow for division between victim and victim's family, not victim and victim's workers' compensation insurer. The "if any" clause then, when determining "the amount, if any, to which the insurer is entitled out of such settlement", makes sense after the 1991 amendment because the derivative claims can have value in poor liability situations even when excessive comparative negligence by the employee/plaintiff makes the primary tort claim valueless. It is possible, therefore, for allocation of tort proceeds to leave the primarily injured plaintiff/employee and the workers' compensation insurer with no recovery.

The problem with reading *Rhode* too expansively, however, is that the "if any" clause predated the 1991 amendment and it predated the *Eisner* decision. Indeed, it has been around since 1939, predating by three decades this Court's recognition of the right to recovery for loss of consortium claims. *Diaz v. Eli Lilly & Co.*, 364 Mass. 153, 165 (1973); *Ferriter v. Daniel O'Connell's Sons*, 381 Mass. 507, 516 (1980). If the Supreme Judicial Court's interpretation in *Rhode* reflected a blanket denial of a judge's ability to alter the allocation between employee and workers' compensation insurer, then for what possible reason did the pre-*Eisner*, pre-1991 version of §15 already talk about the "amount, <u>if any</u>, to which the insurer is entitled out of such settlement" [emphasis added]? If the court reviewing a settlement had no discretion to approve an

allocation between workers compensation insurer and employee, the workers' compensation insurer ALWAYS would have been entitled to reimbursement up to the greater of the proceeds payable under G.L. c. 152 or the amount of the tort recovery. Therefore, the additional words "if any" would have been pointless; there could be no scenario where there would not be "any" because too broad of a reading of *Rhode* would presume the workers compensation carrier to have exclusive and complete priority up to its lien amount. The Legislature is not to be presumed to use extra words for no reason. *Boston Police Patrolmen's Assoc. v. Police Dept. of Boston*, 446 Mass. 46, 50 (2006). The only explanation for the "if any" clause in effect before *Eisner* removed derivative claims from "sum recovered" subject to the §15 lien was an expectation on the part of the Legislature that a judge reviewing a proposed third-party settlement would have discretion to apply equitable principles to approve a proposed settlement that fairly allocates proceeds between sums attributed to injuries for which compensation has been paid and injuries not compensable in workers' compensation. This enables the injured worker to have a fairer overall recovery while avoiding duplicative payment within categories of benefits provided by both Chapter 152 and tort law.

CONCLUSION

For the reasons cited above, the decisions of the Appeals Court's recognizing that §15 allows some flexibility in the distribution of tort damages between an injured employee's liability case and the reimbursement claim of his or her workers compensation carrier should be affirmed.

Respectfully submitted,

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Dated: September 15, 2015

MASS. R. APP. P. 16(k) CERTIFICATION

Undersigned counsel certifies that this brief complies with the rules of Court including, but not limited to, Mass. R. App. P. 16, 18 and 20.

/s/ J. Michael Conley
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CERTIFICATE OF SERVICE

I hereby certify that on this date I forwarded two copies of the Brief of Amicus Curiae, The Massachusetts Academy of Trial Attorneys, via first class mail, postage prepaid to all counsel of record

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Signed under the pains and penalties of perjury this 15TH day of September 2015.

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