COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **SUPERIOR COURT**
CIVIL ACTION
NO. 2284CV00652-BLS2

PEERLESS INSURANCE COMPANY & Others[1]

vs.

JOHN ROONEY

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT

At issue in this case is whether the Defendants, Peerless Insurance Company, Liberty Mutual Fire Insurance Company, and Ohio Casualty Insurance Company (together Liberty or the Insurers) violated G. L. c. 176D, §§ 3(9)(c), (d), and / or (f), and thus, G. L. c. 93A, § 2, in connection with the claims handling practices, investigation, and settlement of John Rooney's personal injury claim against the White-Skanska-Consigli Joint Venture (JV) which resulted, after trial, in a $26.6 million verdict for Rooney (the Underlying Case).

Liberty seeks a declaratory judgment that the Insurers did not violate G. L. c. 93A ("Chapter 93A") and 176D ("Chapter 176D") in connection with the handling of Rooney's claim against the JV. Rooney counterclaims, alleging Liberty violated the statutes because it: (a) failed to adequately investigate the claim and implement reasonable claims handling policies and training; and (b) failed to make a reasonable offer of settlement when the JV's liability to Rooney became reasonably clear.

The case was tried before me over ten days in August and September 2025. Seven witnesses testified and 172 exhibits were admitted into evidence, including the

[1] Liberty Mutual Fire Insurance Company, and Ohio Casualty Insurance Company

deposition testimony of certain unavailable witnesses.

My task now is to determine what evidence and information was, or should have been, known and available to Liberty to determine if, and when, liability became reasonably clear in the Underlying Case. I must also evaluate whether Liberty had in place reasonable protocols and procedures to investigate claims and, importantly, whether it satisfied its obligation to conduct a reasonable investigation to determine liability. Finally, I must determine whether any offers Liberty made to settle the Underlying Case were reasonable. If I conclude that Liberty failed to make a reasonable settlement offer once liability was reasonably clear, I must then determine whether its conduct was willful or knowing such that punitive damages are appropriate. After trial, and pursuant to Mass. R. Civ. P. 52(a), I find the following facts and make the following conclusions of law.

FINDINGS OF FACT[2]

Based on the testimony, exhibits, stipulations, agreed facts, other credible evidence introduced at trial, and the reasonable inferences drawn therefrom, I find the following facts.

I. Insurers, Policies, and Protocols

1. Peerless Insurance Company (Peerless) and Ohio Casualty Insurance Company (Ohio Casualty) are New Hampshire corporations. Liberty Mutual Fire Insurance Company (Liberty Mutual) is a Wisconsin corporation. Each has a principal place of business in Boston, Massachusetts. I refer to all three together as "Liberty" or the "Insurers."

2. When an insured claim is submitted to Liberty, a claims handler, also called an adjuster, is assigned to handle the claim. The adjuster is supervised by

[2] I do not here restate all the testimony or exhibits in this case which I credited, only those facts which I found material and necessary to decide the claims. Certain discrete factual findings are reserved for discussion below.

various senior claims professionals.

3. At all relevant times, Liberty had an internal claim notes or "diary" system in which adjusters and other claims handlers, including supervisors, could review and make notes about the liability and damages investigation of a claim, document information about the insured and the claimant, and record discussions with and reports provided by defense counsel. An adjuster's direct supervisor is required to review the claim notes for specific claims periodically and no less frequently than every 180 days.

4. Liberty has field legal defense counsel – lawyers employed by Liberty and who are assigned to defend claims that are in suit.

5. Adjusters and Liberty-employed defense counsel can all review and enter information in the claim notes.

6. Adjusters and their supervisors rely on defense counsel to handle all aspects of a case in suit, provide reliable factual information on the cases they are defending, and explain the legal strategy of defense.

7. It is the claims professionals, however, who are responsible to ensure there is a strategy in place to resolve the claim and to ensure compliance with all laws and regulations, including whether, when, and what amount of money to offer to settle a claim when liability becomes reasonably clear.

8. "Roundtables" are discussions among the claims professionals held to discuss case evaluations and settlement, set or increase reserves, advise more senior claims professionals about liability, obtain settlement authority, and, when a claim in suit is close to trial and no settlement will be offered, obtain trial authority. Prior to a roundtable, the principal claims handler will prepare a roundtable memorandum or report.

9. When a case is in suit, roundtable discussions and reports must accurately reflect the evidence the jury is going to hear. The consultation in a roundtable is not

meaningful if the claims professionals are not aware of the evidence that both supports and detracts from the liability of the insured.

10. Although Liberty's claims professionals rely on roundtable reports and discussions for accurate information to inform Liberty's assessment of liability and the insured's chances of success, Liberty has no written guidelines about how to write a roundtable report or conduct a roundtable discussion.

11. Roundtable reports, together with the claim notes, should provide an accurate description of the claim, the key elements of the plaintiff's and insured's arguments, and a correct description of the claims and arguments with evidentiary support.

12. If an adjuster is provided information he or she considers harmful to the insured and / or which impacts liability, it should be included in the roundtable report. Liberty has no written guidelines about how to evaluate information to determine liability.

13. Liberty conducts formal six-week training for new claims professionals and thereafter requires adjusters to take online training as indicated. Liberty does not specifically train its claims handlers about how to assess when the liability of an insured is reasonably clear.

14. Liberty has general written claims policies for commercial claims. Liberty did not have any specific claims policies or procedures for complex construction cases and no policy or manual focused on or geared to issues that arise in complex construction claims. For example, Michael Ince, the adjuster on the Underlying Case, see *infra*, did not recall receiving any training about the impact of OSHA violations when assessing construction cases.

15. None of the Liberty claims professionals who handled the Underlying Case, identified below, relied on any written protocols or procedures in adjusting Rooney's claim.

16. A "reserve" represents Liberty's estimated evaluation of the amount of money it expects to pay on a claim. For cases in suit, Liberty determines its reserves by estimating damages and multiplying that figure by a fraction representing the likelihood of non-success.

17. A "value changing event" is new information that drives the need to re-evaluate the current case reserve.

18. The filing of a lawsuit is not a value changing event. Liberty's evaluation of a case should not change simply because of litigation.

II. The Project and Job Site

19. Sometime prior to 2014, three entities – together White-Skanska-Consigli – formed the JV to contract with the Massachusetts Department of Transportation (MassDOT) to repair and rehabilitate the Longfellow Bridge (Bridge) which spans the Charles River to connect Cambridge and Boston (the Project).[3]

20. The contract between the JV and MassDOT required that the JV's health and safety plan comply with standards for construction sites issued by the Occupational Health and Safety Administration (OSHA).

21. The contract also required the JV to conduct and document daily, weekly, and monthly safety inspections and retain the records of those inspections for seven years. Further, the contract prohibited the JV from delegating responsibility for job site safety to a sub-contractor.

22. The JV produced a site-specific safety manual (Safety Manual) that required the Project Safety Manager, Martin Golden (Golden), to perform and document weekly inspections, monitor and confirm project compliance, perform daily

[3] As the parties did in this case and in the Underlying Case, I refer to the JV as the responsible and insured party even though JF White was technically the defendant in the Underlying Case and the general contractor for the Project.

oversight for site conditions, and submit monthly safety reports. Golden was responsible for all on-site inspections.[4]

23. The Safety Manual also required all scaffolds to be fully decked and prohibited the use of single planks. Finally, the Safety Manual required the JV to photograph any accident scene and interview witnesses separately.

24. None of Liberty's claims professionals responsible for the Underlying Case reviewed the JV's contract with MassDOT or the Safety Manual.

25. The JV subcontracted United Stone and Site, Inc. (United Stone) to perform the masonry work on the Bridge.

26. The Project was complex requiring the demolition of the stone bridge to its steel arches.

27. The masonry work was particularly complex. Each stone had to be marked and numbered, chiseled out, removed individually by crane, cleaned and refurbished, and reinstalled. Numbering and marking ensured the stones would be replaced in the same location to preserve the historic architectural aspects of the Bridge. Both Boston and Cambridge required that the reconstruction exactly replicate the historic Bridge.

28. Two sets of scaffolding were erected on each tower or pier of the Bridge. The exterior / perimeter scaffolding was erected by Safway Systems around the outside of each tower and the JV erected interior scaffolding running up the inside of each tower.[5]

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[4] The JV answered interrogatories in the Underlying Case identifying only Golden as the person responsible for on-site inspections.

[5] I do not repeat or credit Liberty's occasional reference to the interior scaffolding as "staging" or a "platform." According to OSHA, a scaffold is simply an "elevated, temporary work platform" and the interior scaffolding met that definition. See https://www.osha.gov/etools/scaffolding (last visited Nov. 8, 2025). See also 29 C.F.R. § 1926.450 (defining "Scaffold" as "any temporary elevated platform (supported or

29. OSHA mandates that scaffolds be fully planked and prohibits gaps in the planking greater than one inch. OSHA also requires that scaffolding be inspected before each work shift.

30. The masonry work plan provided that the masons would "[c]ut out existing mortar joints in stones using plunge saw and water or vacuum as previously submitted from inside the tower." Because the Project required marking each stone prior to its removal, the masons were required to work on the interior scaffolding and were permitted to do so by the JV.

31. At night, the JV's employees used the interior scaffolding to chip the mortar between the stones, remove the debris from the mason's daytime work, and move the scaffolding down as work progressed down the tower.

III. <u>The Accident</u>

32. John Rooney (Rooney) was employed by United Stone as a mason and had twenty-seven years of experience. He was OSHA certified, a "competent person" for scaffolding, and designated the job steward for the job site.

33. On May 9, 2014, Rooney was injured while performing masonry work on one of the Bridge towers. With Rooney on the tower at the time of the accident were the job site foreman, Jonathan Kudirka (Kudirka), and Chris Houde (Houde). Kudirka witnessed the accident. All three were members of the Bricklayers and Allied Craftsmen Union, Local 3.

34. Notes from a meeting held shortly after the incident were attached to the Project's Work Plan Details. Those notes state:

> John Rooney tripped while on top of P5U. Rigging stone *from the inside* moved and tripped when yoyo caught. He fell Around 5'. Tripped on scaffold pieces, not debris.

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suspended) and its supporting structure (including points of anchorage), used for supporting employees or materials or both").

> Is USSI [United Stone] supposed to have interior access? *Their work plan says yes, cutting from both sides*.
>
> . . . USSI will continue to work off interior staging.

(Ex. 120 [emphasis added].)

35. Although Rooney originally told Kudirka that he was fine, his foot began to swell, and Rooney went to the hospital. A hospital note states that Rooney complained of pain in his ankle and that he fell at the Bridge because his safety harness failed.

36. Rooney returned to work on May 12, 2014.

37. On May 12, 2014, an accident report was prepared signed by Rooney and, I reasonably infer, Kudirka, as well as Patricia Boyden as the "Safety Officer."

38. The report stated that at 11:40 a.m. on May 9, 2014, Rooney "[r]eached limit of lanyard which caused him to trip and fall" while he was "[r]emoving granite from Pier 5 upstream tower." The "cause" of the "incident/near miss" was listed as "[l]anyard length limitation" and the corrective action was to "[r]eattach lanyard as work progresses." The report nowhere mentions that Rooney was walking on a plank.

39. On May 22, 2014, Kudirka and Rooney signed a handwritten accident report that described the accident as "fall from [scratched out word] scaffolding." The report nowhere mentions a plank or that Rooney was on a plank. I cannot discern what the scratched out word was and can make no reasonable inference because it is no less likely to be "defective" as "debris pile."

40. On May 29, 2014, Patricia Palmiere, a JV executive, wrote in an email to JV personnel that Rooney "tripped and fell about 5' towards the interior of the tower" and that he either tripped over staging "inside the tower on the staging platform" or because his lanyard caught. She did not mention any separate – non-staging – "plank."

41. Rooney was unable to continue working and went out on worker's compensation. His injuries continued to worsen. By the time of the trial in the

Underlying Case, Rooney had undergone nine total surgeries which included cervical discectomies, and spinal and cervical fusions.

42. Ince does not recall reading any of the reports or notes of the accident from 2014. None of the above were included in case assessments provided to Liberty during the Underlying Case.

IV. The Claim

43. Rooney filed the Underlying Case against JF White[6] in Middlesex Superior Court on September 9, 2015, Case No. 1581CV05662. Rooney alleged that he was working on the Project and "he fell off the scaffolding when his harness failed to function properly." He fell "approximately five feet, landed violently on a concrete platform causing him to suffer serious injuries to his lower back, neck, right buttock, thigh, leg, and foot."

44. Rooney alleged that JF White – and therefore, the JV – was liable for the following reasons: (a) negligent supervision of the site and its subcontractors; (b) negligent site inspections to ensure all areas were safe and free of hazards; (c) negligent inspections to ensure the work being performed by subcontractors was done in a safe manner; (d) failure to establish proper procedure for work from scaffolding; (c) failure to ensure workers on scaffolds had the proper equipment to prevent falls from scaffolds; (d) failure to follow OSHA rules and regulations governing safety on construction sites and failure to follow the standards of care for safe use of scaffolds.

45. Liberty knew or should have known from the Complaint that Rooney alleged negligence based on the JV's failure to inspect and supervise the site, that OSHA violations were at issue, and that Rooney claimed to have fallen while on scaffolding.

46. The suit was reported to Peerless on November 3, 2015. Peerless had issued a $1,000,000 primary policy to United Stone that covered the JV – as a result of

[6] See fn.4, supra.

United Stone's indemnification obligation to the JV. Ohio Casualty and Liberty Mutual issued excess policies that provided coverage upon the exhaustion of the Peerless limits.

V. Claims Professionals

47. The claims professionals principally responsible for handling the claim were Liberty employees Ince; his manager, Patrick Janes (Janes); and Janes' manager, Tres Robertson (Robertson). Ince was the primary claims handler or adjuster. His authority for setting reserves and settling cases was capped at $250,000.

48. Janes managed complex construction-related cases. Between 2015 and 2021, Janes managed between five to six hundred construction claims. His authority for setting reserves and settling cases was capped at $500,000.

49. Robertson was a Senior Field Manager with thirty-five years' experience at Liberty. Robertson had reserve and settlement authority of up to $1 million. His supervisor was Tom Kievet whose authority was capped at $2 million. Toby Rollins supervised Kievet. His authority was capped at $3 million. Yet another Liberty manager, a Mr. Fiato, had authority capped at $6 million.

VI. Early Claim Investigation

50. On November 4, 2015, Liberty described the cause of the incident as follows:

> According to the insured's foreman, John Kudirka, the plaintiff was on scaffolding put up by the GC and the plaintiff apparently put an 8' board between the scaffolding and the bridge. The plaintiff was tied up and attached to the safety lanyard at the time, as required. However, the plaintiff had reached the lanyard's reach limit and while he was walking on the plank he tripped over the plank and feel [sic] 5' onto the concrete decking below him. Per insured's foreman, the plaintiff (as with anyone else) needed to move the lanyard 'hook up' as close to where he was working instead, the plaintiff kept the lanyard hooked up at the same spot as he walked around the top of the tower.

(Ex. 6.)

51. The report indicated that Rooney had a life expectancy of 29 years from

the date of the incident and had, at the time the Complaint was filed, a fusion in his spine at C6-7 and a discectomy at L3-L4 and L4-L5.

52. Liberty ultimately sought two independent medical reviews of Rooney's medical records. Both concluded that his surgeries were related to the fall and not his pre-existing rheumatoid arthritis. Very early in the case, Liberty understood that medical causation was not at issue, i.e., that all Rooney's substantial injuries and surgeries were the result of the fall.

53. On November 13, 2015, Peerless hired an independent investigator from ICS Merrill who issued a report dated November 24, 2015 (Merrill Report). The Merrill investigator spoke with Kudirka and Houde on November 20, 2015.

54. Kudirka told the investigator that Rooney "fell off a [sic] 8' plank resting on . . . [the] inner module staging tower that the claimant put there himself," and Rooney was "walking on a plank when he tripped over the plank at the time the lanyard's reach limit was met." According to the investigator, "Houde was a witness to the accident and confirmed the version provided by Kudirka." [Exs. 7, 8].

55. The Merrill Report included email and cell phone contact information for both Kudirka and Houde.

56. No one from Liberty ever sought to locate, interview, or depose Houde – the only other person on the tower when Rooney fell.

57. If, as Liberty has conceded, the liability defense relied on the single plank theory articulated by Kudirka, good and accepted insurer investigation practices require that Liberty at least interview all persons with any direct information about the accident. Liberty should have at least taken a statement from Houde to determine if his testimony would support Kudirka's narrative. The general statement in the 2015 Merrill Report that Houde "confirmed" Kudirka's version was not sufficient.

58. In December 2015, Ince and Janes conducted the first roundtable to discuss the claim and set an appropriate reserve. Ince recommended an initial reserve

of $400,000 reflecting his view that there was a 25 percent chance Rooney would recover damages at the top end of the range of Ince's estimated damages – between approximately $1.4 million and $1.6 million.

59. Ince wrote in the roundtable report: "I do feel, based on the facts of the case, that we do have [a] good chance of [a] defense verdict based on MA 51% rule. My reserve request is based on a jury finding the general contractor 25% at fault. We will point the finger at plaintiff being responsible for the accident and also use our named insured to assist in defending the general contractor."

60. Ince premised Rooney's responsibility solely on the statement Kudirka reportedly made to the investigator that Rooney "put a[n] 8' board between the scaffolding and the bridge."

61. The "MA 51%" rule refers to the law in the Commonwealth that a plaintiff found more than 50 percent responsible in negligence for his loss is not entitled to recover from a defendant.

62. From the start, Liberty viewed liability as dependent on comparative negligence and thus believed that a "defense verdict" depended on a jury applying the comparative negligence bar.

63. David Cain (Cain) is an attorney employed in Liberty's Field Legal office. He has worked for Liberty nearly his entire legal career, since approximately 1991. When Liberty assumed the defense of the case, Cain became defense counsel for the JV.

64. At the time of the Underlying Case, Cain had been practicing law in the Commonwealth for more than twenty-five years and had tried thirty to fifty cases to verdict. Prior to the Underlying Case, Cain often represented construction companies in cases involving workplace injuries.

65. As between Liberty-employed defense counsel, such as Cain, and Liberty's claims professionals, the claims professionals are responsible for deciding whether and when to make an offer of settlement and how much to offer.

66. Defense counsel are required to provide written reports to the claims professionals at several junctures. They must provide an initial case evaluation, written summaries of depositions and other significant case developments, pre-mediation and pre-trial reports, and a trial plan.

67. Cain first learned of the Underlying Case in December 2015. Cain reviewed the Complaint and the Merrill Report. When Cain read that Rooney fell from a plank that he placed himself, Cain viewed that conduct to be "significant contributory negligence." Based on that, and other preliminary information Cain obtained about the case, Cain agreed with Ince's initial reserve and with Ince's view that there was a seventy-five percent chance of a defense verdict.

68. Defense counsel must also periodically provide the claims professionals with a numerical – percentage-based – assessment of the insured's chances of winning at trial and the likely percentage of comparative negligence that would be assigned to the plaintiff if the case involved comparative negligence.

69. On December 19, 2015, Cain provided an initial case evaluation to Ince. Cain wrote:

> The mechanics of the accident are a little hard to follow. The plaintiff was tied off with a personal lanyard, working on scaffolding that was erected and maintained by the [JV]. He walked along the scaffolding platform to the maximum reach of his lanyard, which would have the effect of pulling him to a stop from behind. . . . At that exact moment, he also encountered a plank on top of the scaffolding planks that was about an inch and a half thick. He tripped on the plank and fell over, apparently sideways, off the scaffolding to the next level 5 feet below. The lanyard is about 6 feet or longer.
>
> The allegation seems to be that the board should not have been there. In other words, the plaintiff wants to make this a simple case of the [JV] allowing or creating a tripping hazard on the scaffolding walking surface. . . . The defense at this point would seem to be straight comparative negligence; that he was not mindful of the limitations of his lanyard line and was not watching where he stepped.

(Ex. 13.)

70. This description of the case – that Rooney tripped over a plank – was inconsistent with Kudirka's reported assertion that Rooney was walking on a plank that he had placed. Cain understood, however, that Rooney was working on and walking on scaffolding the JV had erected.

71. Cain identified the issues facing the defense as determining "why the board was there and why there was a height differential."

72. Despite understanding that duties on a construction site can arise from the construction contract, Cain did not review or consider the contract between the JV and MassDOT (Contract) or the site-specific Safety Manual prior to preparing his initial case assessments or any other assessments.

73. Ince never read or considered the Contract or the site-specific Safety Manual.

74. Robertson expected Ince to have been familiar with the Contract and Safety Manual when he wrote the roundtable reports.

VII. Discovery

75. Sometime in 2016, before his deposition, Rooney answered interrogatories in which he described gaps in the interior scaffolding of between two-and-a-half to three feet and stated that he fell into, or because of, one of those gaps.

76. One of Rooney's interrogatory responses stated: "I was standing on the interior scaffolding planks. There was a space between the scaffolding planks. I stepped forward over the space and as I did my harness engaged and prevented me from moving forward. As a result, my lead foot did not reach the plank on the other side of the space, and I fell straight down approximately 5 feet to the concrete deck of the interior tower."

77. Cain knew that gaps of that size would not be OSHA-compliant. Cain also knew that if a jury believed that Rooney was working on interior scaffolding with

large gaps, the JV would be found to have breached its duty to Rooney.

78. In the summer of 2016, Cain spoke with Marty Golden and learned that, although the JV was supposed to inspect the scaffolding daily and put up scaffolding tags (scaff tags) evidencing those inspections, the JV had "tossed" all the scaff tags and had no documentation of any inspection of the interior scaffolding.

79. Cain recognized the importance of missing safety inspection records, but did not include that information in any of his case assessments or other reports to Liberty. The missing safety documents did not affect Cain's assessment of the case, however, because he continued to believe that Rooney caused the accident by walking or tripping on a plank.

80. Rooney was deposed in September 2016. Cain sent Ince a summary of Rooney's deposition on September 27, 2016. Cain reported that Rooney "appears to be in pain and moves slowly," is "fairly amiable," and his "story makes sense and is credible." Cain concluded that a jury will "like" Rooney and "feel badly for him."

81. Photographs produced to the defense and marked at Rooney's deposition showed dangerous scaffolds with more than two-foot gaps.

82. Cain recounted the highlights of Rooney's deposition testimony which included: (i) the JV had a "100 percent tie off policy that bothered the workers because they were always tripping on the lanyards;" (ii) *the scaffolding "was a source of complaints because boards were missing;* (iii) there was an exterior scaffolding erected by a vendor and a separate inside scaffolding with a permanent footing at the base of the tower; (iv) "Plaintiff and his coworkers had voiced concerns that there were gaps in the planking"; (v) "[t]he photos show this clearly: both sets of scaffolding and some missing planks on the interior"; (vi) Rooney's lanyard, which was "tied to the exterior scaffolding" went taut and Rooney fell into "the hole, hitting his back on a steel beam"; and (vii) Rooney "testified consistently with his Answers to Interrogatories that on the morning of the accident he informed Marty Gold[en], Safety Office[r] for [the JV] that he was concerned

about the scaffolding being unsafe." (Emphasis added).

83. Cain made clear that Rooney denied he reached the "end" of his lanyard. Rather, Rooney testified it "activated" and arrested his forward motion.

84. Cain wrote that the JV should not implead the scaffolding company because, while Rooney "did tie off to the exterior scaffolding, [ ] the interior scaffolding built by [the JV] is the one he was actually working on" and "*the real problem was missing planks[.]"* (Emphasis added).

85. Cain found Rooney to be credible and thought a jury would find him credible.

86. At this point, Liberty was aware that Rooney's theory of the case was that he fell because of large gaps in the interior scaffolding set up by the JV.

87. On November 16, 2016, Palmiere from the JV spoke with Ince, described the accident as occurring in the interior tower, and said nothing about a single plank. Although she indicated she did not think the scaffolding was involved, it is clear from Ince's note that she was referring to the exterior scaffolding and not the interior scaffolding which she called a "wooden framework on which planks were placed."

88. On September 18, 2018, a scheduled deposition of Kudirka did not go forward but Cain spoke with Kudirka nonetheless. Cain reported to Ince that Kudirka claimed the "interior scaffolding was maintained by United Stone" and there were "no issues" with it. According to Kudirka, at the time of the accident, Rooney was marking and numbering the stones. Kudirka could see Rooney only in his peripheral vision. Kudirka claimed Rooney reached the end of his 20-foot lanyard which jerked him back and caused him to fall to the next level. Kudirka also said Rooney was not a careful worker. Cain thought it was unusual for a career union foreman to call out an experienced laborer as not careful, especially when the person got hurt.

89. Kudirka also told Cain that Paul Souza, JF White's labor foreman, came up through the hatch to the tower after the accident. Rooney told Souza that he had gotten

hurt and Souza took Rooney down. Cain told Ince he would notice both Kudirka and Houde's depositions.

90. As noted *supra,* Houde was never interviewed or deposed. No one from Liberty interviewed Souza. Good and accepted claims investigation would have required Liberty to interview Souza to see if he noticed or saw a loose, single "plank" when he arrived on the tower. Interviewing Souza was even more important because the JV had no photographs of the tower from the date of the accident.

91. Peter Rapp, the JV's Project Manager, was deposed on November 26, 2018. Cain provided a written deposition summary to Ince reporting as follows: (i) the JV erected the "internal scaffolding" and the general foreman checked it daily and "signed the scaff tags"; (ii) a site-specific safety plan was submitted to MassDOT; and (iii) there were daily and monthly safety meetings.

92. Rapp also testified that the JV worked in the interior scaffolding at night chipping the cement so the blocks could be freed and moved during the day by the masons. He testified that the intent of the interior scaffolding was for demolition only but that, if the masons "wanted to use the intereior scaffolding *they were free to use it*." (Ex. 156, pp. 94-95 [emphasis added].) When asked whether anyone told United Stone that the masons could not use the interior scaffolding, Rapp testified, "As I mentioned, it was there for their use if they wanted it, but it wasn't intended for their use. It wasn't constructed for their use."

93. Rapp's testimony, to the effect that the masons were free to use the interior scaffolding, was not included in any of Ince's roundtable reports.

94. But Ince knew and understood the importance of that testimony. On November 29, 2018, Ince wrote a note in the claim file that the "optics of the interior scaffolding are not great but the reality is that it was sort of standard fare and [the JV] let United Stone utilize the interior scaffolding as a favor on an 'as-is' basis."

95. As of November 2018, Ince knew and understood that one aspect of the

theory of defense, that Rooney was not allowed to use the interior scaffolding was disputed.

96. Mike Keville (Keville) testified on December 3, 2018 as the 30(b)(6) witness for the JV. Cain reported to Ince that Keville testified: (i) the exterior scaffolding system was erected by Safway Systems which was hired by United Stone and the interior scaffolding "was a post-shoring system with platforms 'every so often' and no guardrails because you were tight up to the granite wall on the inside of the tower;" (ii) there was a demolition chute in the middle of the tower that went down to a dumpster; (iii) subcontractors were not permitted to use the interior scaffolding and, therefore "it was not checked before the morning shift"; (iv) Keville was "90 percent sure that an engineer from the JV told United Stone not to use the interior scaffolding"; (v) Keville inspected the site after the fall with Marty Golden who took photos.

97. No contemporaneous photos of the accident site were ever produced in the Underlying Case. Cain viewed Keville's testimony as important because there were two key questions in the case – whether Rooney should have been in the interior part of the tower and whether he fell on the interior scaffolding or from a plank.

98. In connection with Liberty's theory that Rooney was improperly on top of a plank when he fell, Keville testified that it was "not a huge safety concern about planks across the top because it's not 6 feet. So long as he was tied off. I would have been OK with 4 across, but not necessarily with just 2, Planks come from masons' exterior planks being taken down from Safway system."

99. Keville did not recall any prior complaints about scaffolding and did not believe the incident involved scaffolding. Rather it was his opinion that Rooney "fell off two parallel planks[.]" Cain viewed that testimony as consistent with the Merrill Report.

100. Neither Keville nor Golden, who went on the tower the day of the accident and "inspected," indicated that they saw any plank or planks from which

Rooney may have fallen.

101. At this point in time, Cain thought that if a jury believed Kudirka and Keville, there was a "good chance" it would find that Rooney was not truthful. Cain and Liberty believed the case turned entirely on Rooney's credibility. Cain reported, "[o]ur best information is that [Rooney] was on planking that he himself, or he and a co-worker (likely Kudirka) put across the entire turret as a shortcut from one side to the other."

102. On December 14, 2018, Rooney's counsel made a settlement demand. She identified the central issue constituting negligence as the existence of a "hole in the platform of the scaffolding through which Mr. Rooney was able to fall." Rooney's counsel concluded that "as such" the scaffolding was not OSHA-compliant and, although the scaffolding was dismantled and lowered each night as the concrete was removed, the scaffold was never checked at the end of the night or before the masons began work the next morning.

103. She concluded, "[h]aving known that the masons were working on scaffolding that was also being dismantled by another crew of workers, the Defendants knew or should have known that the use of the scaffolding was unsafe and should have taken necessary precautions and remedial measures to fix the issue before sending workers onto the scaffolding to work."

104. Rooney's counsel detailed Rooney's lost future wages of $1.3 million, medical expenses of $400,000 which were growing, and a worker's compensation lien of $1 million. She also described how the injury impacted Rooney's quality of life given the constant hospitalizations, the pain, suffering, and discomfort from having to be catheterized, and the impact on Rooney's daily activities. Rooney's counsel demanded $5 million to settle the case.

105. Cain thought the demand was excessive.

106. Golden was deposed on November 21, 2018. Cain sent a deposition

summary to Liberty on December 16, 2018. Cain summarized the deposition as follows: Golden was the Project Safety Manager for the Project. There was a written Safety Plan. Golden did daily inspections at various times of the day but specifically denied inspecting or even entering the interior scaffolding. He was on site five to six days a week from 5:30 a.m. to 3:30 or 4:00 p.m. Golden did not recall who set up the scaffolding or when. Golden testified that scaff tags would have been done by the "competent person" of whomever erected the scaffolding. Golden had no recollection of Rooney's accident or injury and does not remember if the JV investigated the accident. Golden recalled no complaints about scaffolding.

107. Although the JV had answered an interrogatory in August 2016 that identified Golden as the only JV employee responsible for conducting site safety inspections and making sure all work was being done safely and in compliance with OSHA, at his deposition, Golden testified he was not the only person responsible for safety and, as Cain reports, see *supra*, testified that he never inspected, or even looked at the interior scaffolding.

108. Kudirka was deposed on December 17, 2018. Cain sent a deposition summary to Liberty. Despite what he had told Cain previously, Kudirka testified that he thought Rooney was a good worker and good at the trade. Kudirka reiterated his view that the masons were not supposed to use the interior scaffolding but, when he was shown photographs of himself on the interior scaffolding, he confirmed that he went on the inside to tighten the straps on the stones for removal. Kudirka claimed that *Houde* was the safety person who was supposed to sign off on the scaffolding daily.[7] With respect to the accident, Kudirka testified that Rooney was walking on a plank on the inside of the tower when he went down. Kudirka did not know who put the plank there but claimed it was not someone from United. Kudirka did not testify that Rooney

[7] This information would elevate the necessity of interviewing Houde.

put the plank on the tower. According to Cain, Kudirka "opined" that Rooney was using the plank as a shortcut.

109. Cain thought it was a "great fact" if Rooney was on a plank because "he would know he shouldn't do that." Kudirka's testimony about the plank "greatly" affected Cain's assessment of the case because, if Rooney was on a plank, and reached the end of his lanyard, then Rooney was "doubly negligent."

110. Cain reported to Ince that Rooney would "likely attempt to use photos of Mr. Kudirka to show that the general conditions of the job site sometimes allowed for United employees to stand on the interior scaffolding, and to paint a picture wherein the work plan and safety measures essentially amount to a "'do as I say, not as I do' philosophy."

111. In fact, numerous job photos produced in discovery showed masons and others using the interior scaffolding. None of those photographs show scaff tags indicating that there had been any inspection.

112. At their depositions, Rapp, Keville and Golden testified that there were inspections of the scaffolding – it is unclear if they were referring to the interior scaffolding – and that they saw scaff tags hanging on scaffolding.

113. After the fact depositions in late 2018, Cain had a long conference call with Ince. On January 8, 2019, Ince updated the file with his notes of that conversation. Ince reported that Cain now believed there was a seventy percent chance of a defense verdict and, if not, a fifty-fifty split on contributory negligence. Cain did not opine that the jury would assign more than fifty percent liability to Rooney.

114. In or around January 2019, attorney Michael Sherry (Sherry) assumed the defense of the Underlying Case as lead counsel.[8] He wrote a report and advised the

[8] Cain continued to be involved and, eventually see *infra* took over the defense and was trial counsel.

claims professionals that his "best estimate" of the likelihood of success was "50/50 as this will come down to whether a jury finds the plaintiff credible or not." Sherry conveyed that "a jury could assign 30-50% comparative negligence for care and action and not tying off closer this work area." At that time, Sherry was not aware of the missing inspection documentation. Sherry did not opine that the jury would assign more than fifty percent liability to Rooney.

115. Discovery in the Underlying Case closed in March 2019. At that time, Cain reported to Ince that although the injury had value, Cain believed the insured had a 70 percent chance of prevailing and, if not, then "a 50-50 split" on comparative negligence, again, not an amount that would bar recovery.

116. At the close of fact discovery, Kudirka was the only person who testified at deposition that he saw Rooney on a plank and there was no direct evidence to support the assertion that Rooney put a plank across the interior scaffolding. Notwithstanding his purported statements in the Merrill Report, Kudirka did not tell Cain in their private discussion and did not testify at deposition that Rooney set up a plank. In fact, Kudirka testified at his deposition that Rooney did not put a plank on the interior scaffolding. Thus, and critically, there was no direct or admissible evidence that Rooney put a plank anywhere in or on the interior scaffolding.

117. At the close of discovery, Liberty knew and / or should have known that the JV's Project Manager, Rapp, confirmed that Rooney was permitted to use the interior scaffolding; there was no witness who would testify for the JV that they inspected the interior scaffolding; and, as discussed, the JV had no documentation of any safety inspections let alone scaff tags.

118. Liberty also knew that Rooney would testify at trial that, on the morning of the accident, he complained to Golden – the JV's safety manager – about gaps in scaffolding and the condition of the scaffolding and that Golden said he would "check it out."

119. With respect to Rooney's lanyard, the evidence at the close of discovery was mixed. Some witnesses, including Rooney, testified that the lanyard would "catch" or lock, like a seat belt, even before it reached its length which, if true, could have caused Rooney to stumble into a gap in the scaffold.

120. Despite the conflicting evidence about the lanyard, and Rooney's alleged negligence in failing to move his lanyard, Liberty did not investigate exactly where Rooney was when he fell compared to where he had tied off his lanyard to determine if it was in a location where Rooney would have reached the end of the lanyard.

VIII. Ince's Roundtable Reports and Pretrial Assessments

121. In advance of a May 3, 2019 roundtable, which was necessary because trial had been scheduled for September 4, 2019, Ince prepared a roundtable report. This was the first roundtable since December 10, 2015.

122. Ince wrote:

> Plaintiff was supposed to only use exterior scaffolding that was intended for the masons / plaintiff's exterior work, and erected at the masonry contractor's direction. The scaffolding planks that plaintiff claims caused him to fall were taken from the exterior scaffolding planking, w[hich] he had put in the interior so that he could save steps by walking across the interior of the tower vs. around the tower's circumference. . . . He fell less than 6' and onto some debris on the interior flooring built beneath the interior scaffolding, however he was not supposed to be on the inside.

(Ex. 24.)

123. This paragraph was repeated in every roundtable report that Ince wrote or circulated. The other Liberty claims professionals, therefore, never moved from their position that Rooney caused the accident by putting a plank across the interior scaffolding, where he was not permitted to work, and walking on it.

124. Ince wrongly believed that Rooney had testified at his deposition that he fell while walking on a plank.

125. Ince did not report that the JV's Project Manager said the masons could

use the interior scaffolding, or that there was no admissible evidence that Rooney put a plank in the interior for any reason.

126. While Ince referenced photographs showing masons using the interior scaffolding and indicated it gave rise to a "notice" issue – he did not disclose that the photographs together with Rapp's testimony did more than establish a notice issue. From that evidence, a jury would likely conclude that the masons were permitted to, and routinely did, use the interior scaffold. Liberty should have reached the same conclusion.

127. As to liability, Ince reported that defense counsel believed there was a seventy percent chance of a defense verdict.

128. Ince reported that, through discovery, "we learned that there was nothing wrong with the scaffolding and that there were safety meetings and plaintiff did have the proper safety equipment." This statement is inconsistent with Cain's report from Rooney's deposition that "[t]he photos show this *clearly*: both sets of scaffolding and some missing planks on the interior[.]" (Emphasis added). Ince did not include in his report that the gaps shown in the photos were not OSHA-compliant.

129. Ince reported Rooney "caused his own accident by [u]sing planking on the interior" and "not moving the lanyard with him as he moved along[.]"

130. Ince recognized that the JV had overall job safety responsibility but claimed it could "not police every single part of the project 24/7." Ince did not disclose – because he was not aware of – the contract provisions prohibiting the JV from delegating any aspect of its safety obligations to a subcontractor and requiring that it perform and document safety inspections.

131. Ince reported a large worker's compensation lien of $692,401 and medical expenses of $402,760. Ince reported that the present-day value of Rooney's lost income would be between $731,868 and $864,926 but incorrectly discounted that figure by 50%

to include social security offsets.[9]

132. Based on those calculations, Ince viewed Rooney's likely damages as between $2 and $2.1 million and recommended the reserve increase to $500,000 based on a 25 percent chance of a Plaintiff's verdict. Ince indicated that Rooney's demand remained $5 million.

133. Another roundtable was held on September 4, 2019 in advance of mediation. Ince prepared a report which essentially parroted the evaluation and information contained in the May 2019 roundtable report.

134. The parties in the Underlying Case participated in an unsuccessful mediation on September 19, 2019, at which Liberty offered $350,000 to settle the Underlying Case. That amount was less than Rooney's provable medical expenses – in a case in which medical causation was never disputed.

135. After a trial assignment conference in Court on October 8, 2019, Cain prepared and provided Liberty with an interim report. Cain reported that new counsel would be appearing to represent Rooney.

136. Cain also reported on a conversation with Rooney's new counsel who had asked why Liberty's offer was so low when there were clear OSHA violations relating to the scaffolding. Cain told Liberty that he "respond[ed] bluntly" that "we simply think Rooney is not telling the truth. He was *not* on the interior scaffolding per se but rather *on a scaffolding plank he or his co-workers took from the exterior Safway scaffolding system and placed across the 5-foot hole*, and walking across it [when] his lanyard arrested his progress causing him to fall." (Emphasis added). As noted, there was no direct evidence Rooney or anyone from United Stone put a plank across the interior and the

[9] The jury would have been instructed that it could not consider any of Rooney's collateral sources of income and the claims professionals agreed at trial of this matter that it was not appropriate for Ince to have discounted damages in this way in his assessment of potential damages liability.

only evidence he was on a plank was wholly unsupported.

137. Cain indicated to Liberty, however, that it had to be "conceded" that the JV knew masons from United Stone were using the interior scaffolding.

138. Rooney's new counsel sought additional documents, which Cain provided including the Safety Manual and MassDOT Contract, among others.

139. Cain reviewed those materials but did not view them as important.

140. Sometime after January 17, 2020, the JV received the expert disclosure from Rooney's expert, David Grafton, who opined that the interior scaffold violated OSHA and that the failure to inspect the dangerous scaffolding caused Rooney's accident.

141. The Underlying Case was stayed during the COVID-19 pandemic.[10]

142. On January 14, 2021, Sherry wrote a pretrial report for Liberty. Sherry wrote:

> Plaintiff claims there were issues with planking on a scaffolding on the interior of the tower, which caused the accident. Defendant claims that Plaintiff had created his own plank bridge across the top of the tower as a shortcut and/or that plaintiff was not diligent with tying off as close as possible to his work are and the incident happened because he over-extended his safety lanyard.

(Ex. 36.)

143. Sherry acknowledged that there was evidence that the nature of Rooney's work tagging stones "required" him to be on the interior scaffolding and that other masons did the same without the JV's objection, i.e., that the JV, which was responsible for erecting and inspecting the interior scaffolding, knew masons were using it to do their work.

144. Sherry nonetheless articulated the theory of defense as two-fold – that the

[10] Jury trials in the Commonwealth were generally put on hold between March 2020 and July 2021.

JV was not negligent, and Rooney's comparative negligence was more responsible for his fall.. First, Rooney was not supposed to be working from the interior scaffolding which would be confirmed with work plans and safety meetings. This was inaccurate, see *supra.* Second, Plaintiff tied off to the exterior scaffolding, moved a plank across the center of the tower, and the lanyard reached its limit and jerked the plaintiff causing the fall. This was inaccurate, see *supra.*

145. Sherry wrote that the chance of a defense verdict was "50/50 as this will come down to whether a jury finds the plaintiff credible or not." Sherry also believed that if Rooney prevailed, a "jury could assign 30-50% comparative negligence" to him. Thus, Sherry did not believe that a jury would find Rooney more than fifty percent responsible such that the contributory negligence bar to recovery would apply. Sherry thought the range of general damages to be between $2 and $5 million with a "likely value" of $3.5 million. Sherry wrote that the maximum expected verdict (based on a 30% reduction for plaintiff's comparative negligence and accounting for prejudgment interest) was $6.5 million and that the probable verdict (based on 40% comparative negligence and accounting for prejudgment interest) was $3.3 million.

146. Sherry did not discuss the missing safety documentation, that the photographs showing two foot or more gaps in the scaffolding would establish OSHA violations, that Rooney had complained about the gaps, or that the JV had no witness who would testify that he or she inspected the scaffolding.

147. On February 3, 2021, Rooney's counsel asked Cain if the JV was going to call Rapp and Golden at trial and whether it was going to seek to "introduce evidence of the plank theory" – by which he meant the theory Rooney walked on a plank, his lanyard went taut, and he fell. Cain responded, "I presume yes since it's what happened."

148. As of February 2021, then, the principal defense remained that Rooney fell from a plank and not from or on the interior scaffolding.

149. A roundtable was held on February 5, 2021. Ince prepared a roundtable report in advance. The factual description did not change significantly and Ince continued to report a 75 percent chance of a defense verdict. The damages range increased, however, to $2.6 – $3 million which resulted, in part, from two additional cervical surgeries Rooney had in January 2020 and January 2021.

150. As a result, Ince recommended an increase in the reserve to $700,000 which Robertson approved. The $700,000 reserve was based on the midpoint range of damages based on "75% chance of [defense verdict] from atty Cain (has done 90% of the work on case)." Ince indicated as well, however, that "[p]rior Co-counsel Sherry opine 60-70% [defense verdict] chance." Ince also reported that, at the 2019 mediation, Liberty's final offer had been $350,000 and Rooney's final demand had been $2.9 million.

151. Rooney's treating physician was deposed on February 5, 2021. Sherry provided a written summary to Ince on February 10, 2021. The doctor described Rooney's surgical history and Rooney's physical limitation which he causally related to Rooney's fall and not Rooney's rheumatoid arthritis. Sherry thought the doctor's testimony regarding how much of Rooney's spine was fused could "be a driver for the jury on future pain and suffering damages."

152. An advisory roundtable took place on or about April 5, 2021. Because the gross potential value of the case had gone up and exceeded $2 million, Robertson's manager, Tom Kievet participated.

153. Another advisory roundtable occurred on May 3, 2021 because the gross potential value of the case had again increased. This roundtable included Toby Rollins, Kievet's supervisor.

154. On June 28, 2021, a final roundtable was held to obtain trial authority, i.e., the authority to take the Underlying Case to trial. Because the gross potential value was within Rollins' authority, he and all his subordinate claims professionals participated,

namely, Ince, Janes, Robertson and Kievet. All agreed with the decision to take the case to trial.

155. None of the roundtable reports from May 2019 through the pretrial report in June 2021 discussed: the obvious OSHA violations in connection with the scaffolds; the photographs of the scaffolding showing large gaps; Rooney's expert's anticipated testimony that the gaps were OSHA deficient and that no OSHA competent person would sign off on the interior scaffolding (which would not be contradicted by the JV's expert); the contract documents indicating that the JV promised to be proactive on safety, could not delegate safety to any sub-contractors, would conduct daily, weekly, and monthly documented safety inspections and would retain the records for seven years; that Rooney had complained to Golden about the scaffolding; that the JV permitted masons to use the interior scaffolding; that the JV had no records of any safety inspections; or that there was no admissible evidence Rooney placed a plank across the interior of the tower or that Rooney was crossing a plank when he fell.

156. With respect to OSHA violations, the roundtable reports only include a general statement that Rooney's expert would testify that the JV "violated OSHA safety and training and did not provide proper safety equipment and materials and let the area have an accumulation of debris." (E.g., Exs. 39, 58). The reports did not address the critical issues of gaps in the scaffolding and, indeed, go on to say "[t]here were no OSHA violations / citations."

157. Several of the roundtable reports failed to mention or include additional surgery that Rooney had undergone in 2019.

158. Ince was aware that an insurer handling a construction claim should consider its insured's contracts, safety manuals, and any evidence of repeated OSHA violations.

159. Ince failed in his obligation to provide all relevant factual information in his roundtable reports and his supervisors failed in their obligation to ensure they

considered all relevant factual information in assessing whether to take the case to trial or make an offer of settlement.

160. All the roundtable reports reiterated that Rooney set up a plank, a fact which Kudirka had discredited in his deposition nearly three years prior in 2018 when he testified that no one from United Stone set up the plank.

161. In his testimony in this case, Ince conceded that he had no evidentiary basis for writing that Mr. Rooney set up a single plank.

162. In their testimony in this case, Janes and Robertson conceded that they never considered any alternative cause of the accident other than that Rooney set up a plank.

163. Janes conceded at trial that the JV's liability increased if it made the safety promises detailed in the MassDOT contract, committed repeated OSHA violations, did not do the required inspections, and someone got hurt as a result.

164. As noted, none of the roundtable reports identified the documented OSHA deficiencies with the scaffolding.

165. Ince could not remember why he never included the evidence that the JV built OSHA-defective scaffolds in his roundtable reports.

166. Before trial, Ince, Janes, and Robertson were unaware of the missing safety documentation, i.e., that the JV had no documentation that *any* safety inspections were conducted.

167. By June 2021, Liberty knew or should have known that Rooney's expert witness would testify that the interior scaffolding was not OSHA-compliant because of the size of the gaps between boards. The JV had no expert prepared to challenge that opinion at trial.

168. None of the claims professionals read Rooney's expert disclosure.

169. Liberty understood that it needed to consider repeated OSHA violations in assessing an insured's liability. Any reasonable investigation would include an

assessment of repeated OSHA violations, and, whether they played a role in the accident. No such assessment was undertaken.

170. Thus, with evidence of two-an-a-half to three-foot gaps in the scaffolding, which the JV built and knew the masons were using, the jury was always going to answer yes to the first question on any verdict slip, namely, was the JV negligent – did it breach its duty to the workers using that scaffold.

171. Both Ince and Robertson confirmed that Liberty should have been familiar with the terms of the construction contract and Robertson confirmed that he expected Ince to have read the contract.

172. Even if it was reasonable at this time for Liberty to continue to believe that Rooney was crossing a plank when he fell, and the overwhelming evidence points elsewise, Liberty understood that Rooney's argument was that he would not have fallen without the large gaps in the scaffolding.

173. No later than the end of June 2021, the liability of the JV for having constructed OSHA-deficient scaffolding, which it had no record of inspecting, was reasonably clear. Put elsewise, given all the evidence and known facts at that time, Liberty knew or should have known that the JV created an unsafe work condition in breach of its duty to Rooney and others.

174. As to causation, no later than June 2021, the overwhelming evidence was that Rooney fell from the interior scaffolding. Whether or not Rooney was on a "plank," the only credible evidence was that he fell into OSHA-deficient gaps of the interior scaffold. Thus, the JV's liability for the accident was reasonably clear, i.e. the JV's breach of its duty to Rooney in constructing and not inspecting unsafe scaffolding with large gaps was a but-for cause of the accident.

175. Ince never considered that Rooney fell in a gap in the scaffolding.

176. Further, even if Rooney was on a "plank," it was undisputed that the JV's employees used the interior scaffolding at night and were responsible for dismantling it

and moving it down as the work progressed from the top to the bottom of the tower. Because there was no evidence that Rooney or anyone from United Stone set up a plank on the day of the accident, the only reasonable inference – if there was a plank on the interior scaffolding over which Rooney walked – was that the JV was responsible for putting the plank there.

177. The JV's liability was, therefore, reasonably clear by June 2021 and the only possible triable issue was whether Rooney bore any responsibility for the accident or would be found to be comparatively negligent.

178. Had the senior claims professionals understood the weaknesses of the single plank theory of defense and the strengths of the straightforward argument that OSHA non-compliant and dangerous scaffolding was a cause of Rooney's accident they would have, in my view, made a reasonable offer of settlement pretrial.

179. I credit Rooney's expert that claims handling is dynamic and reactive, and that new information must be included in the claims notes and roundtable reports. I credit Robertson's testimony that the roundtable reports should have included the above information and should not have included facts for which there was no evidentiary support.

180. Cain and Sherry had both concluded that if Rooney were to prevail his likely award, without any reduction for comparative negligence, would be approximately $3.5 million.

181. I find that as of June 2021, the range of Rooney's damages was reasonably clear, and it was between $4.5 and $5 million.

182. The failure of claims professionals with authority to settle the Underlying Case in the range of Rooney's damages stemmed from Ince's failure to carefully review deposition summaries and other reports from defense counsel and include important information in his roundtable reports. Some of Ince's failure was gross negligence, most was a willful failure to properly investigate, review, understand and report to his

supervisors the information provided to him.

183. For example, in his testimony in this case, Ince admitted the following: (i) he should have known that, under the contract, the JV was required to submit an inspection checklist daily; (ii) he would want to know if Golden testified that he never inspected the interior of the tower; (iii) had he known that there were no scaffold inspection reports for the entire site, he would have put this in his roundtable reports; (iv) Houde was an important witness and he could think of no reason why he did not ask counsel to depose Houde; and, (v) in a case with allegations about defective scaffolding, it would be important for him to reach out to the scaffold erectors.

184. Sometime in early July 2021, the Underlying Case was reassigned back to Cain for trial when Sherry was nominated to become a judge. Sherry wrote the trial plan for Liberty in early July 2021. He indicated that the JV's principal defense continued to be that the JV provided a "safe and OSHA-compliant workspace and that the Plaintiff was specifically told not to utilize the interior scaffolding for any reason on multiple occasions." (Ex. 128.) That defense could not be proved. See *supra*.

185. The JV had retained an expert who was supposed to opine on OSHA matters and that it was misconduct for Mr. Rooney to walk across the plank. At trial, the Court limited the JV's expert's testimony. He was not permitted to testify as to comparative negligence, i.e., that Rooney was negligent in walking across a plank.

186. Sherry also wrote that the JV would argue the "interior and exterior scaffolding were checked on a daily basis to make sure it was safe for use, and would be signed off on by Chris Houde, who is OSHA-compliant." (Ex. 128.) Sherry did not write that there was no documentation that would support that contention.

187. Sherry also wrote that Kudirka would testify that, at the time of the accident, Rooney was on the inside of the tower "having traversed the center of the tower by means of a plank that had been laid in the middle." (Id.)

188. On July 5, 2021, Cain provided an updated pretrial report to Ince. He

wrote that Sherry "says 50-50 liability but then says he thinks we can get 30-50 percent on plaintiff. I think that, and agree, this means the assessment should be 40 /60." Cain estimated the chance of a verdict in favor of the insured as 40 percent and the estimated comparative negligence of the parties as 40 percent to the plaintiff and 60 percent to the JV. The high and likely value of general damages respectively remained $5 million and $3.5 million. (Exs. 60, 129.)

189. Before trial, Sherry also conveyed that there was a 40% chance for a defense verdict on liability and a 40% chance of a comparative negligence bar.

190. Despite telling Ince in 2018 that United Stone was allowed to use the interior scaffolding and that they "had to concede" the JV knew that United Stone was using the interior scaffolding, Cain wrote in his pretrial report on July 5, 2021 that United Stone was not allowed to use the interior scaffolding.

191. On July 23, 2021, Cain wrote a note to his manager indicating that he checked to make sure his trial plan was included in the claims notes because he saw that Robertson had posted that there was a seventy-five percent chance of a defense verdict, whereas both Cain and Sherry "assessed it as a forty percent chance of winning." Robertson testified he was not aware that defense counsel assessed the chance of a defense verdict shortly before trial at just 40 percent.

192. By trial, Cain did not intend to challenge the scope of Rooney's injuries or medical causation, i.e., that Rooney's surgeries and injuries were related to the fall. The entire defense case was that Rooney was walking on a plank. According to Cain, if Rooney was using a shortcut across the interior of the tower while tied off to the exterior scaffold, none of the scaffolding issues, namely, the gaps, mattered.

193. Cain understood, however, that the JV had a duty to keep the job site safe and to erect scaffolds that were compliant with OSHA regulations. Cain understood that the photographs showed interior scaffolding with two-and-a-half foot gaps. Cain also understood that the facts established that the JV erected the interior scaffolding and

had a duty to inspect it and that the lack of scaffolding inspection records was significant. Janes understood most of the above before trial except neither he, Ince, nor Robinson was aware of the lack of any documented inspection reports.

IX. Trial of the Underlying Case

194. Trial commenced on July 26, 2021 with jury selection. Opening statements and testimony began on July 27, 2021. Also on July 27, 2021, the Court allowed Rooney's Motion in Limine to limit the testimony of Keville and preclude any suggestion that Rooney placed a plank across the top of the tower and then fell off that plank.

195. Liberty retained a trial observer, Eric Welsh of Accurate Investigation Service (Observer). The Observer attended each day of the trial and provided written trial reports to Janes at Liberty, who was monitoring the trial because Ince was not available.

196. The Observer had worked in a variety of professions. As a lawyer, he had done some residential real estate closing and refinancing and worked as a contract attorney for large law firms doing document review. The Observer had never tried a case or observed a trial as a lawyer. The Observer had monitored fifty trials, forty-nine for Liberty. He received no training on monitoring trials or on personal injury cases or trials.

197. Each day of the trial, the Observer provided his observations of the witnesses, including summaries of their testimony, and his conclusions about its likely impact on the jury. At the end of the trial, which was August 2, 2021, the Observer thought there was a sixty-five percent chance of a defense verdict.

198. The Observer's observations often did not correspond with the live issues in the case. For example, by the time of trial, Cain had determined that the defense would not challenge medical causation – that the numerous spine and neck surgeries Rooney underwent were causally related to his fall. The Observer, however,

consistently reported to Liberty his skepticism about medical causation.

199. In addition, the Observer criticized Rooney's counsel for focusing on regulations and contracts without seeming to understand Rooney's theory of liability – that the JV erected faulty interior scaffolding that was not OSHA-compliant, did not inspect it, did not maintain inspection documentation, knew the masons were working on the interior scaffolding, and, whatever happened with the lanyard, Rooney would not have fallen in the manner he did if there were not gaps in the scaffolding. (Ex. 78.)

200. The Observer also was biased. For example, in connection with Rooney's testimony he wrote that he was "hoping" Rooney would come across as "shady or manipulative."

201. On the first day of trial, the Observer reported on Rooney's opening statements. The opening focused on the JV's promises of safety and its failure to have OSHA-compliant scaffolding. The jury was shown photographs of the scaffolding showing gaps between planks much wider than the maximum one inch permitted by OSHA regulations. Rooney's counsel told the jury there was no documentation of any inspections of the scaffolding. Rooney's counsel told the jury that Rooney's lanyard did fail – as the JV would argue – but that without the gap in the planks Rooney would not have fallen.

202. Robertson was not aware of the facts Rooney's counsel presented in his opening. Because of Ince's failures in reporting and his supervisor's failure to ensure proper reporting, and although the claim had been handled for years, Liberty's senior claims professionals remained ignorant of the general thrust of Rooney's allegations and the factual support for those allegations.

203. At the end of the day, the Observer wrote it was a "good day for us" and he felt "positive." His theory of the defense, from listening to the openings was that the lanyard was to blame, and it was not the JV's responsibility.

204. Cain reported to Janes on July 27, 2021 that he did not "expect" the jury to

"fully grasp that big gaps in the scaffolding were OK because (1) it was not designed or designated for the masons on this job but for the night demolition and (2) it had a red tag calling for 100 percent tie-off, which Rooney actually adhered to oddly enough."

205. Liberty should have known that Cain's statement that big gaps in the scaffolding were okay was unsupportable factually and legally. Big gaps in scaffolding are not OSHA-compliant whether masons or the demolition crew used the scaffolding and Liberty knew the JV conceded that Rooney was allowed to use the interior scaffolding.

206. On July 27, 2021, Liberty authorized defense counsel to make a high-low offer of $500,000 to $2.5 million.[11] Cain made the offer on July 28, 2021. Rooney's counsel rejected the offer.

207. On July 29, 2021, Cain reported to Liberty that Rooney's expert testified the interior scaffolding was not OSHA-compliant because of the gaps and that there was an issue because the JV did not retain any records of the safety inspections of the scaffolding which, Cain noted, may result in a "spoliation evidence instruction." Cain noted that, as of that point in the trial, the jury had heard only that the JV erected the interior scaffolding with gaps and holes in violation of OSHA regulations. Thus, the jury was "likely to believe at this stage that whoever was responsible for its erection and maintenance is liable for [Rooney's] injuries." (Ex. 75.)

208. The parties ultimately entered a stipulation regarding the missing inspection reports.

[11] A "high-low" agreement is one where both sides agree upon two damages amounts that would cap both the downside and the upside for a Plaintiff. If a jury's damage award fell within the range, the Plaintiff would receive that amount. If a jury did not award damages, or awarded damages less than the low amount, or the Plaintiff lost, the Plaintiff would get the low amount. If the jury awarded damages more than the agreed upon high amount, the Plaintiff's damages would be capped at the high amount.

209. On Friday, July 30, 2021, Cain reported that he thought the case was an "absolute toss up." The Observer reported that the missing inspection reports were a "dark cloud" hanging over the defense that would not go away. (Ex. 77.)

210. Rooney testified first on Monday, August 2, 2021. The Observer reported that he viewed Rooney's emotional moments as "contrived" and that Rooney appeared at times to be untruthful or "stupid." The Observer also reported his view that Rooney "probably did more to hurt than help the case" and Rooney's counsel "must have realized how poorly Rooney did on the stand." The Observer concluded that the defendant had a sixty-five percent chance of prevailing. (Exs. 78, 80.)

211. Cain had a starkly different view of Rooney's testimony which was generally consistent with his view of Rooney from Rooney's deposition. Cain reported to Janes that he thought the case was a "toss-up," Rooney was a "good witness," and Cain was concerned about "sympathy and empathy." Cain believed that Rooney appeared to testify truthfully about how the accident happened.

212. On August 2, 2021 – after and because of Rooney's first day of testimony – Cain reported to Liberty that he thought the chance of a defense verdict had fallen to twenty-five percent and that the jury would find Rooney responsible for only twenty-five percent of his injuries. The Observer reported his view that there was a sixty percent chance of a defense verdict.

213. Notwithstanding the Observer's lack of trial experience and obvious bias, Janes and Robertson credited the Observer more than Cain who had been defense counsel for nearly the entire life of the Underlying Case. Janes thought the Observer's assessment should carry more weight because he was free of the stress of trying the case. I do not find it credible that Janes held that view. Rather, Janes preferred to credit the Observer's much rosier, if ill-informed views.. Robertson believed the defense counsel have a proclivity to look at the dark side during trial. I do also not find it credible that Robertson believed Cain, a highly capable and exceedingly experienced

defense counsel who has spent nearly his entire career at Liberty had such a proclivity.

214. As late as August 2, 2021, Janes remained of the view that the lack of safety inspections and reports, particularly of the scaffolding "was not the proximate cause of this plaintiff falling, it was [Rooney's] own negligence." (Ex. 82.)

215. On August 2, 2021, Cain asked Rooney's counsel about agreeing to a high-low proposal of $1 million to $5 million. Rooney's counsel declined the high-low proposed but Cain understood that Rooney's demand to settle the case for $4 million remained open throughout the trial but was taken "off the table" when the deliberating jury asked a question about damages.

216. On August 2, 2021, Janes wrote that Cain was "losing confidence" but that the plaintiff had not proven the JV's negligence was "the proximate cause" of the accident. Janes was not aware of the law in the Commonwealth that Rooney was not required to prove that the JV's negligence was the only cause of his injuries or even that the JV's negligence was the main or largest cause of his injuries. (Ex. 81.)

217. On August 3, 2021, the Observer reiterated his opinion that there was a sixty-five percent chance of a defense verdict.

218. Closings occurred on August 4, 2021. Rooney's counsel asked the jury to award damages based on a formula that would have resulted in an award of approximately $26.6 million. Cain thought the damages request was presumptuous.

219. The morning of the closings, Cain texted with Janes. He wrote, "The jury has heard in detail that we did not do safety inspections of the scaffolding, we did not follow our own safety plan, and the buck stops with us. I expect them to answer Q1, was the D negligent, 'yes.'" (Ex. 127.) Those facts were known to Liberty well before trial.

220. Cain also wrote that, while he expected the jury to find Rooney negligent as well, "they will award him money." (Id.)

221. Janes responded and pressed the position that "[t]he plank or gap in plank

was not the proximate cause. The plaintiff's own negligence was." Janes discounted all of Cain's concerns – including that the jury would find Rooney sympathetic – relying on the Observer. (Id.)

222. On August 4, 2021, after two and a half hours of deliberation, the jury returned a verdict of $26.6 million. After interest, judgment entered in the amount of $45.49 million.

223. On September 15, 2021, Liberty offered the aggregate policy limits to Rooney – $19.5 million – to settle the claim.[12]

X. Rooney's G. L. c. 93A, § 9 Demand

224. On April 8, 2022, Rooney submitted a written demand alleging unfair and deceptive acts committed by Liberty in violation of G. L. c. 176D, §§ 3(9)(d) and (f).

225. On June 27, 2024, Rooney submitted a supplemental demand letter alleging a violation of G.L. c. 176D, § 3(9)(c).

226. Liberty did not make an offer of settlement.

[12] Neither party's experts in this case added much to my analysis of the facts, with two exceptions. Liberty's lawyer expert conceded that it would be important for defense counsel and an insurer to consider OSHA regulations, missing records, construction contracts and safety manuals, and the credibility of witnesses in assessing a plaintiff's likelihood of success on a construction claim. She further confirmed that final trial assessments must be based on the admissible evidence and the reasonable inferences a jury could draw therefrom. Also, based on the expert testimony from the claims handling experts, I find that the standard of care for claims handlers adjusting a claim involving a construction accident includes that they read and be familiar with the safety portions of the construction contract, the insured's safety manual, if any, applicable OSHA regulations, and the plaintiff's expert reports.

RULINGS OF LAW[13]

I. Applicable Law

General Laws c. 93A, § 2, makes unlawful "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." General Laws c. 176D, § 3, prohibits "unfair or deceptive acts or practices in the business of insurance." "A violation of G. L. c. 176D amounts to an unfair or deceptive act or practice for purposes of claims made under G. L. c. 93A." McGilloway v. Safety Ins. Co., 488 Mass. 610, 618 (2021).

Relevant and as alleged here, the following constitutes an unfair claims practice in the business of insurance that can give rise to liability under Chapter 93A: (i) "failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies"; (ii) "refusing to pay claims without conducting a reasonable investigation based upon all available information"; and (iii) "failing to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear[.]" G. L. c. 176D, § 3(9)(c-f).

Rooney bears the burden of proving Liberty violated one or more of the provisions of G. L. c. 176D § 3(9) and thus G. L. c. 93A, § 2. Hopkins v. Liberty Mut. Ins. Co., 434 Mass. 556, 565 (2001). I discuss the law governing each alleged violation of G. L. c. 176D in turn.

A. Failure to Adopt and Implement Reasonable Standards for Investigation

An insurer must adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies and, pursuant to G. L. c. 176D, § 3(9)(c), may incur liability for failure to do so. Terry v. Hospitality Mut. Ins. Co., 101

[13] As with my findings of fact, I do not restate here all the governing law that might apply to the claims and defenses in this case, only that which is necessary and on which I relied in reaching my conclusions.

Mass. App. Ct. 597, 604-605 (2022); Loftis v. Liberty Mut. Ins. Co., No. 92-2752-B, 1995 WL 491340, at *4 (Mass. Super. Aug. 11, 1995) (Brassard, J.); N.E. Bridge Contractors, Inc. v. Sentry Ins., 652 F. Supp. 3d 225, 232 (D. Mass. 2023).

B. Refusing to Pay Claim without Conducting a Reasonable Investigation

With respect to an insurer's duty to investigate, G. L. c. 176D, § 3(9)(d) makes "refusing to pay claims without conducting a reasonable investigation based upon all available information" an unfair and deceptive insurance practice. See Van Dyke v. St. Paul Fire and Marine Ins. Co., 388 Mass. 671, 675 (1983). "The provisions of c. 176D make it unlawful for insurance companies to 'fail[ ] to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies' and to 'refus[e] to pay claims without conducting a reasonable investigation based upon all available information.'" Terry, 101 Mass. App. Ct. at 604-605, quoting G. L. c. 176D, § 3 (9)(c),(d). "These provisions require insurance companies to investigate insurance claims promptly and reasonably." Terry, 101 Mass. App. Ct. at 605.

The "obligation to conduct a prompt and reasonable investigation" requires an insurer to take "basic steps toward obtaining an independent or neutral assessment of . . . potential fault." McLaughlin v. American States Ins. Co., 90 Mass. App. Ct. 22, 32 (2016). Liberty was not permitted to "cherry-pick[ ] . . . facts favorable to it or disregard unfavorable evidence and, instead, had to assess the evidence objectively." Terry, 101 Mass. App. Ct. at 605 (internal quotation omitted). A failure to objectively assess the evidence violates the insurer's "obligation to conduct a prompt and reasonable investigation[.]" Id. at 607.

"[R]ecovery on a theory of inadequate investigation is limited to circumstances where, if an adequate investigation had been conducted, liability would have been reasonably clear." Spinal Imaging, Inc. v. Aetna Health Mgmt. LLC, No. CIV. 09-11873-LTS, 2014 WL 4202498, at *14 (D. Mass. Aug. 21, 2014) (citation omitted). Thus, if a

proper investigation would not have established the reasonable clarity of liability, the failure to conduct said investigation did not cause injury. Van Dyke, 388 Mass. at 678.

C. Failure to Make an Offer of Settlement When Liability Was Reasonably Clear

"General Laws c. 93A and c. 176D operate in tandem 'to encourage the settlement of insurance claims . . . and discourage insurers from forcing claimants into unnecessary litigation to obtain relief.'" Terry, 101 Mass. App. Ct. at 604, quoting Caira v. Zurich Am. Ins. Co., 91 Mass. App. Ct. 374, 381 (2017), quoting, in turn, Clegg v. Butler, 424 Mass. 413, 419 (1997). "[A]n insurer that has violated G. L. c. 176D, § 3(9)(f), by failing 'to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear,' by definition, has violated the prohibition in G. L. c. 93A, § 2, against the commission of unfair or deceptive acts or practices." Hopkins 434 Mass. at 564. See Liquor Liab. Joint Underwriting Ass'n of Massachusetts v. Great Am. Ins. Co., No. CIV.A. 96-3127, 2003 WL 21048793, at *22 (Mass. Super. Apr. 14, 2003) (Hines, J.) ("[B]ecause G. L. c. 93A, § 9(1) incorporates G. L. c. 176D § 3, a violation of that provision is *ipso facto* a violation of G. L. c. 93A and the injured party is entitled to pursue a remedy in the Superior Court under G. L. c. 93A."). Liability for purposes of G.L. c. 176D, § 3(9)(f), encompasses both "fault" and "damages." Clegg, 424 Mass. at 421.

The determination of when an insured's liability becomes "reasonably clear" is an objective one. "The fact finder determines 'whether a reasonable person, with knowledge of the relevant facts and law, would probably have concluded, for good reason, that the insured was liable to the plaintiff.'" O'Leary-Alison v. Metropolitan Prop. Cas. Ins., 52 Mass. App. Ct. 214, 217 (2001), quoting Demeo v. State Farm Mut. Auto. Ins. Co., 38 Mass. App. Ct. 855, 956-957 (1995). "Liability is not 'reasonably clear' if there is 'a legitimate difference of opinion as to the extent of [the insured's] liability,' or a 'good faith disagreement' over the amount of damages." Chiulli v. Liberty Mut.

Ins., Inc., 97 Mass. App. Ct. 248, 256 (2020), quoting Bobick v. United States Fid. & Guar. Co., 439 Mass. 652, 660 (2003). Accord Terry, 101 Mass. App. Ct. at 607 ("Liability is not reasonably clear if an element of the underlying claim is subject to a good faith disagreement."), citing Clegg, 424 Mass. at 418.

However, "an insurance company may [not] avoid its legal obligation to make a prompt and fair settlement offer simply by disputing how much is owed in damages." Hache v. AIG Claims, Inc., No. CV 20-10652, 2023 WL 8720051, at *2 (D. Mass. Dec. 18, 2023). The reason for that rule is sound. Otherwise, insurers could "dodge their statutory obligation to make settlement offers whenever there is a disagreement over damages—such as disputes over[ ]compensation for pain and suffering, which are quite common." Urban v. Zurich Am. Ins. Co., 752 F. Supp. 3d 310, 336 (D. Mass. 2024). "In other words, 'when it is reasonably clear that an insurer is liable, then an obligation to offer a settlement arises—even when there are disputes as to comparative fault or the extent of damages.'" Id., quoting Hache, 2023 WL 8720051, at *2. Accord Appleton v. National Union Fire Ins. Co. of Pittsburgh, 145 F.4th 177, 186 (1st Cir. 2025) ("[A]n insurer does not need to know the exact 'dollar amount of damages' to be liable under section 3(9)(f)."), quoting Clegg, 424 Mass. at 421.

When a case is in suit, liability can be reasonably clear well before a verdict or a judgment "resolving every contested issue as to monies owed." R.W. Granger & Sons, Inc. v. J & S Insulation, Inc., 435 Mass. 66, 75-76 (2001). That is because, "whether and when the insured's liability and damages become reasonably clear, which is based on the insurer's assessment of the facts known or available at any given time, is not susceptible of precise legal certainty." Chiulli, 97 Mass. App. Ct. at 256-257. "Indeed, an insurer's obligation to tender a reasonable settlement offer under c. 176D, § 3(9)(f), may arise even where triable issues of fact remain." Id.

Further, because "a jury's verdict is not always predictable and may not constitute in all circumstances a definitive measure of reasonableness," Bobick, 439

Mass. at 662, defense counsel's evaluation of an insured's likelihood of success at trial is not a substitute for an objective determination of whether liability is reasonably clear. See McLaughlin, 90 Mass. App. Ct. at 31 ("[T]he question whether and when an insured's liability became reasonably clear is based on an objective assessment of the facts known or available at the time, and is independent of how a jury in a separate trial views the insured's liability."). An insurer cannot turn a "blind eye" and fail to "credit or give appropriate weight to readily available information related to liability" while relying on defense counsel's trial strategy and assessment of trial risk because the insurer is obligated "conduct a neutral assessment of liability, separate from [defense counsel's] litigation strategy." Urban, 752 F. Supp. 3d at 338.

Liability of the insured can also be reasonably clear even when there are other potential tortfeasors or the possibility of contributory / comparative negligence. McLaughlin, 90 Mass. App. Ct. at 31; Urban, 752 F. Supp. 3d at 341. "Indeed, it would significantly diminish, if not defeat, a principal purpose of G. L. cc. 176D and 93A if an insurer could refuse to make any offer of settlement whatsoever in any case in which potential tortfeasors other than its insured might share liability." McLaughlin, 90 Mass. App. Ct. at 31.

Once liability becomes reasonably clear, an insurer is obligated to extend a reasonable settlement offer, even if the injured party would not have accepted that offer. Terry, 101 Mass. App. Ct. at 607, citing Rhodes v. AIG Dom. Claims, Inc., 461 Mass. 486, 495 (2012). The reasonableness of an insurer's offer of settlement must be assessed at the time it was made and in consideration of all the circumstances. "In assessing the adequacy of a settlement offer, we must determine 'whether, in the circumstances, and in light of the complainant's demands, the offer [was] reasonable,' . . . judged at the time it was made." McDade v. Benoit, 103 Mass. App. Ct. 1112, 2023 WL 7289217, at *3 (Nov. 6, 2023) (Rule 23.0), quoting Clegg, 424 Mass. at 421. An unreasonable offer of settlement does not avoid liability because insurers "ought not

wear out the claimant by unduly delaying settlement" when liability, including causation and damages, is clear or highly likely. Parker v. Diavolio, 40 Mass. App. Ct. 394, 395 (1996), citing Miller v. Risk Mgmt. Found. of Harvard Med. Insts., Inc., 36 Mass. App. Ct. 411, 418 (1994) and Guity v. Commerce Ins. Co., 36 Mass. App. Ct. 339, 343 (1994).

Liberty argues that liability is reasonably clear only if I conclude that *no reasonable carrier* would have failed to settle. It relies on Hartford Casualty Ins. Co. v. New Hampshire Ins. Co., 417 Mass. 115 (1994), in which the Supreme Judicial Court (SJC), considering the defendant's "bad faith" and "negligent" failure to settle the underlying tort action, stated that the "test is not whether a reasonable insurer might have settled the case within the policy limits, but rather whether no reasonable insurer would have failed to settle the case within the policy limits." Id. at 121. Liberty contrasts that test with the test applicable to a claimed violation of G. L. c. 176D, § 3(9)(f) articulated in Demeo, 38 Mass. App. Ct. at 956-957. As noted *supra*, in Demeo, the Appeals Court stated that the "objective test [under G. L. c. 176D] calls upon the fact finder to determine whether a reasonable person, with knowledge of the relevant facts and law, would probably have concluded, for good reason, that the insured was liable to the plaintiff." Id.

To understand the relationship between Hartford and Demeo it is important to understand the factual scenario in Hartford and how courts have addressed both cases since the mid-1990s. In Hartford, the plaintiff was a subrogated excess insurer, and the SJC specifically addressed "the nature of the duty that a primary insurer owes to its policyholder (and, therefore, to a subrogated excess insurer) with respect to the settlement of a third-party claim[.]" 417 Mass. at 115. The trial court sent "Hartford's case to a jury on the question of both [the defendant's] bad faith failure to settle the underlying tort action and its negligent failure to do so." Id. at 115-117. The issue on appeal was the propriety of the trial court's jury instructions. Id. at 118 ("Hartford

argues that the judge failed to instruct the jury properly concerning the standard the jury should apply, and the factors the jury should consider, in deciding whether [defendant] was liable for failing to settle the underlying action within the coverage limits of its policy[.]"). In that context, the SJC held,

> The *negligence* standard by which the actions of an insurer concerning settlement will be tested hereafter will be in practice not significantly different from the good faith test that has been evolving in this Commonwealth. The test is not whether a reasonable insurer might have settled the case within the policy limits, but rather whether no reasonable insurer would have failed to settle the case within the policy limits.

Id. at 121 (emphasis added). Without discussing any distinct standard under G. L. c. 176D, the Hartford Court then affirmed the trial court's determination of no chapter 93A liability, discerning no clear error in the judge's finding that the insurer's negligent handling of its early investigation had no causal link to its subsequent failure to settle the underlying case. Id. at 125.

Thereafter, courts have applied the Hartford ("no reasonable insurer") test to negligence or contract claims arising from an insurer's duty to its insured to reasonably settle claims within the policy limits. See Palmi v. Metro. Prop. & Cas. Ins. Co., 60 Mass. App. Ct. 1114, 2004 WL 170401, at *1-2 (Jan. 28, 2004) (Rule 1:28) ("to prevail on a claim against an insurer for breach of its implied contractual obligations with respect to settlement, the insured (or the insured's assignee) must 'prove that the plaintiff in the underlying action would have settled the claim within the policy limits and that, assuming the insurer's unlimited exposure . . . no reasonable insurer would have refused the settlement offer or would have refused to respond to the offer.'"), quoting Hartford, 417 Mass. at 121; Jarry v. Med. Malpractice Joint Underwriting Ass'n, 61 Mass. App. Ct. 1116, 2004 WL 1488181, at *2 (July 2, 2004) (Rule 1:28) (applying Hartford test in a case alleging negligent failure to settle the underlying claim and breach of the implied covenant of good faith and fair dealing under the insurance

contract); Catholic Relief Ins. Co. of Am. v. Liquor Liab. Joint Underwriting Ass'n of Massachusetts, No. CIV. A. 93-0840, 1997 WL 781448, at *24 (Mass. Super. Dec. 22, 1997) (Fecteau, J.) (citing Hartford for the proposition that "[a]t common law, an insurer may be liable to an insured, or to another insurer subrogated to the interests of that insured, for failure to settle a claim only when no reasonable insurer would have failed to settle the claim"); Great Am. Ins. Co. v. Granite State Ins. Co., 378 F. Supp. 3d 103, 105 (D. Mass. 2019) (relying on Hartford when addressing insurer's "contractual and common law duty owed to its insured [ ] and therefore also to Great American which stands in the insured's shoes").

Other courts, addressing an insurer's obligations to a third-party claimant under c. 176D, have simply cited both the Hartford and Demeo tests with no discussion or distinction as between the two. See, e.g., Villanueva v. Commerce Ins. Co., 89 Mass. App. Ct. 1124, 2016 WL 2907827, at *2 (May 18, 2016) (Rule 1:28) (citing both cases); Anderson v. American Int'l Grp., Inc., No. MICV200301212B, 2014 WL 1878882, at *16 (Mass. Super. Apr. 8, 2014) (Davis, J.) (applying Hartford and stating the Demeo standard that "[t]he question . . . is 'whether a reasonable person, with knowledge of the relevant facts and law, would probably have concluded, for good reason, that the insure[d] was liable to the plaintiff.'") (subsequent history omitted). Indeed, language in Hartford suggests that an insurer's duties to an insured and to a third-party claimant are analogous, if not reciprocal. See id., 417 Mass. at 120 ("If, as is true, an insurer can be liable to a claimant for unfair claim settlement practices (see G.L. c. 93A, § 9 [ ], which imposes standards of reasonable care), an insurer should be likewise liable to its insured for negligence in the handling of the settlement of a claim against its insured.").

Finally, in recent decisions, the Appeals Court has cited only the Demeo test to determine whether the insurer violated G. L. c. 176d, § 3(9)(f). See Chiulli, 97 Mass. App. Ct. at 255, quoting Demeo, supra at 956-957; Terry, 101 Mass. App. Ct. at 607 (same).

I need not go further into exhaustive detail to resolve Liberty's argument as to whether the Hartford test applies equally in failure to settle cases brought under chapter 176D, or whether it may require appreciably higher culpability than the Demeo standard / formulation. I conclude, like those cases which apply both Hartford and Demeo in the context of chapter 176D claims for failure to make an offer of settlement, that it would make no difference here even if I were to rely on and apply Hartford. I begin with the law which requires an insurer to "effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear." G. L. c. 176D, § 3(9)(f). It is axiomatic that the determination of whether liability has become "reasonably clear" must be evaluated objectively. Terry, 101 Mass. App. Ct. at 607. The alternative – considering the insurer's subjective perspective – would destroy the statutory obligation to settle imposed by the legislature. As Liberty did here, insurers could always present evidence of their subjective views of the evidence, their insured's likelihood of success at trial, or of the claimant's credibility. The plain terms of the statute and applicable precedent explicitly foreclose an insurer's rose-colored or subjective view of the evidence as a viable defense to a claim under c. 176D. Id. at 605; G. L. c. 176D, § 3(9)(f). Accord Urban, 752 F. Supp. 3d at 342 (Chapter 176D requires "neutral evaluation of fault" not assessment "focused on defensive posturing"). Thus, consistent with Demeo and subsequent decisions, the determination of whether liability was reasonably clear must be objective, requiring assessment of a hypothetical "reasonable person" (specifically, an insurer) faced with the same facts.[14] Likewise,

[14] For example, in interpreting insurance policies, Courts look to the policy as written and, "[i]f in doubt, . . . 'consider what an objectively reasonable insured, reading the relevant policy language, would expect to be covered.'" A.W. Chesterton Co. v. Massachusetts Insurers Insolvency Fund, 445 Mass. 502, 518 (2005), quoting Trustees of Tufts Univ. v. Commercial Union Ins. Co., 415 Mass. 844, 849 (1993), quoting, in turn, Hazen Paper Co. v. United States Fid. & Guar. Co., 407 Mass. 689, 700, (1990). See Ouellette v. Beaupre, 977 F.3d 127, 137 (1st Cir. 2020) (whether plaintiff had adequate

applying the Hartford test, once liability is "reasonably clear" *no reasonable insurer*, acting in good faith, would fail to make a prompt, fair and equitable offer of settlement. No reasonable insurer would knowingly violate chapter 176D (and face the risk of significant punitive damages) by perpetuating litigation where there is no legitimate dispute as to the insured's fault or the scope of the claimant's injury. See Chiulli, 97 Mass. App. Ct. at 256. See also Clegg, 424 Mass. at 419 ("The statutes . . . were enacted to encourage the settlement of insurance claims . . . and discourage insurers from forcing claimants into unnecessary litigation to obtain relief"); Anderson, 2014 WL 1878882 at *19 (insurer violated Chapter 176D by continuing to litigate case merely to wear down claimants).

D. Damages

If there is a finding that an insurer has "failed to effectuate a prompt, fair, and equitable settlement causing injury, the plaintiff is entitled to the greater of actual damages or statutory damages of twenty-five dollars." Rhodes, 461 Mass. at 495, citing G. L. c. 93A, § 9. Actual damages in a failure to settle case generally consist of the lost value of the settlement amount, that is, the interest lost during the time the claimant did not have the money. Auto Flat Car Crushers, Inc. v. Hanover Ins. Co., 469 Mass. 813, 829 (2014) ("Where the conduct alleged to violate G. L. c. 93A is an unreasonable delay in settling a claim arising under an insurance policy, we have held that a plaintiff's actual damages generally comprise the interest lost on the money wrongfully withheld by the insurer[.]"); Chiulli, 97 Mass. App. Ct. at 258 n.18 (typical measure of damages for an insurer's failure to make a prompt offer of settlement is the "loss of the use of

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notice of facts for cause of action to accrue subject to "objective 'reasonable person' standard" – that is, a "hypothetical 'reasonable person'" "similarly situated" (citations omitted)); Federal Deposit Ins. Corp. v. Insurance Co. of N. Am., 928 F. Supp. 54, 60 (D. Mass. 1996), aff'd, 105 F.3d 778 (1st Cir. 1997) ("classic reasonable person" "always acts with caution and care, on the basis of a reasonable assessment of the circumstances, including what is known and what is unknown.").

funds").

Where, however, a court finds the violation of § 3(9)(f) was willful or knowing, the measure of damages is to award not less than two but not more than three times the judgment in the underlying case. Rhodes, 461 Mass. at 498-499. See Chiulli, 97 Mass. App. Ct. at 258 n.18 ("[W]here . . . the claimant has recovered a judgment on the underlying claim, the entire amount of that judgment . . . is subject to multiplication if the violation is found to be willful and knowing.").

"An insurer acts knowingly or willfully when it engages in intentional misconduct, has made knowing misrepresentations, or has acted with 'studied indifference' to a claimant's rights." Urban, 752 F. Supp. 3d at 345, citing Miller v. Risk Mgmt. Found., 36 Mass. App. Ct. 411, 420 (1994) (insurer acted "with knowledge or reason to know of its [legal] violation"), and Kapp v. Arbella Mut. Ins. Co., 426 Mass. 683, 687 (1998) (insurer acted intentionally and "made misrepresentations . . . it knew to be false").

"To be wilful or knowing, a violation need not be malicious, but must constitute more than negligence. Within that range is conduct that is intentionally gainful, . . . or demonstrates a wilful recklessness or conscious, knowing disregard for its likely results[.]" Chiulli, 97 Mass. App. Ct. at 260, quoting Rass Corp. v. Travelers Cos., 90 Mass. App. Ct. 643, 657 (2016). Willful and knowing violations of G. L. c. 176D, § 3(9)(f) have been found where an insurer "argued many facts that it knew to be false or for which it had no evidence," Hejinian v. General Am. Life Ins., Co., C.A. No. 05-3851-BLS1, 2009 WL 981732, at *9 (Mass. Super. Jan. 13, 2009) (Gants, J.) (awarding treble damages), and where an insurer had "no factual basis" for its theory of the incident and relied on "hoped-for, as opposed to actual, evidence." Anderson, 2014 WL 1878882 at *8-9. Put elsewise, insurers cannot ignore facts and rely on fictitious or wishful thinking. Id. Willful blindness is willful conduct.

E. Relevant Law Governing Claims in Underlying Case

A general contractor owes a "general duty to provide a reasonably safe worksite" to the employees of its subcontractors. Corsetti v. Stone Co., 396 Mass. 1, 9 (1985); Holder v. Gilbane Bldg. Co., 19 Mass. App. Ct. 214, 217 (1985). This duty is heightened when the general contractor "retains the right to control the work in any of its aspects, including the right to initiate and maintain safety measures and programs." Kostrzewa v. Suffolk Constr. Co., Inc., 73 Mass. App. Ct. 377, 379-380, quoting Corsetti, 396 Mass. at 10, and citing Dilaveris v. W.T. Rich Co., 424 Mass. 9, 11-12 (1996).

Those employing construction workers must "furnish . . . a place of employment which [is] free from recognized hazards that are causing or are likely to cause death or serious physical harm[,]" and "comply with occupational safety and health standards promulgated under this Act." 29 U.S.C. § 654(a)(1),(2). Regulations, such as OSHA or the Massachusetts Code of Regulations, and industry standards may be considered as evidence of negligence or what constitutes appropriate care under the circumstances. Herson v. New Boston Garden Corp., 40 Mass. App. Ct. 779, 793 (1996).

The applicable regulations in the Underlying Case include that "[each platform on all working levels of scaffolds[15] shall be fully planked or decked between the front uprights and the guardrail supports," 29 C.F.R. § 1926.451(b)(1), "[e]ach platform unit (e.g., scaffold plank, fabricated plank, fabricated deck, or fabricated platform) shall be installed so that the space between adjacent units and the space between the platform and the uprights is no more than 1 inch (2.5 cm) wide . . .," 29 C.F.R. § 1926.451(b)(1)(i), and "[s]caffolds and scaffold components shall be inspected for visible defects by a competent person before each work shift, and after any occurrence which could affect a scaffold's structural integrity." 29 C.F.R. § 1926.451(f)(2). Massachusetts regulations

[15] "Scaffold means any temporary elevated platform (supported or suspended) and its supporting structure (including points of anchorage), used for supporting employees or materials or both." 29 C.F.R. § 1926.450.

also require daily safety inspections to insure safe workspaces. 454 Code Mass. Regs. § 10.03.

Finally, the law of causation in the Commonwealth is well known and requires no more than a recitation of the model jury instructions:

> Often, an injury has more than one cause. If Defendant's negligence was one of those causes, that is enough. Plaintiff does not have to show that Defendant's negligence was the only cause of the injuries. Nor does he have to show that the negligence was the largest or main cause of the injuries, as long as the injuries would to have occurred without the Defendant's negligence.

Super. Ct. Model Jury Instr., 10C Mass. Prac., § 94:12. (6th ed.) (Sept. 2025).

II. Analysis

A. Lack of Procedures and Protocols

Rooney argues first that Liberty failed to adopt and implement reasonable standards for the investigation of claims. In particular, Rooney argues that the lack of written protocols and procedures specific to construction claims was unreasonable where Liberty had a department focused on complex construction claims. I disagree.

Liberty trained its claims professionals, had written protocols and procedures regarding the general investigation of and handling of claims and required periodic online training. Although there were no specific written protocols requiring adjusters to review construction contracts or OSHA regulations, the claims professionals who testified in this case were all aware of the significance of those pieces of evidence and understood they should be included in the claim notes and roundtable reports. The failure in this case was primarily Ince's, but it did not stem from a lack of appropriate protocols and procedures. See Silva v. Norfolk & Dedham Mut. Fire Ins. Co., No. 2011-00020, 2015 WL 13037587, at *20 (Mass. Super. Aug. 12, 2015) (Rufo, J.) (insurer's mere failure to promulgate claims manual and establish uniform standards for the investigation did not violate G. L. c. 176D, § 3(9)(c)).

B. Failure to Conduct Reasonable Investigation and Make Offer of Settlement after Liability was Reasonably Clear

Rooney argues next that Liberty failed to conduct a reasonable investigation and failed to make a reasonable offer of settlement when the JV's liability was reasonably clear. I agree. And, because I conclude that the failure to conduct a reasonable investigation caused Liberty not to make a reasonable offer of settlement when liability was clear, I address both at the same time.

1. JV's Breach of Duty of Care with Respect to Scaffolding

Throughout its claims handling process Liberty typified the three wise monkeys. It refused to see, hear, or speak the evidence that established that the JV breached its duty of care to those who worked on the interior scaffolding.[16] Liberty concluded very early on that nothing about the interior scaffolding had anything to do with Rooney's accident and stuck with that view to the bitter end, despite a wealth of evidence that would cause any insurance construction claims professional to alter that conclusion.

Liberty's single plank theory of the case formed in November 2015 and was based entirely on Kudirka's statements over a year and a half after the accident that Rooney had placed an eight-foot board from the scaffolding across the bridge and that he was walking on that plank when he fell. Even in 2015, that theory was inconsistent with the contemporaneous reports of the accident, which Ince did not review before writing his initial roundtable report and did not review thereafter. For the next six years, Liberty never revised its theory of causation despite contradictory evidence and, importantly never grasped that its theory was consistent with the JV's liability. Put elsewise, Liberty turned a blind eye to evidence that showed the JV to be liable and

[16] Thus, when Cain reported to Janes during the trial that he did not expect the jury to "fully grasp that big gaps in the scaffolding were OK because . . . it was not designed or designated for the masons," Janes and every other Liberty claim professional should have understood – then and earlier – that it was not okay for the JV to erect deficient scaffolding so long as only its employees used said scaffolding.

adopted only that theory that suggested nonpayment – conduct that violates G. L. c. 176D, § 3(9)(d) and (f) and is contrary to proper claims handling.

The very earliest reports of the accident, made within days and weeks, indicated that Rooney fell on the interior scaffolding which the JV built and was responsible for maintaining and inspecting on a daily, weekly, and monthly basis. None of the reports or notes from 2014 indicate that Rooney was walking or standing on a plank laid across the tower, much less one that Rooney himself placed there. Next, Rooney's 2015 Complaint provided notice that he fell from scaffolding and was alleging the JV had an unsafe workplace that failed to comply with OSHA regulations. Indeed, Cain understood as of December 2015 that the scaffolding and whether it was OSHA-compliant were important issues when he wrote to Ince that he wanted to get an OSHA expert to "talk about the masons' responsibility and plaintiff's own responsibilities while working on a scaffolding platform."

By the fall of 2016, Ince knew, and his supervisors should have known, the following from Cain's reports: Rooney would testify that his fall was caused by the two to three foot gaps in the interior scaffolding; photographs provided to the JV at Rooney's deposition established the existence of very large gaps on the interior scaffolding which violated OSHA[17]; Rooney complained about the scaffolding to the

[17] Even the most cursory review of Exhibits 118.8, 118.22, or 118.23 shows the exceedingly unsafe and defective interior scaffold. It is evident the interior scaffolding presented a safety risk to anyone and everyone who worked on it. To the extent Kudirka, or anyone else, testified at deposition that there were no "issues" with the interior scaffold, that testimony should not have been credited by Liberty (and would not have been credited by any finder of fact) in the face of the gaping holes displayed in the photographs. Holes through which a human being could fall. All of Liberty's statements that the scaffolding was "ok" or there were no "issues" with the scaffolding cannot be credited given the photographs. Because none of the senior claim professionals looked at the photographs, they believed Ince's roundtable reports that there was nothing wrong with the scaffolding.

JV's self-proclaimed sole safety manager, Golden, who took no action; Golden was supposed to inspect the scaffolding and document his inspections but he did neither; the JV had no documents evidencing any inspections of the interior scaffolding (or any other aspect of the work site); and Rooney was amiable, credible, and his story made sense.

Additional deposition discovery from late 2018, further undercut Liberty's preferred defense. The JV's project manager confirmed that masons were permitted to use the interior scaffold, which was also confirmed by United Stone's work plan – a document Ince also did not review. Kudirka – the only witness who would testify Rooney was on a "plank" – did not testify at deposition consistent with his statements in 2015. (Liberty would later concede he either had memory or credibility problems). Kudirka testified that Rooney did *not* put a plank on the interior scaffolding and no one else from United Stone did either. Kudirka also did not testify that Rooney was an unsafe worker. To the contrary, he testified that Rooney was a good worker and good at the trade. Kudirka also confirmed that he, himself, worked on the interior scaffolding, as shown in photographs of masons on the interior scaffolding in exhibits 118.11, 118.25, 118.26, 118.44 and others. Neither of the two JV employees who went to the accident site immediately after Rooney was injured, Keville or Golden, would testify that they saw any plank or planks from which Rooney may have fallen. And, although they were obligated to take photographs and document the scene and Keville testified at deposition that he and / or Golden did take photographs, the JV produced none.

Thus, at the close of discovery, Liberty knew and / or should have known that the interior scaffolding was defective, not OSHA-compliant, and constituted a breach of the JV's duty to its employees and all others, including the masons, who used the interior scaffolding; that Rooney complained to the JV employee charged with inspecting and correcting the deficient scaffolding; that there was no witness who could testify for the JV that they inspected the interior scaffolding; and that the JV had no

documentation of any safety inspections let alone scaff tags. Rooney then provided an expert disclosure from David Grafton in which he opined that the interior scaffolding was dangerous and violated OSHA.

With that information, the JV's breach of its duty of care was clear to any reasonable observer. Liberty's "see no evil" approach to claims handling, however, continued. It is exemplified in Ince's November 2018 claims note in which he stated that the "optics of the interior scaffolding are not great" – by which he was referring to visible, gaping, two foot or more wide gaps – but then dismissed those clear violations of the JV's duty of care as "sort of standard fare," and again blamed Rooney for the fall, with the observation that "even if you believe him, the real cause of his fall was lanyard malfunction." Likewise, in his May 2019 report, Ince recognized the JV's responsibility for site safety but dismissed its impact on liability stating that the JV could "not police every single part of the project 24/7." That flippant statement flatly contradicts the JV's legal and contractual obligation to build OSHA-compliant scaffolding and inspect the scaffolding before every workday and ignores the complete lack of evidence that the JV performed any of the requisite inspections. Further, Ince testified in this case that he had no evidentiary basis for continuing to write that Rooney set up a single plank, and his supervisors testified that the *never* considered any alternative other than that Rooney set up a plank. Finally, Robertson testified in this case that, even if he had known that Kudirka was the only witness who claimed to have seen a plank the day of the accident, he would not have considered it relevant because Rooney would have been negligent for stepping over the defective, unsafe and OSHA-violating gap created by the JV.

As the above shows, once Liberty decided to put all its eggs in the single plank theory basket, it found every reason to credit favorable evidence (to the limited extent it even existed) and to disregard all facts and law to the contrary. That is not consistent with its obligations under chapter 176D to conduct a fair investigation.

2. The Defective Scaffolding and Lack of Inspections Was a Cause of the Accident Even Under the Single Plank Theory of Defense.

Putting to the side Liberty's failure to consider evidence that established the JV's liability for the defective scaffolding and contradicted its "single plank" defense theory, Liberty never adequately addressed how its own theory was entirely consistent with the JV's liability. In other words, even if Rooney were on a plank and even if Rooney reached the end of his lanyard, he fell through a gap and to the concrete deck because of the JV's breach of its duty with respect to the scaffolding.

Liberty also never addressed the problem that arose from the lack of evidence that any mason moved the alleged "single plank." It was undisputed the JV's employees used the interior scaffolding at night for demolition and debris removal and were responsible for dismantling it and moving it down as the work progressed from the top to the bottom of the tower. With no evidence that Rooney or anyone from United Stone set up the plank on the day of the accident, or that the JV inspected the scaffolding before the masons began that day's work, the only reasonable inference – if there was a plank across the tower – was that the JV was responsible for putting it there. Having created the unsafe condition, the JV would be liable regardless of whether Rooney walked on the plank.

3. Ince's Faulty Roundtable Reports

Notwithstanding all the above information obtained in discovery and provided to Liberty, in every roundtable report from May 2019 through June 2021, Ince wrote – as if uncontroverted fact – (i) Rooney was "supposed to only use exterior scaffolding," and (ii) Rooney took planks from the "exterior scaffolding planking," and "put [the plank or planks on] the interior so that he could save steps by walking across the interior of the tower vs. around the tower's circumference." The overwhelming weight of the evidence disproved the first statement, and Ince testified in this case that the latter statement never had any evidentiary support except for a single unreliable witness,

Kudirka, who would claim only that he saw Rooney on a plank but not that Rooney set it up or obtained it from the exterior scaffolding.[18]

4. Comparative Negligence

I turn next then to the theory of comparative negligence and that the JV would escape liability because Rooney would be found more than 51 percent liable for the fall.[19] The problem, however, is that neither defense counsel ever advised Liberty that a jury would likely find Rooney more than 51 percent liable for the accident. The comparative negligence bar was never a realistic likelihood.

As early as January 2019, when Sherry wrote his first report, Liberty understood that neither Cain nor Sherry thought a jury, upon finding the JV negligent, would nonetheless find Rooney more than 50 percent responsible for his fall. In his first report, Sherry wrote "a jury could assign 30-50% comparative negligence" which would still result in a recovery. In March 2019, Cain believed and reported to Ince a possible "50-50 split" on comparative negligence. In January 2021, Sherry again reported to Ince that he believed the "jury could assign 30-50% comparative negligence." In July 2021, shortly before trial, Cain reported the maximum amount of comparative negligence that would be awarded against Rooney was 40 percent. Given the JV's breach of its duty of care, which was a cause of Rooney's accident, the existence of a possible comparative negligence finding of less than the fifty percent bar does not absolve Liberty from

[18] Keville's deposition testimony about his belief or view that the masons could not use the interior scaffolding was unbelievable in comparison to Rapp's testimony, the work plan, the photographs of masons (including Kudirka) on the interior scaffold, and the utterly credible description of the masonry work which required masons to be on the interior scaffold in order to number each stone prior to removal. (See Ex. 118.21.) Further, such unsupported belief was inadmissible, as the Court ruled at trial.

[19] In addition to the single plank theory, Liberty claims professionals also seemed to believe that Rooney caused the accident because he continued to work despite the unsafe conditions or because he approached and stepped over a known risk.

having failed to make a reasonable offer of settlement by at least June 2021. Indeed, given that damages were reasonably clear in a range of $4.5 to $5 million, assuming the very high, albeit unlikely, estimate that Rooney might be found up to forty percent responsible, Liberty should have offered between $2.7 and $3 million to settle the case by June 2021. See McLaughlin, 90 Mass. App. Ct. at 32 (where insured's liability is reasonably clear, insurer cannot refuse to make offer of settlement merely because others might share in liability); Urban, 752 F. Supp. 3d at 341 ("While comparative negligence can, *in some cases*, prevent liability from becoming reasonably clear, insurance companies cannot avoid [their] obligation to make a reasonable offer by hiding behind the gamesmanship of anticipated success at trial. . . . The standard of 'reasonably clear' must not be conflated to mean absolutely certain as to all the details and specific comparative percentages, especially where the tortfeasor's fault is substantial." [emphasis added]).

5. Lack of Reasonable Investigation

Further, there is ample evidence that Liberty did not undertake additional investigation it should have given the factual developments in the Underlying Case. Despite recognizing their importance in connection with establishing the duty of a general contractor in a construction accident case, none of the claims professionals read the relevant safety provisions of the MassDOT Contract or the JV's Safety Manual. Nor did Liberty undertake any investigation when it learned the JV could produce no safety inspection documents. For example, Liberty did not ask defense counsel to identify who inspected the scaffold, if anyone, or the reason there were no records. Such an investigation would have been important because, if safety inspections in fact occurred, then Liberty's view that the missing records were a red herring may have had merit. Without such evidence, the missing records were not a "red herring," their absence would likely lead to the conclusion that no inspections occurred – very strong evidence of the JV's breach of its duty to ensure safe scaffolding. I also credit the evidence that

no OSHA-certified person would have approved and tagged the interior scaffolding depicted in the photographs as OSHA-compliant. Further, Liberty should have tried to determine who built the scaffolding or at least investigated how the interior scaffold came to have such large, dangerous gaps in the planks.

With respect to the single plank theory, no claims professional reviewed the initial incident reports that did not support that theory. Liberty never sought to obtain information or testimony from Houde, who was on the tower when the accident occurred, or Souza who arrived shortly after the accident. Relying, as it was, on the theory that Rooney was walking on a single plank, Liberty should have interviewed and / or obtained statements from Houde and / or Souza to determine if they saw such a plank.[20]

The claims professionals also did not reasonably investigate the impact of OSHA regulations and the defective scaffolding. None read Grafton's expert report, and none reviewed the applicable regulations. Most compelling in terms of the investigation, Ince never included crucial evidence contrary to the single plank theory in his roundtable reports. He continued to inform his supervisors that Rooney had placed a single plank to walk on despite no direct admissible evidence of that fact.[21] He continued to inform his supervisors that Rooney was not allowed to be on the interior scaffolding without disclosing that wealth of evidence to the contrary.

The lack of a reasonable investigation, Ince's failure to include in his roundtable reports the information necessary for an objective evaluation of the JV's liability, and the other claims' professionals' failure to ensure they were aware of all the facts that

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[20] Indeed, this failure to investigate undercut Liberty's view that the case boiled down to a factual dispute between Kudirka and Rooney. The case was nominally a "he said / he said" only because Liberty did not seek to interview Houde and Souza.

[21] Janes testified that he thought the jury could infer that Rooney placed the plank but was not aware that Cain was never going to make that argument.

factored into liability resulted in the failure to make a settlement offer when liability was reasonably clear. As noted above, the senior claims professionals were unaware of most of the information that Rooney presented to the jury regarding the JV's liability. They never addressed the OSHA violations, the photographs proving the OSHA violations, or the missing documentation before trial because that information was not included in the roundtable reports and, I infer, none of them read the claims notes. None of the claims professionals took meaningful steps to pursue and familiarize themselves with the information critical to any construction site injury claim but conspicuously absent from the roundtable reports – including, critically, the scope of the JV's legal and contractual obligations, the testimony of percipient witnesses, and evidence of the scaffolding / site at the time of the incident or inspections the JV performed.

6. Liberty's Arguments

Liberty argues "there were two significant unresolved questions that would prevent any carrier from concluding that the JV's fault was reasonably clear: (1) where did Rooney fall from: a single plank that was placed across the top of Tower 5 or the interior platform in Tower 5; and (2) no matter where he fell from, to what degree was Rooney negligent for failing to avoid a hazard that he admitted seeing."

That argument is unpersuasive for all the above stated reasons. It is simply not the case that the evidence on both sides had an equal share of strengths and weaknesses. All the evidence on the question of whether the JV built and maintained safe, OSHA-compliant scaffolding was that it did not. The overwhelming evidence on the question whether Rooney was allowed to use the interior scaffold was that he was. There was no direct evidence Rooney moved a plank. And the only evidence Rooney was on a plank *at all* came from a single witness whose statement contradicted the

contemporaneous accident reports and notes.[22]

In pressing this argument, Liberty relies heavily on defense counsel's assessments of the percentage chance of success on the question of negligence and then on the question of the apportionment of comparative negligence. That reliance was faulty where Liberty did not perform an adequate investigation, and the claims professionals had not been provided the essential facts that supported negligence and undercut comparative negligence.[23] Moreover, if reliance on defense counsel's assessments was the hook on which what Liberty hung its hat throughout this lengthy case, by August 2, 2021 defense counsel told Liberty there was a *seventy-five percent chance* the JC would lose and be required to pay *at least* seventy-five percent of Rooney's damages. Although I conclude liability was reasonably clear earlier, based on the discovery and expected expert testimony, liability also was reasonably clear when experienced trial counsel told Liberty – in laymen's terms – that the JV was going to lose. A reasonable settlement must be made then – even if mid-trial. But Liberty ignored Cain's assessment and chose to credit the Observer. That decision further exemplified again Liberty's refusal to see, hear, or credit the obvious conclusions about the JV's liability.

Liberty also argues that damages were not clear because the bulk of Rooney's claimed damages consisted of future pain and suffering which, according to Liberty "is an inherently difficult matter to predict." The difficulty of measuring pain and suffering damages is not a reason an insurer may fail to make a reasonable offer of

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[22] Having failed to locate, let alone interview, Houde, I do not credit Liberty's insistence that Houde confirmed Kudirka's statement to the investigator.

[23] While defense counsel's assessments can be one factor in determining whether liability was reasonably clear, and one factor in determining the willfulness of the Insurer, here, crediting those assessments without having considered the requisite *facts* does not assist Liberty.

settlement when liability is reasonably clear. See Hache, 2023 WL 8720051, at *2; Urban, 752 F. Supp. 3d at 336. But even so, Liberty could approximate a *reasonable* offer of settlement which included pain and suffering. In his pretrial report of January 2021, Sherry informed Liberty that the likely value of Rooney's damages was $3.5 million, and potentially up to $5 million. By the June 2021 trial approval roundtable – at which Liberty made the decision not to make any offer to settle but to force Rooney to trial – Liberty knew that Rooney's provable medical expenses were approximately $1.5 million, and his economic expert would opine that Rooney's lost future wages was $1.5 million.[24] Liberty had sufficient factual information about Rooney's nine surgeries and their impact on his quality of life to know that a pain and suffering award would at a minimum equal his medical damages. Thus, I find that in June 2021 a reasonable settlement offer would have been between $4.5 and $5 million.

Because I find that Liberty's conduct was willful, see *infra*, I need not identify the reasonable settlement amount with more specificity. However, in the event it becomes necessary, i.e., if an appellate Court were to determine there was a lack of sufficient evidence of willfulness, I would calculate Rooney's actual loss as the interest on $4.5 million – representing his actual medical damages, his lost income, and an award for future pain and suffering equal to medical damages – calculated from June 30, 2021 until Liberty paid the judgment. Given the above conclusions, Liberty's offers of settlement – $350,000 at mediation, and the high-low offers of the $500,000 to $2.5 million and then $1 million to $5 million made at trial – were neither prompt nor reasonable. Liberty has not cited any cases, and I have found none, holding that the offer of a high-low agreement, which, by definition still requires a plaintiff to litigate the claim to verdict, may satisfy the requirement that an insurer offer prompt fair and

[24] That figure was not that far off what Ince estimated – which was $600,000 to $715,000—although Ince, as noted, improperly discounted that amount.

equitable settlement where liability is reasonably clear. Such a holding would appear inconsistent with the fundamental purpose of G. L. c. 176D. See Clegg, supra.

7. Liberty's Conduct was Willful

I next consider whether Liberty's conduct was willful or knowing. Given the facts that I have found above, despite understanding the gravity of this decision, I cannot conclude otherwise. Liberty deliberately closed its eyes to known and available information, in order to hold fast to its premature, yet somehow cast in concrete, theory of the case.[25] The question is not whether, on a roll of the dice, a defense verdict was possible. That is not the standard that governs insurers in the Commonwealth. The question does not depend on trial counsel's assessment of the potential jury verdict. If the possibility of a defense verdict – whether forty percent or twenty-five percent – were alone sufficient to avoid making a reasonable offer of settlement when liability was reasonably clear, no insurer would settle. Ever. Jury trials are, by definition, unpredictable. The obligation to make a reasonable offer of settlement when liability is reasonably clear is the law. When liability becomes reasonably clear is always fact specific. It became so here with the undisputed evidence that the JV negligently created

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[25] Liberty's argument that Cain's knowledge cannot be imputed to Liberty for purposes of Chapter 176D because Cain owed fiduciary duties to the JV misses the point. Liberty, especially Ince but not only Ince, should have been proactive in finding out and reporting the information Cain knew.

Likewise, Liberty cannot avoid liability or multiple damages by placing all blame in Ince's lap. As set forth above, Ince's supervisors failed in their obligations to ensure the Underlying Case was properly handled and willfully ignored glaring deficiencies in the Liberty's investigation and theory of the case. "Regardless of whatever knowledge any individual may or may not have had," Liberty, "as an entity" certainly knew or should have known that liability was reasonably clear, thus requiring a reasonable offer of settlement. See Arno v. Arbella Mut. Ins. Co., No. CIV.A. 03-1301, 2005 WL 2739905, at *4 (Mass. Super. Aug. 26, 2005) (Fabricant, J.). Liberty "was responsible for establishing and maintaining reliable systems to make sure that such obligations would be met promptly[.]" Id.

OSHA-violative scaffolding, the overwhelming evidence that the JV, with no documented records of *any* safety inspections, allowed the masons to use such scaffolding, and the overwhelming evidence that Rooney fell into a hole in that scaffolding causing him catastrophic injuries.

Liberty was required to view the Underlying Case with a clear, objective eye and an unbiased view of all the information available to it. It did not. Ince included knowingly false information in his roundtable reports and failed to include important information that arguably constituted value changing information. Ince's supervisors, who had access to the claim file and could have – for example – reviewed deposition summaries, expert reports, etc., or directed Ince / defense counsel to investigate avenues where evidence was plainly lacking, did not do so. Instead, they too clung to their initial view – repeated for years by Ince – that Rooney was responsible for the accident because he moved a plank, walked on a plank, fell from a plank, and was not allowed to be in the interior scaffolding.

In doing so, Liberty ignored that the JV built visibly unsafe scaffolding and had no record of inspecting it, knowing that its own workers would use that scaffolding during the night, and the masons would use it during the day. Evidence of that level of callous indifference to its workers and others should have led Liberty to appreciate the JV's liability. Instead, Ince and others claimed such faulty scaffolding was okay and par for the course – further evincing a complete disregard of the law governing worker safety. The failure to grasp the JV's heightened safety requirements was also deliberate where no one from Liberty read the relevant portions of the MassDOT contract of the JV's Safety Manual. Likewise, Liberty's insistence on the single plank theory in the face of its illogic and the wealth of contradictory evidence makes no sense unless Liberty was simply closing its eyes to reality. Finally, Liberty consistently devalued and discounted the missing inspection records as a "red herring" with no understanding or recognition of the JV's contractual obligation to maintain such records. Documents or

the lack of documents do not cause accidents. But documentation can establish that safety protocols such as inspections were followed. The absence of the documents in this case was no red herring given the photographic evidence of yawning holes in the interior scaffold. Their lack further showed laxness and disregard to safety.

Liberty was obligated to offer $4.5 million to Rooney to settle the case before trial and no later than the end of June 2021. Its failure to do so stemmed from its willful and knowing failure to properly investigate the Underlying Case and recognize that liability was reasonably clear at that time.

8. Damages

Having found willfulness, I am acutely aware the statute and governing law require me, at a minimum, to double the judgment in the Underlying Case. See G. L. c. 93A, § 9(3)("[f]or the purposes of this chapter, the amount of actual damages to be multiplied by the court shall be the amount of the judgment on all claims arising out of the same and underlying transaction or occurrence"), Rhodes, 461 Mass. at 498-499, Chiulli, 97 Mass. App. Ct. at 258 n.18. In my view, the law does not account for the possibility that a jury would issue a verdict of more than five times what this objective observer determined were reasonable damages,[26] or a situation where it took an excessive amount of time to get a case to trial (partially caused by the COVID19 pandemic). In my view, given the remarkably large judgment in the Underlying Case, a finding of willfulness results in a grossly excessive punitive damages award against Liberty far in excess of the goals the statute is designed to achieve. However, the statute and controlling precedent offer me no discretion. That I am required by law to issue what I find to be an excessive punitive damages award should not, *and did not*, cause me to flinch from my duty to determine whether Liberty's conduct was willful. It was.

Defendant, as the prevailing party, is also entitled to an award of reasonable

[26] Some might conclude it was a runaway jury verdict.

attorney's fees and costs in this action. G. L. c. 93A, § 9(4).

ORDER

For the foregoing reasons, Judgment shall enter for the Defendant and against the Plaintiffs on all claims and counterclaims.

Judgment shall enter in the amount of two times the judgment in the Underlying Case – ninety million, nine hundred seventy-one thousand, six hundred and twelve dollars **($90,971,612**).

Entry of judgment shall be stayed pending resolution of Rooney's attorney's fees. Defendant shall file a motion under Superior Court Rule 9A for attorney's fees and costs supported by affidavits and invoices from which the Court can conduct a lodestar analysis within sixty days of the date of this Order.

/s/ Debra Squires-Lee

Debra A. Squires-Lee
Justice of the Superior Court

December 1, 2025