Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS
NO. SJC-11958

HOWARD H. BAYLESS, ADMINISTRATOR OF THE ESTATE OF
HERMAN T. BAYLESS,
PLAINTIFF-APPELLEE,

v.

T.T.S. TRIO CORPORATION, ET AL,
DEFENDANTS-APPELLANTS.

ON *SUA SPONTE* TRANSFER FROM THE APPEALS COURT
OF AN INTERLOCUTORY APPEAL OF AN ORDER OF THE
SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT

BRIEF OF *AMICUS CURIAE*,
MASSACHUSETTS ACADEMY OF TRIAL ATTORNEYS

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INTEREST OF *AMICUS CURIAE*

The Massachusetts Academy of Trial Attorneys (Academy), *amicus curiae*, is a voluntary, non-profit, state-wide professional association of attorneys in the Commonwealth. The Academy's purpose is to uphold and defend the Constitutions of the United States and the Commonwealth of Massachusetts; to promote the administration of justice; to uphold the honor of the legal profession; to apply the knowledge and experience of its members so as to promote the public good; to reform the law where justice so requires; to advance the cause of those who seek redress for injury to person or property; steadfastly to resist efforts to curtail the rights of injured individuals; and to help them enforce their rights through the courts and other tribunals in all areas of law. The Academy has been actively addressing various areas of tort law in the courts and the Legislature of the Commonwealth since 1975.

The Academy submits that G.L. c. 231, § 60J, properly read, allows for an affidavit signed by counsel based upon information and belief as a result of investigation into the circumstances of a plaintiff's dram-shop claim.

STATEMENT OF THE ISSUE

Since 1985, when bringing an action for the negligent distribution, sale, or service of alcohol to minors or to intoxicated persons, a plaintiff must file an affidavit with the complaint, or within ninety days thereafter.

The statute under review merely requires that such an affidavit set forth facts sufficient to raise a legitimate question of liability appropriate for judicial inquiry.

Given that it is to be filed so early in cases which usually have three-year statutes of limitations, might be on behalf of decedents, and typically require exhaustive discovery, what is the appropriate quantum of proof for that affidavit?

STATEMENT OF THE CASE

The Academy is content with the Appellee’s Statement of the case.

STATEMENT OF FACTS

The Academy is content with the Appellee’s Statement of facts.

ARGUMENT

I. The statute under review does not require the affidavit filed in support of plaintiff's case be based upon personal knowledge; an affidavit signed by counsel, based upon information and belief after investigation into the facts extant, is sufficient.

A. The affidavit required by section § 60J need not be based upon personal knowledge.

Section 60J requires that in these cases a plaintiff must file (not sign) "an affidavit setting forth sufficient facts to raise a legitimate question of liability appropriate for judicial inquiry" either with the complaint or ninety days thereafter.

This Court has said that the "procedural requirements" of the statute "were designed to promote the availability of liability insurance by establishing mechanisms whereby the incidence of frivolous claims might be reduced." Croteau v. Swansea Lounge, Inc., 402 Mass. 419, 422 (1988), citing to 1985 House Doc. No. 6508.

Nowhere does § 60J define "affidavit"; nor does it identify the affiant or require personal knowledge. Given the timing of the required filing (with the complaint, or within ninety days, but well before discovery even starts), the word "affidavit" should be

accorded a generic meaning and reviewed under a "plausible" standard of review.

No doubt statutes are to be "accorded their plain and ordinary meaning, considered in connection with the cause of its enactment, the preexisting state of the law, the mischief to be remedied and the main object to be accomplished. The language of a statute is not to be enlarged or limited by construction unless its object and plain meaning require it. A statute's words must be accorded their plain and ordinary meaning, 'considered in connection with the cause of its enactment, the preexisting state of the law, the mischief to be remedied and the main object to be accomplished.'" A. Belanger & Sons v. Joseph M. Concannon Corp., 333 Mass. 22, 25 (1955), quoting Rambert v. Com., 389 Mass. 771, 773 (1983).

Long-standing cannons of statutory construction, coupled with fundamental principles of common sense -- to say nothing of equity -- compel a straight answer to the first part of this question: the affidavit need not be based on personal knowledge but, instead, may be based upon information and belief.

In Howland v. Cape Cod Bank and Trust Co., 26 Mass. App. Ct. 948 (1988), the Appeals Court

interpreted the word "affidavit" as implying (not meaning) "a statement under oath by a person having direct knowledge of the facts which he verifies" id. at 949 (1988). These defendants' mistakenly read that dictum to mean that a § 60J affidavit must be based upon personal knowledge.

There, however, the Appeals Court dealt not with a § 60J "affidavit" but was construing that word as used in Probate General Court Rule 16. Putting aside the fact that Howland comes to us in a will contest from a court sitting in equity, nowhere did Howland require an affidavit be based upon the affiant's personal knowledge.

Moreover, the above-quoted passage goes on to carve out an exception: namely, "...except as otherwise clearly stated in the affidavit itself." Id. One such exception (i.e., "upon information and belief") applies here, and this affidavit complied with the statute.

Defendants' reliance on McCauliff v. O'Sullivan, No. 99-02543, 2000 WL 33170919 (Mass. Super. Sept. 26, 2000) (Fecteau, J.), and Bronfield v. Congress Fine Dining, LLC, No. 10-293940, 2011 WL 7110487 (Mass. Super. Oct. 20, 2011)(Kaplan, J.), is similarly

misplaced. Indeed, those cases are persuasive for plaintiff's view of the facts that inform this issue.

True enough, both decisions considered the meaning of the word "affidavit" in § 60J, looking to Howland for instruction. But neither McCauliff nor Bronfield read a "personal knowledge" requirement into the statute. McCauliff, 2000 WL 33170919 at *1 ("Neither the statute, nor the general definition require the same level of personal knowledge as Rule 56(e)").

Similarly, Bronfield v. Congress Fine Dining, LLC, rejected the argument that a § 60J affidavit was defective because it was not based entirely on personal knowledge. 2011 WL 7110487, at * 1. To hold the term to that standard at such an early point in the life of a dram-shop case would be inconsistent with its intent. ("The purpose of the § 60J affidavit appears to be to insure at the outset of the case that there is evidence sufficient to raise a 'legitimate question of liability,' on the part of the defendant dram shop, before it is forced to incur the costs of defending the claim in a court proceeding.") Id. at *2.

As for the chronology, § 60J allows a plaintiff to file the affidavit either with the writ or ninety days later, the deadline for filing a return of service of process under Mass. R. Civ. P. 4(j). Given that timeline, there is no discovery before filing the affidavit. The Legislature could not have required a plaintiff, who had just served the complaint and not had the opportunity to conduct any discovery, to file an affidavit based exclusively upon personal knowledge.

Several additional, practical considerations militate against reading a personal-knowledge requirement into the § 60J affidavit. First, doing so would prevent a plaintiff who is over-served alcohol and does not recall the events from bringing a dram-shop claim. Second, where a plaintiff is injured as a result of the actions of a third-party who was over-served, she would not have personal knowledge of the facts. Finally, where, as here, a plaintiff is the personal representative of one who dies as a result of being over served, or as elsewhere because of a third-party being over served, that plaintiff could no possibly satisfy a personal-knowledge requirement. In reality, as a practical matter most of the facts which

give raise to a legitimate question of liability rarely come from one person. They come from many people: percipient witnesses, law enforcement officials, reconstruction experts, toxicologists, etc.

In requiring a § 60J affidavit to be filed at or near the inception of the civil action, the Legislature sought to discourage "frivolous" claims -- not to eliminate legitimate cases where no one person had personal knowledge of all facts necessary to meet the requirements of the statute.

Reading the statute to require personal knowledge of the affiant, therefore, would render compliance with the statute impossible in the most serious cases, would be inconsistent with legislative intent, and would frustrate rather than advance that purpose.

B. An affidavit filed at the outset of a civil action need not be subject to the strictures of those filed with a dispositive motion for summary judgment.

Section 60J begins by stating that venue for these cases is proper in the Superior Court and "shall proceed according to the Rules of Civil Procedure." After calling for the affidavit, it goes on to declare: "Any party may make a motion for summary judgment pursuant to Rule 56." That simple declarative

statement, so the defendants contend, necessarily requires § 60J affidavits be held to the Rule 56(e) standard. But that makes no sense; it is a non sequetur. It ignores the sequence of events in civil litigation and puts the cart well ahead of the horse.

Summary judgment typically follows discovery. Rule 56(e) requires that affidavits at that stage, both in support of and in opposition to the dispositive motion, be "made on personal knowledge, [and] shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

That is, a Rule 56 affidavit establishes (or contests) genuine issues of material fact with admissible evidence adduced over the course of discovery. See Mass. R. Civ. P. 56(c). If a § 60J affidavit, filed as early in the life of an action as it must be, were to satisfy Rule 56(e) standards there would be no need for discovery. Holding it to that standard is like requiring a home buyer to have financing in place when submitting the first offer.

By contrast, a § 60J affidavit is filed with or shortly after a complaint -- in litigation terms,

light-years before filing, let alone preparing, drafting, and serving summary judgment affidavits -- and need only contain "sufficient facts to raise a legitimate question of liability appropriate for judicial inquiry."

Given the timeline and orderly progression of these civil actions (i.e., Rule 7 complaint, Rule 4 return of service with § 60J affidavit, Rule 12 motion to dismiss, Rule 26 discovery, Rule 56 motion for summary judgment, Rule 38 trial, Rule 50 motion for directed verdict, verdict, post-trial motions, and appeal), it follows that a § 60J affidavit should at most[1] be held to a Rule 12 standard. That is, whether a plaintiff has set forth "allegations plausibly suggesting" enough "to raise a right to relief above the speculative level[.]" Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554-555 (2007).

[1] Indeed, an earlier version of what became § 60J required the affidavit to state facts which "constitute a prima face case" but that phrase was changed to "raise a legitimate question of liability appropriate for judicial inquiry." Journal of the Senate, 1985; Def. brief Add. 14.

By comparison, when evaluating a plaintiff's offer of proof under a much more arduous statute,[2] a medical malpractice tribunal applies the standard that a trial judge applies when ruling on a motion for a directed verdict. See Little v. Rosenthal, 376 Mass. 573, 578 (1978).

Under § 60B, a tribunal must conclude that an offer does indeed raise a legitimate question of liability appropriate for judicial inquiry if "anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the plaintiff." Dobos v. Driscoll, 404 Mass. 634, 656, cert. denied sub nom. Kehoe v. Dobos, 493 U.S. 850 (1989).

A § 60J affidavit should only be held to a Rule 12 standard, if that, and not that under Rule 56(e).

C. A § 60J affidavit signed by counsel, based upon investigation into the facts and circumstances underlying a claim, satisfies the statute.

The purpose of the § 60J affidavit is to weed out frivolous dram-shop cases. Croteau v. Swansea Lounge, Inc., 402 Mass 419, 422 (1988). A plaintiff,

[2] G.L. c. 232, § 60B.

personally, should not be required to sign the affidavit; in many cases, such a requirement would foreclose legitimate (i.e., non-frivolous) cases.

While the statute provides that a plaintiff must "file" the required affidavit, it is silent as to who the affiant must be; it certainly does not prohibit counsel from signing the document. In fact, often the plaintiff -- be it an injured party or the personal representative of a decedent -- has no personal knowledge of the facts. That may be due to the severity of the injuries or a lack of memory. In such a case, it is counsel that should sign the affidavit. In fact, affidavits signed by counsel are held to the Rule 11 standard.[3]

"Good ground" under Rule 11 requires that the document be based on "reasonable inquiry and an absence of bad faith." Bird v. Bird, 24 Mass. App. Ct. 362, 368 (1987); New England Allbank for Savings v. Rouleau, 28 Mass. App. Ct. 135, 141 (1989).

The net effect of requiring personal knowledge of a plaintiff-affiant would be to immunize tortfeasors

[3] "The signature of an attorney . . . constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is a good ground to support it; and that it is not interposed for delay." Mass. R. Civ. P. 11.

who serve alcohol to clearly-intoxicated patrons who later cause injury. Such a result is inconsistent with the statute's intent; more than weeding out the idle cases, that would shut the Courthouse doors to deserving consumers.

CONCLUSION

For the foregoing reasons, The Massachusetts Academy of Trial Attorneys, *amicus curiae*, urges the Court to reject the defendants' reading of G.L. c. 231, § 60J. Affidavits signed by counsel based upon information and belief which are gleaned from a preliminary investigation of the facts satisfy the statute.

Respectfully submitted,

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Dated: December 18, 2015

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

I hereby certify that this brief complies with the rules of Court, including but not limited to Mass. R. A. P. 16, 18, and 20.

/s/ Thomas R. Murphy
Thomas R. Murphy

CERTIFICATE OF SERVICE

I hereby certify that I served two (2) copies of this brief on counsel of record in this matter by priority mail, postage prepaid, on this 18th day of December, 2015.

/s/ Thomas R. Murphy
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