The Appellate Division Clarifies the Law of Nuisance, Trespass and Strict Liability in Connection with Environmental Claims and Denies the Expansion of a Breach of Good Faith and Fair Dealing to Third-Party Insurers

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On March 18, 2014, the Appellate Division upheld the trial court's decision in Ross v. State Farm Fire & Casualty, et al., which dismissed Plaintiff's claims against homeowner defendants for trespass and nuisance and claims against the homeowner defendants' insurers for bad faith that arose from a leaking underground storage tank. 2014 N.J. Super. LEXIS 568 (App. Div. 2014).

The pertinent facts of Ross are as follows: the underlying matter sought damages from neighboring homeowners for contamination associated with a leaking underground storage tank under theories of nuisance and trespass and against the homeowners' insurers for bad faith. The underground storage tank at issue was owned by Ellman from 1988 until 1999, at which time she sold her property to Lowitz. During her ownership, Ellman maintained insurance with High Point Preferred Insurance Company. Before purchasing the property, Lowitz hired ANCO Environmental Services, Inc. to conduct testing of the UST, which did not detect a leak. Lowitz was initially insured through State Farm and was later insured by New Jersey Manufacturers. In 2003, Lowitz entered into an agreement to sell the property and environmental testing performed by the buyer revealed a leak.

Plaintiff, John Ross, purchased a neighboring home (2 doors down) in July of 2004. He was married to his wife, Pamela, in 2007. In that same year, oil from the Ellman/Lowitz property was discovered to have migrated onto the Ross property. Thereafter, Plaintiffs put Lowitz' insurers on notice of the contamination and Lowitz' insurers proceeded to remediate the Ross property and obtained a No Further Action letter from the NJDEP, without any cost to the Ross'.

Based upon the above, Plaintiffs filed a Complaint against Lowitz, Ellman, State Farm, New Jersey Manufacturers and High Point. In their Complaint, Plaintiffs alleged negligence, strict liability, Spill Act Liability, trespass and nuisance.[1] Towards the conclusion of discovery, the insurers filed motions for summary judgment, which were granted by the trial court. Ellman and Lowitz also filed for summary judgment motions which were granted by the court.

On appeal, Plaintiffs sought review of the court's decision to dismiss the private nuisance and trespass claims against Ellman and Lowitz, and the bad faith claim against NJM and State Farm.

The *per curium* decision of the court noted that summary judgment as to the nuisance and trespass claims was appropriate. Specifically, the court noted that in order to establish a nuisance or trespass, one must establish an unreasonable interference with the use and enjoyment of land by meeting the factors set forth in the Restatement (Second) of Torts § 822 (1979). Section 822 of the Restatement states in relevant part:

> One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either
>
> (a) intentional and unreasonable, or
>
> (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities

(Continued on page 7)

(Continued from page 6)

In applying the Restatement to Plaintiffs' claims, the trial court found that no reasonable juror could conclude that the homeowner defendants were negligent in maintaining the underground storage tank and that the migration of oil was not caused by an intentional or negligent act. The Appellate court agreed and noted that "liability for private nuisance is not imposed without proof of some fault, unless, of course, there is intentional or hazardous activity requiring a higher standard of care, or some compelling policy reason, in which case liability is strict or absolute." The Appellate Division also noted that the same limitation applied to trespass.

With regard to the second prong of the Restatement, the Appellate Division extended the holding in Biniek v. Exxon Mobil Corp., 358 N.J. Super. 587 (Law. Div. 2002) and found the storage of home heating oil was not an abnormally dangerous activity to which strict liability may attach.

With regard to the insurer defendants, the Appellate Division agreed with the comprehensive written statement of reasons by Judge Bauman that noted there was no basis as a matter of law for Plaintiffs to assert a direct claim alleging breach of the covenant of good faith and fair dealing against the homeowners' insurers, absent a fiduciary duty or special relationship. Specifically, the Appellate Division noted that the Plaintiffs were injured by the carriers' insureds and were precluded from filing a direct claim against the insurers absent of an assignment of rights. Additionally, while Plaintiffs argued that they were third-party beneficiaries of the contracts of insurance, the Appellate Division found that the contracts of insurance were not intended at the outset to confer a benefit on the Plaintiffs. Finally, the Appellate Division found that there were no public policy considerations to allow Plaintiffs' claims to proceed.

The Ross decision, although unpublished, provides clarification as to the status of the law as it relates to nuisance, trespass and strict liability claims that arise from heating oil contamination. Specifically, Ross extended the holding in Biniek to claims involving heating oil contamination and clarified that specific conduct (ie. recklessness or negligence) must be proven in order to prevail. Additionally, the Ross panel confirmed the holding in Caldwell Trucking PRP Group v. Spaulding Composites Co., 890 F. Supp. 1247 (D.N.J. 1995) which noted that "actions by a third party against an insurer are prohibited absent some statutory or contractual provision permitting direct action" and extended it to claims beyond those just arising under the New Jersey Spill Act.

ENDNOTE

[1] The Spill Act claim was withdrawn as Plaintiffs had not incurred any cleanup and removal costs.

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Jacob is a Partner in Hoagland, Longo, Moran, Dunst & Doukas's Environmental and Toxic Tort Practice Group and Green Building Practice Group. He has extensive experience defending and prodecuting environmental claims in both state and federal courts arising from contamination associated with dry-cleaning operations, service stations, industrial facilities, underground-storage tanks and landfills.