

HAVE THE TIDES CHANGED IN FAVOR OF THE DEFENSE IN ENVIRONMENTAL LITIGATION?

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On August 6, 2015, the Supreme Court of New Jersey affirmed the Appellate Division's decision in Ross v. State Farm Fire & Casualty, et al., which upheld the dismissal of Plaintiffs' 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. 222 N.J. 494 (2015). It was a significant win for the defense bar in light of the Supreme Court's recent plaintiff-friendly decisions in Morristown Associates v. Grant Oil and Magic Petroleum Corp. v. ExxonMobil Corp., which overturned the application of a six-year statute of limitations to Spill Act claims and allowed contribution claims to be filed without the incurrence of any costs or an approved workplan from the NJDEP, respectively. Below is a

brief summary of the case and the reasoning set forth by the Court and a commentary on the recent defensive trend in the law.

Background

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 breach of the covenant of good faith and fair dealing (ie. bad faith). The underground storage tank at issue was owned by Plaintiffs' neighbor (Ellman) from 1988 until 1999, at which time she sold the property to Lowitz. Lowitz owned the property from 1999 through October of 2003. She was initially insured through State Farm and was later insured by New Jersey Manufacturers. In August of 2003, Lowitz entered into an agreement to sell the property and environmental testing performed revealed a leak.

Plaintiff, John Ross, purchased a home two properties away from Lowitz in 2004. In 2007, he was married to his wife Pamela, at which time she began residing at the home her husband previously purchased. In that same year, and shortly after the Ross' entered into a contract to sell their home, oil from the Ellman/Lowitz property was discovered to have migrated onto their property. Ultimately, the contract of sale was cancelled. Thereafter, Plaintiffs put Lowitz' insurers on notice of the contamination and Lowitz' insurers proceeded to remediate the Ross property and obtain a No Further Action letter from the NJDEP without any cost to the Ross'.

In September of 2008, John and Pamela Ross 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. 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. Plaintiff's appealed and the summary judgments granted by the trial court were affirmed. Ross v. State Farm, 2014 N.J. Super. Unpub. LEXIS 568 (App. Div. 2014).

The Ross' filed a Petition for Certification, which was granted by the New Jersey Supreme Court. Plaintiffs raised two issues in the Petition for Certification: (1) Where leaking oil migrated onto plaintiff's property, did Plaintiffs have a viable nuisance action against his neighbor based on the neighbor's failure to mitigate the contamination within a reasonable amount of time; and (2) where the neighbor's insurance companies acknowledged an obligation to clean up Plaintiffs' land, should Plaintiffs have been considered third-party beneficiaries of the insurance contract?

Nuisance/Trespass

Plaintiffs alleged that the Appellate Division misconstrued their private nuisance claim because they did not address the existence of a claim under Section 824 of the Restatement of Torts based on the Defendants' failure to abate. Specifically, Plaintiffs alleged that Section 824 created a separate cause of action from Section 822. Additionally, Plaintiffs contended that the Court should recognize a related claim based on failure to timely abate the nuisance within a reasonable time and that the Defendants' conduct constituted a continuing trespass.

The home owner Defendants argued that because the storage of home heating oil was not unreasonably dangerous, and there was no evidence that they acted intentionally, recklessly or negligently, that Plaintiffs could not establish a claim under Section 822 of the Restatement. Further, they argued that Plaintiffs' reliance on Section 824 of the Restatement was misplaced because liability could not be imposed pursuant to that section of the Restatement in the absence of a cause of action for nuisance under Section 822 of the Restatement.

The Court agreed with the Defendants. In doing so, it noted that Section 824 of the Restatement did not expand private nuisance claims into settings in which there was no showing of fault and no abnormally dangerous activity being conducted. Rather, it confirmed that two categories of conduct, an affirmative act and a failure to act, could give rise to a claim for private nuisance. Thus, while Section 824 of the Restatement confirmed that a breach of an affirmative duty could give rise to liability, it did not give rise to a strict liability claim outside of the abnormally dangerous activity doctrine. In other words, in order to reach and impose liability under Section 824 of the Restatement, the Court determined that one must demonstrate liability under Section 822.¹



With regard to the trespass claim, the Court applied a similar standard. Specifically, the Court noted that a cause of action for trespass required a showing of intentional, reckless or negligent conduct, or the conduct of abnormally dangerous activity. In applying the facts to the law, the Court noted that Plaintiffs did not contend that their damages derived from negligent, reckless, or intentional and unreasonable conduct on the part of the Defendants, nor did the record support such a claim. While the Court noted that Plaintiffs' allegations presented a sympathetic argument, they did not provide a basis for private nuisance under Sections 822, 824 or 839 of the Restatement or for trespass. Therefore, the Court affirmed summary judgment on the part of the home owner Defendants.

Implied Covenant of Good Faith and Fair Dealing

In the Petition for Certification, Plaintiffs also alleged that they were third-party beneficiaries of the insurance contracts between State Farm and NJM and their insured and that there was a special relationship between plaintiffs and the insurers in the factual setting of the case. In response, State Farm and NJM argued that in the absence of an assignment of rights under their contracts with their insured, or an intent to on the part of the parties to the contract to designate plaintiffs as third-party beneficiaries of the contract, Plaintiffs could not pursue a bad faith claim against the insurers. In review of the matter, the Court noted that, "as a general rule, an individual or entity that is a stranger to an insurance policy has no right to recover the policy proceeds." The Court further noted that there was no assignment of rights and that Plaintiffs' claim hinged on whether they could be considered third-party beneficiaries to the contracts of insurance between State Farm, NJM and their insured. In evaluating whether Plaintiff's held such status, the Court noted that the inquiry must be focused on whether the parties to the

contract intended others to benefit from its existence or whether the benefit so derived arose as an unintended incident of the agreement. Here, there was no suggestion in the record that the parties to the insurance contracts had any intention to make Plaintiffs third-party beneficiaries of their agreements. Nor did the migration of oil from the home owner Defendants' property to Plaintiffs' retroactively confer third-party beneficiary status on Plaintiffs. Accordingly, the insurers' duty of good faith and fair dealing only extended to their insured and not to Plaintiffs.

Dissent

Although the Court affirmed the Appellate Division, there was a dissent. Justice LaVecchia concurred in part and dissented in part and wrote the minority opinion. She was joined by Justices Albin and Fernandez-Vina. While Justice LaVecchia agreed that Plaintiffs were not third-party beneficiaries of the contracts of insurance between the home owner Defendants and their insurers, she would have permitted Plaintiffs to pursue their failure to timely abate nuisance claim based on the asserted unreasonable delay in action by the home owner Defendants' insurers. In her opinion, Justice LaVecchia noted that the common law on tort liability is not static and that with changes in social expectations, values, and public policy, the common law evolves to keep pace with what we expect of one another. While she recognized that Section 839 of the Restatement of Torts and the majority opinion noted that in order to impose liability, the "nuisance must otherwise be actionable" under Section 822, she would none-the-less impose liability under the facts based upon the ability of the landowner to take practicable and reasonable measures under the circumstances to remedy the conditions on it that are a source of harm to others (ie. remediate). In her view, practicality and reasonableness should guide the approach to Plaintiffs' failure to timely abate nuisance claim. Moreover, because remediation is now commonplace, Justice LaVecchia would impose a duty to abate contamination in a reasonably timely manner.

Conclusion

Although the Ross decision does not directly involve a Spill Act claim, it does hamper the ability of plaintiffs to pursue and prove common law claims associated with environmental contamination. No longer is strict liability the norm. In order to prevail on a common law claim, plaintiffs must prove intentional, reckless or negligent conduct, or the conduct of abnormally dangerous activity.² The Ross decision combined with the Appellate Division's recent opinion in Favorito v. Puritan Oil Co., will make it increasingly difficult for Plaintiffs to prove common law/soft damages claims (ie. loss of use, diminution in value, etc.) in the context of environmental claims. While Ross addresses the liability standard applicable, Favorito addresses the damages that are recoverable. Under Favorito, Plaintiffs are entitled to the costs of cleaning the property or the difference between the market value of the property in a contaminated and uncontaminated state, assuming liability can be met. No longer can Plaintiffs rely on strict liability in common law environmental cases or double dip and obtain the costs of cleanup and diminution. Perhaps the tides have shifted?

ENDNOTES

¹ During oral argument, the Court raised Section 839 of the Restatement. While it seemed more applicable to the facts of the matter, it still required the demonstration of liability under Section 822.

² With regard to the latter, the Appellate Division in Ross held that the storage of the home heating oil is not abnormally dangerous.

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