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CLIENT ALERT

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NEW JERSEY SUPREME COURT DENIES THE EXPANSION OF THE APPLICATION OF STRICT LIABILITY IN PRIVATE NUISANCE AND TRESPASS CLAIMS AND UPHOLDS APPLICATION OF DIRECT ACTION STATUTE

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In a case which confirms the inapplicability of strict liability to claims of private nuisance and trespass as well as the prohibition of third party direct claims against the tortfeasor's insurer, a split New Jersey Supreme Court in Ross v. Lowitz, Docket No. A-00101-13 (Aug. 6, 2015) upheld the Appellate Division's decision and found that a property owner ("Ross") whose property was impacted by the migration of fuel oil from a underground storage tank ("UST") leak on a neighboring property, cannot be held liable for private nuisance or trespass without a showing of (1) intentional and unreasonable conduct, (2) unintentional and negligent or reckless conduct; or (3) abnormally dangerous activities. In addition, the New Jersey Supreme Court unanimously found that Ross is not an intended beneficiary of the neighbor's insurance policy and has no right to assert a direct claim against the defendant insurers.

In 1999, the defendant, Karen Lowitz ("Lowitz"), purchased a single family home located at 72 Leighton Avenue, Red Bank, New Jersey from defendant Susan Ellman ("Ellman"). Prior to her purchase, Lowitz had the UST located on the property tested and no leakage was found. Lowitz owned the property from 1999 until 2003 at which time she sold it. In preparation for the sale, Lowitz had the UST tested again and this time, the UST showed signs of leakage. During her ownership of the property, Lowitz purchased insurance from State Farm Fire & Cas. Co. ("State Farm") from 1999 until February, 2003. She purchased insurance from New Jersey Manufacturers Ins. Co. ("NJM") effective February, 2003 until the time of the sale in October, 2003. When the UST leak was discovered, Lowitz notified the insurers who then funded the remediation.

In 2004, Ross purchased his property located two doors down from Lowitz's property. In late, 2006, Ross put his property on the market and entered into a purchase and sale agreement in May, 2007. Shortly thereafter, Ross was advised that the fuel oil from Lowitz's leaking UST had migrated onto his property. The prospective buyer cancelled the purchase and sale agreement due to the contamination.

Ross filed suit against Lowitz, Ellman, State Farm and NJM alleging private nuisance and trespass against the individual defendants and breach of good faith and fair dealing against the insurer defendants. Summary judgment motions were filed by all defendants and all motions were granted by the Trial Court. The Appellate Division upheld the grant of summary judgment and the New Jersey Supreme Court granted certification.

PRIVATE NUISANCE AND TRESPASS CLAIMS AGAINST INDIVIDUAL DEFENDANTS:

In a split court decision (4-3), the Supreme Court found that the facts in this case do not support a claim for private nuisance or trespass. Guided by §822 of the Restatement, a defendant is subject to liability for private nuisance "if, and 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 (1) intentional and unreasonable, or (2) unintentional and otherwise actionable for negligent or reckless conduct or for abnormally dangerous conditions or activities." Without evidence of fault, the defendant must be shown to be involved in abnormally dangerous activity. The Supreme Court noted that an intentional but reasonable or entirely accidental activity does not trigger liability under a private nuisance theory. Moreover, the Supreme Court refused to expand the application of §824 of the Restatement to private nuisance claims where there is no showing of fault or abnormally dangerous activity. This section of the Restatement merely confirms that if defendant has an affirmative duty to act and fails to do so, a claim for private nuisance is viable.

The Restatement also applies to a trespass claim, defined as an intentional entry onto another's land regardless of harm. A defendant may be held liable if he/she recklessly or negligently or as a result of abnormally dangerous activity enters onto another's land and the entry causes harm. A defendant is not liable for non-negligent and unintentional entry on land in possession of another. Moreover, there is no strict liability in a trespass claim unless defendant's conduct can be defined as intentional or as an "abnormally dangerous activity."

As the Supreme Court majority pointed out "the outcome should logically depend on whether the offending landowner has made a negligent or unreasonable use of his land when compared with the rights of the injured party on adjoining lands." Here, plaintiffs do not contend that their damages derive from negligent, reckless or intentional and unreasonable conduct by either Ellman or Lowitz. Ultimately, the Supreme Court found that Ellman's and Lowitz's actions do not support an allegation of an intentional tort, recklessness or negligence. Therefore, under well-settled law, plaintiffs do not provide a basis for a claim for private nuisance under Restatement §§822, 824 or 839 or trespass under Restatement §§158, 161 or 165.

CLAIMS FOR THIRD PARTY BENEFICIARY STATUS AGAINST INSURERS:

Ross's third party claims against the defendant/insurers State Farm and NJM allege a breach of good faith and fair dealing. The general rule is that an individual or entity that is a stranger to an insurance policy has no right to recover the policy proceeds. However, by an assignment of rights, a third party may assert a bad-faith claim against an insurer; however, there is no assignment in this case.

In determining whether a third party to an insurance contract can be considered a third party beneficiary as plaintiffs assert in this case, the legal inquiry focuses on whether the parties to the contract intended others to benefit from the existence of the contract or whether the benefit so derived arises merely as an unintended incident of the agreement. If there is no intent to recognize the third party's right to contract performance, then the third party is only an incidental beneficiary and has no contractual standing.

The New Jersey Supreme Court noted that an insurer's duty of good faith and fair dealing has never been applied in New Jersey to recognize a bad-faith claim by an individual or entity that is not the insured or an assignee of the insured's contract rights. This factual record does not demonstrate that the parties to the insurance contracts had any intention to make plaintiffs, the then-neighbors of the insured, a third-party beneficiary of their agreements. The migration of fuel oil from Lowitz's property to plaintiff's property does not retroactively confer third-party beneficiary status on plaintiffs as plaintiffs suggested. The insurers' duty of good faith and fair dealing extended to their insured, not to plaintiffs. The New Jersey Supreme Court unanimously found no basis for plaintiffs' bad-faith claims against State Farm and NJM in this case.

Should you have any questions concerning this case or any other environmental matter, you may contact John M. Bowens at jmb@spsk.com.

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