PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY, Plaintiff, v. JOHN D. ST. JOHN, et al., Defendants

NO. 09-06388

COMMON PLEAS COURT OF CHESTER COUNTY, PENNSYLVANIA

2011 Pa. Dist. & Cnty. Dec. LEXIS 179

April 22, 2011, Decided
April 22, 2011, Filed

SUBSEQUENT HISTORY: Affirmed by *Pa. Nat'l Mut. Cas. v. St. John, 38 A.3d 931, 2011 Pa. Super. LEXIS 5458 (Pa. Super. Ct., 2011)*

PRIOR HISTORY: *Pa. Nat'l Mut. Cas. Ins. Co. v. St. John, 2010 Pa. Dist. & Cnty. Dec. LEXIS 350 (2010)*

COUNSEL: [*1] Michael P. McKenna, Esquire, Attorney for Plaintiff.

Douglas R. Widin, Esquire, Attorney for Defendants St. John.

Randall M. Justice, Esquire, Attorney for Defendant LPH Plumbing.

No appearance for Defendant Stoltzfus Welding.

JUDGES: Robert J. Shenkin, J.

OPINION BY: Robert J. Shenkin

OPINION

Defendants John D. St. John and Kathy M. St. John (collectively, "St. John") have filed an appeal "from the order entered in this matter on August 31, 2010, as rendered final by the order entered on December 20, 2010, and the order entered in this matter on December 20, 2010.[1] Pursuant to *Pa.R.A.P. No. 1925(a)*, we herewith file this opinion setting forth the reasons for our decision and order.

1 The "order" entered on August 31, 2010, was actually our decision rendered pursuant to *Pa.R.C.P. No. 1038* after having heard this matter sitting without a jury. The order entered December 20, 2010, denied St. John's motion for post-trial relief. As of the date of this opinion, the docket does not reflect judgment having been entered.

Following the filing of the appeal, appellants were directed to file a concise statement of the errors complained of on appeal and have done so, albeit the document filed was entitled "Statement of Matters [*2] Complained of on Appeal".

In 2002, St. John retained LPH Plumbing, plaintiff's insured, to perform work at the St. John's dairy farm. LPH and its subcontractor performed the work negligently so that contaminated water infiltrated the clean water system that supplied drinking water to St. John's herd. The negligent actions of LPH and its subcontractor had already occurred when the first milking of cows at the expanded dairy farm took place on July 1, 2003, although the contaminated water did not reach the cows until some time thereafter and the contamination continued until the situation was discovered and rectified

in March, 2006. St. John sued LPH for its negligence and obtained a verdict for $3,500,000.00. Plaintiff provided four (4) policies of insurance to LPH, one covering the period July 1, 2003 to July 1, 2004, a second one covering the period July 1, 2004 to July 1, 2005, a third one covering the period July 1, 2005 to July 1, 2006 and a fourth policy -- an "umbrella" policy -- that also covered the period July 1, 2005 to July 1, 2006. Plaintiff brought this action seeking a declaration of its obligations under the aforesaid policies of insurance. St. John filed a counterclaim [*3] seeking a declaration that all four (4) of the aforesaid policies of insurance are applicable and available to respond to the liability imposed on LPH up to and including the full limit of liability of each of the policies of insurance.

We heard the case sitting without a jury and issued a decision finding "in favor of the plaintiff and against the defendants on plaintiff's action and in favor of the plaintiff and against defendants John D. St. John and Kathy M. St. John on the counterclaim of those said defendants. We declare that plaintiff is liable to defendants upon the policy of insurance effective from 7/1/2003 to 7/1/2004 and only that policy." We held that in order for a policy of insurance to be applicable, an occurrence during the policy period was required and that there was but a single occurrence so that only one policy (the one in effect for the period of time during which there was an occurrence) was applicable. St. John filed a motion for post-trial relief which we denied by order dated December 20, 2010. This appeal followed.

St. John's statement or errors complained or on appeal raises the same two (2) issues raised in the motion for post-trial relief First, St. John [*4] argues that the first manifestation of injury occurred no earlier than March 31, 2006. If that assertion is correct, then both policies of insurance which cover that date would be available to respond to LPH's liability. Second -- and inconsistently -- St. John argues that there was not a single occurrence but multiple occurrences, at least one of which was during a period covered by each of the policies at issue in this case, the so-called "multiple trigger" theory. If St. John is correct on its first argument, the second argument is moot Since if the first manifestation was on or after March 31, 2006, the policies of insurance covering prior periods would not be applicable to this loss. Nevertheless, we disagree with each of St. John's positions.

With respect to the first issue, St. John contends that the first manifestation of damage for LPH's negligence did not occur prior to March 31, 2006. The date of manifestation is significant because each of the policies of insurance at issue in this case provides coverage for damage resulting from an occurrence. If there were no occurrence during a policy period, the policy is not applicable. For this purpose, an occurence happens when the [*5] effect of a negligent act **first manifests** itself. See *Consulting Engineers, Inc. v. Insurance Co. of North America, 710 A.2d 82 (Pa.Super. 1998)*, affirmed on the basis of the opinion of the Superior Court, *560 Pa 247, 743 A.2d 911 (2000)*, citing *D'Auria v. Zurich Insurance Co., 352 Pa.Super. 231, 507 A.2d 857 (1986)*. "By way of corollary, in a property insurance context, coverage is triggered when the property damage first manifests itself-presumably in a manner 'that would put a reasonable person on notice of the [damage].' *Id*." *Zimmerman v. Harleysville Mutual Insurance Company, 2004 PA Super 383, 860 A.2d 167, 176* (Pa.Super. 2004, Joyce, dissenting). In other words, when observation of a situation or condition would put a reasonable person on notice of damage to personal property, the effect of the negligent conduct has manifested itself. (The parties have stipulated that the only coverage of the insurance policies here at issue is the coverage for liability for property damage.) In this case, even though St. John did not know the reason for the obvious problems with the dairy herd, St. John was clearly aware of the problems. The illnesses and ailments being suffered by the cows were numerous and [*6] obvious, including a decrease in milk production, increase in general health problems, increase in deformed calves, and salmonella, laminitis and metabolic disorders. St. John does not dispute observing these conditions during the term of the policy period of the first policy set forth above. St. John contends that he did not know the cause of these conditions and simply ascribed it to the types of problems generally found in dairy herds. But St. John cannot deny that he was aware of the **effect** of the negligent conduct even if he did not actually know that LPH had been negligent in the performance of its work. Therefore, we found that there was an occurrence during the period July 1, 2003 to July 1, 2004 and, therefore, plaintiff is liable on the policy of insurance applicable during that period. We believe that the first manifestation occurred as early as April, 2004, but the exact date is not significant so long as the occurrence was by no later than June 30, 2004, and we are satisfied that the evidence proves that the occurrence was on or before that date.

St. John's second contention is that there were occurrences during each of the policy periods, i.e. multiple triggers. As we [*7] stated in the footnote to our decision:

> Defendants contend that there were occurrences during each of the policy periods because damage took place during each of the policy periods, thus dictating "application of the continuous trigger of coverage to determine whether a liability policy is triggered and, thereby, required to respond to damage caused by an insured party." St. John Defendants' Reply Memorandum of Law Responding to Plaintiffs Trial Brief at page 2. Relying upon *JH France Refractories v. Allstate Insurance Co., 534 Pa, 29, 626 A.2d 502 (1993),* defendants contend that there were multiple or continuous triggers occurring during each of the policy periods, thus dictating that "all of those policies must respond to the verdict entered against [plaintiff's insured] and in favor of the St. Johns." *Ibid*. The problem with that argument is that, at least to date, it has been considered and rejected by Pennsylvania appellate courts with respect to all claims other than ones involving toxic torts (notwithstanding that from the cows' point of view, this case does, indeed, involve a toxic tort.) The Superior Court was aware of *J.H. France* when it decided *Consulting Engineers* and the [*8] Supreme Court was equally aware of *J.H. France* when it affirmed the Superior Court. The Supreme Court did not deny *allocatur* but, rather, specifically affirmed the Superior Court on the basis of the opinion of the Superior Court which contained the following language:
>
> > "Our Supreme Court has thus far adopted the "multiple trigger" theory to determine the occurrence of injury for insurance coverage purposes only in cases involving toxic torts. See *J.H. France Refractories v. Allstate Insurance Co., 534 Pa, 29, 626 A.2d 502 (1993)*. The "multiple trigger" theory is applied in latent disease cases, like asbestosis or mesothelioma, because such injuries may not manifest themselves until a considerable time after the initial exposure causing injury occurs. The: overriding concern in latent disease cases is that application of the *D'Auria* "first manifestation" rule would allow insurance companies to terminate coverage during the long latency period (of asbestosis); effectively shifting the burden of future claims away from the insurer to the insured (manufacturers of asbestos), even though the exposure causing injury occurred during periods of insurance coverage. See *Keene Corp. v, Insurance Co. of North America, 667 F.2d 1034, 215 U.S. App. D.C. 156 (D.C.Cir.1981)*.

Consulting Engineers, Inc. v, Insurance Co. of North America, supra at 87. [*9] Defendants argue that *Consulting Engineers* is inapplicable because in that case the Superior Court round that the injury was not progressive and continuous but that all of the injuries occurred at the time of the commission of the tort, On the contrary, the significant factor in that case was that, as here, it was **not** the case that "the injuries, occasioned by the tort, lay dormant for extended periods" but, rather, that the injuries all manifested themselves and became evident when the tort was committed. Unquestionably in *Consulting Engineers*, as in virtually every tort case,

> the harm and damage continued in effect and continued to accrue and increase well after the tort was committed.

Both parties have cited *Donegal Mutual insurance Company v. Baumhammers, 595 Pa. 147, 938 A.2d 286 (2007)*, *Baumhammers* cites *D'Auria v. Zurich Insurance Company*, *supra*, with apparent approval or, at a minimum, with acquiescence, and, in any event, clearly without repudiating *D'Auria*. Although cited by St. John as well as by plaintiff, we find that *Baumhammers* supports our decision. In *Baumhammers*, the insureds were the parents of a son who had gone on a shooting spree, killing five people and seriously [*10] injuring a sixth person. The cause of action against the insureds was for negligent supervision of their son. The plaintiff insurer sought a declaratory judgment that there had been only a single occurrence. In ruling that there had been only a single occurrence, the Supreme Court adopted the "cause" approach for determining the number of occurrences for purposes of liability. "Courts that employ this 'cause' theory consider whether there is a single cause or multiple causes for the losses sustained." *Id at 159, 938 A.2d at 293*. The Supreme Court ruled that the parents, who were the insureds, had been negligent one lime in failing to supervise their son and although that one act of negligence produced several horrific results, nevertheless, it was only one occurrence for the purposes of the insurance policy. That same analysis leads to the conclusion that there was but a single cause, the negligence of LPH and its subcontractor, and, therefore, only one occurrence in this case.

We have carefully reviewed the record in this case and searched for any cases issued since our original decision that might alter our conclusion. We have found none and none have been brought to our attention.

Therefore, [*11] for the reasons set forth above, we are of the opinion that St. John's arguments lack merit and that the appeal should be denied.

BY THE COURT:

/s/ Robert J. Shenkin

Robert J. Shenkin J.

Date: April 23, 2011

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