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New Jersey Supreme Court Declines To Expand Bases For Private Nuisance And Trespass Causes Of Action And Limits Grounds On Which A Non-Party To An Insurance Contract Can Bring A Bad Faith Claim Against an Insurer

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In *Ross v. Lowitz*, (A-101-13) decided August 6, 2015, the New Jersey Supreme Court addressed whether to expand private nuisance and trespass causes of action to impose strict liability and whether a claimant can maintain a bad-faith claim against an insurer absent as assignment or status as a third-party beneficiary of the insurance policy. The Court answered both questions in the negative.

In *Ross*, the plaintiffs filed an action against the current and former owners of neighboring property for damages from migrating fuel oil due to a leaking underground storage tank. They also sued the insurers of the former owners. The lawsuit asserted claims against all defendants “based on negligence, strict liability, nuisance, trespass and Spill Act liability”, and asserted bad faith claims against the insurers. During the litigation the insurers arranged for remediation of plaintiffs’ property to the satisfaction of the Department of Environmental Protection. Plaintiffs thereafter abandoned their Spill Act and strict liability claims. Defendants moved successfully for summary judgment on the private nuisance, trespass and bad faith claims and the Appellate Division affirmed.

After an extensive review of the bases for private nuisance claims, the Supreme Court concluded that such claims only could be viable when based on the defendant’s fault, or strict liability based on conduct that was abnormally dangerous. The Court rejected the dissent’s argument that Section 839 of the Restatement, addressing failure to abate an artificial condition, provided a basis to impose liability for private nuisance absent fault or an abnormally dangerous activity. The Court noted that the section on its face only applied “if the nuisance is otherwise actionable.” The Court held that trespass, like nuisance, was limited to instances in which the defendant acted intentionally, recklessly or negligently, or based on conduct that was abnormally dangerous. Because plaintiffs had failed to demonstrate any fault or abnormally dangerous activity, the Court held that plaintiffs had no viable

claims for private nuisance or trespass, and declined to impose strict liability in the absence of an abnormally dangerous activity.

As for the bad faith claims, the Court was called on to consider whether plaintiffs were third-party beneficiaries of the insurance policies because they had no assignment from the neighboring owners. On this issue the Court noted “that a third party is deemed to be a beneficiary of a contract only if the contracting parties so intended when they entered into their agreement.” Further, the Court stated that the record before it contained no evidence that “the parties to the insurance contracts at issue had any intention to make plaintiffs, then the neighbors of the insured, a third-party beneficiary of their agreements.” They added that “the migration of oil from [the] property to plaintiffs’ residence [does not] retroactively confer third-party beneficiary status on plaintiffs.” Thus, the Court held that the insurers’ duty of good faith and fair dealing did not extend to plaintiffs.

Should you have any questions concerning the decision, or the issues discussed above, please call us.