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I. INSURANCE LAW

No Estoppel Where Express Reservation of Rights Letters Were Provided to Policyholders

In *Nationwide Prop. & Cas. Ins. Co. v. Shearer*, 2016 U.S. App. LEXIS 9635 (3d Cir. (Pa.) 2016), Randy and Erin Shearer sued a group of homeowners, claiming that the owners permitted sewage to leak onto the Shearer's property. Nationwide agreed to provide a defense under a reservation of rights. Specifically, Nationwide advised by two separate letters that upon the conclusion of its coverage investigation, it might deny coverage based on its policy's exclusions for pollution or biological deterioration. Nationwide's letters expressly stated that its decision to provide a defense should not be deemed a waiver or estoppel of its rights under its policy.

Nationwide subsequently sought a declaration that it had no duty to defend or indemnify the policyholders in connection with the Shearers' lawsuit, citing pollution and biological deterioration exclusions in their policies.

The policyholders did not challenge the exclusions but rather claimed prejudice from Nationwide's decision to terminate their defense. The district court granted summary judgment in favor of Nationwide ruling that the reservation of rights letters entitled Nationwide to withdraw its defense. The policyholders appealed to the Third Circuit.

On appeal, the policyholders argued that notwithstanding the reservations of rights letters, Nationwide's decision to provide a defense for over two years resulted in an estoppel. They further contended that they were prejudiced by Nationwide's decision to withdraw from the defense.

The Third Circuit disagreed, finding that the policyholder did not establish "inducement" by virtue of the fact that Nationwide provided a defense for more than two years. The court explained that any claim of inducement was defeated by Nationwide's express reservation of rights. Each policyholder, the circuit court said, had been informed that Nationwide could withdraw its defense for various reasons. The court further provided that the insured could not demonstrate it was prejudiced by Nationwide's decision to provide a defense under a reservation of rights.

II. EMPLOYMENT LAW

The Court, Not the Arbitrator, Should Determine the Arbitrability of Claims

In *Smith v. Millville Rescue Squad*, 2016 N.J. LEXIS 572 (June 21, 2016), plaintiff, who was employed as director of operations of defendant Millville Rescue Squad, was terminated from his employment shortly after he informed his supervisor that he was engaged in an affair, and that he and his wife, who also worked for the rescue squad, were separated and about to commence divorce proceedings.

Plaintiff testified that, when he informed his supervisor about the affair, the supervisor stated that he could not promise that it would not affect plaintiff's job. The supervisor brought the matter to the rescue squad's board. At the meeting, the board decided to

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terminate plaintiff's employment. The minutes of the meeting referred to a corporate restructuring, plaintiff's poor performance for some time, and the failure of efforts to remediate plaintiff's performance, as grounds for the termination.

Plaintiff commenced suit against the rescue squad and his supervisor, asserting claims under the LAD for wrongful discrimination on the basis of his marital status. Plaintiff testified at trial to the statements that his supervisor had made after plaintiff told him about his separation and impending divorce. Plaintiff also testified that he was never subject to formal discipline, and that he was promoted twice and had received annual raises. Plaintiff further testified that he and his wife obtained a divorce several months after they commenced proceedings, the divorce was amicable, and he continues to have a good relationship with his former wife.

At the conclusion of plaintiff's case, the court granted defendant's motion for an involuntary dismissal. The court found that plaintiff had failed to present evidence that he was terminated because he was either married or unmarried, or because he was having an affair, or any evidence that employees were treated differently based on their marital status. The court found that plaintiff's proofs showed that he was terminated because management was concerned about the likelihood of an acrimonious divorce, which the court held did not give rise to a marital-status discrimination claim.

The Appellate Division reversed the dismissal of plaintiff's marital-status discrimination claim. The panel interpreted "marital status" to include the states of being separated and involved in divorce proceedings. The panel determined that, based on the comments by plaintiff's supervisor, plaintiff presented evidence that he was terminated based on negative stereotypes that defendant held about divorcing employees, and that plaintiff had established a prima facie case of discrimination. The Supreme Court granted certification.

The New Jersey Supreme Court concluded that marital status is not limited to the state of being single or married. Instead, the Court held that the LAD protects from workplace discrimination employees who announce that they have gotten engaged, have separated from their spouse, have begun divorce proceedings, or have gotten divorced. The Court held that under the LAD, plaintiff had made a prima facie case that he had been discriminated against because of his transition from being married to being single.

III. PROFESSION LIABILITY **Plaintiff Who Had Unknowingly Retained an** **Unqualified Expert to Prepare an Affidavit of** **Merit Should Be Granted Time to Retain a New** **Expert**

In *Castello v. Wohler*, 2016 WL 3369247 (N.J. App. June 20, 2016), Castello first visited Wohler because she was having difficulty breathing. Wohler discovered that Castello's stomach was in her chest as opposed to its usual place below the diaphragm and immediately performed a hernia operation in June 2010. When Castello experienced post-operative discomfort, Wohler performed an exploratory surgery to repair a tear to the gastroesophageal junction and discharged her to a rehabilitation facility. More complications led to Castello's transfer to a Pittsburgh hospital, where an esophageal surgeon diagnosed an esophageal leak and performed various medical procedures, including an esophagectomy, thoracotomy and laparotomy.

In October 2011, Castello filed a malpractice complaint alleging that Wohler had negligently performed the hernia repair, leading to multiple additional medical procedures and substantial pain and suffering,

Plaintiff retained Dr. John E. Edoga, a general surgeon, to prepare an affidavit of merit (AOM) and expert report. Plaintiff's attorney used a copy of Dr. Edoga's curriculum vitae he had in his office and simultaneously served defendant with the complaint, AOM, and original CV.

In his AOM, Dr. Edoga stated he had been in "surgical practice for more than [thirty-five] years[,] which is set forth in my [CV] attached hereto." The original CV attached to the AOM reflected Dr. Edoga was an attending surgeon. Defendant's attorney waived the need for a Ferreira conference and signed a consent order waiving "any objection" to Dr. Edoga's qualifications.

In discovery, plaintiff's counsel produced Dr. Edoga's updated CV and expert report. The updated CV stated that Dr. Edoga was an attending surgeon since 1976. Defendant's counsel deposed Dr. Edoga and learned, contrary to the information in the AOM and original and updated CVs, he had been retired for approximately five years before the medical procedure in question was performed.

Defendant moved to dismiss for failure to comply with the statutory expert foundation requirement primarily arguing Dr. Edoga was unqualified to testify because he retired from the practice of medicine. The trial court granted the motion and denied re-opening of discovery.

On appeal, the court reversed as to the denial of discovery deadline extension. The court held that because the expert did not actively practice at the time of the surgery he was disqualified. He was not credentialed by a hospital to treat the condition at issue when plaintiff's claim arose nor was he board certified in defendant's specialty. But the appeals court held that the trial court erred in not allowing plaintiff additional time to find a replacement expert. The purpose of the AOM procedure is to weed out frivolous suits. Here there was no evidence the suit was frivolous. Evidence showed plaintiff's counsel tried in good faith to satisfy the requirements. Counsel did not know the expert had retired. In light of the strong preference for adjudication on the merits, the court concluded that an extension of discovery was warranted.

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