

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3155-06T2

HOBART BROTHERS COMPANY,
an Ohio Corporation,

Plaintiff-Appellant,

v.

NATIONAL UNION FIRE INSURANCE
COMPANY, a Pennsylvania
Corporation,

Defendant-Respondent,

and

CONTINENTAL INSURANCE COMPANY,
a New Hampshire Corporation
as successor to certain policies
issued by HARBOR INSURANCE
COMPANY, a California corporation
and/or GREENWICH INSURANCE
COMPANY, a California corporation,

Defendant.

Argued March 4, 2008 - Decided March 25, 2008

Before Judges Coburn, Fuentes and Chambers.

On appeal from the Superior Court of New Jersey,
Law Division, Essex County, L-8356-97.

Gregory J. Schwartz argued the cause for appellant (Schwartz Kelly, LLC, attorneys; Mr. Schwartz, of counsel; Mr. Schwartz and Vanessa M. Kelly, on the brief).

Karol Corbin Walker argued the cause for respondent (Seiden Wayne, LLC, and Smith, Stratton, Wise, Heher & Brennan, LLP, attorneys; Thomas E. Hastings, of counsel; Ms. Walker and Gregory S. Thomas, on the brief).

PER CURIAM

This is a declaratory judgment action for insurance coverage under comprehensive general liability ("CGL") insurance policies. Coverage is sought for the costs of an environmental clean-up of commercial property ordered by the Department of Environmental Protection ("DEP"). The insured is plaintiff Hobart Brothers Company ("Hobart"). The carrier is defendant National Union Fire Insurance Company ("National Union"). A Law Division judge entered summary judgment for National Union based solely on the entire controversy doctrine. The judge concluded that Hobart's deliberate failure to include National Union in earlier suits was inexcusable and accepted National Union's claim that it had suffered substantial prejudice as a result. Hobart appeals, contending that neither finding is supported by the record. We agree with Hobart and therefore reverse and remand for further proceedings.

The property is located in an industrial park in Nutley. From at least 1933 until 1963, it was used as a lumberyard. In 1963, a building was constructed on the property, and until 1968 the building was used by a textile-cutting company. In 1968, Nova Industries, Inc. ("Nova") leased the property for a manufacturing process that involved the use of two pollutants: trichloroethene ("TCE") and trichloroethane ("TCA").

In 1984, Hobart acquired Nova, and merged it into a newly-formed, wholly-owned subsidiary. At the time, this transaction triggered obligations under New Jersey's Environmental Clean-up Responsibility Act ("ECRA"), N.J.S.A. 13:1K-6 to -13,¹ which included obtaining DEP approval before the transaction was finalized. Unfortunately, DEP's approval was not sought. When Hobart acquired Nova, and for about ten years prior to the acquisition, Nova's primary CGL carrier was Atlantic Mutual Insurance Company ("Atlantic Mutual"). During the acquisition, Nova was represented by the law firm of Gutkin, Miller, Shapiro & Selesner ("Gutkin").

In 1990, Hobart sold the assets of Nova to Technology Dynamics, Inc. This sale also triggered the ECRA. Hobart

¹ The ECRA is now known as the Industrial Site Recovery Act, N.J.S.A. 13:1K-6 to -14.

notified DEP, which determined that the site was contaminated by Nova's spills of TCE and TCA. Hobart agreed to a DEP plan for the clean-up.

In 1991, Hobart retained Harding Lawson Associates ("HLA"), an environmental consulting firm. At that time, HLA estimated that the cost of removing the TCE and TCA from the site would be about \$700,000.

In 1992, Hobart sued Gutkin for malpractice, alleging that compliance with ECRA was the seller's responsibility and that Gutkin, as Nova's attorney, was responsible for Nova's failure to satisfy the ECRA requirements. Gutkin's malpractice carrier at the time was National Union. In 1993, Hobart and Nova sued Atlantic Mutual under the CGL policies it had issued to Nova. Both actions sought the same relief: compensation for the clean-up expenses. And in both actions, Hobart was represented by the same law firm, Anderson, Kill, Olick & Oshinsky ("Anderson"), which filed certifications under Rule 4:5-1 stating that there were no other parties that should be joined in the actions.

In July 1994, HLA increased its estimate of the clean-up costs to \$1.4 million. In December 1994, HLA wrote to Hobart's in-house engineer further increasing the estimate to \$2.7 million, but that letter was not received by Hobart before it settled with Gutkin and Atlantic Mutual in 1995. In the

settlements, Hobart received \$100,000 from Gutkin's carrier, National Union, and \$973,454 from Atlantic Mutual.

Hobart gave Atlantic Mutual a customary general release, but in the Gutkin action, the release was unusual. Although National Union was not a party in the lawsuit, it insisted on being a party to that settlement agreement. At National Union's insistence, that agreement provided that it would receive a release from Hobart

limited to claims that have been or could have been made in the future in this litigation upon National Union's professional liability insurance policy issued to . . . Gutkin

In return, National Union agreed to accept the following additional language demanded by Hobart's attorneys: "This release shall have no effect on any claim under any insurance policy issued by National Union to [Hobart]."

In October 1995, Hobart became aware for the first time of HLA's last estimate of \$2.7 million. And in July 1997, Hobart began the action that we are now reviewing against National Union and Continental Insurance Company ("Continental"), which was a successor to Harbor Insurance Company, the company that had provided Hobart with umbrella liability policies.

Two years after Hobart filed this action, National Union and Continental moved for summary judgment, relying on the

entire controversy doctrine. A Law Division judge agreed and dismissed the action. Hobart appealed, and another panel reversed and remanded for further proceedings. Hobart Bros. Co. v. Nat'l. Union Fire Ins. Co., 354 N.J. Super. 229 (App. Div.), certif. denied, 175 N.J. 170 (2002) ("Hobart I").

In Hobart I the court rejected the Law Division judge's determination that Hobart's failure to join National Union in the earlier lawsuits "was a sufficient basis, by itself, to preclude Hobart from maintaining the present action." Id. at 242. The court held that the action should not have been dismissed unless Hobart's deliberate failure to join National Union was inexcusable and had resulted in substantial prejudice to National Union. Ibid. On remand, the court directed the judge to consider at the least the following factors:

(1) Is National Union precluded, as it contends, from seeking recovery from Atlantic Mutual?

(2) If National Union is precluded, can it be compensated by an allocation calculation, as Hobart asserts?

(3) Was Hobart's failure to supply information about its liability carriers as part of the Gutkin discovery an attempt to thwart the assertion of a claim against National Union?

(4) Was Hobart's action in settling with Atlantic Mutual and Gutkin without conferring with HLA as to the status of its cost estimates unreasonable in the

circumstances[?]

(5) Should National Union, as the Gutkin firm's malpractice carrier, be charged with knowledge of the Nutley claim? In this latter regard, all the participants in this matter have addressed that issue based upon their own alleged understanding of the internal workings of insurance carriers, without any specifics to the instant claim. Determining the parameters of resolving that issue will require some careful analysis. National Union has, for example, already produced for in-camera review its file in connection with the legal malpractice litigation. After an in-camera review, the Assignment Judge wrote to all counsel that no "document contained any information of plaintiff's claim for coverage against National Union [and] [n]o reference to any insurance policy issued by National Union to Hobart was found." We leave to the trial judge and the parties whether that statement sufficiently demonstrates that its malpractice section, which defended claims presented against an insured, operated independently of the section which handled first-party claims by its own insureds.

(6) What impelled Hobart to insert in the Gutkin settlement agreement the apparently unique provision exempting its own liability policies with National Union from the scope of the release it was to provide?

(7) To what extent were judicial resources called upon in connection with the earlier suits?

(8) Was Hobart's decision to settle its claims relating to the clean-up of the Nutley site without calling upon its own insurance policies reasonable?

(9) What is the nature of the prejudice to which National Union might be subjected if

this suit were allowed to continue, i.e., is its ability to mount a defense to this claim unfairly hampered, or is the prejudice restricted to the release of Atlantic Mutual, or is it a combination of both? In this regard, we have in the past spoken of the concept of substantial prejudice for purposes of claim preclusion in terms of the loss of evidence, [Mitchell v. Procini, 331 N.J. Super. 445, 454 (App. Div. 2000)], but we do not understand the concept of substantial prejudice to be necessarily restricted to that area alone. The running of a period of limitations or the bar of a claim for contribution or indemnification may constitute substantial prejudice in certain contexts.

(10) What is the impact, if any, of the Supreme Court's recent opinion in [K-Land Corp. No. 28 v. Landis Sewerage Auth., 173 N.J. 59 (2002)], issued after this appeal was argued?

[Id. at 243-44.]

The questions posed in Hobart I implied the necessity for further development of the facts. But before recounting the subsequently developed facts, we note the relevant additional facts on which Hobart I was based (apart from those described above) that related to the remanded issues.

Gutkin's answer referred to Hobart's failure to join its general liability carrier as a party in the suit. And Gutkin's counsel asked for information about Hobart's own liability coverage. In response, Hobart only provided information

regarding Nova's liability policies. The issue was not thereafter pursued.

While the actions were proceeding against Gutkin and Atlantic Mutual, Hobart was defending many toxic tort cases in which plaintiffs alleged that they had been injured by Hobart's emission of welding fumes. National Union provided Hobart with coverage for those claims. In Hobart I, the court observed that Hobart "made a conscious choice not to pursue National Union in connection with the Nutley matter" because it wanted to preserve good relations with National Union in the defense of the toxic tort cases. Id. at 236. That comment was based on the following passage from a deposition given by Hobart's general counsel:

The concern always was that we had had-- "we," Hobart, had a fine working relationship with National Union as well as, for that matter, USF & G and Great American, parties who we litigated against for this toxic tort coverage, had maintained good relationships with them on the defense of cases, these welding cases that were ongoing and very voluminous and potentially very costly. And we candidly didn't want-- necessarily want to pursue National Union unless we really thought it was absolutely necessary because we didn't want to jeopardize the health of that ongoing relationship on the other cases. The other cases were very much larger in potential liability.

There were literally thousands and thousands of these lawsuits, welding fumes

lawsuits pending and the aggregate potential liability from them was far, far, far in excess, much in excess of anything that would have flowed from the Nova site.

And that is the basic preservation of the good will of the relationship was really the governing sort of watch word, as it were, of our thoughts on that.

As will appear shortly, although the court's comment in Hobart I was warranted by the just cited quotation from the deposition of Hobart's general counsel, the actual motivation was based, to a substantial degree, on other considerations that appeared, as further discovery showed, in what was a more complex factual setting.

On the remand ordered in Hobart I, the following additional facts were presented to another Law Division judge.

National Union provided annual one-million dollar CGL policies to Hobart from 1983 to 1988. But the 1987 National Union policy, which covered the period January 1987 to January 1988, and which was the first National Union policy to list Nova as a named insured, contained an exclusion for bodily injury or property damage arising out of a discharge of pollutants, an exclusion not present in its policies covering the earlier periods. Nova maintained its own liability policy with Atlantic Mutual for a few years after its sale to Hobart. Hobart also maintained umbrella policies with Continental's predecessor for

twenty-million dollars in 1984 and ten-million dollars in 1985 and 1986.

At a meeting in January 1992, Paul Breene, a member of the Anderson law firm, Hobart's insurance coverage counsel, and Hobart's representatives agreed that Hobart would not sue National Union because Nova was not covered under the National Union policy until 1987. They concluded that such an action was unlikely to succeed because of the pollution exclusion in the 1987 National Union policy. In preparation for the meeting, Richard Cultice, Hobart's treasurer, had searched for policies in which Nova was the named insured, and the only National Union policy he found that listed Nova was the 1987 policy. Breene said that he focused on the 1987 policy because that was when Nova was added as a named insured on that policy. He also testified as follows:

[W]e missed the issue. I think we didn't consider this coverage. In retrospect we should have. We thought of this solely as a Nova liability and not as a Hobart liability and did not consider that there might be coverage directly running to Hobart for this liability.

In May 1994, before the settlements were made, an internal memorandum to Breene from Mark E. Miller, Breene's associate, suggested further review of Hobart's insurance policies to see if there were other viable coverage claims. A schedule of the

policies was appended to the memorandum, but the only National Union policy listed was the one for 1987 that had the pollution exclusion clause.

Breene also indicated that when the first two cases settled it "made little sense" for Hobart to attempt to sue National Union because they were "high percentage" settlements. He described the giving of the release to National Union in the Gutkin case as unusual because National Union was not a party to that action. He further explained that he included Hobart's reservation of the right to sue National Union in the release because Hobart was unwilling "to simply give away claims for nothing." He also testified that the only National Union policy of which he was aware when he drafted the reservation was the 1987 policy. In Hobart I, the court noted, in essence, that the claim-reservation language of the release "was not included in the original draft of the settlement agreement. Its later insertion indicates that it was not considered to be a routine clause" Id. at 237. Apparently, the record at the time contained no further information about why the reservation was included in the release.

Breene said that when Hobart became aware after the settlements with Gutkin and Atlantic Mutual of HLA's new \$2.7 million estimate for the cleanup, no thought was given to suing

National Union. That issue only arose about two years after the settlements when Hobart was acquired by another company and its attorney reviewed Hobart's policies.

At all relevant times, National Union's claims agent was American International Adjustment Company, which became AIG Technical Services, Inc. ("AIG"). Since AIG defended Hobart's claim against Gutkin, AIG became aware of Hobart's obligation to clean up the Nutley site in 1992. AIG also handled Hobart's defense in the welding fume cases. But AIG's environmental and malpractice departments were separate, and an attorney in AIG's environmental department stated that she had no contact with anyone in the malpractice department.

As of July 1997, there had been no soil removal at the site. Soil-vapor extraction and groundwater pump-and-treat were used to abate the pollution under DEP supervision. All of the data relating to investigation and remediation were made available to National Union during the discovery conducted in these proceedings, and National Union has never complained about the quality of the data or the methods selected for the remediation.

Few judicial resources were consumed in the Gutkin and Atlantic Mutual cases. After the initial pleadings were filed, there were no motions or depositions. There were no court

appearances except for a very brief and routine trial call.

App.'s brief 17-18

II

Following the Hobart I remand and after the parties engaged in further discovery, both parties moved for summary judgment and, as already noted, National Union prevailed on the ground that the entire controversy doctrine barred Hobart's suit. But Continental did not pursue summary judgment, choosing instead to go to trial. Hobart's motion for leave to appeal dismissal of its action against National Union was denied, and Hobart and Continental settled before trial.

The judge gave the following reasons for granting National Union's summary judgment motion, first addressing the question of whether the failure to join National Union was inexcusable: Hobart knew when it filed the first two actions that National Union was entitled to notice of the pollution at the Nutley site. Breene's testimony, that the only National Union policy that he knew of when the first two actions were filed was the 1987 policy that contained the pollution exclusion, is unbelievable. The May 1994 Miller internal memorandum suggesting that Breene review all of Hobart's insurance policies before settlement with Gutkin and Atlantic Mutual provides further support for the conclusion that Breene knew of the

earlier National Union policies and their relevance. Moreover, since Hobart did not assert before the remand that the only National Union policy it or its attorney's reviewed in 1994 was the 1987 policy, judicial estoppel bars that contention after the remand.

The judge then ruled on the issue of prejudice, noting first that because of the passage of time, remediation of the site was almost complete. Consequently, National Union "lost the opportunity to have its experts investigate the site" and can no longer "identify other parties that may have contributed to the pollution." In addition, National Union was prejudiced because it could no longer bring claims for subrogation or contribution as a result of the releases granted in the prior litigation.

We turn next to our reasons for reversal of the judgment.

III

National Union supports the judge's reliance on judicial estoppel and also relies, alternatively, on quasi-estoppel. Judicial estoppel prevents a party from taking a position contrary to a position successfully espoused in the same or prior litigation. McCurrie v. Town of Kearny, 174 N.J. 523, 533 (2002); Kimball Int'l, Inc. v. Northfield Metal Prods., 334 N.J. Super. 596, 607 (App. Div. 2000), certif. denied, 167 N.J. 88

(2001). Here, the judge faulted Hobart for not previously asserting that the 1997 policy was the only one it reviewed and ruled that it should be barred from asserting after remand that it did not review the earlier policies.

We do not accept the idea that not taking a particular position is the same as taking a position for purposes of judicial estoppel. Nor is there any inconsistency between the reason given pre-remand for not suing National Union by Hobart's general counsel, which was maintenance of good relations, and Breene's subsequent explanation that, in addition to maintenance of good relations, suit was not brought against National Union because the only policy then-reviewed was the 1987 policy, which had the pollution exclusion. His testimony was not contrary to the earlier position; rather, it further explained that position. Also, of course, the doctrine is inapplicable because Hobart did not successfully maintain its position in the pre-remand proceedings. Quasi-estoppel, the other argument advanced by National Union, is merely a form of judicial estoppel applied to circumstances outside the courtroom. Heuer v. Heuer, 152 N.J. 226, 237 (1998). Since there were no such circumstances here, this doctrine is also inapplicable.

Generally, the entire controversy doctrine requires the joinder of claims arising from a single transaction. Oliver v.

Ambrose, 152 N.J. 383, 392 (1998). The goals intended to be achieved by mandatory joinder in those circumstances include efficiency, economy, and fairness to the parties and to the court system. Id. at 392-93 (citations omitted); Vision Mortgage Corp. v. Patricia J. Chiapperini, Inc., 156 N.J. 580, 584 (1999). When, as here, the withheld claim involves a new party, the doctrine is a bar only if two elements are present: inexcusable conduct in withholding the claim and substantial prejudice to the new party. K-Land Corp. No. 28 v. Landis Sewerage Auth., 173 N.J. 59, 69-70 (2002). In other words, the doctrine applies to calculated claim-splitting, not to situations where the omission is uninformed and innocent. Id. at 70. The party invoking the doctrine has the burden of proof on those issues. Hobart I, supra, 354 N.J. Super. at 242.

Since the case is here on review of summary judgment, our review is de novo. Bennett v. Lugo, 368 N.J. Super. 466, 479 (App. Div.), certif. denied, 180 N.J. 457 (2004). The governing principle is that summary judgment is proper when

the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.

[R. 4:46-2(c).]

In other words, when the evidence is so one-sided that one party must prevail as a matter of law, summary judgment should be granted. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

National Union did not meet its burden of showing that Hobart's failure to include it in the Atlantic Mutual litigation was a calculated and unjustified splitting of claims. Breene's testimony, that when the decision was made he only considered the 1987 policy, and that he did not believe a suit on that policy was warranted because of the seeming adequacy of the settlements and because the policy's pollution exclusion made success unlikely, was uncontradicted. And, contrary to the judge's finding, the Miller internal memorandum corroborated Breene's testimony because, although it lists many insurance policies, the only National Union policy listed is the one for 1987.

Breene's testimony is further buttressed by the undeniable fact that Hobart did not consider suing National Union when, after settling with Gutkin and Atlantic Mutual, it learned that the clean-up would cost almost twice what it had previously believed. Indeed, neither Hobart nor its counsel considered the possibility of an action against National Union until Hobart was purchased by another company some two years after the

settlements. That company's attorney discovered the existence and relevance of the earlier National Union policies, none of which included Nova as a named insured or pollution exclusion clauses. Of course, this action is based on the coverage afforded by those policies, not by the 1987 policy. In short, this case involved nothing more than a mistake by Hobart's counsel; it was not a deliberate splitting of claims and cannot be characterized as unjustifiable. Hobart was thus entitled to a favorable ruling on this issue.

In addition, National Union failed to prove the second, and equally important element of the entire controversy defense; namely, that the non-joinder caused it prejudice, which is the subject to which we now turn.

In its appellate brief, National Union described the prejudice it suffered in the following words:

National Union has been prejudiced by Hobart's broad release of Atlantic Mutual, the insurer which covered Nova for 16 years prior to its merger with Hobart, during the period when most, if not all, of the pollution-causing activities took place. This broad release effectively distinguished any contribution or equitable subrogation claims by National against Atlantic Mutual. Further, the trial court found that "after 14 years, the contaminated site is near completion of being remediated, so that there is now a change at the site, [and] National Union has lost the opportunity to have its experts investigate the site and also precludes their [] ability to identify

other parties that may have contributed to the contamination.

We begin our analysis with the settled proposition that an insurance company is not entitled to deny coverage "unless there are both a breach of the notice provision and a likelihood of appreciable prejudice." Cooper v. Gov't Employees Ins. Co., 51 N.J. 86, 94 (1968).

In Sagendorf v. Selective Insurance Co. of America, 293 N.J. Super. 81, 93 (App. Div. 1996) (quoting Morales v. National Grange Mutual Insurance Co., 176 N.J. Super. 347 (Law Div. 1980), we endorsed the principle that "the carrier must establish more than the mere fact that it cannot employ its normal procedures in investigating and evaluating the claim" And we noted that even a six-year delay in notification would not necessarily indicate prejudice. Id. at 95. Sagendorf involved a pollution claim submitted to the insurance carrier about two years after DEP became involved in the site. Ibid. We rejected the denial of coverage, noting the following, among other things:

Defendant had the benefit of the various DEP tests as well as the consulting tests and studies, and fails to point to anything to indicate they were unreliable Defendant has pointed to no expert of other evidence--beyond speculation--linking plaintiffs' failure to give it earlier notice with any resultant prejudice. It fails altogether to identify a likely

circumstance detrimentally affecting a successful defense on the merits of the remediation expenses.

[Id. at 96 (citation omitted).]

Our observations in Sagendorf are equally applicable here. Although National Union's agent, AIG, which monitored the defense of the Gutkin action, became aware of the pollution in 1992, and National Union itself obtained that information at the latest in 1997 when this suit was filed, to date it has failed to indicate, let alone prove, any facts supporting its claim of prejudice. And in particular, it has wholly failed to provide any evidence that the contamination had any cause other than the activities of Nova. National Union had the burden of persuasion on the issue of prejudice. Cooper, supra, 51 N.J. at 94. Mere speculation of prejudice, which is what the judge and National Union have offered, is simply not enough.

The judge found, and National Union maintains, that the release Hobart gave to Atlantic Mutual caused prejudice by denying National Union an opportunity to seek contribution from Atlantic Mutual. Assuming the release would bar an action by National Union against Atlantic Mutual, no prejudice results from that bar.

There is no prejudice because in these environmental coverage disputes allocation is proportionate to the degree of

risks transferred or retained during the years of exposure, and losses are allocated among carriers based on the extent of the risk assumed; i.e., the policy limits multiplied by the years of coverage. Carter-Wallace, Inc. v. Admiral Ins. Co., 154 N.J. 312, 320-23 (1998). Accordingly, an insurer will pay its pro rata share of the costs for each triggered policy year. Id. at 322; Spaulding Composites Co., Inc. v. Aenta Cas. & Sur. Co., 176 N.J. 25, 39-42 (2003), cert. denied sub nom., Spaulding Composites Co., Inc. v. Caldwell Trucking PRP Group, 540 U.S. 1142, 124 S. Ct. 1061, 157 L. Ed. 2d 953 (2004).

National Union argues that "[a]s a matter of fundamental fairness, the allocation of responsibility for a single covered loss . . . must take place in a single action." To support that proposition, National Union cites Owens-Illinois, Inc. v. United Insurance Co., 138 N.J. 437 (1994), and Carter-Wallace, supra. But neither of those cases so holds; they are simply cases in which it happened that all of the carriers were involved in a single action. While the concept of resolving related claims in a single action is relevant to an entire controversy determination, there can be no unfairness as to allocation here since the allocation must be made in accordance with the noted principles applicable to environmental insurance claims.

In short, if National Union is liable, the degree of liability can be fully and fairly determined without the presence of Atlantic Mutual in the case and without the necessity of reserving a claim against that entity for some supposed future litigation.

Finally, we emphasize that Hobart's conduct resulted in an extremely minimal use of judicial resources since, as noted, the cases against Atlantic Mutual and Gutkin were resolved without motion practice or depositions and after one routine trial call.

At oral argument, the parties agreed that resolution of this appeal would in no way deprive National Union of its defenses under the policy, including the defense of untimely notice.

Reversed and remanded.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION