

IN THE SUPREME COURT OF OHIO

PENNSYLVANIA GENERAL INS. CO., : Case No. 2009-0104
: :
Plaintiff-Appellee : :
: :
vs. : :
: :
PARK-OHIO INDUSTRIES, INC., et al. : Court of Appeals Case No. 90619
: :
Defendants-Appellants :

APPELLEE PENNSYLVANIA GENERAL INSURANCE COMPANY'S
MEMORANDUM IN OPPOSITION TO JURISDICTION

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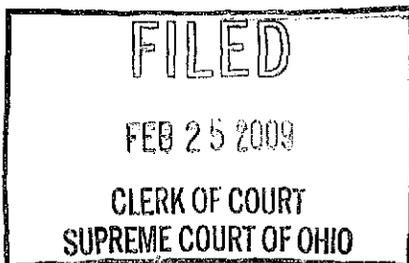


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THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This case is a fact-intensive dispute between insurers about responsibility for the cost of settlement of a California asbestos case. As a defendant in the underlying tort action, Park-Ohio Industries, Inc. (“Park-Ohio”) had several insurers from which it could have demanded defense and indemnity. However, pursuant to this Court’s decision in *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, Park-Ohio demanded that Plaintiff-Appellant Pennsylvania General Insurance Company (“Penn General”) alone pay the full settlement.¹

Pursuant to *Goodyear*, Penn General honored Park-Ohio’s demand, paid the settlement in full, and sought contribution from other applicable insurers, including Defendants-Appellants Continental Casualty Company (“CNA”) and Nationwide Insurance Company (“Nationwide”).² In doing so, the Eighth Appellate District correctly found that Penn General “investigated, handled and resolved the . . . claim in accordance with the terms and conditions of its policies, and, in compliance with *Goodyear*, paid the entirety of the claim and timely pursued its equitable contribution claim against the non-selected insurers. It should not be penalized for doing so.”³

No one questions the application or authority of *Goodyear* in this case. No one questions the right of a “targeted” insurer (like Penn General) to seek contribution from “non-targeted” insurers

¹*Goodyear* outlined procedural steps intended to streamline allocation issues in “long-tail” insurance claims. With respect to the “all sums” insurance policies (such as those in this case), the insured is permitted to select a single insurer to respond to the claim up to its limits (in this case, Penn General), and then that insurer is responsible for seeking equitable contribution from other potentially applicable insurers. “This approach promotes economy for the insured while still permitting insurers to seek contribution from other responsible parties when possible.” *Id.*, ¶11.

²Policies issued to Park-Ohio by Travelers were also triggered, but Travelers settled with Penn General at the Trial Court level. *Pennsylvania Gen. Ins. Co. v. Park-Ohio Industries, Inc.*, 8th Dist. No. 90619, 2008-Ohio-5991, at ¶13.

³*Pennsylvania Gen.*, 2008-Ohio-5991, at ¶40.

with applicable policies (like CNA or Nationwide). No one questions that such contribution is an equitable remedy. No one questions that *if* CNA's and Nationwide's policies are applicable, Penn General has a right to contribution from them. CNA and Nationwide, however, contend that they should be allowed to escape responsibility for the settlement because their policies are not "applicable". Why? Not because the settlement falls outside their insuring agreements or falls within substantive exclusions—it is undisputed that the CNA and Nationwide policies were designed to provide coverage for the type of claim involved in this case. Rather, they contend their policies are not applicable "because [Park-Ohio] violated the policy conditions requiring timely notice and prohibiting voluntary payments."⁴ Thus, this appeal really asks this Court a fact-intensive insurance coverage question: did Park-Ohio violate the notice and cooperation provisions in the CNA and Nationwide policies such that insurance coverage for the California settlement is precluded? If the answer is yes, no one disputes that Penn General is not entitled to contribution. If the answer is no, no one disputes that Penn General is entitled to contribution. Either way, there is little reason for this Court to invest its time and energy to resolve this case.

The pedestrian nature of the issues involved is evidenced by the plain language of the bland "Propositions of Law" advanced by CNA and Nationwide. Each Proposition of Law is simply a restatement of some uncontested legal axiom. For instance, Proposition of Law No. I simply asserts that contribution can only be sought if a non-targeted insurer's policy is "applicable" which, in turn,

⁴(CNA's Memorandum in Support of Jurisdiction, p. 1). Nationwide's arguments are the same and "incorporate[] by reference in the arguments set forth in the Memorandum in Support of Jurisdiction of [CNA] . . . Nationwide's policies are substantially the same as [CNA's] and the factual circumstances are also the same." (Nationwide's Memorandum in Support of Jurisdiction, p. 2). CNA and Nationwide also claim that Park-Ohio violated their right to control the defense and settlement of the California asbestos litigation. (CNA's Memorandum in Support of Jurisdiction, p. 2). However, it is clear that this is simply a restatement of their late notice arguments. That is, they lost the right to control the defense and settlement because Park-Ohio provided late notice.

depends upon the policy's terms. No reasonable person can argue with such statement. Similarly, Propositions of Law Nos. II and III collectively provide that contribution is an equitable remedy subject to an abuse of discretion standard on appellate review. It is not clear why CNA or Nationwide believe that these are Propositions of Law that this Court needs to entertain. There is nothing new in the issues framed by CNA and Nationwide. Moreover, there is nothing in the record to indicate that the Eighth Appellate District disagreed with the foregoing Propositions of Law, or that their acceptance would lead to a different result. How is any of this an issue of public or great general interest?

Perhaps the bland Propositions of Law are designed to mask the substantive arguments of CNA and Nationwide because they are contrary to controlling legal precedent. In this regard, the crux of their arguments is that they were not timely informed of the settlement and/or Penn General's contribution claims. Therefore, they assert: whether their liability is analyzed under contract law (with respect to the policies they issued to Park-Ohio), or, whether it is analyzed under equitable principles (with respect to Penn General's contribution claims), they can avoid liability because they did not receive timely notice of, and did not consent to, the settlement of the California asbestos lawsuit.

However, they seem to have forgotten that under either analysis, the success of their argument depends upon whether they suffered actual prejudice. If they did not, they cannot avoid responsibility under the arguments they have advanced. With respect to a contract analysis, this Court sets forth the applicable rule in *Ferrando v. Auto-Owners Mut. Ins. Co.*, 98 Ohio St.3d 186, 2002-Ohio-7217, at paragraph one of the syllabus, which followed the national majority position to find that violation of notice-related provisions does not preclude coverage *unless the insurer was*

prejudiced. Similarly, with respect to an equitable analysis (laches), one of the elements they were required to prove to defeat Penn General's contribution claim *was prejudice*. *State ex. rel. North Olmsted Fire Fighters Ass'n. v. City of North Olmsted*, 64 Ohio St.3d 530, 536-537, 1992-Ohio-4. However, the Eighth Appellate District correctly found that the evidence in the record affirmatively demonstrated that *neither CNA nor Nationwide suffered any prejudice as a result of the actions of Park-Ohio or Penn General*.⁵ From that record, the Eighth Appellate District concluded: "We find nothing to indicate that the fact or amount of settlement would have been any different if Nationwide or CNA, with policies nearly identical to [Penn General], had been selected by Park-Ohio and presented with the DiStefano claim."⁶

CNA and Nationwide were free to present evidence of prejudice at the Trial Court level, but they did not. Instead, they chose to rely upon the legal abstractions of late notice, but that approach fails to undertake the fact-intensive prejudice analysis required by *Ferrando* or *North Olmsted Fire Fighters Ass'n*. Perhaps their approach should not be surprising because the undisputed evidentiary record clearly reveals that they were *not* prejudiced by the actions of either Park-Ohio or Penn General as to render their policies inapplicable. That record provides that Park-Ohio was sued in California by George DiStefano ("DiStefano") for damages related to mesothelioma allegedly caused by years of exposure to asbestos. Without notice to, or consent from, any of its insurers (including Penn General), Park-Ohio settled DiStefano's claims. When Penn General received Park-Ohio's demand to pay the full settlement under *Goodyear*, Penn General retained experienced coverage counsel and investigated the circumstances to determine, among other

⁵*Pennsylvania Gen.*, 2008-Ohio-5991, at ¶¶28-30.

⁶*Id.*, ¶37.

things, whether Park-Ohio violated the notice-related provisions of Penn General's policies such that coverage should be precluded. Penn General's investigation revealed that: (1) Park-Ohio had enjoyed excellent legal representation; (2) Park-Ohio had no liability defenses available; (3) Park-Ohio conservatively faced a \$5-6 million exposure at trial; (4) settlement was the best option to resolve DiStefano's claims; and (5) Park-Ohio's lawyers were able to settle DiStefano's claims for only \$1 million (which was in line with the settlements in similar cases in the venue). In sum, it was unlikely that Penn General could have obtained a better outcome had it received pre-settlement notice and been able to control the defense. Consequently, Penn General's coverage counsel further advised that despite Park-Ohio's actions, there was no prejudice to Penn General as to allow it to avoid coverage on the basis of violation of the notice-related provisions in its policies.⁷ Neither CNA nor Nationwide offered any evidence to the contrary, but instead insisted that Park-Ohio's actions released them from their obligations regardless of prejudice.

Respectfully, that is not, and should not be, the law of Ohio (or California, for that matter). Based upon the foregoing, this is not a case of public or great general interest. It is a fact-intensive dispute of interest only to the parties. It was correctly decided by the Eighth Appellate District based on controlling legal precedent from this Court. Accordingly, this Court should decline to entertain this appeal.

STATEMENT OF THE CASE AND FACTS

On March 7, 2002, DiStefano filed suit against Park-Ohio in California state court seeking damages arising from mesothelioma allegedly caused by years of exposure to asbestos in the 1960s.

⁷*Id.*, at ¶¶5-8.

Pennsylvania General, 2008-Ohio-5991, at ¶2. There is no evidence in the record that Park-Ohio had notice of the DiStefano claim prior to the filing of his lawsuit.

Five months later, on August 22, 2002, just five weeks before trial, Park-Ohio provided first notice of DiStefano's claim to Penn General and demanded that Penn General provide defense and indemnity to Park-Ohio under policies Penn General had issued to Park-Ohio's predecessor in the 1960s. Penn General immediately retained experienced California coverage counsel to assist its investigation of DiStefano's claims and demanded that Park-Ohio provide information regarding all other insurance coverage. Despite this request, Park-Ohio would resist efforts to produce other insurance information for another two years.⁸

Shortly thereafter, on October 6, 2002, without notice to or consent from Penn General, Park-Ohio settled the DiStefano lawsuit for \$1 million. Both Park-Ohio's lawyers and Penn General's coverage counsel agreed that: (1) Park-Ohio had enjoyed excellent legal representation; (2) Park-Ohio had no liability defenses available; (3) Park-Ohio faced multi-million dollar verdict potential that likely had a conservative value of \$5-6 million; and (4) far from being prejudicial, the settlement was probably the best outcome in the case in light of the circumstances. Consequently, Penn General's coverage counsel further advised that despite Park-Ohio's actions, there was no prejudice to Penn General as to allow it to avoid coverage on the basis of violation of the notice-related provisions in its policies.⁹

⁸*Id.*, ¶¶3-4.

⁹*Id.*, at ¶¶5-8.

On September 23, 2003, Park-Ohio filed a lawsuit against Penn General in Ohio to resolve whether Penn General was obligated to provide coverage for the entire settlement or just part of it.¹⁰ Nearly a year later, in discovery, Park-Ohio finally produced information regarding other insurance that pertained to DiStefano's claims, including policies issued by CNA and Nationwide. Penn General then quickly notified CNA and Nationwide that it would be seeking equitable contribution from them if it was required to pay more than its share of the settlement.¹¹

Despite the fact that the provisions of the policies issued by CNA and Nationwide were legally indistinguishable from those of the policies issued by Penn General, CNA and Nationwide refused to provide coverage for the settlement. This prompted Penn General to file the instant action on October 27, 2004 seeking declaratory relief and equitable contribution against Park-Ohio, CNA and Nationwide. Penn General then sought to consolidate this suit with the earlier suit filed by Park-Ohio so that all insurance issues and parties could be joined before a single judge. However, Park-Ohio successfully opposed the effort, and won a stay of the instant action until its suit against Penn General was resolved. All the while, CNA and Nationwide, fully aware of the allocation issues swirling around responsibility for the settlement, sat on their hands for over a year and did nothing. Finally, in November of 2005, Penn General and Park-Ohio resolved the remaining issues between them, the stay was lifted, and Penn General was able to proceed with its claims against CNA and Nationwide.¹²

¹⁰*See Park-Ohio Industr. Inc. v. Gen. Acc. Ins. Co.*, No. 2003-CV-511015, in the Court of Common Pleas for Cuyahoga County, Ohio.

¹¹*Id.*, ¶¶11-12.

¹²*Id.*, ¶¶11-14.

The dispute was submitted to the Trial Court on briefs and a stipulated record. The Trial Court incorrectly entered judgment for CNA and Nationwide, and Penn General appealed to the Eighth Appellate District. On appeal, the Eighth Appellate District correctly reversed and remanded the case to determine allocation shares between the insurers. CNA and Nationwide now appeal to this Court.

ARGUMENT AGAINST APPELLANTS' PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. I: No claim for contribution can be made against a non-targeted insurer pursuant to *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842 unless its policy is “applicable.” In order for the policy to be “applicable” to a claim, there must be full compliance with all terms and conditions of coverage in the non-targeted insurer’s policy.

Penn General has no quarrel with the axiom that only “applicable” insurance policies are subject to equitable contribution claims. However, the real question is: whether the policies of CNA and Nationwide are “applicable” to DiStefano’s claims? DiStefano’s claims clearly fell within their insuring agreements and neither policy had any substantive exclusions which barred coverage. Instead, both CNA and Nationwide rigidly insist that their policies are not “applicable” because Park-Ohio violated the notice-related provisions of their policies. However, this argument is untenable for the following reasons.

First, it is contrary to *Goodyear*. *Goodyear* allowed Park-Ohio to select Penn General to pay the full settlement, then Penn General could seek equitable contribution from other applicable insurance. In doing so, Penn General does not stand in Park-Ohio’s shoes as a subrogee, but it brings its equitable contribution claims in its own right as co-insurer. Thus, Park-Ohio’s actions are not relevant to Penn General’s contribution claim. Even if they were, there is no evidence that Park-Ohio violated any provisions of the CNA or Nationwide policies. In this regard, Park-Ohio elected

not to seek coverage from CNA or Nationwide, and therefore had no obligation to provide notice to CNA or Nationwide. Under such circumstances, it is axiomatic that Park-Ohio could not have violated the policy conditions of the CNA or Nationwide policies. Even if there were some abstract theoretical construct under which Park-Ohio could be said to be bound by notice-related conditions of insurance policies from which it was not seeking coverage (which strains credulity), there simply is no evidence that anything Park-Ohio did caused any prejudice to CNA or Nationwide. Nor could Penn General, which is not in privity of contract with either CNA or Nationwide, do anything to render their policies not “applicable”. Rather, any argument with respect to Penn General’s actions is best addressed under the rubric of laches which, as discussed below, could theoretically bar Penn General’s contribution claim, but has no bearing on whether the policies of CNA or Nationwide are “applicable” in the first instance. If this Court were to adopt the arguments of CNA and Nationwide, it would severely erode *Goodyear* by preventing targeted insurers from settling claims unless and until the targeted insurer was subjectively satisfied that the insured had complied with all preconditions of coverage under all potentially applicable policies from non-targeted insurers. The negative impact on insureds and injured claimants could be staggering as clearly applicable insurance could be withheld for years or decades as these issues were litigated.

Second, the argument is contrary to *Ferrando* and general Ohio contract law. As previously stated, *Ferrando* provides that alleged violations of notice-related provisions do not preclude coverage unless the insurer was prejudiced. This approach is consistent with that used to determine if an alleged breach of contract by one party justifies non-performance by the other. Ohio law (and the national majority view) holds that a breach of contract by one party does not discharge the obligations of the other party to the contract unless that breach is “material.” “Materiality,” in large

part, is determined by a fact-specific, prejudice analysis.¹³ CNA and Nationwide ignore this well-established body of law to advance an argument that any contractual infraction by a contracting party (regardless of materiality or prejudice) justifies non-performance by the other party. While such a rule would undoubtedly be a boon for large institutional litigants that use standardized contracts and panel counsel (like insurance companies, banks and other commercial entities), it does not require much imagination to see the damage it could cause to everyone else. Because the evidentiary record clearly demonstrates that neither CNA nor Nationwide were prejudiced by the actions of Park-Ohio (or Penn General), there is no reasonable basis for them to argue that their policies do not “apply” based upon late notice.

PROPOSITION OF LAW NO. II: To obtain contribution, a targeted insurer bears the burden to do what is necessary to secure contribution from other applicable insurance carriers, which includes the duty to diligently ascertain the identity of other insurers and to put those insurers on timely notice of the claim.

In support of this Proposition of Law, CNA and Nationwide argue it is inequitable to require them to provide contribution to Penn General because: (1) late notice deprived them of their notice-rights, including the right to control the litigation and settlement; (2) Penn General failed to force Park-Ohio to timely turn over information regarding other applicable insurance; and (3) Penn General failed to enforce its own policy provisions (variously referred to as “being a volunteer” or “sitting on one’s rights”).¹⁴ However, for the reasons that follow, none of the contentions has merit.

¹³*Lewis & Michael Moving & Storage, Inc. v. Stofcheck Ambulance Serv., Inc.*, 10th Dist. No. 05AP-662, 2006-Ohio-3810, at ¶¶20-22; *O’Brien v. The Ohio State University* (Feb. 15, 2006), Court of Claims No. 2004-10230, 2006-Ohio-1104, at ¶¶98-105; *Silver Line Building Products, supra.*, at *3; *Tucker v. Young*, 4th Dist. No. 04CA10, 2006-Ohio-1126, at ¶25; *Software Clearing House, Inc. v. Intrak, Inc.* (1st Dist. 1990), 66 Ohio App.3d 163, 583 N.E.2d 1056; Restatement (Second) of Contracts, §241.

¹⁴CNA’s Memorandum in Support of Jurisdiction, pp. 11-13.

First, as previously explained, there was no time-related or notice-related deficiency to Penn General's contribution claim. The notice-related provisions of the CNA and Nationwide policies are not germane to Penn General's contribution claims. Even if they were, they were not violated in a manner as to preclude coverage under those policies. Furthermore, any argument that Penn General's own actions caused a time-related or notice-related bar to its claim for contribution is really an assertion of the equitable defense of laches. To succeed on a laches defense CNA and Nationwide needed to prove: (1) a delay or lapse of time in asserting a right; (2) an absence of an excuse for such a delay; (3) knowledge, actual or constructive, of the injury or wrong; and (4) prejudice.¹⁵ Even assuming (without conceding) that Penn General unduly delayed asserting its contribution claims, the evidentiary record nonetheless clearly establishes that: (1) Penn General had a valid excuse for the delay due to Park-Ohio's refusal to turn over other insurance information; and (2) neither CNA nor Nationwide suffered any prejudice as a result of the delay. Consequently, there are no time-related or notice-related defenses to Penn General's contribution claim.

Second, the arguments of CNA and Nationwide are unreasonable and run afoul of the public policy considerations in *Goodyear*.¹⁶ The idea behind *Goodyear* was to streamline the resolution of "long-tail" insurance coverage claims—not to add an additional, contentious layer of litigious complexity. Requiring insureds and targeted insurers to involve non-targeted insurers during litigation of underlying tort claims in order to minimize the risk of subsequent allegations by non-targeted insurers that they could have done better if the claim had been tendered to and controlled by them erodes the central purpose of *Goodyear* and promises to increase the financial and human

¹⁵*State ex. rel. North Olmsted Fire Fighters Ass'n. v. City of North Olmsted*, 64 Ohio St.3d at 536-537.

¹⁶*See Pennsylvania General*, 2008-Ohio-5991, at ¶¶39-40.

cost of tort litigation in Ohio. Such increased cost is completely unnecessary because existing law adequately addresses the issues in this case. If a non-targeted insurer is truly prejudiced by the actions of the insured or a targeted insurer, it can mount a notice or laches defense which can be weighed and resolved by the trial court. In this case, however, such claims fail because the record unequivocally demonstrates that neither CNA nor Nationwide suffered any prejudice. From this, it is also clear that Penn General, which shared legally indistinguishable policy language with CNA and Nationwide, was not a volunteer, did not sit on its rights and did not fail to enforce its own policy provisions. Accordingly, the Eighth Appellate District was correct to conclude that contribution was proper.

PROPOSITION OF LAW NO. III: Since contribution between insurers is based upon principles of equity, a trial court's decision is reviewed for an abuse of discretion. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court where there is some competent, credible evidence supporting the trial court's judgment.

While Penn General agrees that a trial court's decision to grant equitable relief is *generally* subject to an abuse of discretion standard on appeal, where a trial court is requested to determine equitable and declaratory relief on a stipulated evidentiary record, the review on appeal is de novo. Accordingly, the Eighth Appellate District would have been correct to review this matter on a de novo basis.

In this case, however, it makes little difference. The Eighth Appellate District succinctly explained that the outcome would be the same no matter which standard of review was employed, and then analyzed the Trial Court's decision under *both* standards of review.¹⁷ Under either

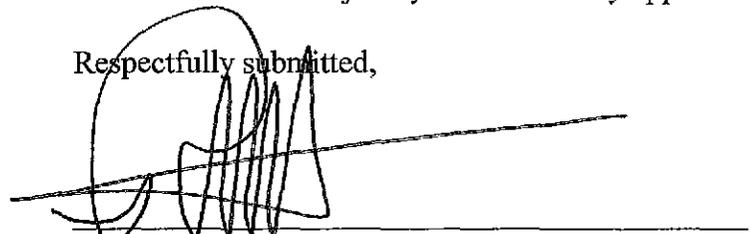
¹⁷*Pennsylvania General*, 2008-Ohio-5991, at ¶¶17-18.

standard, Penn General was entitled to prevail, and neither CNA nor Nationwide have offered any specific substantive argument why the standard of review would make a difference.

CONCLUSION

The legal and equitable concepts in this case are hardly new. Rather, they are well-established and well-understood, and, contrary to the lamentations of CNA and Nationwide, they appear to work rather well. Nevertheless, CNA and Nationwide ask this Court to conduct a fact-intensive re-review of an out-of-state tort case to tell them whether they can avoid responsibility under their policies for time-related/notice-related reasons. This was a task that was appropriately handled by the Eighth Appellate District through application of this Court's decisions. It does not involve a question of public or great general interest and does not justify a discretionary appeal to this Court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing has been served via ordinary U.S. Mail, this 24th day of February

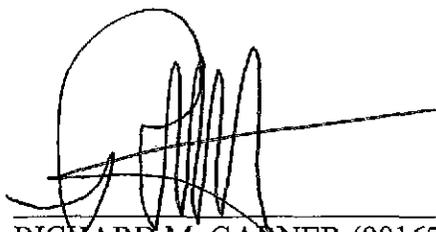
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