IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

FARM FAMILY INSURANCE COMPANY, as subrogee of Thomas K. Kearny and, THOMAS K. KEARNY,	)	
Appellants, Plaintiffs-Below,	)	
v.	)	C.A. No. 07A-08-008 PLA
CONECTIV POWER DELIVERY, a Foreign Corporation, and PEPCO HOLDINGS, INC., a Delaware Corporation,	)	
Appellees, Defendants-Below.	)	

ON APPEAL FROM THE COURT OF COMMON PLEAS
AFFIRMED

Submitted: May 13, 2008
Decided: May 21, 2008

Sandra F. Clark, Esquire, KENT & MCBRIDE, P.C., Wilmington, Delaware, Attorney for Appellants/Plaintiffs-Below.

Todd L. Goodman, Esquire, Wilmington, Delaware, Attorney for Appellees/Defendants-Below.

ABLEMAN, JUDGE

I. Introduction

This is an appeal from a Decision and Order of the Court of Common Pleas granting Defendants-below/Appellees' Conectiv Power Delivery and Pepco Holdings, Inc. (collectively "Defendants") Motion to Dismiss. Plaintiffs-below/Appellants Farm Family Insurance Company ("Farm Family") and Thomas K. Kearney ("Kearney") (collectively "Appellants") filed a Complaint against Defendants on October 4, 2006 alleging that Defendants negligently caused property damage to Kearney's home on October 27, 2003 and November 18, 2003. The Court dismissed the case based on the expiration of the two-year statute of limitations.

On appeal, Farm Family contends that the Court committed reversible error because Defendants, as insurers or self-insurers, were estopped from raising the statute of limitations as a defense based on their failure to give prompt and timely written notice of the two-year limitations period pursuant to 18 *Del. C.* § 3914. Since the Court below correctly determined that Defendants are not insurers or self-insurers, Conectiv was not required to give notice to Farm Family or Kearney of the applicable statute of limitations period. The Court therefore did not commit any errors of law when it determined that Appellants' action is time barred. For the reasons

set forth below, the Court of Common Pleas Opinion and Order is **AFFIRMED**.

II. Statement of Facts

Thomas K. Kearney maintained a home owners insurance policy for his Delaware home through Farm Family Insurance Company. On October 27, 2003, a fire occurred at Kearney's home causing extensive property damage. On October 4, 2006, Kearney and Farm Family, as subrogee, filed a Complaint against Conectiv Power Delivery ("Conectiv") and Pepco Holdings, Inc. ("Pepco")[1] alleging that the cause of the fire was a faulty underground power line owned and maintained by Conectiv. Appellants further alleged that, on November 18, 2003, after the fire, Conectiv negligently rerouted a new cable over Kearney's neighbor's driveway that resulted in further damage.

Since this action was filed more than two years after the alleged incidents occurred,[2] Defendants filed a motion to dismiss raising the statute of limitations as a defense. In response, Farm Family contended that

[1] Pepco Holdings, Inc. is the parent corporation of Conectiv. *See* Appellee's Answering Br., Ex. 5.

[2] *See* 10 *Del. C.* § 8107 ("No action to recover damages for wrongful death or for injury to personal property shall be brought after the expiration of 2 years from the accruing of the cause of such action."). Both parties agreed that the action is subject to the two-year statute of limitations. *See Farm Fam. Ins. Co. et al. v. Conectiv Power Delivery et al.*, C.A. No. 2006-10-029 (Del. Com. Pl. Jul. 18, 2007), at 2.

Defendants were estopped from raising the statute of limitations defense because they were self-insurers or insurers that failed to give prompt and timely written notice of the applicable statute of limitations.[3] Defendants disputed that they were insurers or self-insurers and asserted that Farm Family was a "sophisticated" party who should not receive the benefit of 18 *Del. C.* § 3914.

In its Opinion and Order, the Court of Common Pleas concluded that Conectiv was not an insurer or self-insurer and thus not required to give notice to Plaintiffs of the statute of limitations to Plaintiffs pursuant to 18 *Del. C.* § 3914. The Court noted that Conectiv, as a public utility company, was not in the business of entering into contracts for insurance.[4] Although Conectiv paid claims of less than two million dollars from its revenues, the Court still found that Conectiv was not a self-insurer because it did not establish a fund to insure against losses.[5] While acknowledging that Farm Family would be entitled to notice if it submitted a claim to Defendants

[3] Appellants relied on 18 *Del. C.* § 3914, which requires an insurer to "give prompt and timely written notice to claimant informing claimant of the applicable state statute of limitations regarding action for his/her damages" after it receives a claim pursuant to a casualty insurance policy.

[4] *Farm Fam. Ins. Co.*, C.A. No. 2006-10-029 at 4 (citing 18 *Del. C.* §§ 102(2) & (3)).

[5] *Id.* at 4-5. The CCP defined self-insurers as a business that "sets aside money, for example by creating a fund, to cover any losses." *Id.* at 4 (citing BLACK'S LAW DICTIONARY 356 (7th Ed. 2001)).

because it was a subrogee of Kearney, the Court recognized that Farm Family was more sophisticated in insurance matters than Conectiv, a utility company, and therefore held that Farm Family could not rely upon 18 *Del. C.* § 3914.[6] Finally, the Court found that Conectiv's decision to pay the claim related to the November 18, 2003 damage did not automatically establish it as an insurer because the decision to pay could have been based on valid business reasons unrelated to insurance.[7] As a result, the Court held that Appellants' claims were barred by the applicable statute of limitations.

III. Parties' Contentions

In their appeal, Appellants contend that the Court of Common Pleas erred in concluding that Conectiv is not self-insured because its decision to pay claims not exceeding two million dollars from its "revenue fund" indicates that it assumed the risk of payment, making the company a self-insurer of that risk. The absence of a special fund should not alter the analysis. Because Conectiv failed to give notice of the applicable statute of limitations, Appellants submit that the Court below committed reversible error by allowing Defendants to raise the statute of limitations defense.

[6] *Id.* at 5-6.

[7] *Id.* at 6-7.

Defendants argue that the Court's decision determining that Conectiv was not an insurer subject to 18 *Del. C.* § 3914 is free from error. Because Conectiv is not in the business of entering into insurance contracts, it is not an insurer under 18 *Del. C.* § 102(3). Conectiv further notes that it never portrayed itself as a self-insurer, nor does it maintain a separate fund or set aside money for claims from predictable risks. Because Defendants are not insurers, they assert that they could properly raise the statute of limitations as a defense to Plaintiffs' action. They also suggest that affording a sophisticated insurer such as Farm Family the protections of 18 *Del. C.* § 3914 would conflict with the statute's purpose.

IV. Standard of Review

This Court reviews a Court of Common Pleas decision below just as the Supreme Court would review an appeal.[8] The Court applies a two-fold analysis.[9] First, where there is question of law, this Court reviews the alleged error *de novo*.[10] Second, this Court must accept the Court of

[8] *Trader v. Wilson*, 2002 WL 499888, at *2 (Del. Super. Ct. Feb. 1, 2002), *aff'd*, 804 A.2d 1067, 2002 WL 1924649 (Del. Aug. 15, 2002) (Table) (citing *Baker v. Connell*, 488 A.2d 1303, 1309 (Del. 1985)).

[9] *Id.*

[10] *Id.* (citing *Downs v. State,* 570 A.2d 1142 (Del. 1990)).

Common Pleas' findings of fact that are "supported by the record and which are the product of a logical and deductive process."[11]

As long as there is substantial evidence supporting the finding of fact made by the CCP, this Court will not disturb that decision.[12] Substantial evidence is "that which a reasonable mind might accept to support a conclusion."[13] It is more than a scintilla but less than a preponderance of evidence.[14] Only where the Court of Common Pleas has abused its discretion will this Court reverse a finding of fact.[15]

V. Analysis

The parties agree that the applicable statute of limitations for this action is two years and that Farm Family's action was filed more than two years after the alleged incidents occurred.[16] It is also undisputed that Conectiv never gave prompt and timely written notice to Farm Family of the applicable statute of limitations. Only if Conectiv is classified as an insurer or self-insurer under 18 *Del. C.* § 3914 will its failure to give notice of the

[11] *Id.*

[12] *Id.* at *3 (citing *Johnson v. Chrysler*, 213 A.2d 64 (Del. 1965)).

[13] *Id.* (citing *Oceanport v. Wilmington Stevedores,* 636 A.2d 892 (Del. 1994)).

[14] *Trader*, 2002 WL 499888 at *3 (citing *Olney v. Cooch,* 425 A.2d 610 (Del. 1981)).

[15] *Id.*

[16] *See* 10 *Del. C.* § 8107.

limitations estop it from raising the statute of limitations as a defense. Therefore, whether Conectiv is an insurer subject to 18 *Del. C.* § 3941 is dispositive of this case.

Section 3914 of Title 18 is an "expression of legislative will to toll [the] otherwise applicable time limitations with respect to claims made against insurers."[17] The statute requires an insurer to give prompt and timely written notice to a claimant informing him of the applicable statute of limitations when a claim is submitted pursuant to a casualty insurance policy.[18] If an insurer fails to provide written notice to the claimant, the tolling of the statute is mandated, and the insurer is estopped from raising the statute of limitations as a defense.[19] In interpreting 18 *Del. C.* § 3914, the Delaware Supreme Court has held that the statute is unambiguous.[20]

The statute applies to both insurers and self-insurers.[21] An insurer is "every person engaged as principal and as indemnitor, surety or contractor in

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[17] *Stop and Shop Cos., Inc. v. Gonzalez*, 619 A.2d 896, 898 (Del. 1993) (citing *Lankford v. Richter*, 570 A.2d 1148, 1149 (Del. 1990)).

[18] 18 *Del. C.* § 3914.

[19] *Stop and Shop Cos., Inc.*, 619 A.2d at 898; *McMillan v. State*, 2002 WL 32054600, at *3 (Del. Super. Ct. Sept. 19, 2002).

[20] *Stop and Shop Cos., Inc.*, 619 A.2d at 899.

[21] *Id.* at 898.

the business of entering into contracts of insurance."[22] A contract for insurance requires one party (the insurer) to contractually agree to indemnify another party for loses resulting from enumerated contingencies or perils.[23] As explained by the Delaware Supreme Court:

> Insurance, in its basic operation, involves the setting aside of money to establish a fund sufficient to respond to claims arising from predictable risks. 1 *Couch on Insurance 2d* §§ 1:2-1:3 (1984). Whether the funding be through contract with an independent insurer, or self-funding, or a combination of the two through partial self-insurance in the form of deductibles, the result is the same. A fund is created to protect against risk of bodily harm or property damage.[24]

As an initial matter, regardless of the Court's conclusion as to Conectiv's status as an insurer, the Court finds that 18 *Del. C.* § 3914 is inapplicable to Conectiv because it never received any claim pursuant to a casualty insurance policy. Only where a claim is received "during the pendency of any claim received pursuant to a casualty insurance policy" must the insurer give notice to a claimant.[25] To have a casualty insurance

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[22] 18 *Del. C.* § 102(3). "Every person" includes corporations. *Id.* § 102(1).

[23] *Id.* § 102(2); *see also Maurer v. Int'l Re-Insurance Corp.*, 74 A.2d 822, 826 (Del. Ch. 1950) (defining insurance as a contractual agreement "whereby for a stipulated consideration called a premium, one party undertakes to indemnify another against loss by a certain specified contingency or peril called a risk.").

[24] *Stop and Shop Cos., Inc.*, 619 A.2d at 898.

[25] 18 *Del. C.* § 3914.

policy, there must be a written contract or agreement to effect insurance for some type of loss.[26] Here, there is no evidence that Conectiv ever issued any type of written agreement amounting to a casualty insurance policy for property damage to either Kearney or Farm Family. While Conectiv did agree to pay for any property loss resulting from the November 18, 2003 incident, that decision was not made as a result of claim submitted pursuant to a contractual agreement between Appellants and Defendants. On that basis alone, Defendants are not subject to 18 *Del. C.* § 3914.

Even assuming that Conectiv received a claim pursuant to a casualty insurance policy, which it did not, it is clear that Defendants are not "insurers" for purposes of 18 *Del. C.* § 3914. Defendants are a public utility company who provide electric and natural gas to their customers. They are not in the business of entering into contracts for insurance.[27] Conectiv never received a premium in exchange for the promise to indemnify Kearney for any named contingencies, or specifically for a faulty power line causing fire damage to his home. As a result, the CCP correctly found that Defendants are not an "insurer" under 18 *Del. C.* § 102(3).

[26] *Id.* § 2702. 18 *Del. C.* § 906 defines casualty insurance policy.

[27] *See id.* § 102(3).

The fact that Conectiv agreed to pay damages for the November 18, 2003 incident does not alter the Court's conclusion that it is not a self-insurer. As explained by the Delaware Supreme Court, insurance usually requires that a person or company set aside money to establish a fund to respond to claims arising from predictable risks.[28] It is undisputed that Conectiv had no insurance fund established to pay for predictable risks, such as property damage arising from faulty power lines. The fact that Conectiv chooses to pay damages not exceeding two million from its general revenues, offset against company profits, does not constitute a "fund" established for predictable risks. Conectiv does not set aside any money to "fund" the payment of claims that may be asserted against it. In fact, as noted in the Court's decision below, the policy of paying from revenues may be completely unrelated to insurance, but rather the result of a valid business decision to avoid litigation or foster customer goodwill.[29] Conectiv cannot therefore be classified as a self-insurer of risks merely because it may choose in certain cases to pay claims asserted against it.

Because they never received a claim pursuant to a casualty insurance policy, and are not insurers or self-insurers, Defendants are not subject to the

[28] *Stop and Shop Cos., Inc.*, 619 A.2d at 898.

[29] *Farm Fam. Ins. Co.*, C.A. No. 2006-10-029 at 6-7.

notice requirement of 18 *Del. C.* § 3914. While this decision allows Defendants to raise the statute of limitations as a defense to Plaintiffs' action, the Court is also mindful that 18 *Del. C.* § 3914 was intended to protect unsophisticated claimants from more sophisticated insurance companies.[30] As explained by this Court in *Taylor v. Bender*:[31]

> The requirements of § 3914 are designed to provide claimants with notice of the applicable statute of limitations. The burden placed on insurers is not an onerous one and conforms to a readily discernible rational social policy considering the relative knowledge and position of the parties. Insurance companies are likely to be aware of laws and regulations applicable to their business. A claimant, on the other hand, is not. Concern over the possibility of a sophisticated insurance industry overreaching a less sophisticated claimant is legitimate and reasonable.[32]

To afford Farm Family, a sophisticated party, with the protection afforded by 18 *Del. C.* § 3914 would not be furthering the legislature's intent.[33] While the Court agrees that Farm Family inherits all of Kearney's rights, including the right to notice, as it is the substituted party through

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[30] *See Stop and Shop Cos., Inc.*, 619 A.2d at 898 (citing *J.D.P. v. F.J.H.*, 399 A.2d 207, 210 (Del. 1979) (noting that the statute "may be deemed remedial legislation designed to benefit claimants").

[31] 1991 WL 89882 (Del. Super. Ct. May 28, 1991).

[32] *Taylor*, 1991 WL 89882 at *2.

[33] *See Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1246 (Del. 1985) ("To apply a statute the fundamental rule is to ascertain and give effect to the intent of the legislature."). In this regard, the Court again emphasizes that neither Kearney nor Farm Family entered into any insurance contract with Defendants.

subrogation,[34] Defendants, a utility company, are not a sophisticated insurance company. Tolling the statute for the benefit of Farm Family, to whom the statute was never intended to apply, would therefore be inappropriate.

VI. Conclusion

The Court of Common Pleas correctly determined that Defendants are not insurers or self-insurers subject to 18 *Del. C.* § 3914. Defendants were therefore not required to give notice of the applicable statute of limitations to Appellants and could raise the statute of limitations as a defense to Appellants' action. Because it is undisputed that Appellants' action is time barred, the Court of Common Pleas appropriately granted Defendants' Motion to Dismiss. There being no error of law, the Opinion and Order of

[34] *See Blue Cross & Blue Shield of Del., Inc. v. Gov't Employees Ins. Co.*, 1984 WL 553557, at *1 (Del. Super. Ct. Apr. 23, 1984) (holding that a subrogated party acquires all rights of the party for whom he is substituted, including the right tolling of the statute of limitations pursuant to 18 *Del. C.* § 3914).

the Court of Common Pleas granting the Motion to Dismiss of the Defendants is hereby **AFFIRMED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary

cc: Sandra F. Clark, Esq.
Todd L. Goodman, Esq.