STATE FARM FIRE AND CASUALTY COMPANY, A/S/O KIMBERLY DUNBAR ROSSI, Plaintiff-Respondent,

v.

TIMOTHY SHEA, Defendant-Appellant.

CUMBERLAND MUTUAL FIRE INSURANCE COMPANY, A/S/O TIMOTHY SHEA Plaintiff,

v.

KIMBERLY DUNBAR ROSSI, Defendant.

Docket No. A-4124-10T1.

Superior Court of New Jersey, Appellate Division.

Argued: December 21, 2011.
Decided: September 28, 2012.

Fredric P. Gallin argued the cause for appellant (**Methfessel** & **Werbel**, attorneys; Mr. Gallin, of counsel and on the brief).

Sandra Calvert Nathans argued the cause for respondent (Schenck, Price, Smith & King, LLP, attorneys; John M. Bowens and Ms. Nathans, on the brief).

Before Judges Cuff, Waugh, and St. John.

NOT FOR PUBLICATION

PER CURIAM.

At issue in this appeal is the liability of a residential property owner to remediate contamination, which migrated to an adjacent property, caused by an abandoned underground storage tank (UST) on his property. The property owner contends he cannot be considered a responsible party as a matter of law and the trial judge improperly imposed liability on him for pre-existing damage to the neighboring property. We hold that Judge Nugent properly applied the law to the facts as found at trial and not contested on appeal, and affirm.

Kimberly Rossi[1] owned the property at 6046 Main Street in Mays Landing from June 1998 to January 2004. During that time, Rossi's property contained a fuel oil storage tank buried beneath her driveway. This tank had leaked and contaminated her property. In 2004, Rossi sold the property to John Schleifer. As a condition of the sale of the house, Rossi removed the UST prior to the closing. Additionally, Rossi agreed to be held responsible for the clean-up of any contamination existing on her former property.

Timothy Shea purchased the property at 6044 Main Street in September 1999. This property is separated from the former Rossi property by a driveway. Prior to purchasing the home, Shea did not conduct a home or environmental inspection. When he viewed the home prior to purchase, he noticed a vent pipe in the backyard. He did not inquire, however, about the purpose of the pipe at any time prior to or following the purchase.

In November 2004, Bill Schmitt, an Associate Director at environmental consulting firm ECC Horizon (ECC), was contacted by State Farm Fire and Casualty Company (State Farm), Rossi's insurance carrier, to investigate the former Rossi property for contamination. His task was to determine the extent of contamination found at the property, develop a remedial strategy, and conduct an age-dating analysis.

A contractor for State Farm, Aqua-tex, had already analyzed the site and discovered underground contamination. Schmitt reviewed the Aqua-tex analysis and concluded the contaminated plume[2] may have been caused by a source other than Rossi's driveway tank. He based his conclusion on tests that revealed higher levels of contamination in the backyard of the property than the driveway of the property, under which the oil tank had been located. Upon physical inspection of the property, Schmitt found no evidence of other oil tanks located near the backyard. After reviewing permit records for surrounding properties,

Schmitt found that an oil tank existed at Shea's property and had not been removed.

Schmitt directed Aqua-tex to install four monitoring wells throughout Rossi's former property to determine the direction of the groundwater flow and to collect groundwater samples. Schmitt determined from these tests that the groundwater flowed in a southwest and west direction toward the Great Egg Harbor River. All groundwater tests conducted by Schmitt, Aqua-tex, and RedHawk Environmental Consulting, Ltd. (RedHawk) were consistent with this conclusion.

After this groundwater analysis, Schmitt ordered the performance of a ground penetrating radar event to locate any other USTs in the area not visible from the ground surface. The test discovered two USTs: one at Shea's property, and one at Rossi's new property, 6042 Main Street. The parties stipulated that 6042 Main Street was not a source of the contamination.

Following the test, Aqua-tex informed Shea about the existence of the oil tank and advised him to remove it. Shea complied. Shea testified he had no previous knowledge of the tank. He had never used oil heat at the house.

When the tank was removed, oil was found inside it. Due to the shape of the tank and the fact that it had four legs on it, Schmitt "could tell immediately that this actually was an above-ground tank that was buried...." Schmitt further inspected the soil beneath the tank after its removal and discovered fuel odors; he also counted more than twenty-five holes in the tank, indicating the cause of the leak and suggesting the leak of product continued until its removal.

State Farm, as subrogee of Kimberly Rossi, filed a complaint against defendant Shea to recover compensatory damages for the funds it had paid for the reasonable cost of investigation, remediation and restoration of the Rossi property. State Farm contended that fuel oil leaked from the UST on Shea's property and contaminated the rear yard of the property owned by Rossi until 2008. State Farm alleged defendant was negligent and in violation of the New Jersey Spill Compensation and Control Act (the Spill Act), N.J.S.A. 58:10-23.11 to-23.50.

Shea answered denying negligence and liability pursuant to the Spill Act. Shea's homeowner's insurer, Cumberland Mutual Fire Insurance Co. (Cumberland), filed a complaint as subrogee of Shea against Rossi seeking an equitable allocation of Rossi's responsibility for the contamination on the neighboring properties and reimbursement of sums paid by Cumberland to address the contamination. An order dated October 16, 2008, consolidated the complaints. State Farm and Cumberland filed cross-motions for summary judgment, which were denied. Judge Perskie found genuine issues of material facts regarding whether any contamination occurred after Shea purchased his house and whether the plumes of contamination were separate and distinct or commingled, thus requiring denial of both motions.

The case proceeded to trial before Judge Nugent sitting without a jury. At trial, Schmitt testified as an expert in environmental science. He was a state-licensed Subsurface Evaluator and Pre-Qualified Unregulated Heating Oil Tank Professional. By the time of his testimony, he had worked on about 300 residential storage tank cases.

Schmitt testified that the New Jersey Department of Environmental Protection (DEP) required soil remediation when contamination reached a level of 5100 parts per million. Three soil samples taken from the tank cavity after the tank's removal registered results of 35,000 parts per million, 9600 parts per million, and 6000 parts per million. Using pictures of the tank and the tank cavity, Schmitt explained that the oil tank had not been decommissioned, which is the process by which an oil tank is properly drained and closed, or removed from the ground.

Schmitt also testified about a site plan submitted to him by Cumberland. The plan contained the results of analyses conducted by RedHawk, such as groundwater results and Photoionization Detector (PID) readings. PID readings show contaminants, including oil levels, present in vapors emitted from the soil. At one location on the eastern side of Rossi's former property, which Schmitt described as the "clean zone," the PID readings detected no contamination. Schmitt interpreted this result to mean that "there were no impacts confirmed or detected at that location; it was an unimpacted area on the site." The same clean PID results occurred at an area underneath Shea's home, leading Schmitt to similarly conclude "[t]here were no impacts at that location."

Following up on these results, Schmitt conducted more testing to confirm the cleanliness of these areas. After installing fifteen soil borings, Schmitt found several areas where no oil-related impacts were detected. Schmitt also conducted groundwater testing at these uncontaminated areas. All tests conducted by ECC, Aqua-tex, and RedHawk confirmed that the areas tested below actionable levels.

Based on all of this testing, Schmitt concluded that two separate plumes existed, with a "clean zone" between them. Additionally,

Schmitt concluded that the direction of the groundwater flow was consistent with the flow of contaminants from Shea's UST to the backyard of Rossi's former property.

Robert Erickson, a principal at Columbia Environmental, an environmental consulting firm, created a soil model for Rossi's old property. A soil model is a graphical representation of impacts on a site. Schmitt testified that he did not believe Erickson's soil model demonstrated the existence of additional sources of contamination at 6046 Main Street other than Shea's UST. Erickson's model, Schmitt argued, took into account soil samples that were collected in different manners, thus creating "a hodgepodge of information thrown into the model" that is "not going to tell you what's going on."

In support of his doubt about Erickson's model, Schmitt cited six specific soil borings included in the model that were improperly collected. He doubted the veracity of two of the samples because the instrument used to detect their contamination level was not inserted into the ground deeply enough to determine the full extent of the contamination. He expressed doubt about another sample because it was submitted for analysis after forty-two days, even though oil samples begin to biodegrade within the "holding time" of fourteen days, thus biasing the results of the sample. Two others were analyzed two and a half years outside of the holding time. Schmitt further questioned a final sample because the results listed a finding of 9400 parts per million, but Erickson's boring log explained that no samples were collected from that location.

Schmitt testified that the doubts cast upon these results suggest that all of Erickson's conclusions about the areas may be flawed. Consequently, he believed Erickson's soil model did not "accurately reflect what is going on in the site." He elaborated that

> [t]he samples, according to what [Erickson] put into this model, were collected over a span of five years by three different companies: ECC, Aqua-tex and Redhawk. They're collected from various depths using various sampling techniques, they're submitted to three different laboratories, also analyzed for three different analyses for TPH, so with all of these variables going on, it's not a surprise that there's vulnerability.

He concluded by restating that he did not believe that Erickson's soil model showed additional sources of contamination other than Shea's UST.

On cross-examination, Schmitt admitted that the sources for his own information were also varied, including three different consultants who measured soils at different depths over four or five different years. Schmitt, however, distinguished Erickson's model from his own: Erickson was trying to show the highest level of contamination in each location; Schmitt, however, was trying to depict the areas of contamination as they have historically existed.

Schmitt further admitted on cross-examination that he did not turn over a report he reviewed that contained results of an age-dating analysis, which would show how long Shea's tank had been leaking. Rossi's counsel argued that Rossi was not obligated to provide the court with this report because Schmitt did not create it, and he did not rely on it to form his opinion on this matter; therefore, it was inadmissible as an immaterial report from a non-testifying expert. Schmitt explained that he did not consider the age-dating analysis in his conclusions because the age of the plumes did not bear on his job, which was to determine how far each of the plumes had traveled and identify the properties from which the contamination was emanating.

Schmitt also admitted on cross-examination that some contamination from the UST on the front of Rossi's property reached onto the front of Shea's property. He also acknowledged that the plume did not uniformly decrease in concentration as it traveled away from Shea's UST; rather, it fluctuated up and down as it spread out from the UST area.

Theodore Sobieski, a principal at Tri-state Environmental Management Services, Inc., an environmental consulting firm, testified for Shea. Sobieski was admitted by the court as an expert in evaluation and remediation of UST spills. His firm primarily did work for insurance company investigations concerning environmental site assessments, and he had worked on six or seven hundred UST cases.

Sobieski handled the Rossi case for his firm. In response to Schmitt's concern about the handling of some samples, Sobieski testified that properly refrigerated samples provide proper results despite being submitted long after the holding time, even two years past it. He further testified he questioned some of Schmitt's sampling, specifically due to an unclear chain of custody of four samples.

Sobieski ultimately opined that he did not believe the separation of the plumes, as well as the boundaries of a clean zone, could be definitively identified. He further explained that the fluctuations in contaminant levels in areas away from the Shea tank

suggested, among other possibilities, that another source contributed to the contamination in the Rossi backyard. He believed that plumes typically have a more even distribution of contaminant levels. Sobieski went so far as to speculate that the plume from Shea's tank may have headed in an entirely different direction than Rossi's former property: in the direction of her new property, which sits on the other side of Shea's home. Yet, he conceded he could not identify any additional source of contamination to a reasonable degree of scientific certainty. He also admitted that he was "not sure" whether or not the Shea and Rossi plumes were commingled.

In a comprehensive written opinion, Judge Nugent found the plumes of contamination were separate and distinct, and Shea made no assessment of the property before he acquired the property in spite of observing two stacks (the vent and fill pipe) sticking out of the ground in his rear yard. Therefore, Judge Nugent concluded that Shea could not be considered an innocent purchaser who may become absolved of liability for soil contamination on his and neighboring property in accordance with N.J.S.A. 58:10-23.11g(d)(2), and was a responsible party under the Spill Act.

Judge Nugent, therefore, on November 3, 2010, ordered that Rossi was responsible for the plume denominated the green plume, and Shea was responsible for the plume denominated the red or pink plume. Subsequently, on April 18, 2011, the parties entered a stipulation of settlement that provided Cumberland would reimburse State Farm $19,500 for all costs of investigation, sampling and monitoring during the course of delineation. Cumberland reserved its right to appeal from the November 3, 2010 judgment.

On appeal, Shea argues Judge Perskie should have granted his motion for summary judgment. He also contends Judge Nugent misapplied the law to the facts as found following a bench trial.

We address the denial of the cross-motions for summary judgment by Judge Perskie. Of course, we have the benefit of a full trial record, which amply demonstrates the sharp difference of opinions of the primary expert witnesses: Schmitt and Sobieski. The measure of the order denying summary judgment, however, is the record before the motion judge. Having reviewed the motion record, we are satisfied that the pleadings, certifications, and exhibits in support of and in opposition to both motions required denial of the motion. The record revealed genuine issues of material fact that would inform whether Shea could be found an innocent purchaser and thus absolved from liability for the contamination caused by the failed UST on Shea's property. In addition, the record revealed genuine issues of fact whether the failed USTs on the Rossi and Shea properties caused distinct areas of contamination or had commingled and whether the Shea UST introduced product into the soil during his ownership of the property. Judge Perskie properly applied the standard required by Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

Shea does not contest the findings of fact made by Judge Nugent following this bench trial, recognizing those findings will not be disturbed when supported by substantial, credible evidence in the record. Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974). Shea contends Judge Nugent committed legal error because the judge incorrectly imposed an affirmative duty on him to conduct a pre-purchase environmental investigation and should have considered equitable factors when fashioning his remedy. Shea also contends the trial judge never addressed whether the contamination occurred during his ownership of the property.

The Spill Act explains how it apportions liability:

> Except as provided in section 2 of P.L.2005, c.43 (C.58:10-23.11g12), any person who has discharged a hazardous substance, or is in any way responsible for any hazardous substance, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs no matter by whom incurred.
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> [N.J.S.A. 58:10-23.11g(c)(1).]

It also addresses the liability of a real estate purchaser who had no knowledge of the contamination that occurred prior to his purchase:

> In addition to the persons liable pursuant to this subsection, any person who owns real property acquired on or after September 14, 1993 on which there has been a discharge prior to the person's acquisition of that property and who knew or should have known that a hazardous substance had been discharged at the real property, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs no matter by whom incurred.

> [N.J.S.A. 58:10-23.11g(c)(3).]

The Spill Act further provides a defense to this strict liability:

> A person, including an owner or operator of a major facility, who owns real property acquired on or after September 14, 1993 on which there has been a discharge, shall not be liable for cleanup and removal costs or for any other damages to the State or to any other person for the discharged hazardous substance pursuant to subsection c. of this section or pursuant to civil common law, if that person can establish by a preponderance of the evidence that subparagraphs (a) through (d) apply, or if applicable, subparagraphs (a) through (e) apply:
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> (a) the person acquired the real property after the discharge of that hazardous substance at the real property;
>
> (b) (i) at the time the person acquired the real property, the person did not know and had no reason to know that any hazardous substance had been discharged at the real property, or (ii) the person acquired the real property by devise or succession, except that any other funds or property received by that person from the deceased real property owner who discharged a hazardous substance or was in any way responsible for a hazardous substance, shall be made available to satisfy the requirements of P.L. 1976, c. 141, or (iii) the person complies with the provisions of subparagraph (e) of paragraph (2) of this subsection;
>
> (c) the person did not discharge the hazardous substance, is not in any way responsible for the hazardous substance, and is not a corporate successor to the discharger or to any person in any way responsible for the hazardous substance or to anyone liable for cleanup and removal costs pursuant to this section;
>
> (d) the person gave notice of the discharge to the department upon actual discovery of that discharge.
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> [N.J.S.A. 58:10-23.11g(d)(2).]

The statute explains "no reason to know" as follows:

> To establish that a person had no reason to know that any hazardous substance had been discharged for the purposes of this paragraph (2), the person must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property. For the purposes of this paragraph (2), all appropriate inquiry shall mean the performance of a preliminary assessment, and site investigation, if the preliminary assessment indicates that a site investigation is necessary, as defined in section 23 of P.L. 1993, c. 139 (C.58:10B-1), and performed in accordance with rules and regulations promulgated by the department defining these terms.
>
> [Ibid.]

Shea does not contest on appeal that he failed to make a preliminary assessment. He also admitted in his trial testimony that he did not conduct a home or environmental inspection prior to his purchase. He did, however, notice a vent pipe sticking out of the ground in the backyard when he viewed the home, but never inquired about its purpose prior to or after the purchase. The issue then is not whether every buyer of a home must conduct an environmental assessment prior to purchase but whether, having observed a pipe protruding from the ground, Shea had a duty, at a minimum, to inquire.

The record demonstrates that not one but two pipes protruded from the ground in the backyard. One was a fill pipe for the UST; the other was a vent. Shea admitted he saw one of the pipes. He also admitted he never asked a single question to identify the article protruding from his backyard. His ignorance of the UST buried in his backyard is not a problem occasioned by utilizing the "South Jersey" option of closing title without an attorney. His ignorance is solely associated with his failure to ask a basic question about something most people do not expect to encounter in the backyard of their home. It is not unreasonable to require him to ask questions under these circumstances to identify the pipe and then take whatever measures are warranted by the response to those questions.

Shea's reliance on White Oak Funding, Inc. v. Winning, 341 N.J. Super. 294 (App. Div.), certif. denied, 170 N.J. 209 (2001) and Marsh v. New Jersey Department of Environmental Protection, 152 N.J. 137 (1997) is misplaced. First, Marsh explains that the Spill Act, specifically N.J.S.A. 58:10-23.11g(d)(2), does not impose an affirmative duty on all purchasers to conduct a pre-purchase environmental inspection of the property. 152 N.J. at 147. Rather, the Court explained "it established a `new

defense' to Spill Act liability for landowners who acquired their property after it had been contaminated and who could prove that they conducted such an investigation." Id. at 147-48. Notably, in Marsh, the defense was not available to the purchaser because she acquired the property in 1991, two years before the effective date of the Spill Act amendment recognizing the purchaser without knowledge of the contamination defense. Id. at 140. Moreover, in Marsh, the issue reserved by the Court, liability of a purchaser with no knowledge of pre-existing contamination, applied only to owners, who purchased their properties prior to the amendment's enactment without actual or constructive knowledge of pre-existing contamination. Id. at 148 n.2, 150. Similarly, White Oak is limited to pre-amendment cases. 341 N.J. Super. at 301 n.3.

New Jersey Department of Environmental Protection v. Dimant, ___ N.J. ___ (2012), also does not support Shea's argument. In Dimant, the DEP sought contribution for costs expended to investigate and remediate ground water contamination from the defendant under the Spill Act. Id. at ___ (slip op. at 3). The agency alleged the defendant was responsible for ground water contamination. Ibid. The defendant operated a dry cleaning establishment. Ibid. The trial court found that the DEP had not proven a sufficient nexus between the discharge and the defendant and, thus, found no liability. Id. at 3-4. We affirmed. 418 N.J. Super. 530, 548 (App. Div. 2011).

The Supreme Court agreed that the proofs submitted by DEP did not demonstrate a connection between the discharge at the dry cleaning establishment and the ground water contamination. Dimant, supra, ___ N.J. at ___ (slip op. at 41-42). In reaching this determination, the Court accepted the interpretation of discharge proferred by DEP that any release of a hazardous substance onto the lands of the State is considered a discharge, id. at 24-25, and addressed the proofs required to link a discharge to the contaminated natural resource, id. at 26. It does not address in any way whether a property owner such as Shea could be absolved from liability for soil contamination in accordance with N.J.S.A. 58:10-23.11g(d)(2).

Unlike Dimant, Shea's case is not about a lack of evidence tracing the plume to his UST. Although contrary evidence was presented, Shea is not contesting the factual findings of the trial court. The trial court found that Shea's UST was a distinct source of the contamination plume found on Rossi's property.

Shea further argues that the trial court erred because it did not rely on appropriate equitable factors in N.J.S.A. 58:10-23.11f(a)(2) when it fashioned the remedy in this case. The statute allows for a party to bring a contribution claim against other responsible parties for the cost of clean up and removal, up to the liability of those other parties. N.J.S.A. 58:10-23.11f(a)(2). The statute further reads: "In resolving contribution claims, a court may allocate the costs of cleanup and removal among liable parties using such equitable factors as the court determines are appropriate." Ibid.

Contrary to Shea's contention, the judgment apportioned liability for remediation costs of the damage caused by Shea; it also held Rossi liable for the contamination created by her UST. This decision allocated contribution according to the responsibility of each party in accordance with N.J.S.A. 58:10-23.11f(a)(2).

The statute merely requires the trial court to consider "equitable factors as the court determines are appropriate." Ibid. Shea presents no legal support for the proposition that the trial court missed any particular equitable factor that should have been considered. Furthermore, Shea provides no support for his assertion that the trial court disproportionately spread the liability, when it was in accordance with the factual findings of responsibility.

Finally, although Judge Nugent determined he did not need to determine whether the failed UST on Shea's property leaked and caused contamination during Shea's ownership of the property, there is substantial credible evidence in the record to permit the fact-finder to find that fuel oil escaped from the UST, entered the soil and migrated to Rossi's backyard while Shea owned the property.

Affirmed.

[1] Rossi married and changed her name to "Vasile" and she used Vasile as her surname at trial. However, the pleadings and all documentary evidence refer to her as Rossi, and we elect to use that name.

[2] Although no definition is clearly provided in the record, "plume" is commonly used throughout the record to refer to the area and path of underground contamination.