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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2845-22  
A-2846-22  
A-3771-22

FPS RINK, LP, a Limited  
Partnership,

Plaintiff-Respondent,

v.

TWIN CITY FIRE INSURANCE  
COMPANY,

Defendant,

and

DISCOVER PROPERTY &  
CASUALTY INSURANCE  
COMPANY, GREAT AMERICAN  
ASSURANCE COMPANY,  
PENNSYLVANIA  
MANUFACTURERS'  
ASSOCIATION INSURANCE  
COMPANY, NOVA CASUALTY  
COMPANY, and GULF  
INSURANCE COMPANY, n/k/a/  
THE TRAVELERS INDEMNITY  
COMPANY,

Defendants-Appellants.

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Argued April 8, 2024 – Decided June 27, 2024

Before Judges Gilson, DeAlmeida, and Jacobs.

On appeal from interlocutory orders of the Superior Court of New Jersey, Law Division, Camden County, Docket No. L-1972-22.

Daren S. McNally argued the cause for appellants Discover Property & Casualty Insurance Company and Gulf Insurance Company, n/k/a The Travelers Indemnity Company (Clyde & Co US LLP, attorneys; Daren S. McNally, Barbara M. Almeida, Meghan C. Goodwin, and Ryan R. Iglesias, on the joint briefs).

Alyse Berger Heilpern argued the cause for appellant Great American Assurance Company (L'Abbate, Balkan, Colavita & Contini, LLP, attorneys; John D. McKenna, of counsel and on the joint briefs; Alyse Berger Heilpern, on the joint briefs).

Danielle Amanda Willard argued the cause for appellant Pennsylvania Manufacturers' Association Insurance Company (Stewart Smith, attorneys; Danielle Amanda Willard and Kevin M. Apollo, on the joint briefs).

Andrew John Gibbs argued the cause for appellant Nova Casualty Company (Wade Clark Mulcahy LLP, attorneys; Robert James Cosgrove, on the briefs).

Lee M. Epstein (Flaster Greenberg, PC), of the Pennsylvania bar, admitted pro hac vice, argued the cause for respondent (Flaster Greenberg, PC, attorneys; Lee M. Epstein and Jennifer D. Katz, on the briefs).

## PER CURIAM

These consolidated appeals arise out of insurance coverage disputes concerning whether the insurers are required to defend and indemnify the insureds in an underlying workplace personal injury action. One insurer filed a declaratory judgment action in Pennsylvania and, shortly thereafter, an insured filed an action in New Jersey against four other insurers. Eventually, all five of the insurers involved in these appeals were added to the New Jersey action, and four were added to the Pennsylvania action. So, the issue on these appeals is whether the New Jersey court should dismiss or stay its action and allow the Pennsylvania court to address the insurance coverage disputes on grounds of comity and the first-filed rule.

The New Jersey Law Division determined that there were special equities warranting New Jersey retaining jurisdiction to decide the coverage disputes because the underlying personal injury action involved allegations of toxic exposure at a workplace located in New Jersey. Accordingly, the Law Division issued a series of orders denying the insurers' motions to dismiss or stay the New Jersey action in favor of the Pennsylvania action. On leave granted, five insurers appeal from those orders. Because the Pennsylvania action did not involve all insurers when the New Jersey action was filed, the insurers did not clearly

establish that the Pennsylvania action was the first-filed action for comity purposes concerning four of the insurers. The Pennsylvania action, however, was the first-filed action for one of the insurers. Nevertheless, even if the Pennsylvania action is considered the first-filed action for all the insurers, there are special equities that warrant New Jersey retaining jurisdiction and deciding the insurance coverage disputes because the underlying personal injury action involves allegations of exposure to toxic substances at a New Jersey workplace. Accordingly, we affirm all the orders on appeal and remand so that the insurance coverage issues can be decided in the New Jersey action.

#### I.

On April 12, 2022, James McCrossin, Salvatore Raffa, and their wives sued FPS Rink, LP (FPS Rink) and several related entities associated with the Philadelphia Flyers professional ice hockey team (the Flyers) in the Court of Common Pleas of Philadelphia County, Pennsylvania (the Underlying Action).<sup>1</sup> McCrossin and Raffa, who worked as athletic trainers, alleged they suffered physical injuries from long-term exposure to carcinogens emitted from Zamboni

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<sup>1</sup> In their initial complaint, McCrossin and Raffa named various entities associated with the Flyers. In September 2022, they voluntarily dismissed several of those entities and in an amended complaint included only FPS Rink and Comcast Spectacor, LLC as named defendants. The amended complaint also included fictitious defendants plead as the "ABC Companies."

machines that had been used at the Flyers' training facility in Voorhees, New Jersey. McCrossin and Raffa had worked at the Voorhees facility since 2000 and 2004, respectively. McCrossin and his wife live in New Jersey, and Raffa and his wife live in Pennsylvania.

Between 2000 and 2022, FPS Rink and the related Flyers entities had commercial general liability insurance policies issued by at least six insurance companies covering various years. Accordingly, FPS Rink and the related Flyers entities put their insurers on notice of the Underlying Action and requested a defense and indemnification. One of the insurers, Nova Casualty Company (Nova), stated that it would provide a defense with a reservation of rights to disclaim coverage. Other insurers disclaimed coverage for defense and indemnification.

On June 29, 2022, Nova filed an insurance coverage declaratory judgment action in the Court of Common Pleas of Philadelphia County, Pennsylvania (the PA Action). Nova sought a declaration that the damages McCrossin and Raffa were seeking in the Underlying Action were not covered by its policies based on a pollution exclusion provision.

Approximately one month later, on August 2, 2022, FPS Rink filed a declaratory judgment action against four other insurers in the Law Division in

New Jersey (the NJ Action). The NJ Action named Great American Assurance Company (Great American), Discover Property & Casualty Insurance Company (Discover), Pennsylvania Manufacturers' Association Insurance Company (Manufacturers), and Twin City Fire Insurance Company (Twin City) as defendants and sought a determination that those insurance companies were obligated to defend and indemnify FPS Rink in the Underlying Action.<sup>2</sup> In its initial complaint, FPS Rink did not name Nova as a defendant. Moreover, at the time that the NJ Action was filed, none of the insurers named in the NJ Action were involved in the PA Action.

Approximately a week after FPS Rink filed the NJ Action, it filed an answer, affirmative defenses, and a counterclaim in the PA Action. While asserting that it was entitled to a declaratory judgment of coverage by Nova, FPS Rink also contended that Pennsylvania was not the proper forum because the cause of action arose in New Jersey, the parties and policies were more closely related to New Jersey, New Jersey law should be applied, and the coverage issues should be adjudicated in New Jersey.

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<sup>2</sup> FPS Rink's initial complaint named Hartford Insurance Company (Hartford) as a defendant but, shortly thereafter, it amended its complaint to replace Hartford with Twin City.

Over the next several months, Great American, Manufacturers, and Discover moved to intervene in the PA Action. Manufacturers and Great American also moved to dismiss or stay the NJ Action, alleging that the insurance coverage issues should be addressed in the PA Action on grounds of comity and the first-filed rule. During that same time, FPS Rink moved to amend its complaint in the NJ Action to add Nova and Gulf Insurance Company (Gulf) as defendants.<sup>3</sup>

In January 2023, the Law Division heard arguments on Great American's and Manufacturers' motions to dismiss the NJ Action and FPS Rink's motion to amend its complaint. On January 6, 2023, the court entered three orders: (1) denying Manufacturers' motion to dismiss; (2) denying Great American's motion to dismiss; and (3) granting FPS Rink's motion to amend its complaint. FPS Rink then filed a second amended complaint in the NJ Action and added Nova and Gulf as defendants.

Over the next several weeks, Manufacturers and Great American moved for reconsideration and to dismiss the second amended complaint. Thereafter,

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<sup>3</sup> Gulf is now part of the Travelers Indemnity Company (Travelers). Discover is also part of Travelers. Therefore, in some of the orders and pleadings, Gulf and Discover are identified as Travelers.

Nova, Discover, and Gulf also moved to dismiss the second amended complaint in the NJ Action.

In late March 2023, the Law Division heard oral argument on: (1) the motions for reconsideration; (2) the motions to dismiss the second amended complaint on the theory that the PA Action was first-filed; and (3) the motion to stay proceedings in the NJ Action pending an anticipated appeal. In a series of orders issued on March 24, 2023 and March 31, 2023, the Law Division denied the insurers' motions to dismiss the NJ Action and motions for reconsideration. On March 30, 2023, the Law Division also entered an order granting the insurers' motion to stay the NJ Action pending their anticipated motion to seek leave to appeal.

Meanwhile, in February 2023, FPS Rink filed a motion in the PA Action to dismiss that action on the grounds of comity in favor of the NJ Action. On April 28, 2023, the Pennsylvania court denied the motion to dismiss but stayed the PA Action, pending the outcome of the NJ Action or further order by the Pennsylvania court. The Pennsylvania court noted the conflict between Pennsylvania and New Jersey law regarding coverage under the policies' pollution exclusions and reasoned that while the choice of law question was not yet ripe, New Jersey law would likely apply. The Pennsylvania court cited that



preliminary reason as a ground for deferring to the Law Division on the determinations of choice of law and coverage issues.

So, by April 2023, Great American, Manufacturers, and Discover had intervened and joined Nova in seeking declaratory judgments concerning their insurance coverage in the PA Action. Those four insurers, plus Gulf and Twin City, were all also named as defendants in the NJ Action, where FPS Rink was seeking a declaration that all its insurers were obligated to provide defense and indemnification in the Underlying Action.

Thereafter, Great American, Manufacturers, Gulf, Discover, and Nova all moved for leave to appeal the denial of their motions to dismiss the NJ Action on grounds of comity and the first-filed rule. In a series of orders, we granted leave to appeal and consolidated these three appeals. There are seven orders being appealed: two orders from January 6, 2023; three orders from March 24, 2023; one order from March 31, 2023; and one order from June 7, 2023. All those orders either denied the motions to stay or dismiss the NJ Action or denied motions for reconsideration.

## II.

Appellate courts evaluate a trial court's decisions of comity matters under an abuse of discretion standard. See Sensient Colors Inc. v. Allstate Ins. Co.,

193 N.J. 373, 390 (2008). "The determination of whether to grant a comity stay or dismissal is generally within the discretion of the trial court." Ibid.

On appeal, the insurers raise several related arguments challenging the Law Division's orders denying their motions to dismiss the NJ Action and their motions for reconsideration. The primary contention is that the NJ Action should be dismissed based on comity and the first-filed rule. In that regard, the insurers argue that the PA Action filed by Nova involves an insurance coverage dispute that raises essentially the same coverage issues concerning all the insurers. Nova, for its part, contends that its action is clearly the first-filed action and that the Law Division erred in denying its motion to dismiss it from the NJ Action. Finally, Manufacturers argues that if the matter is remanded, it should be reassigned to a different judge because the Law Division judge who heard the various motions has "demonstrated a commitment to his prior rulings and given the impression of partiality."

Accordingly, there are three primary issues in these consolidated appeals: (1) whether the PA Action should be considered the first-filed action with respect to all the insurers; (2) whether, if the PA Action is first-filed, special equities weigh in favor of continuing the NJ Action; and (3) whether the NJ

Action should be reassigned to a different judge if we reject the insurers' arguments and remand.

A. Comity and the First-Filed Rule.

"New Jersey has long adhered to 'the general rule that the court which first acquires jurisdiction has precedence in the absence of special equities.'" Id. at 386 (quoting Yancoskie v. Del. River Port Auth., 78 N.J. 321, 324 (1978)). "Under the first-filed rule, a New Jersey state court ordinarily will stay or dismiss a civil action in deference to an already pending, substantially similar lawsuit in another state, unless compelling reasons dictate that it retain jurisdiction." Platkin v. Smith & Wesson Sales Co., 474 N.J. Super. 476, 487 (App. Div. 2023) (quoting Sensient Colors, 193 N.J. at 386).

When a party moves for a comity stay or dismissal, the court must undertake a two-step analysis. First, the court decides whether the moving party has shown "that there is a first-filed action in another jurisdiction involving substantially the same parties, claims, and legal issues as the action in this state." Sensient Colors, 193 N.J. at 393. Then, "[o]nce that is established, the party opposing a stay or dismissal must demonstrate the presence of one or more special equities that overcome the presumption favoring the first-filed action." Ibid.

1. Determining the First-Filed Action.

The parties seeking "a comity stay or dismissal [have] the burden of establishing . . . that an earlier-filed action in another state 'involve[s] substantially the same parties, the same claims, and the same legal issues.'" Id. at 392 (second alteration in original) (quoting Am. Home Prods. Corp. v. Adriatic Ins. Co., 286 N.J. Super. 24, 37 (App. Div. 1995)). "[T]he parties, claims, and issues in the two lawsuits" need not be "exactly the same"; rather, the question is whether the issues are "substantially the same." Id. at 391 (emphasis in original). That determination is fact-specific. For example, where a later-filed action significantly expands the scope of the claims at issue by adding additional parties and claims, the earlier action may not be considered the "first-filed" action for comity purposes as to the additional parties and claims. See Cont'l Ins. Co. v. Honeywell Int'l, Inc., 406 N.J. Super. 156, 175-76 (App. Div. 2009).

In Continental, the New Jersey complaint was filed before multiple out-of-state complaints. Id. at 175. The later-filed actions included more claims; while there were "a few overlapping claims," the overlapping claims were addressed "at early stages and, in most respects, dismissed by the courts of our sister states." Id. at 176. Therefore, we held that it was an "oversimplification"

to view the New Jersey complaint as first-filed because "the claims in question were filed first in other states." Ibid.

The PA Action was clearly the first-filed action concerning the claims by Nova. In that action, Nova seeks a declaration concerning its obligation to defend and indemnify FPS Rink and the other Flyers entities in the Underlying Action. That is the same issue of coverage by Nova that FPS Rink seeks to determine in the NJ Action.

Great American, Discover, Manufacturers, and Gulf argue that the PA Action should also be considered the first-filed action concerning their obligations to defend and indemnify FPS Rink and the other Flyers entities. That issue is not as clear. When FPS Rink filed the NJ Action, Great American, Discover, Manufacturers, and Gulf were not involved in the PA Action. Instead, Great American, Discover, and Manufacturers moved for and were granted leave to intervene in the PA Action months after the NJ Action had been filed. So, when the NJ Action was filed, the PA Action did not involve the same parties.

Nevertheless, we deem the more critical issue on this appeal to be whether the PA Action, when initiated, involved the same claims and same legal issues that are now involved in the NJ Action. The insurers argue that their claims on legal issues are substantially the same because all parties are seeking

determinations of whether the insurers have an obligation to defend and indemnify FPS Rink and the Flyers entities in the Underlying Action.

That general framing of the issues, however, is too broad. Ultimately, some court will need to determine whether each policy provides coverage in the Underlying Action. The six insurers involved in this action provided coverage during different periods of time between 2000 and 2022. For example, Gulf provided coverage from June 2000 to June 2002; Discover provided coverage from June 2004 to June 2008; Great American provided coverage from June 2008 to June 2013; Nova provided coverage from June 2013 to March 2019; and Manufacturers provided coverage from March 2019 to March 2022. Therefore, a court will need to analyze whether those different coverage periods involve substantially the same issues.

Additionally, a court will need to analyze the specific policies. All the insurers contend that they do not need to provide coverage based on pollution exclusions included in their policies. To date, however, no court has analyzed the specific policies, and no court has determined that the exclusions in those different policies are all substantially the same. Indeed, the insurers did not ask the Pennsylvania court or the Law Division to make those determinations. In

short, it is not clear that the coverage issues raised by Nova are the same coverage issues raised by Discover, Gulf, Manufacturers, or Great American.

Having identified some of the unresolved issues concerning the first-filed action, we nonetheless hold that the first-filed determination is not the critical determination for resolving the comity issue in these matters. Instead, we conclude that an analysis of the special equities is the controlling issue in these cases. In that regard, the New Jersey Supreme Court has explained: "[T]he presence of special equities may lead a court to disregard the traditional deference paid to the first-filed action in another state and to exercise jurisdiction over a case filed in this state." Sensient Colors, 193 N.J. at 387.

## 2. Special Equities.

"Special equities are reasons of a compelling nature that favor the retention of jurisdiction by the court in the later-filed action." Ibid. Courts have found special equities under a variety of circumstances, including when (1) "significant state interests . . . are implicated, and when deferring to a proceeding in another jurisdiction "would contravene the public or judicial policy" of the forum state"; (2) "it would cause "great hardship and inconvenience" to one party by proceeding in the first-filed action and no unfairness to the opposing party by proceeding in the second-filed action"; (3)

"one party has engaged in jurisdiction shopping to deny the other party the benefit of its natural forum"; and (4) "a party acting in bad faith has filed-first in anticipation of the opposing party's imminent suit in another, less favorable, forum.""<sup>1</sup> Smith & Wesson Sales Co., 474 N.J. Super. at 487 (omission in original) (quoting Sensient Colors, 193 N.J. at 387-89). In Sensient Colors, the Court found special equities supported New Jersey's exercise of jurisdiction because the action in New Jersey involved environmental cleanup of property located in New Jersey. 193 N.J. at 393-94.

The Law Division in the NJ Action focused on the special equities related to providing insurance coverage for alleged personal injuries from exposure to toxic chemicals in a New Jersey workplace. We discern no abuse of discretion in that finding. Indeed, New Jersey has a strong policy of protecting employees from workplace injuries. See Romanny v. Stanley Baldino Constr. Co., 142 N.J. 576, 584 (1995) (explaining New Jersey's public policy in the context of providing workers with uninterrupted workers' compensation coverage); Malone v. Aramark Servs., Inc., 334 N.J. Super. 669, 674 (Law Div. 2000) (noting that "the public policy of New Jersey . . . accord[s] injured workers significant protections and benefits"). Whether McCrossin or Raffa ultimately prove their claims is not the relevant issue in making the comity determination. Instead, the



relevant question is whether New Jersey has a strong public policy interest in ensuring that the Voorhees facility is safe.

The insurers argued that the trial court misread and misapplied the Court's holding in Sensient Colors. In that regard, they contend that Sensient Colors involved environmental remediation of a New Jersey property and this case does not. We reject this argument because the insurers are trying to narrow the holding of Sensient Colors. While Sensient Colors involved the remediation of property, the Court's rationale and holding were not limited to the facts of that case. Indeed, the Court discussed and explained that there could be a variety of special equities and the focus should be on whether there is a "significant state interest[]" rather than on whether environmental remediation specifically is involved. Sensient Colors, 193 N.J. at 388-89. In Sensient Colors, the Court held that New Jersey had a strong public policy interest in addressing harms to New Jersey residents from contaminated sites within the state. Id. at 394. Similarly, this case involves New Jersey's strong public policy interest in ensuring that workplaces are safe and that employees working in New Jersey are not exposed to harmful substances. Also like in Sensient Colors, that interest includes ensuring that insurance policy holders are not wrongfully denied indemnification if a hazard is proven. See ibid.

We also reject the insurers' argument that retaining jurisdiction in this matter would be inconsistent with the holding in Continental. The insurers contend that Sensient Colors and Continental establish that in a coverage action, the state with the greatest interest is the state where "the potential ultimate beneficiaries of the coverage litigation are located." Accordingly, they argue that in this case, the plaintiffs in the Underlying Action are located both in New Jersey and Pennsylvania. The insurers are misinterpreting our holding and rationale in Continental.

In Continental, we addressed two consolidated cases. In one of those cases, there was an earlier-filed action in New Jersey and later-filed actions in other states. Cont'l Ins. Co., 406 N.J. Super. at 165, 168. The New Jersey action was more limited because it involved four policies covering a four-year period and five insurers. Id. at 175. In contrast, four later-filed actions in other states each involved over twenty insurers and over ninety insurance policies covering four or more decades. Id. at 176. Given those specific facts, we held that the earlier-filed New Jersey action should not be considered the first-filed action for comity purposes. Id. at 176-77. Our analysis, however, made clear that we were dealing with fact-specific circumstances. Id. at 177.

The Law Division appropriately considered the specific facts involved in this case, and we discern no abuse of discretion in its analysis of the special equities justifying retaining jurisdiction in New Jersey. Indeed, we agree with that analysis and holding.

Finally, we note that the court in the PA Action has stayed that action pending a resolution of the issues in the NJ Action. Thus, we are not faced with a situation where two courts may reach conflicting resolutions. That said, the court in the PA Action independently determined that comity considerations warranted a stay of that action. We need not, and do not, comment on the choice of law issue. That is an issue the Law Division will address when it analyzes the substance of the coverage disputes on remand.

**B. The Request for Reassignment to a Different Judge on Remand.**

Manufacturers argues that, if this matter is remanded, it should be assigned to a different Law Division judge because the judge who has addressed the issues to this point "has demonstrated a commitment to his prior rulings and given the impression of partiality."

We have "the authority to direct that a case be assigned to a [different] judge upon remand," but we use that authority "sparingly." Graziano v. Grant, 326 N.J. Super. 328, 349-50 (App. Div. 1999). A matter should be assigned to

a different judge only when "there is a concern that the trial judge has a potential commitment to his or her prior findings." Id. at 349; see Brown v. Brown, 348 N.J. Super. 466, 493 (App. Div. 2002).


In this matter, Manufacturers' arguments are focused on the Law Division's legal analysis and denial of reconsideration. Having reviewed those decisions, we discern no error of law and no abuse of discretion. We also see no improper commitment to a prior holding or finding and no reason to reassign the matter to a different judge on remand.

### III.

In summary, we affirm all the orders on appeal. The matter is remanded so the Law Division can make the insurance coverage determinations raised by the parties. In that regard, we note that the NJ Action includes all six insurers, while only four insurers are involved in the PA Action.

Affirmed and remanded. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION