STATE OF MICHIGAN

COURT OF APPEALS

KRUEGER SEED FARMS, INC.,

Plaintiff/Counter Defendant/Garnishor-Appellee,

v

DONALD SKLARCZYK, MARY KAY SKLARCZYK d/b/a/ SKLARCZYK SEED FARM and SKLARCZYK MINI SPUDS,

Defendants/Counter Plaintiffs/Third-Party Plaintiffs-Appellees,

and

MICHIGAN CROP IMPROVEMENT ASSOCIATION,

Defendant/Third-Party Defendant-Appellee,

and

COLONIAL INSURANCE COMPANY,

Garnishee Defendant-Appellant.

UNPUBLISHED
March 9, 1999

No. 200249
Otsego Circuit Court
LC No. 92-005342-CZ

DUANE R. BASEL, TERRY L. BASEL d/b/a/ BASEL SEED FARM, and PAUL SCHALK, MARY S. SCHALK d/b/a/ SCHALK SEED FARM,

Not participating,

v

No. 200250
Otsego Circuit Court
LC No. 93-005615-CZ

DONALD SKLARCZYK, MARY KAY SKLARCZYK d/b/a/ SKLARCZYK SEED FARM and SKLARCZYK MINI SPUDS,

Defendants/Third Party Garnishors-Appellees,

and

MICHIGAN CROP IMPROVEMENT ASSOCIATION,

Defendant-Appellee,

and

KRUEGER SEED FARMS,

Third-Party Defendant-Appellee,

and

COLONIA INSURANCE COMPANY,

Garnishee Defendant-Appellant.

Before: Saad, P.J., and Jansen and Hoekstra, JJ.

SAAD, J. (dissenting).

I respectfully dissent. Because all of the farmers' claimed losses were the direct consequence of damage to the potatoes, the policy's exclusion for damage to tangible property precluded coverage.

The pertinent exclusion provision of the insurance policy states that the insurer is not liable for loss directly or indirectly resulting from "any actual or alleged damage to or destruction of any tangible property including loss of use thereof". Thus, the primary issue in this case can be framed as: Did the farmers' losses stem from property damage, in which case the policy exclusion barred plaintiff's coverage?

Citing *Fitch v State Farm Fire & Casualty Co*, 211 Mich App 468; 536 NW2d 273 (1995), the majority has concluded that the loss is better characterized as an economic loss, which is not excluded from the coverage. However, the *Fitch* Court stated that the property damage exclusion was not applicable because:

> Froling [plaintiff in the underlying lawsuit] did not allege, and the record does not support, a claim that his tangible property was damaged or destroyed as a result of plaintiff's statements. *Moreover, the damages Froling claims do not stem from physical damage to or destruction of tangible property.* [*Id.*, 474.]

Here, all of the damages the farmers claimed stemmed from the damage to the potatoes, namely the bacterial ring rot contamination. Applying the *Fitch* reasoning, the loss was not covered.

I conclude, as a matter of law, that the potatoes were "damaged" within the meaning of the policy because they were exposed to a communicable potato disease which rendered them unfit for use as certified seed potatoes, regardless of the fact that most of the potatoes manifested no signs of disease. I also conclude that the loss of eligibility for seed certification constituted a loss of use within the meaning of the exclusion, irrespective of the fact that the potatoes could still be used for less profitable purposes.

In *General Insurance Company of America v Gauger*, 13 Wash App 928; 538 P2d 563 (1975), a seed supplier represented to buyers that the barley he sold was Unitan spring barley. In fact, it was a mixture of spring and winter varieties, which "did not properly head out or produce a normal crop." *Id.*, 928-929. The supplier's customers settled their claims with the supplier, which then sought indemnity from its insurance carrier. The supplier maintained that this constituted property damage, which was covered by the policy; the insurance carrier contended that it was economic loss, which was excluded (the converse of the Colonia insurance policy). *Id.*, 929-930. The court concluded that the poor crop constituted property damage:

> Having found injury to tangible property, General's contention that crop loss is not covered by the policy must fail. In this contention, General confuses the injury to tangible property with the nature of the damages flowing therefrom. Crop loss is merely a measure of the damage, albeit intangible, flowing from the injury to tangible property and not, itself the injury. [*Id.*, 931.]

Similarly, in *Safeco v Insurance Company v D.E. Munroe*, 165 Mont 185; 527 P2d 64 (1974), the insured sold winter wheat to a customer who wanted spring wheat. Consequently, the customer was forced to replant and sustain a reduced crop yield. *Id.*, 187. The insurer argued that there was no coverage because there was no damage to tangible property. *Id.*, 190. The court rejected this argument, holding that it was "beyond dispute that a Montana wheat field and the crop therein, is tangible property." The court also concluded on these facts that the customer's losses, including the loss of use of property, resulted from injury to intangible property. *Id.*, 192.

In *St Paul Fire and Marine Ins Co*, 365 F2d 361 (CA 8, 1966), the insured, a grain supplier, sold customers the wrong variety of wheat seed, which was less productive than the requested variety. *Id.*, 363-364. The supplier argued that its insurer was obligated to provide coverage under the policy, because the loss involved damage to property. *Id.*, 365. The Court agreed, holding that the "diminution in the productivity of the wheat crop, as the result of an inferior and deficient quality of seed wheat, constitute property damage within the coverage of this policy." *Id.*, 366.

Accordingly, I conclude that the potatoes' exposure to disease constituted property damage. Because all of the farmers' losses were the direct consequence of this property damage, they came within the policy exclusion. I would therefore reverse the trial court's order granting summary disposition against garnishee defendant Colonia.

/s/ Henry William Saad