STATE OF VERMONT
WINDSOR COUNTY, SS

Eugene R. Guy Plaintiff v. Town of Springfield Defendant Town of Springfield Third-party Plaintiff v. J.P. Sicard, Inc, d/b/a Sicard Construction and Acadia Insurance Company Third-party Defendants	SUPERIOR COURT Docket No. 467-7-09 Wrcv

DECISION ON MOTION TO DISMISS OR SEVER

This litigation arises out of claimed damage to property owned by Plaintiff which he claims was caused by negligent repair of the sidewalk adjacent to his property and negligent supervision by the engineers employed by the Town in overseeing and inspecting the work of the contractor, J.P. Sicard. The Town has brought third-party claims against the contactor based upon the contract between Sicard and the Town. The Town has also brought third-part claims against Acadia insurance seeking declaratory relief and a second count, styled as a breach of contract, alleging a duty to indemnify and defend the Town under a policy of insurance issued by Acadia.

Acadia has moved to dismiss or sever the declaratory relief count against it, asserting that the litigation of an insurance coverage issue along with a negligence claim unfairly injects insurance into the case. The Town opposes the motion arguing that keeping the claims together promotes judicial economy and evidence of liability insurance when offered for another purpose than to show a party acted negligently is admissible.

Vermont has long guarded against the unnecessary introduction of insurance issues into a case. In *Wilbur v. Tourangeau*, 116 Vt. 199 (1950), a case involving claims arising out of an automobile accident, the Court stated:

> The correct procedure is to exclude all reference to insurance at these trials. The fact of insurance may incidentally and unavoidably appear. But even this should not be permitted on slight grounds or for specious reasons. The whole subject is foreign to the issue to be tried, and its introduction, even incidentally, should be avoided whenever it is practicable to do so. 119 Vt. at 567.

The introduction of insurance before a jury has been viewed as a "poisonous fact." *Joslin v. Griffith*, 125 Vt. 104 (1965); *Ryan v. Barrett*, 105 Vt. 21 (1932). The unnecessary introduction of insurance often requires a mistrial. *Bliss v. Moore*, 112 Vt. 185 (1941).

The Town is correct that at this early stage the issue of insurance is not before the jury and that no prejudice exists at this time. Such would not be the case at the time of trial. While there may be reasons of economy for conducting discovery on all issues at one time, participation of the insurer in discovery in the tort claim may raise practical issues concerning the possible use of such discovery at the time of trial (e.g impeachment by the use of a question propounded by the insurers attorney).

In *Western Fire Insurance v. Persons*, 393 N.W. 2d 234 (Minn. App. 1986), the court was faced with similar circumstances to the instant matter. In *Persons* the trial court severed the coverage claim from the tort action and ordered the coverage claim tried first. The appellate court, although reversing on other grounds, affirmed the trial court severance decision noting:

> The trial court concluded that the actions should be severed to avoid the conflict that may result from requiring the insurer to take two positions at trial: defending the insured in the tort action and defending itself on the coverage action. In the interest of judicial economy and to minimize possible prejudice to both parties, the court decided to first try the declaratory judgment action. We cannot say the trial court abused its discretion in so holding. 393 N.W.2d at 236.

Acadia argues the declaratory action is not properly brought as a third party claim in this case as by doing so the issue of insurance will be improperly brought before the jury at the same time they are deciding liability issues. The potential prejudice from a joint trial on the tort and coverage issues is manifest. Even so, dismissal of the declaratory claims is not required. *Christian v. Sizemore*, 383 S.E. 2d 810 (W.Va. 1989). But see *Home Insurance v. Hillview 78 West Fire District*, 395 So. 2d 43 (Ala.1981); *Employers' Fire Ins. Co. v. Beals*, 103 R.I. 623, 240 A.2d 397 (1968). Severance of the tort and coverage claims provides adequate protection; there is no procedural reason to require dismissal and re-filing of the declaratory action at a later time.

The preferred practice is to try the declaratory coverage issues before the tort action is decided where the coverage and tort claims are distinct. See *Grain Dealers Mut. Ins. Co. v. Cady*, 318 N.W.2d 247 (Minn.1982); *American Home Assurance Co. v. Employers Mut. of Warsaw*, 406 N.Y.S.2d 826 (N.Y. App. Div.1978). This promotes the possible resolution of the tort claim through clarification of the coverage issues. In this

case the issues concerning coverage are intertwined with the contract between Sicard and the Town. In addition, the insurer here is providing a defense to the tort claim despite the coverage issues. Where there is not a clear distinction between the tort and coverage claims, resolution of the tort claim ahead of the declaratory issues is proper. *Christian v. Sizemore*, 383 S.E. 2d 810 (W.Va. 1989).

As a result, the Court will **GRANT** Acadia's request for severance of the declaratory action (and the related breach of contract claim-Count II) and **DENY** Acadia's request to dismiss the declaratory action. The claims against Acadia will be decided after the other claims.

Because the declaratory action remains pending, Acadia shall receive copies of discovery and other pleadings in the case. They may not propound discovery at this juncture. They may also attend, but not participate in, any depositions conducted in the case. This limitation pertains only to counsel defending Acadia's interests in the third party claim against it.

Dated at Woodstock this 15th day of April, 2010.

Harold E. Eaton, Jr.
Superior Court Judge