SHORT FORM ORDER

INDEX # 29155/98

SUPREME COURT - STATE OF NEW YORK
IAS PART XXXVIII SUFFOLK COUNTY

PRESENT:
Honorable **JAMES M. CATTERSON**

R/D: 03-22-04
MOTION NO. 014 MG; 015 MOT-D; 016 MD; 017 MG CASEDISP

ST. CHARLES HOSPITAL and REHABILITATION CENTER,

Plaintiff,

-against-

ROYAL GLOBE INSURANCE COMPANY, ROYAL INSURANCE COMPANY OF AMERICA, JOSEPH MULHOLLAND and SARAH J. MULHOLLAND as Co-Guardians of the Person and Property of TARA MULHOLLAND An Incapacitated Person, JUSTIN E. DOHENY, M.D., P.C., JUSTIN E. DOHENY, M.D., CHARLES PETIGROW, M.D., P.C., CHARLES PETIGROW, M.D., IRA MARVIN CIMONS, M.D., P.C., And IRA MARVIN CIMONS, M.D.,

Defendants.

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Upon reading and filing the following papers in this matter: (1) Notice of Motion dated March 10,2004 and supporting papers by plaintiff St. Charles Hospital and Rehabilitation Center; (2) Memorandum of Law in Support of Plaintiffs Motion for Summary Judgment dated August 28,2003 by plaintiff; (3) Affirmation of Dennis J. Artese in Support of Plaintiffs Motion for Summary Judgment and supporting papers dated November 19,2003 by plaintiff; (4) Affidavit of Deborah L. Lantz in Support of Plaintiffs Motion for Summary Judgment dated November 18,2003; (5) Reply Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment and in Opposition to Royal's Cross-Motion for Summary Judgment by plaintiff (6) Notice of Cross-Motion dated March 11, 2004 by defendant Justin E. Doheny, M.D., P.C. and Justin E. Doheny, M.D.; **(7)** Notice of Cross-Motion dated March 11,2004 and supporting papers by defendants Royal Globe Insurance Co. and Royal Insurance Co. of America's; (8) Royal Globe Insurance Co and Royal Insurance Co. of America's Memorandum in Opposition to Plaintiffs Motion for Summary Judgment and in Support of Cross-Motion for Summary Judgment dated October 20,2003 by defendants Royal Globe Insurance Co. And Royal Insurance Co. Of America; (9) Reply Affirmation of Justin Kattan and supporting papers dated December 1,2003; (10) Royal Globe Insurance Co. And Royal Insurance Co. Of America's Reply Brief in Support of Cross-Motion for Summary Judgment and in Opposition to the Cross-Motion of the Physician Defendants and Mulholland dated December 1, 2003 and supporting papers by defendants Royal Globe Insurance Co. And Royal Insurance Co. Of America; (11) Affidavit in Opposition to Royal's Cross-Motion for Summary Judgment dated March 6,2004 March 16,2004 and supporting papers by Joseph Mulholland and Sarah Mulholland, as co-guardian of the person and property of Tara Mulholland, an incapacitated person; (12) Notice of Cross-Motion dated March 12,2004 and supporting papers by defendants Ira Marvin Cimons, M.D., P.C. and Ira Marvin Cimons, M.D.;' and now

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'The Affidavit In Support And In Partial Opposition by plaintiff St. Charles Hospital dated November 26,2003 is not considered by this Court as there is no record of any such motion having been filed.

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing, the motions are decided as follows:

ORDERED that the plaintiff St. Charles Hospital's motion for summary judgment is granted; the plaintiff is entitled to indemnification for liability in the underlying malpractice action. It is further

ORDERED that the defendants Cimons' motion for summary judgment is granted; it is further

ORDERED that the motion by the defendants Doheny is granted to the extent that it seeks the same relief as that of the plaintiff St. Charles and denied in all other respects. It is further

ORDERED that the defendants Royal Insurance Company of America's and Royal Globe Insurance Company's cross-motion for summary judgment is denied. It is further

ORDERED that the plaintiff is directed to serve a copy of this decision and order upon all parties.

This is a declaratory judgment action commenced by the plaintiff, St. Charles Hospital and Rehabilitation Center (hereinafter referred to as "St. Charles") against the defendants, Royal Globe Insurance Co., Royal Insurance Company of America (hereinafter collectively referred to as "Royal"), Joseph Mulholland and Sarah J. Mulholland as co-guardians of the Person and Property of Tara Mulholland an Incapacitated Person, Justin E. Doheny, M.D., P.C., Justin E. Doheny, M.D., Charles Petigrow, M.D., P.C., Charles Petigrow, M.D., Ira Marvin Cimons, M.D., P.C. and Ira Marvin Cimons, M.D., for a declaration that Royal breached its contractual duty to St. Charles by refusing to defend and indemnify St. Charles in an underlying medical malpractice action. The undisputed facts of the case are that the medical malpractice action [Mulholland v. St. Charles et al., index no. 3941/1996] involves the delivery and post delivery care of Tara Mulholland, who was born at St. Charles Hospital, Port Jefferson, New York on March 16, 1975. **At** the time of Tara's birth, St. Charles was listed **as** an additional insured on a hospital malpractice liability policy sold by Royal to the Catholic Diocese of Rockville Centre (hereinafter referred to as the "Diocese"). The policy included a provision for coverage up to $500,000.00 for "each occurrence". **As** of March 1, 1975, Royal also provided to the Diocese a "Comprehensive Catastrophic Liability Coverage" policy with a limit of $12,000,000.00 (twelve million) "per occurrence." St. Charles was named as an additional insured on this policy as well. The Diocese was responsible for and did pay the premiums on both of these policies.

In June 1994, more than nineteen years after Tara's birth, the medical records department of St. Charles received a letter from the law firm of Black and Black, requesting Tara's medical records. Three months later, the medical records department received a letter from the law firm of Pegalis & Wachsman [now Pegalis & Erickson, LLC] requesting the obstetrical records of

Tara Mulholland's mother. On March 7, 1996, Joseph and Sarah Mulholland, grandparents and legal guardians of Tara, commenced the underlying medical malpractice action on her behalf. The Mulhollands asserted the claim of medical malpractice against of St. Charles and three doctors employed by the hospital [the same doctors named in the instant declaratory judgment action].

At the time of the commencement of the malpractice action, neither the Diocese nor St. Charles were insured by Royal. Both entities were now insured under the Diocesan self-insured plan. The risk department manager for St. Charles forwarded the summons and complaint to attorney Patrick Adams who wrote to Royal about the underlying lawsuit on January 15, 1997. Adams wrote in that letter: "it wasn't until we forwarded a bill to St. Charles that we were advised that Royal should be paying the bill." On March 10, 1997, Royal disclaimed coverage. In that disclaimer, Royal stated it was disclaiming coverage "on the grounds that Royal did not receive notice [. . .] until January 16, 1997, nine months after a lawsuit had been filed."

In December 1998, St. Charles commenced the instant declaratory judgment action alleging Royal had breached it contractual duty to defend and indemnify the hospital. The underlying medical malpractice action was settled for **$4.3** million dollars before this Court on the record on March 26, 2004. St. Charles now moves for *summary* judgment in its declaratory judgment action on the grounds that Royal's disclaimer of coverage was improper because New York law requires that Royal must show prejudice before disclaiming coverage, and, that as a matter of law, Royal cannot show such prejudice; and that it had a reasonable excuse for the delay in notice, and whether the excuse is reasonable is a triable issue of fact. Royal cross-moves for summary judgment on the grounds that an insurer has the right to timely notice of claim, and because St. Charles did not comply with the notice of claim provision, Royal properly disclaimed coverage. Royal also argues that an insurer does not have to show prejudice in such a situation, and that St. Charles' claim of a reasonable excuse is a "fantasy."[2]

For the reasons set forth below, the Court finds that Royal was required to demonstrate prejudice before the disclaimer of coverage can be upheld. Furthermore, the Court agrees with St. Charles that Royal, as a matter of law, cannot show prejudice. Finally, the Court finds that no triable issue of fact exists as to whether St. Charles' excuse was reasonable. Accordingly,

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[2]Defendants Justin E. Doheny, M.D., P.C., Justin E. Doheny M.D., **Ira** Marvin Cimons, M.D., P.C. and Ira Marvin Cimons, M.D. also cross-moved for *summary* judgment. The cross-motions of the Cimons defendants essentially mirrors that of St. Charles and will be treated as one motion for the purposes of this decision and order. The cross-motion of the Doheny defendants seeks in part the same relief as that of St. Charles **and** will be treated as above. However, the remainder of the Doheny defendants' motion which seeks a declaration that Royal defend and indemnify the Doheny defendants as either employees or volunteers of St. Charles is unsupported by an affidavit of a person with personal knowledge and is therefore denied. C.P.L.R. 3212(b); Figueroa v. Flatbush Women's Services. Inc., 222 A.D.2d 398, **634** N.Y.S.2d 518 (2d Dept. 1995).

Royal's cross-motion for summary judgment is denied, St. Charles' motion for summary judgment is granted and Royal is ordered to indemnify St. Charles according to the terms of the original policies obtained by the Diocese.

This Court is well aware that New York is one of a minority of states that still maintains a "no-prejudice" standard in insurance law. Brandon v. Nationwide Mutual Insurance Co., 97 N.Y.2d 491,496, 743 N.Y.S.2d 53, 56,769 N.E.2d 810, 813 (2002)(Kaye, Ch.J.). The "no-prejudice" rule means that failure of timely notice by an insured allows an insurer to disclaim coverage without showing prejudice. Id. at 495-496, 743 N.Y.S.2d at 55. The "no-prejudice" rule is an exception to the well-established principle of general contract law that "one seeking to escape the obligation to perform under a contract must demonstrate a material breach or prejudice." Id. at 496, 743 N.Y.S.2d at 56, citing Unigard Security Insurance Co. v. North River Co., 79 N.Y.2d 576,581,584 N.Y.S.2d 290,292,594 N.E.2d 571,573 (1992). The Court of Appeals has made it clear that this exception is tolerated because of "the insurer's need to protect itself from fraud by investigating claims soon after the underlying events; to set reserves and to take an active early role in settlement discussions." Id; American Home Assurance Co. v.International Insurance Co., 90 N.Y.2d 433,441-442,661 N.Y.S.2d 584, 587,684 N.E.2d 14, 17(1997). In Brandon, Chief Judge Kaye established that the "no-prejudice" exception is a limited one. In that case, the Court ruled that insurers must demonstrate prejudice where they rely on a defense of late notice of legal action in the uninsured motorist context when the notice of claim was timely. The Court recognized that notice of claim is typically submitted before notice of legal action, and concluded that "while immediate notice of legal action may indeed help insurers to protect themselves [. . .] the notice of claim requirement serves this purpose." Brandon v. Nationwide Mutual Insurance Co., 97 N.Y.2d at 497, 743 N.Y.S.2d at 57.

Royal argues that the Brandon Court left unaltered the "no-prejudice" exception for timely notice of claim, and that Brandon stands for the proposition that an insurer need show prejudice for late notice of legal action when the timely notice of claim requirement has been met. Royal then asserts that in the instant case where St. Charles notified Royal of the lawsuit in January 1997, St. Charles failed to provide timely notice of claim; and that timely notice of claim is condition precedent to coverage. Royal then concludes that the Brandon decision upholds well-settled New York law and mandates summary judgment in favor of the insurer.

Royal has failed to recognize the turning of the tide. Indeed, this Court finds Royal's reasoning oddly oblivious to the demonstrable aversion with which the Court of Appeals has scrutinized the "no-prejudice" rule which allows insurers to "avoid their obligations to premium-paying clients." Brandon v. Nationwide Mutual Insurance Co., 97 N.Y.2d at 496,743 N.Y.S.2d at 56.

The Brandon decision is the clearest signal yet of the Court's acknowledgment that the time has come for New York to recognize what the majority of other states have recognized, namely that the egregious imbalance between insurer and insured needs to be corrected. In Brandon, the Court, while noting the late notice of claim was not the issue before it, appeared,

albeit in a footnote, to consider the possibility of adopting a "prejudice" standard for late notice of claims. Id., 97 N.Y.2d at 496 n.3, 743 N.Y.S. at 56 n.3. In particular, Chief Judge Kaye pointed to recent decisions in two other jurisdictions, observing that the shift to a prejudice standard often starts in contexts like the uninsured motorist context in Brandon where three public policy concerns are implicated. The Court enumerated these as: (1) the adhesive nature of insurance contracts; (2) the public policy objective of compensating tort victims and (3) the inequity of the insurer receiving a windfall due to a technicality. Brandon v. Nationwide Mutual Insurance Co., 97 N.Y.2d at 496,743 N.Y.S.2d at 56, citing Alcazar v. Haves, 982 S.W.2d 845, 850 (Tenn. 1998) and Clementi v. Nationwide Mutual Fire Insurance Co., 16 P.3d 223,229 (Colo. 2001).

In both Colorado and Tennessee, the courts struck down the "no-prejudice" exception in the uninsured motorist context. By so doing, both states left New York as the only jurisdiction which, in the preceding 20-plus years, had "considered the issue and continued to strictly adhere" to the "no-prejudice" exception. Brandon v. Nationwide Mutual Insurance Co., 97 N.Y.2d at 496, 743 N.Y.S.2d at 56, citing Alcazar v. Haves, 982 S.W.2d 845, 850 (Tenn. 1998). The Colorado Court addressed the same concerns as other jurisdictions that have adopted the "prejudice" standard. In particular, in Clementi, the Colorado Court expressed its concern over the "unequal bargaining power of the parties in an insurance policy," and the public interest in furthering "the goal of compensating tort victims, including innocent third parties." Clementi v. Nationwide Mutual Fire Insurance Co., 16 P.3d at 229. In detailing its reasons for adopting the prejudice requirement, the Colorado Court also expressed its concern over the "severity of forfeiting one's insurance benefits based on the technical violation of a notice provision.", Id at 229-230, citing Brakeman v. Potomac Insurance Co., 371 A.2d 193, 198 (Pa.1977)("allowing an insurance company, which has collected full premiums for coverage, to refuse compensation to an accident victim or insured on the ground of late notice, where it is not shown timely notice would have put the company in a more favorable position, is unduly severe and inequitable"). See Alcazar v. Haves, 982 S.W.2d at 851 (a technical interpretation of the notice requirement often results in an "undeserved windfall" to the insurer) citing Miller v. Marcantel, 221 So.2d 557, 559 (La. App. 1969)("the function of notice requirements is "simply to prevent the insurer from being prejudiced not to provide a technical escape-hatch"); Weaver Bros., Inc. v. Chappell, 684 P.2d 123, 125 **(Alaska,** 1984)("the notice requirement is designed to protect the insurer from prejudice; in the absence of prejudice, regardless of the reasons for the delayed notice, there is no jurisdiction for excusing the insurer from its obligations"); Great American Insurance Co. v. C.G. Tate Const., 279 S.E.2d 769, 774 (N.C. 1981)("no condition of timely notice will be given a greater scope than required to fulfill its purpose"); Brakeman v. Potomac Insurance Co., 371 A.2d at 197 ("when the insurance company's interests have not been harmed by a late notice [. . .] the reason behind the notice condition in the policy is lacking, and it follows neither logic nor fairness to relieve the insurance company of its obligations under the policy").

New York's Court of Appeals has not newly arrived at this juncture. The Court signaled its inclination toward the majority view almost a decade prior to Brandon when it refused to extend the no-prejudice exception to late notices of claim submitted to reinsurers.

Unigard Security Insurance Co. v. North River Insurance Co., supra, 79 N.Y.2d 576,584 N.Y.S.2d 290, 594 N.2d 571. The Unigard Court observed that reinsurers do not have the same pressing need as primary insurers to control the investigation and defense of a claim, and therefore the "jurisprudential policies" which underlie the presumption of prejudice accorded to primary insurers do not apply to the reinsurance industry. 79 N.Y.2d at 584,584 N.Y.S.2d at 294. Thus, the Court concluded that there was "no sound reason" for departing from general contract law principles. Id. Subsequently the Brandon Court limited the exception further by refusing to accord a presumption of prejudice to situations involving late notices of legal action. In distinguishing between notices of claim and notices of legal action, the Court firmly reiterated the rationale behind the "no-prejudice" exception. Brandon v. Nationwide Mutual Insurance Co., 97 N.Y.2d at 498,743 N.Y.S.2d at 57. It concluded that "most" notices of claim must be "submitted promptly after the accident, while an insurer's investigation has the greatest potential to curb fraud." The court distinguished notices of claim from notices of legal action which are "not necessarily fixed relative to [a] key event such as the injury." Id. Clearly, the Court intended that Unigard and its progeny stand for the proposition that the "no-prejudice" exception should be applied narrowly, and only where circumstances support its raison d'etre.

In considering the circumstances of the instant case, this Court find that no sound reasons exist for extending the "no-prejudice" exception to a situation where notice of legal action served also as notice of claim, and where an investigation of the underlying claim could not have been launched any sooner than twenty-one years after the occurrence.[3] The Court agrees with St. Charles that the "no-prejudice" exception cannot be extended to this case because the factors justifying its application would not be advanced. Since the rationale for the "no-prejudice" exception is based on the presumption that an insurer will be prejudiced if it cannot investigate a claim or negotiate a settlement on a timely basis, it necessarily follows that whatever need exists to conduct an investigation or enter into settlement negotiations exists within a timeframe that occurs "soon after the underlying event." Brandon v. Nationwide Mutual Insurance Co., 97 N.Y.2d at 496,743 N.Y.S.2d at 56; see American Home Assurance Co. v. International Insurance Co., 90 N.Y.2d at 441-442, 661 N.Y.S.2d at 587. Neither by stretch of imagination, nor by operation of law, could a notice of claim submitted twenty-one years after the occurrence be viewed as being submitted either "promptly" or "soon" enough after the underlying event to allow an insurer to investigate the claim without prejudice. Yet twenty-one years after the occurrence is the soonest that St. Charles could have notified Royal of the Claim given that the commencement of the legal action was, in effect, the notice of claim, which is often the case in "infant" claims where the statute of limitations is so expansive. This Court, therefore, finds that Royal was required to show that it was prejudiced by receiving the notice of claim and legal action twenty-one years and nine months after the occurrence as opposed to having received it twenty-one years after the occurrence.

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[3]While Royal claims that notice could have been given sooner because it was triggered by the 1994 requests for medical records, it has failed to persuade this Court that the 1994 requests constituted such notice of claim or triggered any obligation of notice.

St. Charles further urges this Court to adopt a "prejudice" requirement on the grounds that the public policy considerations which supported the shift to a prejudice requirement in other jurisdictions exist in the instant case. The Court is mindful that there is a need to balance the "prejudice" standard with the historical reluctance in this jurisdiction "to inhibit the freedom of contract by finding insurance policy clauses violative of public policy." Slavko v. Security Mutual Insurance Co., 98 N.Y. 2d 289,295,746 N.Y.S.2d 444,448,774 N.E.2d 208,212 (2002) citing Miller v. Continental Insurance Co., 40, N.Y.2d 675,679,389 N.Y.S.2d 565, 568,358 N.E.2d 258, 261 (1976). That said, this Court finds the facts of the instant case implicate precisely those public policy concerns raised by the Brandon Court. While it may appear incongruent to view the Diocese as a party without bargaining power, in fact, St. Charles, as an additional insured claims it did not even see the policy much less was it in a position to negotiate any terms. On the other hand, the windfall of several million dollars which Royal would receive if its disclaimer is allowed to stand would be substantial given that, according to an affidavit submitted by St. Charles, the "Diocese paid tens of millions of dollars in premiums over the life of the policy." As for the public objective of compensating innocent tort victims and the concern that they do not become public charges, the instant case could not speak more graphically to that concern. Tara Mulholland, the most innocent of victims as a severely handicapped newborn abandoned by her birth mother, could have easily become a public charge. The fact that her grandparents willingly took on the task of caring for her, years before commencing the underlying action, makes this a rare and unusual, if not unique situation rather than one that could ameliorate any broader public policy concerns.

Finally, there is no question that, even in jurisdictions that have struck down the "no-prejudice" exception, the insurer may still prevail by showing it was prejudiced by late notice. Royal, however, does not even attempt to make any such argument. On the contrary, Royal asserts, at the outset, and in a footnote, that it does not have to address the prejudice issue at all. Royal states boldly: "That issue is not before the Court on the present summary judgment motions. Why? Because under the well-settled law of New York, insurers need not show prejudice to disclaim coverage where an insured ignores its obligations to tender notice "as soon as practicable."' This Court finds Royal's assertion disingenuous because the caselaw discussed above points to the fact that the law, far from being well-settled, is on the contrary, still evolving. The assertion is also irrelevant because Royal cannot show that it was prejudiced.

Whether or not an insurer is prejudiced is generally a question for the trier of fact. However, in the instant case this Court holds that, as a matter of law, Royal cannot show it was prejudiced because it did not hold any investigation at all into the underlying occurrence. As the highest court in another jurisdiction stated in similar circumstances: *"An* insurer cannot assert prejudice with regard to its ability to conduct an investigation that it never even tried to conduct." Cooperative Fire Insurance Association of Vermont v. White Caps Inc., 694 A.2d 34, 39 (Vt. 1997) citing General Accident Ins. Co. V. Scott, 669 A.2d 773,780 (Md. Ct. Spec. App. 1996). The only investigation conducted by Royal was its investigation, including an EBT, into when St. Charles first had notice of the claim, and when it should have known about the claim. Royal does state in another footnote that if this case proceeds to trial it will demonstrate it was

prejudiced by not being able to set reserves, and not being able to resolve the issue amicably. St. Charles argues that if Royal was prejudiced in setting of reserves, it was so prejudiced by being unable to set reserves for twenty-one years, and was not additionally prejudiced by the nine month delay. St. Charles also argues that Royal's claim about taking charge of settlement negotiations is pure speculation since the insurer does not offer any admissible evidence to support the assertion. The Court agrees that the assertion is belied not only by Royal's inaction in that area since January 1997 but also by its intransigence during recent settlement conferences in Court.

The Court additionally finds that Royal erroneously contemplates prejudice based on its claim that the 1994 request for medical records of St. Charles triggered an obligation of notice. Royal suggests that if it had been notified in 1994 it "may have been able to resolve the claim for a reasonable sum before litigation was commenced." In the first place, this statement conjures up the rather unlikely scenario of an insurer initiating contact with an attorney for the purpose of offering to settle a claim (that had not even been made) solely on the basis of the attorney's request for medical records. Second, the Court rejects Royal's argument that the 1994 request for medical records triggered any obligation of notice.[4] Ultimately, Royal itself places no reliance on this argument, disposing of the issue half-heartedly, stating that "the court does not need to reach the issue [of whether the letters triggered an obligation of notice] because St. Charles' nine month delay after service of the lawsuit was itself sufficient for Royal to disclaim on late notice grounds." In any event, the Court in addition to reviewing the record including the pleadings and the bill of particulars, takes judicial notice of the fact that in this case passage of over two decades works in favor of the insurer rather than to its detriment when it comes to negotiating a settlement amount.[5] The Court therefore finds that as a matter of law Royal cannot show it was prejudiced by St. Charles' nine-month delay.

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[4]Royal, hard-pressed to make the case that the requests for medical records were notice of an actual claim, then attempts to argue that the medical records requests were notice of a potential claim, citing one Second Department decision which held that "providing an insurer with timely notice of a potential claim is a condition precedent . . . ." Saved v. Macari, 296 A.D.2d 396,397,744 N.Y.S.2d 509,510 (2d Dept. 2002). The Saved Court relied on the 1972 Court of Appeals decision in Security Mutual Insurance Company v. Acker-Fitzsimons Corp., 31 N.Y.2d 436, 340 N.Y.S.2d 435,293 N.E.2d 76. The Security Mutual case is of doubtful validity in light of the Court of Appeals 2002 decision in Brandon, supra.

[5]By the time this case was put into suit, the infant plaintiffs damages were easily ascertainable given the course of treatment for over twenty years. Indeed, Royal had not only the benefit of the use of the money for those years, but the benefit of the documentation of treatment provided to the infant plaintiff. Royal simply points to no action that they could have taken that would have altered this.

Because the Court finds no rationale for applying the "no-prejudice" exception, and further finds that, as a matter of law, Royal was not prejudiced by the nine month delay in notification, St. Charles' motion for summary judgment is granted. Royal is ordered to indemnify the plaintiff St. Charles.

The above constitutes the decision and order of the Court.

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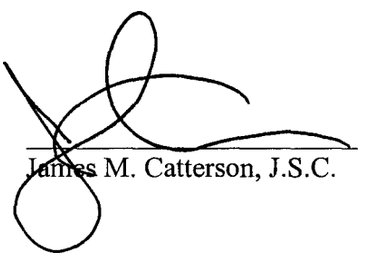

Date: April 28, 2004

James M. Catterson, J.S.C.

___**FINAL DISPOSITION**

_✓_**NON-FINAL DISPOSITION**