IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

EVRAZ CLAYMONT STEEL, INC. and EVRAZ, INC., NA,	)	
Plaintiffs,	)	
V.	)	C.A. No. N10C-12-038 JRS
HARLEYSVILLE MUTUAL INSURANCE COMPANY and MILL PRO CORP.,	)	
Defendants.	)	

Date Submitted: November 15, 2011
Date Decided: November 30, 2011

MEMORANDUM OPINION

Upon Consideration of Cross Motions for Summary Judgment. Defendant Harleysville Mutual Insurance Company's Motion for Summary Judgment. **GRANTED.** *Plaintiff Evraz Claymont Steel, Inc. and Evraz, Inc.'s Motion for Partial Summary Judgment.* **DENIED.**

James J. Sullivan, Jr., Esquire, BUCHANAN INGERSOLL & ROONEY, PC, Wilmington, Delaware. Paul S. Mazewski, Esquire, BUCHANAN INGERSOLL & ROONEY, PC, Pittsburgh, Pennsylvania. Attorneys for Plaintiffs.

Joseph J. Bellew, Esquire, COZEN O'CONNOR, Wilmington, Delaware. Michael J. Smith, Esquire, COZEN O'CONNOR, West Conshohocken, Pennsylvania. Attorneys for Defendant, Harleysville Insurance Company.

SLIGHTS, J.

I.

In this opinion, the Court considers cross motions for summary judgment brought by plaintiffs, Evraz Claymont Steel, Inc. and Evraz, Inc., NA (collectively "Claymont Steel") and defendant Harleysville Mutual Insurance Company ("Harleysville") in which the parties seek a determination of whether Claymont Steel is an additional insured under a Harleysville general liability insurance policy issued to defendant Mill Pro Corp. ("Mill Pro"). Specifically, Claymont Steel alleges that it is entitled to "costs of defense" under the Harleysville policy in connection with costs and fees incurred while defending a lawsuit ("the underlying lawsuit") in which a Mill Pro employee alleged that he sustained serious personal injuries as a result of Claymont Steel's negligence. Because the Court finds that the claims raised in the underlying lawsuit do not trigger the clear and unambiguous "additional insured" language in the Harleysville policy, Harleysville's motion for summary judgment must be **GRANTED** and Claymont Steel's motion for partial summary judgment must be **DENIED.**

II.

On August 28, 2009, Jonathan Morton ("Morton") and his wife Sandra Morton filed a complaint in the Superior Court of Delaware against Claymont Steel in which they sought damages arising from personal injuries Morton sustained on July 31,

2008, "while in the course and scope of his employment with Mill Pro Corp."[1] Morton alleged that he was working "at the Claymont Steel plant . . . using a rolling/grinding machine as part of his employment duties [when his hand] came into contact with the rolling/grinding machine [resulting in] amputation of his fingers."[2] The parties agree that Morton's complaint contains no allegation of negligence directly against Mill Pro; the express allegations of negligence are directed only against Claymont Steel. Claymont Steel contends, however, that the Mortons' complaint implies comparative negligence on Mr. Morton's part when it describes the manner in which the incident giving rise to Morton's injuries occurred.

Claymont Steel tendered a demand for defense and indemnity to Harleysville on or about September 21, 2010. Harleysville, in turn, denied coverage for Morton's claim on September 27, 2010. The Mortons claim ultimately was submitted to binding arbitration on March 21, 2011. The arbitrator found in favor of the Mortons and awarded $775,000.00 in damages, reduced by 15% "to account for the plaintiff's comparative negligence."[3]

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[1] Morton Complaint, ¶ 6.

[2] *Id.* at ¶¶ 6-8.

[3] Arbitrator's letter decision, at 4.

Claymont Steel initiated this action for declaratory judgment and breach of contract on December 3, 2010. It alleges that "Claymont, a division of Evraz, is an additional insured" under the Harleysville policy.[4] While initially seeking both indemnity and costs of defense, Claymont Steel has now paired its claim down to a claim for reimbursement of its costs in defense of the underlying litigation. Claymont Steel points to the following Harleysville policy language which it claims clearly and unambiguously provides that Claymont Steel is an additional "insured" under the policy as amended:

> **A. Section II - Who Is An Insured** is amended to include as an insured any person(s) or organization(s) shown in the Schedule, but only ***with respect to liability for 'bodily injury,'*** 'property damage' or 'personal advertising injury' ***caused, in whole or in part, by***:
>
> 1. Your[Mill Pro's][5] acts or omissions; or
> 2. ***The acts or omissions of those acting on your [Mill Pro's] behalf;***
>
> ***In the performance of your [Mill Pro's] ongoing operations for the additional insured(s)*** at the location(s) designated above.[6]

The Schedule lists "Claymont Steel" as an additional insured.[7]

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[4] Claymont Steel Complaint at ¶ 21.

[5] The parties agree that "your" as set forth in the Harleysville policy refers to Mill Pro.

[6] Endorsement, Additional Insured, Owners, Lessees or Contractors, Scheduled Person or Organization ("The Add'l Ins. Endors.") (emphasis supplied).

[7] *Id.*

III.

Claymont Steel alleges that it is entitled to reimbursement of its defense costs under the additional insured endorsement because Morton's claim arises from an "act or omission of [Morton while] acting on Mill Pro's [behalf]."[8] Moreover, the "liability" to which the endorsement refers is the costs and fees Claymont Steel incurred while defending Morton's claims in the underlying litigation.[9] According to Claymont Steel, the Court cannot save Harleysville from the language of its own insurance policy in which Harleysville chose not to define "liability" and, instead, defined "insured" in a manner that broadly encompasses any claim that arises from an act or omission of a Mill Pro employee acting on Mill Pro's behalf.

Harleysville counters that Claymont Steel simply cannot point to any allegation in the Morton complaint that would suggest that Claymont Steel could be subject to "liability" for any conduct of Mill Pro or anyone acting on Mill Pro's behalf. In this regard, Harleysville points out that the Morton complaint makes allegations of negligence only against Claymont Steel. To the extent the complaint can be read to imply comparative negligence on the part of Morton, Harleysville notes that Claymont Steel could not be subject to liability for such comparative negligence

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[8] Sect. II, Add'l Ins. Endors.

[9] *Id.*

under Delaware's comparative negligence statute.[10] Accordingly, Claymont Steel has no basis to invoke the additional insured endorsement in connection with its defense of Morton's claims.

IV.

In deciding a motion for summary judgment, the Court must determine whether genuine issues of material fact remain for trial.[11] Summary judgment will be granted only if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.[12] If the record reveals that material facts are in dispute, however, or if the factual record has not been developed thoroughly enough to allow the Court to apply the law to the factual record *sub judice*, then summary judgment must be denied.[13]

The moving party bears the initial burden of demonstrating that the undisputed facts support his claim for dispositive relief.[14] If the motion is properly supported, then the burden shifts to the non-moving party to demonstrate that material issues of fact remain for resolution by the ultimate fact-finder and/or that the movant's legal

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[10] *See* 10 *Del. C.* § 8132.

[11] *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. 1973).

[12] *Id.*

[13] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

[14] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979) (citing *Ebersole*, 180 A.2d at 470).

arguments are unfounded.[15] In this regard, "Rule 56(c) mandates the entry of summary judgment against a party who fails to establish the existence of an element essential to that party's case."[16]

Superior Court Civil Rule 56(h) states that when parties have filed cross motions for summary judgment and have agreed that no genuine issues of material fact exist, "the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions."[17] Under such circumstances, a final decision on the merits is encouraged even when the parties dispute the import of the undisputed record, particularly when the parties have requested a bench trial.[18] "Conflict concerning the ultimate and decisive conclusion to be drawn from undisputed facts does not prevent rendition of a summary judgment, when that conclusion is one to be drawn by the court."[19]

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[15] *See Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

[16] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

[17] Super. Ct. Civ. R. 56(h). *See also Scottsdale Ins. Co. v. Lankford*, 2007 WL 4150212, * 3 (Del. Super.) ("Upon cross motions for summary judgment, this Court will grant summary judgment to one of the moving parties.").

[18] 10A Charles Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure*: Civil 3d. § 2720.

[19] *Fox v. Johnson & Winsatt, Inc.*, 127 F.2d 729, 737 (D.C. Cir. 1942).

V.

Under Delaware law, an insurer is obliged to provide a defense for an insured only when the underlying complaint reveals that "the third party's action against the insured states a claim covered by the policy, thereby triggering the duty to defend."[20] When determining if the duty to defend has been triggered, the Court must compare the allegations in the underlying complaint with the terms of the insurance policy.[21] While engaged in this exercise, the Court's analysis must be informed by the following principles:

> (1) where there is some doubt as to whether the complaint against the insured alleges a risk insured against, that doubt should be resolved in favor of the insured; (2) any ambiguity in the pleadings should be resolved against the carrier; and (3) if even one count or theory alleged in the complaint lies within the policy coverage, the duty to defend arises.[22]

In the midst of a coverage dispute, parties are bound by the "plain meaning" of "clear and unequivocal" policy language.[23] And, "[c]lear and unambiguous

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[20] *Am. Ins. Group v. Risk Enter. Mgmt., Ltd.*, 761 A.2d 826, 829 (Del. 2000).

[21] *See Cont. Cas. Co. v. Alexis I. DuPont School Dist.*, 317 A.2d 101, 104 (Del. 1974); *Scottsdale Indem. Co. v. Lloyd*, 2005 WL 516852, at *2 (Del. Super. 2005).

[22] *Pacific Ins. Co. v. Liberty Mut. Ins. Co.*, 956 A.2d 1246, 1254-55 (Del. 2008) (citation omitted).

[23] *O'Brien v. Progressive Northern Ins. Co.*, 785 A.2d 281, 288 (Del. 2001).

language in an insurance contract should be given 'its ordinary and usual meaning.'"[24] Moreover, the policy provisions are "not ambiguous simply because the parties do not agree on the proper construction."[25] "Instead, a contract is only ambiguous when the provisions in controversy are reasonably or fairly susceptible to different interpretations or may have two or more different meanings."[26]

In this case, the Court is satisfied that the additional insured endorsement is clear and unambiguous. Accordingly, the Court will give its unambiguous terms their "ordinary and usual meaning."[27] The additional insured endorsement clearly provides that Claymont Steel would be entitled to a defense (and perhaps ultimately indemnity) if a complaint brought against it would potentially subject it to "liability for 'bodily injury' . . . , caused, in whole, or in part, by [either] Mill Pro's acts or omissions or the acts or omissions of those acting on Mill Pro's behalf."[28] Thus, in order for the duty to defend to be triggered in connection with Morton's complaint, the complaint must set forth at least some basis to conclude that Claymont Steel could be subject to liability for the acts or omissions of Mill Pro or someone acting on Mill Pro's behalf.

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[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] Sect. II, Add'l Ins. Endors.

As stated, the parties agree that Morton's complaint does not allege any negligence or, for that matter, any "act or omission" on the part of Mill Pro that gave rise to Morton's alleged injuries. Rather, the Morton complaint identifies only Claymont Steel's "acts or omissions" as causing Morton's injuries. No other claim can be gleaned from the "four corners" of Morton's complaint.

Claymont Steel misses the mark when it argues that the Morton complaint implies that Mr. Morton was comparatively negligent and, thereby, suggests that Claymont Steel could be subject to "liability" for "acts or omissions of those acting on Mill Pro's behalf." First, Morton's complaint supports no such inference.[29] Second, and more to the point, even if Morton's complaint inferred comparative negligence on his part, Claymont Steel, as a matter of Delaware statutory law, could not be subject to "liability" for Morton's comparative negligence.[30] Simply stated, Claymont Steel could not have been, and was not, subject to "liability" for any conduct on the part of Mill Pro or anyone acting on Mill Pro's behalf, including

[29] The complaint simply states that Morton's hand came into contact with a "rolling/grinding machine." Morton Complaint, ¶ 6. This allegation, standing alone, does not infer, much less plead with particularity, any comparative negligence on Morton's part.

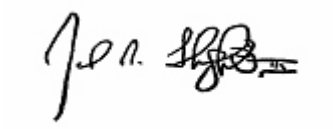
[30] *See* 10 *Del. C.* § 8132 (providing that the percentage attributed to Morton's comparative negligence would be deducted from any damages award returned against Claymont Steel up to 50% and, beyond 50%, providing that Morton would be barred from any recovery).

Morton.[31]

VI.

Based on the foregoing, the Court concludes that the clear and unambiguous allegations raised in Morton's complaint, when applied to the clear and unambiguous language in Harleysville's additional insured endorsement, lead to the clear and unambiguous conclusion that Claymont Steel is not an "additional insured" for purposes of the claims raised in Morton's complaint. Accordingly, Harleysville's motion for summary judgment must be **GRANTED** and Claymont Steel's motion for partial summary judgment must be **DENIED.**

IT IS SO ORDERED.



Judge Joseph R. Slights, III

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[31] The term "liability" is not defined in the Harleysville policy. Accordingly, the Court is obliged to give the term its "plain and ordinary meaning." In this regard, Delaware courts routinely refer to dictionary definitions as the source for determining the "plain and ordinary meaning" of disputed contractual terms. *See Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 738 (Del. 2006) ("Under well-settled case law, Delaware courts look to dictionaries for assistance in determining the plain meaning of terms which are not defined in a contract."). "Liability," in the civil context, is defined as "the state of being legally obligated for civil damages." BLACK'S LAW DICTIONARY, 926 (7th Ed. 1999).