IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

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| PERRY PRICE, | : | |
| Plaintiff, | : | |
| | : | C.A. No. K11C-08-017 WLW |
| v. | : | |
| | : | |
| KOSKI TRUCKING, INC., a Delaware corporation, and TONY PARKER, | : | |
| Defendants, | : | |
| and | : | |
| | : | |
| KOSKI TRUCKING, INC., a Delaware corporation, | : | |
| Third-Party Plaintiff, | : | |
| | : | |
| v. | : | |
| | : | |
| MAINE PLASTICS, INC., | : | |
| Third-Party Defendant. | : | |

Submitted: April 4, 2012
Decided: July 27, 2012

**ORDER**

Upon Third-Party Defendant's Motion to Dismiss.

Jeffrey J. Clark, Esquire of Schmittinger & Rodriguez, P.A., Dover, Delaware; attorney for Plaintiff.

Kimberly Meany, Esquire of Marshall Dennehey Warner Coleman & Goggin, Wilmington, Delaware; attorney for Defendants Koski Trucking, Inc. and Tony Parker.

Nancy Chrissinger Cobb, Esquire of Law Offices of Chrissinger & Baumberger, Wilmington, Delaware; attorney for Third Party Defendant Maine Plastics, Inc.

WITHAM, R.J.

## ISSUE

Whether third-party Defendant's motion to dismiss should be granted?

## FACTS

On August 10, 2011, Perry Price ("Plaintiff") filed a suit alleging negligence on the part of Koski Trucking, Inc. ("Koski") through the actions of its driver, Tony Parker ("Parker"). Plaintiff states that, on or about May 26, 2010, Plaintiff was employed as a forklift operator for Maine Plastics, Inc. ("Maine"). While operating a forklift on that date, Plaintiff states he was in the back of a Koski-owned tractor trailer unloading pallets from the trailer onto the loading dock. As Plaintiff was unloading the trailer, the driver, later identified in the amended complaint as Parker, pulled away from the loading dock, causing Plaintiff and the forklift to fall to the ground. Plaintiff alleges personal injuries as a result.

On September 14, 2011, Koski filed a Third-Party Complaint against Maine alleging that Maine owned, controlled, and/or maintained the premises involved and that Maine was responsible for safety on said premises. Koski further alleged that Maine was solely liable and/or jointly and severally liable to Koski for contribution or indemnification in the action between Plaintiff and Koski. On March 6, 2012, Plaintiff filed a Suggestion of Death stating that Plaintiff died on February 6, 2012. A stipulation and order followed on March 26, 2012 allowing the Estate of Perry Price, by and through its administrator, Shirley Price, to become Plaintiff. On February 22, 2012, Maine filed an answer and motion to dismiss the third-party complaint.[1] Koski responded on March 22, 2012. Plaintiff takes no position on Maine's motion to dismiss.

[1]Apparently, the motion to dismiss was re-filed separately on March 20, 2012, as it had been improperly filed in LexisNexis previously.

### *Standard of Review*

When deciding a motion to dismiss, all factual allegations in the complaint are accepted as true.[2] If the complaint and facts alleged are sufficient to support a claim on which relief may be granted, the motion is not proper and should be denied.[3] That is, a motion to dismiss is decided on "whether a plaintiff may recover under any conceivable set of circumstances susceptible to proof under the complaint."[4] Consequently, dismissal will only be warranted when "under no reasonable interpretation of the facts could the complaint state a claim for which relief might be granted."[5]

Superior Court Civil Rule 12(b) states, in pertinent part:

> If, on a motion asserting the defense numbered (6) for failure of the pleadings to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

## DISCUSSION

Third-Party Plaintiff Koski stated in its response to Maine's motion to dismiss, "In 2009, Koski and Maine Plastics entered into an Agreement for the dropping and distribution of trailers in the Dover, Delaware location [sic] A copy of the Letter of

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[2] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

[3] *Id.*

[4] *Id.*

[5] *Hedenberg v. Raber*, 2004 WL 2191164, at *1 (Del. Super. Aug. 24, 2004) (citing *Evans v. Perillo*, 2000 WL 973245, at *2 (Del. Super. May 26, 2000)).

Agreement is attached as Exhibit 'A.'"[6] Exhibit A, which contains a signature above the line for Maine Plastics, appears for the first time in Koski's response. Because a matter outside the pleadings is raised, the Court must evaluate whether a conversion of the motion to dismiss to a motion for summary judgment is proper.

The general rule is that matters outside the pleadings should not be considered on a Rule 12(b)(6) motion to dismiss.[7] "'Either the pleader or the moving party or both may bring the conversion provision into operation by submitting a matter that is outside the challenged pleading . . . .'"[8] There are two exceptions to the rule prohibiting consideration of extrinsic materials in a motion to dismiss: "(i) where an extrinsic document is integral to a plaintiff's claim and is incorporated into the complaint by reference, and (ii) where the document is not being relied upon to prove the truth of its contents." On the first exception, it appears that the alleged contract provides background for the incident, and it was not incorporated into the third-party complaint. Therefore, the first exception does not apply. On the second exception, it is unclear to the Court whether the alleged contract is being used, or will be used, to prove the truth of its contents.

Therefore, Court will do the following. First, the Court intends to convert the motion to dismiss into a motion for summary judgment unless the parties stipulate that the document is not being relied upon to prove the truth of its contents within 20 days of this Order. Second, before the Court applies the protections and

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[6]Koski Resp. ¶3.

[7]*Vanderbilt Income and Growth Assocs. L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 612 (Del. 1996) (citing *In re Santa Fe Pac. Corp. Shareholder Litig.*, 669 A.2d 59, 68 (Del. 1995)).

[8]*J.L. v. Barnes*, 33 A.3d 902, 911 (Del. Super. 2011) (quoting CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1366 (3d ed. 2011)).

limitations under the exclusivity provision of the Delaware Workers' Compensation Act[9], including the bar on contribution under a theory of liability as a joint tortfeasor, the Court desires satisfactory proof of compliance with the statute rather than a conclusory statement of compliance that, as of yet, has not been disputed by Plaintiff.[10] Third, the Court notes that the Prothonotary's Office received no reply with regard to its March 6, 2012 letter to obtain a trial date and scheduling order. As such, the Prothonotary will proceed immediately with setting a trial date and scheduling order on its own accord as per the letter of March 6th.

**CONCLUSION**

Therefore, IT IS HEREBY ORDERED that: (1) unless the condition discussed above is fulfilled, Maine's motion to dismiss shall be converted into a motion for summary judgment; (2) Maine shall provide satisfactory proof of compliance with the Workers' Compensation Act; (3) a trial date and scheduling order shall be set by the Prothonotary with discovery proceeding accordingly.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh

[9] 19 *Del. C.* § 2304.

[10] *See Wisniewski v. Ocean Petroleum LLC*, 2010 WL 2340227, at *2-3 (D. Del. June 7, 2010). The Court notes that in *Wisniewski* genuine issues of material fact existed with respect to the employer's compliance with the Workers' Compensation Act. *Id.* Plaintiff does not appear to dispute Maine's compliance. However, when, by corollary, 19 *Del. C.* § 2304 "precludes the imposition of joint tort liability upon an employer in a suit brought by an injured employee against a third party where the employer has paid compensation benefits to the employee" it is essential to the Court's ruling on contribution to have satisfactory proof of proper compliance before precluding tort liability. *See id.* at *3 (quoting *Precision Air, Inc. v. Standard Chlorine of Delaware, Inc.*, 654 A.2d 403, 406-07 (Del. 1995)).