Mass Transit Administration v. CSX Transportation, Inc., No. 121, September Term, 1996.

[Contractual Indemnification - Indemnitee, a supplier of services to indemnitor, was indemnified for loss "arising out of" rendering of the services. Held: Loss to indemnitee that was not proximately caused by rendering of service and that was proximately caused by negligence on the part of indemnitee nevertheless, on facts, arose out of contractual services and was covered by indemnity.]

Circuit Court for Howard
County Case #95-CA-26990

IN THE COURT OF APPEALS OF MARYLAND

No. 121

September Term, 1996

MASS TRANSIT ADMINISTRATION

v.

CSX TRANSPORTATION, INC.

Bell, C.J.
Eldridge
Rodowsky
Chasanow
Raker
Wilner
Karwacki, Robert L.
(retired, specially assigned),

JJ.

Opinion by Rodowsky, J.
Eldridge, Chasanow & Raker, JJ., dissent

Filed: April 15, 1998

This action is one for judicial review of a decision of the Maryland State Board of Contract Appeals (BCA). Since 1979 the State has arranged for Maryland Rail Commuter (MARC) service under a series of contracts with the Baltimore and Ohio Railroad Company (B & O) and its successor. The contract in issue here provides that the State will hold the railroad harmless from "liability of every kind arising out of the Contract Service," a defined term under the contract. In the instant matter we interpret this indemnification provision and apply it to a grade-crossing collision that occurred without any fault on the part of the crew of the MARC train involved.

I

On October 1, 1990, B & O's successor, CSX Transportation, Inc. (CSXT), a Virginia corporation, and the Mass Transit Administration (MTA), a unit of the Maryland Department of Transportation, executed the Commuter Rail Passenger Service Agreement (the Contract) that is the subject of this action. Article I, Section 1 of the document summarizes CSXT's primary obligations under the Contract:

> "(a) CSXT will provide regularly scheduled daily commuter rail service on weekdays (Monday through Friday) on its Capitol Subdivision line between Baltimore, Maryland, and Washington, DC, and on its Metropolitan and Cumberland Subdivision lines between Martinsburg, West Virginia, and Washington, DC, in accordance with Section 2 of this Agreement. This train operation, plus the maintenance of equipment, access of and use of facilities, ticket sales, and other activities required to support the operation of the train service as provided in this Article I, shall be called the 'Contract Service.' CSXT will make available its rail facilities on the above stated lines to provide the Contract Service. CSXT will operate the Contract Service in a safe and efficient manner with use of appropriate facilities and staff for management, train operations, and maintenance. ..."

The provision of the Contract that ultimately gave rise to this appeal is Article I, Section 9(b), which provides:

> "(b) Indemnification by [MTA]
>
> "(1) [MTA] agrees to indemnify, save harmless, and defend CSXT from any and all casualty losses, claims, suits, damages or liability of every kind *arising out of* the Contract Service under this Agreement, up to a maximum amount of One Hundred Fifty Million Dollars ($150,000,000), per occurrence, during the term of this Agreement, as excepted or limited by the terms of subsections (a), (c), (d), and (e), infra.[1] This maximum indemnification amount shall include any expenses for outside manpower, for legal representation and for other extraordinary expenses of handling individual claims for [MTA]. ...
>
> "(2) CSXT will promptly advise [MTA] of pending claims for which [MTA] is responsible under subsection (b)(1) with estimates of settlement costs in each instance. Any proposed settlement or payment in excess of Ten Thousand Dollars ($10,000) will be submitted to [MTA] for prior approval."

(Emphasis added).

In subsection 9(d)(1) MTA "agrees to self-insure Five Million Dollars ($5,000,000) per occurrence of any casualty claim or loss for which it is responsible" under the Contract. In subsection 9(d)(2) MTA agrees, at its cost and expense, to procure and maintain "excess liability insurance coverage commonly provided by Railroad operations liability insurance" in the amount of $145 million in excess of the $5 million "self-insured retention." Subsection 9(d)(2) further provides:

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[1]Subsection 9(a) contains an indemnification by CSXT of MTA for "liability of every kind arising out of the injury to or death of CSXT employees while engaged in activities directly related to the provision of the Contract Service on any railroad property."

> "This insurance shall cover liability assumed by [MTA] under this [Contract] ... and shall name the State of Maryland and [MTA] as insured. Such insurance policies shall name CSXT as an additional insured for CSXT's operation of the Contract Service ...."[2]

On November 4, 1992, CSXT contracted with Melvin Benhoff Sons, Inc. (Benhoff) to pave four, at-grade, public road crossings over CSXT's Baltimore-Washington tracks, including the Hanover Road crossing in Howard County. MTA was neither notified of the work to be done, nor was it asked to help defray the cost of the work.

On December 18, 1992, Benhoff commenced work on the Hanover Road crossing. The work included a Benhoff employee's operation of a backhoe on the tracks. A CSXT foreman was supervising, in accordance with certain rules promulgated by CSXT.[3] At

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[2]Subsection 9(c) seems intended to complement subsection 9(d) by limiting MTA's indemnification to $5 million if the claim against CSXT is covered by insurance purchased pursuant to subsection 9(d)(2).

Subsection 9(e) expressly subjects MTA's self-insurance and insurance purchase obligations to the availability of funding and budgetary appropriations.

[3]CSXT's *On-Track Equipment and Work Authority Rules* provide:

> "**701.** On-track equipment [OTE] operators must be examined and qualified on the Operating Rules or they must be working under the immediate (on-the-job) supervision of a person who has been examined and qualified on these rules.
>
> "**702.** When other than CSX on-track equipment is being operated on CSX track, a qualified employee must accompany and direct such equipment. He shall position himself to observe and give instruction to the OTE operator and he will be responsible for obtaining authorities and complying with the Operating Rules.

(continued...)

approximately 9:10 a.m. that same day, MARC passenger train No. 244 was bound toward Baltimore. After rounding a bend just prior to the Hanover Road crossing, the MARC train struck Benhoff's backhoe and "totalled" it. No one was injured as a result of the collision. The backhoe operator left the machine on the tracks as the train approached. Whether the CSXT foreman warned the backhoe operator of the approaching train in sufficient time to move the machine off the tracks was disputed between CSXT and Benhoff. BCA, however, found that "apparently the central train dispatcher was not informed of Benhoff's presence and work plans pursuant to Rule 704. Thus, there was no notice to any train engineers or any notice to the dispatcher so that he might alert any oncoming trains of the obstruction on the track."

Benhoff sued CSXT in the Circuit Court for Howard County seeking $40,420.25 as the value of the backhoe. Benhoff's complaint alleged CSXT's negligence to be the failure of the track foreman to warn the backhoe operator of the approaching MARC train. CSXT

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[3](...continued)

> "**703.** The OTE operator must be familiar with the method of train operation and the physical characteristics of the territory over which the on-track equipment is being operated, or on which work is to be performed."

Rule 704, as summarized by BCA,

> "governs on-track equipment movement and short-term track movements. For example, a main track, signalled track or siding must not be occupied or fouled without written authority of the train dispatcher. The track foreman is required to request authority from the dispatcher to occupy the tracks, including the specific location, the limits and time of occupancy. After authority for presence on the track is received, the track must be cleared within the authorized time, and the track foreman must report that the track is clear."

denied liability and asserted contributory negligence. Prior to trial, CSXT settled with Benhoff for $23,350. In the action now before us, MTA concurred that the amount of the Benhoff settlement was "reasonable."

In its claim for indemnification from MTA for the amount paid to Benhoff, CSXT asserted two grounds for indemnification. As described by MTA:

> "1. The maintenance and repair work performed on the Hanover Road track crossing 'was necessary to support the operation of the train service.'
>
> "2. The train involved in the collision was a MARC train that was engaged in Contract Service."

MTA denied CSXT's claim on three grounds: (1) the work performed by Benhoff was not part of Contract Service; (2) although a MARC train was the instrumentality that actually struck Benhoff's backhoe, there was no negligence in the rendering of that Contract Service; and (3) "to interpret Contract Section 9(b)(1) to prescribe indemnification under the circumstances presented here would be violative of a strong Maryland public policy articulated in § 5-305, Md. Cts. & Jud. Proc. Ann. Code."[4]

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[4]Maryland Code (1974, 1995 Repl. Vol.), § 5-305 of the Courts and Judicial Proceedings Article (CJ) reads:

> "A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relating to the construction, alteration, repair, or maintenance of a building, structure, appurtenance or appliance, including moving, demolition and excavating connected with it, purporting to indemnify the promisee against liability for damages arising out of bodily injury to any person or damage to property caused by or resulting from the sole negligence of the promisee or indemnitee, his agents or

(continued...)

In accordance with Md. Regs. Code tit. 21, § 10.04.06 (1989) (COMAR), CSXT appealed MTA's decision to BCA which ruled in favor of MTA on summary disposition. BCA determined that, (1) the grade crossing repair undertaken by Benhoff "represented a necessary and recurring maintenance activity required of CSXT notwithstanding the existence of the instant commuter rail Contract," and, as such, was "outside the scope of the Contract with the State, provided no direct benefit to the State, and was performed without its knowledge"; and (2) "[t]he mere fact that a MARC train was innocently and fortuitously involved in the incident does not bring the incident within the ambit of the definition of '[C]ontract [S]ervice' under the Contract." BCA concluded that it need not consider whether the incident arose out of a construction contract to which CJ § 5-305 applied.

CSXT petitioned the Circuit Court for Howard County for judicial review. That court affirmed, concluding that the reasons given by BCA were supported by substantial evidence.

CSXT appealed to the Court of Special Appeals, which reversed and directed the circuit court to instruct BCA to order MTA to pay $23,350 to CSXT. *CSX Transp., Inc. v. Mass Transit Admin.*, 111 Md. App. 634, 647-48, 683 A.2d 1127, 1133 (1996). The court agreed with CSXT's contention that, notwithstanding the absence of negligence in the

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[4](...continued)

employees, is against public policy and is void and unenforceable. This section does not affect the validity of any insurance contract, workers' compensation, or any other agreement issued by an insurer."

CJ § 5-305 has been renumbered CJ § 5-401 by Section 9, Chapter 14 of the Acts of 1997. *See* Maryland Code (1974, 1995 Repl. Vol., 1997 Cum. Supp.). The new CJ § 5-401 is substantially identical to its predecessor.

operation of the MARC train, "the December 18, 1992, collision arose out of 'Contract Service' because the collision involved a MARC train and 'Contract Service' specifically includes 'train operations.'" *Id.* at 640, 683 A.2d at 1129. The court also held that CJ § 5-305 was no bar because the indemnification agreement is "neither 'in, or in connection with, or collateral to, a contract or agreement relating to' construction." *Id.* at 645, 683 A.2d at 1132.[5]

This Court granted MTA's petition for certiorari. The petition presents the following questions:

> "1. Does contractual indemnity for liability 'arising out of' work under a contract extend to liability caused solely by the negligence of the indemnitee (or its contractor) in work that is not work under the contract?
>
> "2. Is an indemnitor's promise to indemnify for liability that was caused only by the indemnitee or its agent rendered unenforceable by [CJ] § 5-305, which voids a promise in, in connection with, or collateral to a construction agreement that purports to indemnify the promisee for its own negligence or the negligence of its agents?"

II

On the first issue MTA's premise is that the Hanover Road work is not Contract Service, in whole or in part, and that the only Contract Service involved in the collision was the operation of the MARC train. MTA argues that the Court of Special Appeals erred in

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[5]In the Court of Special Appeals, CSXT also argued that the claim for indemnification "arose out of Contract Service because the rehabilitation work being done to the crossing, and the flagging activity at the site, were in support of the track and facilities used for the MARC trains." No. 179, September Term, 1995, Appellant's Brief at 16. In view of its holding, the Court of Special Appeals found it unnecessary to address the alternative contention of CSXT. *CSX Transp.*, 111 Md. App. at 644 n.4, 683 A.2d at 1131 n.4.

holding that the mere fact that the MARC train collided with the backhoe satisfies the "arising out of" requirement. MTA submits that more than mere "but for" causation is required to create "arising out of" indemnification liability. What that extra quantum must be is not made clear by MTA, other than that it is more than "but for" causation and that it need not reach the level of proximate causation. (Borrowing a term from the equal protection field, we shall call this notion "intermediate causation."). The operation of the MARC train did not constitute a cause of the injury, in MTA's view, because the operation of the train was not negligent; only the track maintenance was negligent. Furthermore, argues MTA, absent commercial insurance or an agreement to the contrary, Maryland law precludes indemnification for the indemnitee's own negligence.

CSXT contends that, inasmuch as operating the MARC train clearly constitutes Contract Service, Benhoff's claim "arose out of" Contract Service because the MARC train was the direct and immediate physical cause of the damage to Benhoff's backhoe. CSXT submits that an instrumentality need not be the "proximate" cause of damage, nor need there be any fault or negligence in the operation of the instrumentality to give rise to "arising out of" indemnification liability. In short, concludes CSXT, "[u]nlike a tort claim, where 'proximate cause' is the issue, in contract indemnity claims the language 'arising out of' triggers a 'causation in fact' analysis." Appellee's Brief at 21. CSXT also asserts that "there is no way to interpret the MTA's agreement to indemnify CSXT against claims arising out of Contract Service, other than as including an agreement to indemnify it for claims asserting negligence on the part of CSXT or its employees." Appellee's Brief at 30-31.

III

Although MTA suggests to the contrary, the indemnification provision in the instant matter applies to CSXT's liability based solely on its own negligence. MTA places considerable reliance on *Heat & Power Corp. v. Air Prods. & Chems., Inc.*, 320 Md. 584, 578 A.2d 1202 (1990), and *Farrell Lines, Inc. v. Devlin*, 211 Md. 404, 127 A.2d 640 (1956).

In *Heat & Power* a contractor agreed to construct a building to house the assembly used to produce certain gases. *Heat & Power*, 320 Md. at 587, 578 A.2d at 1204. During construction an employee of the contractor was injured when the building exploded, due solely to the fault of the building's owner. *Id.* at 587-88, 578 A.2d at 1204. The construction contract provided that the contractor would hold the owner harmless "from any and all loss [or] liability ... resulting from or arising out of or in connection with the performance of this Contract by Contractor." *Id.* at 588, 578 A.2d at 1204 (emphasis omitted).

After holding that the indemnity provision was void under CJ § 5-305, we alternatively held as follows:

> "Even if [CJ § 5-305] was not applicable, [the indemnification provision] of the contract is not sufficiently clear and unequivocal to indemnify Owner against its own negligence. In *Crockett v. Crothers*, 264 Md. 222, 227, 285 A.2d 612, 615 (1971), this Court held that 'contracts will not be construed to indemnify a person against his own negligence unless an intention to do so is expressed in those very words or in other unequivocal terms.' Since the contract did not expressly or unequivocally indemnify Owner against its own negligence, the circuit court judge was correct in ruling as a matter of law that Contractor had no contractual duty to indemnify Owner."

Id. at 593, 578 A.2d at 1206-07.

We qualified that holding by saying:

> "The rule of construction that a 'contract will not be construed to indemnify a person against his own negligence unless an intention to do so is expressed in those very words or in other unequivocal terms,' *Crockett, supra*, does not apply to an insurance contract. The policy consideration against implying agreements to indemnify one for one's own negligence are inapplicable to liability insurance contracts which generally have as their primary purpose indemnification against one's own negligence. Also, one of the reasons why contracts to indemnify must be expressed in unequivocal terms is to protect the unwary or uninformed promisor. A liability insurer is rarely an unwary or uninformed promisor."

Id. at 596, 578 A.2d at 1208.

In *Farrell Lines* there was no express agreement of indemnity in the contract between the parties, a shipowner and a stevedoring company. *Farrell Lines*, 211 Md. at 421, 127 A.2d at 648.[6]

Heat & Power involved a promise by one who was hired to perform a service to indemnify the person for whom the service was to be performed. *Heat & Power*, 320 Md.

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[6]The relevant portion of the contract in *Farrell Lines* read as follows:

> "7. INSURANCE: The Contractor agrees to carry and include in the rates herein specified, Workmen's Compensation Insurance for the unlimited protection of its employees under State and Federal laws, also Comprehensive General Liability Insurance in the amount of $100,000.00 for death or injury of one person and $1,000,000.00 for death or injury of more than one person in a single accident. Such Comprehensive General Liability Insurance to contain a provision or endorsement to indemnify Farrell Lines Incorporated against loss for damages due to or arising out of such operations on account of bodily injuries or death sustained by any person or persons as in the policy defined and further as respects such injuries sustained by employees of the Contractor, anything in the policy to the contrary notwithstanding."

Farrell Lines, Inc. v. Devlin, 211 Md. 407, 127 A.2d 640 (1956), Record Extract at 306.

at 587-89, 578 A.2d at 1204-05. In that relationship the person for whom the service is to be performed incurs a risk that the conduct of the person providing the service will create vicarious liability on the part of the hirer, or that the conduct may involve a non-delegable duty. Consequently, we require that there be no ambiguity and that the indemnification, if intended to embrace the sole negligence of the indemnitee, be unequivocal. *See id.* at 593, 578 A.2d at 1206-07. The indemnification provision in the instant matter, however, reverses the direction of the indemnification from that more commonly encountered. Here, the hirer of the service gives the indemnity, and the party performing the service is indemnified. It appears that the railroad industry historically has sought and obtained indemnifications. In E.R. Tan, Annotation, *Validity, Construction, and Effect of Agreement, in Connection with Real-Estate Lease or License by Railroad, for Exemption from Liability or for Indemnification by Lessee or Licensee, for Consequences of Railroad's Own Negligence*, 14 A.L.R.3d 446 (1967), the author summarizes: "The validity of an exculpatory or indemnity clause discussed in this annotation has been recognized in numerous cases." *Id.* at 453. Indeed, this Court, relying on exculpatory agreements, has sustained injunctions against the prosecution of actions at law against railroads for damages caused by the railroad's negligence. *See, e.g., Danzer & Co. v. Western Md. Ry. Co.*, 164 Md. 448, 165 A. 463 (1933); *Adamstown Canning & Supply Co. v. Baltimore & Ohio R.R. Co.*, 137 Md. 199, 112 A. 286 (1920).[7] In a more contemporary context, indemnifications of established railroads

[7]In both cases the relevant provision in substance read:

(continued...)

are found in agreements between the railroads and governmental entities whose light rail service shares the existing railroad right of way. *See* B.D. Morant, *Contracts Limiting Liability: A Paradox with Tacit Solutions*, 69 Tul. L. Rev. 715, 726 nn.45 & 46 (1995).

In "unequivocal terms," the indemnification in the instant matter includes the liability of CSXT for its own acts or omissions. As the party rendering the commuter rail service, CSXT does not have any exposure to vicarious liability for the negligence of MTA arising out of the Contract Service; the exposure to any vicarious liability in that circumstance runs in the other direction. Under the Contract MTA indemnifies the first $5 million of CSXT's liability, arising out of Contract Service, and MTA either provides public liability insurance at its expense for CSXT's exposure from $5 million to $150 million, or MTA indemnifies CSXT for any uninsured balance of that exposure. In addition to the very words used in expressing the indemnification, the fact that it extends to $150 million clearly indicates that the parties were contemplating a possible disaster, such as a wreck of a train filled with commuters, due to CSXT's negligence.

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[7](...continued)

> "'And the said second party releases said first party from all claims of whatsoever character for damages resulting to the property of said second party by reason of fire originating from the engines and locomotives of the first party and resulting in the burning or destruction of or injury to the property of the second party.'"

Danzer, 164 Md. at 452, 165 A. at 465; *see also Adamstown Canning*, 137 Md. at 201, 112 A. at 286-87.

IV

Inasmuch as the indemnification was intended, at a minimum, to serve as liability insurance for CSXT for the first $5 million of CSXT's liability, it is appropriate to interpret and apply the indemnification in the same manner as liability insurance policies are interpreted and applied. That is what the Court of Special Appeals did when it relied on liability insurance cases in holding that the operation of the MARC train was a cause of the damage to the backhoe but that that operation need not be a proximate cause. *CSX Transp.*, 111 Md. App. at 643-44, 683 A.2d at 1131-32.

In public liability insurance policies, "arising out of" may introduce either coverage or exclusion provisions. *Northern Assurance Co. of America v. EDP Floors, Inc.*, 311 Md. 217, 533 A.2d 682 (1987), cited by both parties, concerned an exclusion in a commercial general liability policy for bodily injury or property damage "'arising out of the ownership, maintenance, operation, use, loading or unloading of ... any automobile.'" *Id.* at 225, 533 A.2d at 686. The underlying claim was asserted by an employee of a customer of the insured. *Id.* at 220, 533 A.2d at 683-84. The claimant was injured while assisting the insured's driver in unloading a delivery from the insured's truck--assistance that was required because the driver's helper, although present, was either inebriated or hung over. *Id.* When the helper threw a lever that caused the hydraulic lift at the rear of the truck to move, part of the load fell on the claimant. *Id.* at 220, 533 A.2d at 684. In his suit the claimant alleged, in addition to vicarious liability of the insured, that the insured negligently hired, supervised, and retained the helper. *Id.* We held that there was no coverage on the following rationale:

> "The words 'arising out of' must be afforded their common understanding, namely, to mean originating from, growing out of, flowing from, or the like. While these words plainly import a causal relation of some kind, read in context, they do not require that the unloading of the truck be the sole 'arising out of' cause of the injury; they require only that the injury arise out of the unloading of the vehicle. Therefore, if [claimant's] bodily injury arose out of EDP's employee's unloading of the truck, then that injury is excluded from coverage. This is so regardless of whether the injury may also be said to have arisen out of other causes further back in the sequence of events, such as the employee's consumption of alcohol, or the employer's negligent failure to supervise the employee. The exclusion also applies irrespective of the theory of liability by which [claimant] seeks redress for his injury, as the policy exclusion is not concerned with theories of liability. Rather, the policy insures against certain types of damages or injuries, specifically excluding injuries arising out of the operation, use or unloading of EDP's vehicle.
>
> "As we see it, the language in the exclusionary clause clearly focuses the 'arising out of' inquiry on the instrumentality of the injury, *i.e.*, upon the truck and its unloading. When, as here, there is no ambiguity in the policy exclusion, the first principle of construction of insurance policies in Maryland requires that we apply the terms of the contract as written. To apply either a proximate or concurrent cause analysis in the interpretation of the policy exclusion, as EDP urges, would severely strain its plain import and would result in coverage being provided, contrary to the intention of the parties, for acts inseparably associated with the operation, use or unloading of the truck."

Id. at 230-31, 533 A.2d at 688-89 (citations omitted).

Here MTA argues that negligence on the part of CSXT, further back in the chain of causation, caused the accident, either by failure to warn the backhoe operator, failure to warn the oncoming MARC train, or failure to alert the dispatcher that the work on the crossing was being done. Those omissions do not diminish the fact that the damage to the backhoe arose out of the collision with the MARC train, just as the insured's negligence in *EDP Floors* in allowing the helper to go out on the delivery truck did not diminish the fact that the personal injuries in that case arose out of unloading the truck.

EDP Floors has been favorably cited in other "arising out of" automobile use exclusion cases where the claimant alleged that the insured negligently supervised or trained the auto-using tortfeasor. *See, e.g., Scarfi v. Aetna Cas. & Sur. Co.*, 233 N.J. Super. 509, 515, 559 A.2d 459, 463 (1989) ("[T]he underlying action for negligent hiring or training was triggered only when [the claimant] was injured as a result of the [automobile accident]."); *McPherson v. Michigan Mut. Ins. Co.*, 310 S.C. 316, 320, 426 S.E.2d 770, 772 (1993) ("[W]ithout the [operator's] allegedly negligent operation of the [automobile], there is no link by which [the owner's] negligence can be independently connected to [the claimant's] injuries."); *Taylor v. American Fire & Cas. Co.*, 925 P.2d 1279, 1283 (Utah Ct. App. 1996) ("[T]he acts complained of could not have resulted in injury but for the use of the automobile."), *cert. denied*, 936 P.2d 407 (Utah 1997).

An argument analogous to that of MTA in the instant matter was rejected by Judge Kaufman in *Chesapeake & Potomac Tel. Co. v. Allegheny Constr. Co.*, 340 F. Supp. 734 (D. Md. 1972). In that case, the telephone company's insurer under a manufacturer's and contractor's liability policy denied coverage for a personal injury damage suit brought by the employee of a contractor engaged by the telephone company to replace old telephone poles. *Id.* at 736-38. After the claimant had climbed a pole and attached himself to it, the pole broke beneath the surface of the earth and toppled the claimant to the ground. *Id.* at 737. Judge Kaufman interpreted the policy to insure against liability for injury "arising out of" operations performed by the contractor. *Id.* at 741. Rejecting the insurer's argument that the pre-contract negligence of the telephone company was alleged to be the cause of the accident

so that the injury could not arise out of contract operations, Judge Kaufman held that "'but for' the operations having been conducted, [the claimant] would not have been injured during the course of them." *Id.* at 742; *see also Township of Springfield v. Ersek*, 660 A.2d 672 (Pa. Commw. Ct. 1995), *appeal denied*, 544 Pa. 640, 675 A.2d 1254 (1996).

National Indemnity Co. v. Ewing, 235 Md. 145, 200 A.2d 680 (1964), involved a coverage provision for bodily injury caused by accident and arising out of the ownership, maintenance, or use of an automobile. There we concluded that "it has generally been held that, while the words import and require a showing of causal relationship, recovery is not limited by the strict rules developed in relation to direct and proximate cause." *Id.* at 149, 200 A.2d at 682. In that case the driver of the insured vehicle and his passenger, both of whom were inebriated, were traveling late at night on a rural road during a snowstorm. *Id.* at 147-48, 200 A.2d at 681. When the vehicle went off the road, skidded along the shoulder, and ultimately struck a utility pole, the passenger was thrown from the car, but was not injured. *Id.* A passing motorist stopped and rendered assistance, including locating the passenger sitting on a snowbank. *Id.* at 148, 200 A.2d at 681. While the host driver was assisting his passenger in walking down the highway to re-enter the insured vehicle, the passenger was struck and injured by a third car that was traversing the highway some twenty-five minutes after the first accident. *Id.* We affirmed a declaratory judgment, entered after a jury trial, that the injuries to the claimant passenger arose out of the host driver's use of the insured automobile. *Id.* at 147, 200 A.2d at 680-81. Although bound by the jury's finding that the injuries to the claimant in the second accident were proximately caused by

concurrent negligence on the part of the host driver and the third motorist, the Court found that there was a sufficient nexus of cause and effect between the use of the insured automobile in the first accident and the injuries to the claimant in the second accident. *Id.* at 150-51, 200 A.2d at 682-83. The connection was that "the negligent use of the [insured] car created a situation where [the claimant] was subjected to the risk of injury." *Id.* at 150-51, 200 A.2d at 683.

Ewing relied, *inter alia*, upon *Schmidt v. Utilities Ins. Co.*, 353 Mo. 213, 182 S.W.2d 181 (1944), involving coverage under an automobile liability policy for a pedestrian fall-down accident. *Schmidt*, 182 S.W.2d at 181-82. The claimant had tripped over triangular wooden blocks that a coal company's employees had left on the sidewalk when they had completed deliveries of coal. *Id.* at 182. The blocks had been used as a ramp, rising from street level to the top of the curb, to allow the insured delivery trucks to back up on the sidewalk to the customer's coal chute. *Id.* Although the negligent disposition of the blocks could be viewed as the proximate cause of the claimant's injuries, "the acts of disposition grew out of or arose from the use of the trucks, as trucks." *Id.* at 184.

The insurance treatises support the view articulated in *EDP Floors* and in *Ewing* that the words "arising out of" mean "originating from, growing out of, flowing from, or the like." *See, e.g.*, 6B J.A. Appleman & J. Appleman, *Insurance Law and Practice* § 4317, at 360-63 (R.B. Buckley ed., 1979) (in the context of automobile insurance, the words "arising out of" have "broader significance than the words 'caused by', and are ordinarily understood to mean originating from, incident to, or having connection with the use of the vehicle"); 12 G.J.

Couch, *Couch Cyclopedia of Insurance Law* § 45:61, at 294 (2d ed. 1981) ("[T]he words 'arising out of' ... generally mean 'originating from,' 'growing out of,' or 'flowing from.'"); 1 R.H. Long, *The Law of Liability Insurance* § 1.22, at 1-57 (1972) ("The phrase 'arising out of' is not to be construed to mean 'proximately caused by.' ... The words 'arising out of' mean causally connected with, not 'proximately caused by' use.").

In its opinion in this case the Court of Special Appeals also relied upon *Faber v. Roelofs*, 311 Minn. 428, 250 N.W.2d 817 (1977) (en banc), where coverage turned on whether the bodily injury was one "arising out of" the ownership, maintenance, or use of the insured school bus. *Faber*, 250 N.W.2d at 819-20. The school bus was owned by a private contractor whose liability policy named the school district as an additional insured. *Id.* at 819. An elementary school pupil had been killed when he ran into the street alongside the bus, slipped, and fell under the wheels. *Id.* There was no negligence on the part of the bus driver or owner, but the school district had been found to be concurrently negligent in establishing the bus route and the boarding and embarking procedures. *Id.* at 819-20. The court rejected the argument that, because of the absence of negligence on the part of the bus operator or owner, the accident was not one "arising out of" the use of the school bus. *Id.* at 822-23. Rather, because the pupil "was run over by the insured vehicle [t]he causal relation [was] present." *Id.* at 823.

See also American Family Mut. Ins. Co. v. Shelter Mut. Ins. Co., 747 S.W.2d 174 (Mo. Ct. App. 1988) (where claimant tripped in ruts in driveway of business premises while assisting the driver of the business's insured truck to carry an automobile transmission that

had been unloaded from the truck twenty to thirty-five feet away, claimant's injury arose out of the use of the insured vehicle).

MTA alternatively contends that, even if proximate causation is not required for "arising out of" coverage, something more than "but for" causation is required. From among the decisions of this Court MTA selects two as illustrations of "intermediate causation," *Ewing*, *supra*, and *Frazier v. Unsatisfied Claim & Judgment Fund Bd.*, 262 Md. 115, 277 A.2d 57 (1971). MTA's argument attempts to read into these cases a meaning that is not there. In *Ewing* this Court simply rejected proximate cause as a predicate for "arising out of" coverage, without mentioning any need for some lesser fault. *Ewing*, 235 Md. at 149, 200 A.2d at 682.

The flaw in MTA's argument is clearly exposed in *Frazier*. There the claimants against the former Unsatisfied Claim and Judgment Fund (the Fund) were a mother and her child, age five at the time of the accident. *Frazier*, 262 Md. at 116, 277 A.2d at 58. Under the Fund law one basis for recovery against the Fund was a personal injury that "arises out of" the use of an unidentified motor vehicle. *Id.* at 117, 277 A.2d at 58. While the mother had been driving an open convertible with her child in the back seat, an unidentified motorist, driving in the opposite direction, threw a lighted cherry bomb or firecracker into the back seat of the convertible. *Id.* at 116, 277 A.2d at 58. The projectile exploded, the child cried, the mother lost control of the car, and the car hit a tree. *Id.* This Court, drawing on automobile liability coverage cases, held that the Fund was answerable because "the injuries under the facts of this case did arise out of the ... use of an unidentified motor

vehicle." *Id.* at 119, 277 A.2d at 59. There was no fault in the driving, *per se*, of the unidentified motor vehicle--only in what the unidentified motorist did while driving. We fail to see how *Frazier* supports the need for "intermediate causation" in the operation of the MARC train before the collision can be said to "arise out of" the train's operation.

Contracts made by promisors, other than commercial insurers, to indemnify for loss "arising out of" certain activity of the indemnitor are interpreted and applied in the same manner as contracts made by commercial insurers. Here, Contract Service is an activity of MTA, and we have demonstrated (*see* Part III, *supra*) that the promise to indemnify includes liability for the sole negligence of CSXT. Consequently, so long as the liability of CSXT arises out of Contract Service, it matters not that MTA is without fault.

The indemnification agreement at issue in *O'Connor v. Serge Elevator Co.*, 58 N.Y.2d 655, 458 N.Y.S.2d 518, 444 N.E.2d 982 (1982) (per curiam), *amended on other grounds by* 58 N.Y.2d 799, 459 N.Y.S.2d 266, 445 N.E.2d 649, *and reargument denied*, 58 N.Y.2d 824, 459 N.Y.S.2d 1030, 445 N.E.2d 657 (1983), involved the construction of a thirty-two-story building. *O'Connor*, 444 N.E.2d at 983. The drywall subcontractor, in its subcontract, agreed to indemnify the general contractor against liability "includ[ing] personal injuries 'arising out of the work which is the subject of this contract,' regardless of whether caused by [the subcontractor, the general contractor], or others." *Id.* An employee of the subcontractor, while leaving his workplace for lunch, had been injured by an elevator then being installed by the elevator subcontractor. *Id.* Reversing a judgment for the drywall

subcontractor on the general contractor's claim against it for indemnification, the Court of Appeals of New York said:

> "The [sub]contract could not be performed, of course, unless [the drywall subcontractor's] employees could reach and leave their workplaces on the job site. The instant injuries, occurring during such a movement, must be deemed as a matter of law to have arisen out of the work. Thus, [the general contractor] was entitled to indemnity from [the drywall subcontractor]."

Id. Similarly, the damage to the backhoe arose out of CSXT's Contract Service.

The following cases are to the same effect: *Indemnity Ins. Co. of N. Am. v. Koontz-Wagner Elec. Co.*, 233 F.2d 380 (7th Cir. 1956) (applying Indiana law) (under contract for removal of light fixtures in owner's manufacturing plant, providing that contractor indemnify owner for liability "growing out of the performance of this order," contractor must indemnify owner for injuries to contractor's employees incurred when owner's employee drove a lift truck into scaffolding on which contractor's employees were standing while removing fixtures); *Myers v. Burger King Corp.*, 618 So. 2d 1123 (La. Ct. App.) (under contract for renovation of owner's fast food restaurant, providing that contractor promised to maintain liability insurance to protect owner from any claims which "arise from" the contractor's operations, contractor breached promise by failing to obtain insurance, and contractor is liable for damages payable to contractor's employee for injuries suffered due to owner's negligent installation of a menu board that struck contractor's employee while employee was working on it), *writ denied*, 629 So. 2d 348 (1993); *Vitty v. D.C.P. Corp.*, 268 N.J. Super. 447, 633 A.2d 1040 (App. Div. 1993) (under contract to provide towing and wrecking services on the Garden State Parkway, providing that contractor indemnify state highway

authority for liability "arising out of this License," contractor must indemnify state highway authority for death of contractor's employee who, while on duty in tow truck standing at crossover, was killed when struck by a drunk driver whose car allegedly became airborne as a result of defective design of highway median); *Wallace v. Sherwood Constr. Co.*, 877 P.2d 632 (Okla. Ct. App. 1994) (mem.) (under subcontract for hauling dirt during construction of turnpike, providing that hauling subcontractor indemnify general contractor for all damages "arising out of or resulting from subcontractor's performance of the work required by the subcontract," subcontractor must indemnify general contractor for injuries to subcontractor's sub-subcontractor caused fifty percent by general contractor's negligence and fifty percent by claimant's contributory negligence).

In the instant matter, were we to interpret the contractual indemnification by MTA of CSXT more narrowly than a liability insurance policy, then CSXT would have less protection against the risk of liability up to $5 million than it would have under a liability policy in the exposure range of $5 million to $150 million. That was not the intention of the parties to the Contract.

V

MTA argues that, if the indemnification provision in the Contract applies to the facts of the matter at hand, then the indemnification is void under CJ § 5-305, set forth in full in note 4, *supra*. The obvious obstacle that the argument faces is that the Contract relates to commuter rail service and not to construction work. MTA's response to that obstacle is that the promise to indemnify is also unenforceable if the promise is "in connection with or collateral to, a contract or agreement relating to the construction ... of a ... structure." MTA

submits that when the indemnification promise in the Contract is applied to a loss that is caused by the negligence of the CSXT foreman who was overseeing work under the CSXT-Benhoff contract, then the indemnification is "in connection with" a construction contract. The Court of Special Appeals refused to give the statute so expansive a reading, agreeing with the observation of the United States Court of Appeals for the Fourth Circuit in *Brown v. Baltimore & Ohio R.R. Co.*, 805 F.2d 1133 (1986), that the General Assembly did not intend a reading so expansive as to reach, as presented in *Brown*, hold harmless provisions in license and easement agreements given by railroads for access over and under their rights of way. *Id.* at 1142.

We agree with the Court of Special Appeals that CJ § 5-305 is not to be given so expansive a reading that it is applicable to the facts of the instant matter. In doing so we shall assume, *arguendo*, that the CSXT-Benhoff contract is a contract "relating to the construction, alteration, repair, or maintenance of a building, structure, appurtenance or appliance." Nevertheless, the plain or ordinary meaning of "in connection with or collateral to" in the context of CJ § 5-305 would embrace supplemental, amendatory, or side agreements relating to the construction contract and made between the parties to the construction contract. Further, CJ § 5-305 possibly could embrace contracts between third parties and one or the other of the parties to the construction contract where such a third-party contract is necessary to the performance by a party to the construction contract of that party's obligations under the construction contract.

The Contract was executed October 1, 1990, succeeding agreements between the railroad and the State for commuter rail service dating back to 1979. CSXT's "construction"

contract with Benhoff was not made until November 1992. Inasmuch as a railroad is an operating unit, *see* Maryland Code (1986, 1994 Repl. Vol.), § 8-108 of the Tax-Property Article, some connection can be found between almost any two contracts of a railroad that are to be performed during the same period of time. We do not believe, however, that the General Assembly intended so attenuated a connection.

A decent respect for the freedom of sophisticated parties contractually to establish the rules governing their business relationship compels the conclusion that the General Assembly intended contracting parties to be able to determine, when they contract, whether CJ § 5-305 applies to their agreement. On October 1, 1990, the Contract was not one for construction, and we hold that it did not become a construction contract because of the collision between a MARC train and the backhoe. Construing CJ § 5-305 as MTA proposes would retroactively void the indemnification of the State by CSXT, as to claims of CSXT's employees against MTA, and retroactively void the indemnification of CSXT by the State. Were the General Assembly to enact a statute that expressly and retroactively voided pre-existing contracts of indemnity, weighty constitutional issues would be raised. We do not interpret CJ § 5-305 to operate in the same fashion based on a temporary interface of forces.

MTA asserts that there is a contradiction in the analysis by the Court of Special Appeals when it said: "Although the collision may have arisen out of the construction contract between CSXT and Benhoff, CSXT's right to indemnification does not arise out of a construction contract." *CSX Transp.*, 111 Md. App. at 645, 683 A.2d at 1132. As the Court of Special Appeals made plain, and as we attempted to make plain in Part IV, *supra*, the chain of causation "arising out of" the Benhoff contract, *i.e.*, omission by the CSXT

foreman at the Hanover Road crossing, is a proximate cause of the backhoe's destruction, while the chain of causation "arising out of" Contract Service under the Contract is physical causation or causation in fact. The latter satisfies contractual indemnity while the former is required for tort liability.

VI

For the reasons above set forth the Circuit Court for Howard County erred in its judicial review of the BCA determination. That court considered that BCA applied correct legal principles to facts supported by substantial evidence. BCA, however, used an incorrect legal standard. It applied the indemnification provision based on the proximate cause of the collision with the backhoe, without recognizing that the "arising out of" promise in the Contract's indemnification of CSXT was a broader concept.

JUDGMENT OF THE COURT OF SPECIAL APPEALS AFFIRMED. COSTS TO BE PAID BY THE PETITIONER, MASS TRANSIT ADMINISTRATION.