IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JERRY LAGRONE and ROSE LAGRONE, his wife,	)	
Plaintiffs,	)	
v.	)	C.A. No. 04C-10-116-ASB
AMERICAN MORTELL CORP., et al.,	)	
Defendant.	)	
THE MARMON GROUP, LLC, et al.,	)	
Plaintiffs,	)	
v.	)	C.A. No. 07C-12-019-JRS
MORTELL COMPANY, et al.,	)	
Defendants.	)	

Date Submitted: June 20, 2008
Date Decided: September 4, 2008

MEMORANDUM OPINION.

Upon Consideration of Defendants' Motion to Dismiss.
GRANTED.

Timothy Jay Houseal, Esquire, YOUNG CONAWAY STARGATT & TAYLOR, Wilmington, Delaware; and Stephen S. McCloskey, Esquire, SEMMES BOWEN & SEMMES, Baltimore, Maryland. Attorneys for Marmon Group, LLC and TRH Holding Corporation.

Donald E. Reid, Esquire and Jason A. Cincilla, Esquire, MORRIS NICHOLS ARSHT & TUNNELL, LLP, Wilmington, Delaware. Attorneys for Mortell Company and The Dow Chemical Company.

SLIGHTS, J.

I.

In this opinion, the Court considers the legal viability of claims for indemnification brought by one of several co-defendants in an asbestos exposure case against another co-defendant after the underlying tort action was resolved by settlement. The plaintiffs in this action, The Marmon Group, LLC ("Marmon"), TRH Holding Corp. ("TRH") and Fenestra Corp. ("Fenestra") (collectively "Plaintiffs"), seek indemnification, both contractual and implied, from defendant, Mortell Company ("Mortell") and its successor, The Dow Chemical Company ("Dow") (collectively "Defendants"), for amounts Marmon paid in settlement of an asbestos exposure claim brought by Jerry Lagrone and his wife against Marmon, Fenestra, Mortell and others. Mortell settled with Mr. and Mrs. Lagrone before trial. Marmon settled with Mr. and Mrs. Lagrone during trial. Defendants have moved to dismiss Plaintiffs' indemnification complaint on the grounds that no contract exists to support a claim of contractual indemnification and the implied indemnification claim fails as a matter of law because the underlying action was settled before the jury could determine whether *vel non* Marmon was negligent.

The Court has concluded that Plaintiffs' indemnification complaint does not and cannot allege that either TRH or Fenestra have suffered damages and, therefore, both entities have failed to plead a valid indemnification claim against Mortell. In

addition, because the complaint does not and cannot allege that Mortell made a contractual commitment to indemnify Marmon, the express indemnification claim brought by Marmon must fail. Finally, implied indemnification is not available here because Plaintiffs cannot well-plead that Marmon's settlement of the Lagrone action did not resolve claims of direct (active) negligence against it (as opposed to claims that Marmon was liable solely for the negligence of others). Accordingly, Mortell's motion to dismiss must be **GRANTED.**

II.

Mr. Lagrone filed suit in this Court alleging that he was exposed to asbestos while working as a technician for a company that fabricated asbestos-containing fire doors. He alleged that Marmon/Fenestra manufactured the doors and that Mortell manufactured an asbestos-containing sound deadening core that was placed inside the shell of the doors.[1] Mr. Lagrone named dozens of other defendants in connection with various other exposures to asbestos as identified in his complaint. As to all defendants, Mr. Lagrone alleged that he was exposed to asbestos and developed mesothelioma "as a result of defendants' wrongful conduct."[2] He characterized that wrongful conduct, as to all defendants, as negligence, failure to warn, civil conspiracy

[1]TRH was not named as a defendant in *Lagrone.*

[2]Lagrone Compl. ¶2.

and strict liability.[3] All defendants answered and asserted generic cross claims against each other for contribution and indemnification.

All defendants except Marmon settled with the Lagrones before trial. Mortell settled a month prior to trial in June, 2007. The trial commenced on July 23, 2007 with Marmon as the only defendant. During trial, Mr. Lagrone alleged that Marmon was vicariously responsible for Mortell's defective product (the asbestos-containing sound deadener) and also negligent in its own right for knowingly including Mortell's asbestos-containing product *and* for incorporating other "asbestos millboard" within its fire doors.[4] Marmon denied all allegations of negligence whether passive/vicarious or active/direct.

The Court was advised on the morning of July 26th that the parties had settled. Needless to say, the jury never reached the question of whether Marmon was negligent and, if so, in what manner. The Court entered an order dismissing the *Lagrone* action on October 17, 2007. The Court vacated that order on October 31, 2007, at Marmon's request, so that Plaintiffs could proceed with this indemnification claim. Perhaps in response to the Court's direction that Marmon "initiate" indemnification proceedings against Mortell by a date certain, Plaintiffs filed a

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[3] *Id. passim.*

[4] Trial Trans. 7/23/07 at 10, 143-144; 7/25/07 at 72-73, 75.

separate action for indemnification rather than simply prosecuting their cross claims in the reopened *Lagrone* case.[5]

The indemnification complaint alleges that TRH is the "successor by merger" of Fenestra."[6] Marmon was sued in *Lagrone* in its own right and as the successor of Fenestra, the manufacturer of the fire doors at issue in *Lagrone.*[7] According to Plaintiffs, Marmon is not, in fact, the successor of Fenestra and maintained its separate status throughout the *Lagrone* litigation.[8]

Plaintiffs allege that Fenestra entered into a contract with Mortell "for the sale and use of the 177 Weld-Thru Sealer" and that "the contract contained an indemnity provision that requires Mortell to defend and to indemnify Fenestra for liability that arose out of Mortell's 1777 Weld-Thru Sealer."[9] Plaintiffs also allege that they "were exposed to liability in the *Lagrone* lawsuit solely as a result of Fenestra's incorporation of Mortell's asbestos-containing 1777 Weld-Thru Sealer into Fenestra's own product, with no additional negligence on its part."[10] Based on these factual

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[5]Both actions have been consolidated without objection of the parties.

[6]Indem. Compl. at ¶ 3.

[7]*Id.* at ¶1.

[8]*Id.* at ¶¶ 1,3.

[9]*Id.* at ¶¶ 22-23.

[10]*Id*. at ¶24.

predicates, Plaintiffs seek recovery for both "contractual indemnification" and "common law indemnification," respectively.[11]

III.

Defendants' motion first questions whether Marmon is a proper plaintiff in this indemnification action. Defendants point out that Marmon, in its answer to the *Lagrone* complaint, alleged that it was neither the corporate successor to Fenestra nor otherwise liable for Fenestra's acts or omissions. This allegation was reiterated in the Plaintiffs' indemnification complaint.[12] Because Fenestra, not Marmon, manufactured the fire doors at issue in *Lagrone*, and at issue here, Defendants allege that Marmon lacks standing "to bring an indemnity claim arising from Fenestra's use of Mortell's product...."[13]

Defendants next argue that TRH has no viable indemnification claim because it has not, as a matter of law, suffered any damages. According to the indemnification complaint, Marmon, not TRH and not Fenestra, settled the *Lagrone* case.[14] TRH is not affiliated with Marmon. Rather, it is the corporate successor to Fenestra.[15]

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[11] *Id.* at Count I & Count II.

[12] *Id.* at ¶1.

[13] Defendants' Opening Br. at 4.

[14] Indem. Compl. at ¶20.

[15] *Id.* at ¶3.

According to Defendants, because neither Fenestra nor TRH paid any amounts to settle *Lagrone,* TRH cannot, as a matter of law, recover indemnification for amounts paid by Marmon, an entity with which it is not legally affiliated.

Defendants next argue that Plaintiffs cannot prosecute an express indemnification claim in the absence of an express contract between any of the Plaintiffs and Mortell. Plaintiffs allege in their indemnification complaint, "upon information and belief," that such a contract exists but they do not describe it or attach it to their complaint.[16] Defendants contend that this allegation is not "well plead" and cannot be considered in determining whether plaintiffs have plead a sustainable claim for contractual indemnification. Moreover, say Defendants, the contract that allegedly exists is between Fenestra and Mortell, and Plaintiffs have plead no facts that would support their claim that Marmon's settlement payment in *Lagrone* would be covered by this contract.

Finally, with respect to the implied indemnification claim, Defendants argue that Plaintiffs cannot prevail because they cannot properly plead that Marmon's settlement payment in *Lagrone* did not resolve, at least in part, claims that Marmon and/or Fenestra were actively negligent (as opposed to vicariously negligent) in a manner that proximately caused injury to Mr. Lagrone. In this regard, Defendants

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[16] *Id.* at ¶¶ 22-23.

argue that the allegations in the indemnification complaint regarding the nature of Marmon's alleged wrongdoing contradict the trial record in *Lagrone* and are not, therefore, well plead. According to Defendants, by settling *Lagrone* in the face of claims that it was actively negligent and before the jury reached its verdict, Marmon extinguished the Plaintiffs' right to prosecute an implied indemnification claim as a matter of law.

Plaintiffs contend that their indemnification complaint does allege facts that would allow an inference that Marmon has standing to pursue this claim and TRH has suffered compensable damages. The allegations are stated summarily but, according to Plaintiffs, they must be accepted as true for purposes of this motion to dismiss. Plaintiffs suggest that summary judgment motion practice, after discovery, is the proper context in which to address Defendants' standing and damages concerns.

Plaintiffs disagree with Defendants' argument that the implied indemnification claim rises or falls on the state of the record in the *Lagrone* case at the time of settlement, and specifically take issue with the notion that implied indemnification is not available to them because the claims of active negligence against Marmon were unresolved when Marmon settled with Mr. and Mrs. Lagrone. Plaintiffs contend that they should be given the opportunity to take discovery and then to prove that Mortell's negligence alone caused Mr. Lagrone to be exposed to asbestos while

working with Fenestra fire doors.

Discovery is also necessary before the Court can consider the viability of Plaintiffs' contractual indemnification claim, according to Plaintiffs, because the Court cannot make a determination of whether Plaintiffs, or any of them, are owed contractual indemnification until the Court sees the contract(s) at issue. Plaintiffs cannot locate the operative contracts and want the opportunity to discover if Defendants or third parties might have them. Plaintiffs reiterate that their indemnification complaint alleges that the contract exists, and that each plaintiff has a right to enforce the indemnification provisions within the contract. They argue that the Court must accept these allegations as true under the operative standard of review.

IV.

Defendants have styled their motion as a motion to dismiss. When considering a motion to dismiss, the Court must read the complaint generously, accept all of the well-pleaded allegations contained therein as true, and construe them in a light most favorable to the plaintiff.[17] A complaint is 'well-plead' if it puts the opposing party

[17]*See In re Tri-Star Pictures, Inc. Litig.*, 634 A.2d 319, 326 (Del. 1993)(the reviewing court must accept the allegations of the complaint as true); *Browne v. Robb*, 583 A.2d 949, 950 (Del. 1990)("The complaint sufficiently states a cause of action when a plaintiff can recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint.'")(citation omitted); *Johnson v. Gullen*, 925 F. Supp.244, 247 (D. Del. 1996)(same).

on notice of the claim being brought against it.[18] "Allegations that are merely conclusory and lacking factual basis, however, will not survive a motion to dismiss."[19]

Defendants have attached and referred to *Lagrone* pleadings and trial transcripts in their motion to dismiss. Plaintiffs argue that these references to matters outside of the indemnification complaint automatically convert the motion to dismiss that complaint into a motion for summary judgment. If this conversion occurs, Plaintiffs argue that they are entitled to develop the factual record relating to their indemnification claims before the Court considers the propriety of dispositive relief. Defendants counter that the *Lagrone* pleadings and transcripts are not extraneous matters, but rather are matters inextricably linked to the underlying action that gives rise to the alleged right to indemnification being prosecuted here. Alternatively, Defendants contend that the pleadings and transcripts are items of which the Court can take judicial notice.

In determining whether to convert a motion to dismiss to a motion for summary judgment, the court must first consider whether the movant, in fact, has attached or relied upon "matters outside the pleadings" as contemplated by Superior Court Civil

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[18] *Precision Air v. Standard Chlorine of Del.,* 654 A.2d 403, 406 (Del. 1995).

[19] *See Criden v. Steinberg,* 2000 WL 354390 at *2 (Del. Ch. March 23, 2000)(citation omitted).

Rule 12(b).[20] Matters attached to a complaint, and incorporated by reference, are not "extraneous" for purposes of Rule 12.[21] Similarly, if a plaintiff chooses not to attach a document, e.g. a contract, to a complaint that raises claims based on the document, e.g. a breach of contract, a defendant may properly attach a copy of the document to a motion to dismiss without implicating the motion for summary judgment standard of review.[22]

Here, Plaintiffs make several references to the *Lagrone* litigation in their indemnification complaint but do not attach any of the *Lagrone* pleadings or transcripts. Defendants, in turn, make several specific references to the pleadings and transcripts in their motion to dismiss and attach portions of the documents as exhibits to their motion papers. These are not extraneous matters; they are the factual predicates upon which the Plaintiffs' indemnification claims are based. They are as integral to indemnification claims as a contract would be to a breach of contract

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[20]Del. Super. Ct. Civ. R. 12(b).

[21]*See O/E Systems, Inc. v. Inacom Corp.,* 179 F. Supp.2d 363, 367 n. 2 (D. Del. 2002)(holding that a contract attached to complaint and incorporated by reference may be considered by the court on a motion to dismiss the complaint).

[22]*See e.g. Aim Int'l Trading v. Valcucine S.P.A.,* 2003 WL 21203503, *3 (S.D. N. Y. May 22, 2003) (defendant properly attached contract omitted from complaint to a motion to dismiss complaint).

claim. [23] Moreover, the pleadings and transcripts are part of the official court record and are subject to judicial notice.[24] As such, they may properly be considered on a motion to dismiss.[25] To the extent Plaintiffs' complaint alleges facts regarding the *Lagrone* litigation that are at odds with the official record of that case, such allegations will not be regarded as well plead and will not be regarded as true for purposes of the motion *sub judice.*[26]

V.

Before the Court turns to the merits of the motion to dismiss, it first must address the choice of law applicable to this dispute. Once this is determined, the Court will address whether the alignment of the various Plaintiffs, given the nature of the *Lagrone* settlement, leaves each of them without a right to pursue indemnity

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[23] *See* 61A AM. JUR. 2D *Pleading* §584 (2008)("Documents that the defendant attaches to the motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to the claim; as such, they may be considered by the court.").

[24] *See Frank v. Wilson,* 32 A.2d 277, 280 (Del. 1943)(taking judicial notice of court record in companion litigation on a motion to dismiss related complaint); *Orloff v. Schulman,* 2005 WL 3272355, at * 12 (Del. Ch. Nov. 23, 2005)(court considered pleadings in companion bankruptcy litigation which contradicted pleading filed in the Chancery litigation); *Lawrence v. The Richman Group Cap. Corp.,* 358 F. Supp. 2d 29, 35 n.5 (D. Conn. 2005)(court may take judicial notice of "prior pleadings, orders judgments and other items appearing in the Court's records of prior litigation....").

[25] *Id. See also* 61A AM. JUR. 2D *Pleading* §584 (2008)("the court may consider matters which are properly the subject of strict judicial notice [on a motion to dismiss].").

[26] *Frank,* 32 A.2d at 280-81 (finding that plaintiff was bound by matters contained in the court record of prior litigation regardless of his contrary assertions in a later complaint).

here. The Court will then separately consider the viability of the implied indemnification claim given the procedural posture in which it is brought.

A. Choice of Law

Delaware follows the "most significant relationship test" when determining questions of choice of law.[27] This test applies to actions for indemnification.[28] To determine which State has the most significant relationship to a controversy, the Court must consider such factors as the place of contracting or place of injury, the place where the contract was negotiated or the place where conduct causing injury occurred, the place where the parties are resident and/or domiciled and the place where the relationship between the parties is centered.[29] The court must apply the law of the State with the most significant relationship to the controversy in the absence of a contract between the parties specifying the choice of law.[30]

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[27] *See Travelers Indem. Co. v. Lake*, 594 A.2d 38, 47 (Del. 1991)(adopting RESTATEMENT (SECOND) CONFLICTS §§ 6, 145).

[28] *See* RESTATEMENT (SECOND) CONFLICTS § 173 (1971).

[29] *Lake,* 594 A.2d at 47 (discussing most significant relationship test in tort actions); *Northwestern Nat'l Ins. Co. v. Esmark, Inc.*, 1996 WL 527349, *3 (Del. Super. Ct. Aug. 9, 1996)(discussing most significant relationship test in breach of contract action).

[30] *See Annan v. Wilmington Trust Co.*, 559 A.2d 1289, 1292 (Del. 1989)("Delaware courts will generally recognize a valid choice of law provision in a contract, as long as the jurisdiction selected bears some material relationship to the transaction.")(internal quotations omitted).

Not surprisingly, the parties disagree as to the choice of law in this case. Defendants urge the Court to apply Illinois law, and for good reason. The parties agree that implied indemnification is not available under Illinois law.[31] Plaintiffs, on the other hand, argue that either Pennsylvania, Maryland or Delaware has the most significant relationship and that Illinois has virtually no connection to this dispute. Pennsylvania, Maryland and Delaware, of course, each recognize a right to implied indemnification.

The Court has reviewed the applicable law from each of the competing jurisdictions and has concluded that the end result is the same regardless of which State's law the Court applies here. In such instances of "false conflicts" of laws, the Court may resolve the dispute without a choice between the laws of the competing jurisdictions.[32] To the extent useful, the Court will draw on the law of each of the jurisdictions that recognize implied indemnification as a cause of action in order to address the *bona fides* of that claim here.[33]

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[31] *Frazer v. A.F. Munsterman, Inc.,* 527 N.E.2d 1248, 1255-56 (Ill. 1988)(rejecting implied indemnification claim as a matter of law).

[32] *See Savor, Inc. v. FMR Corp.,* 2004 WL 1965869, at *6 (Del. Super. Ct. July 15, 2004); *Rohm & Hass Co. v. Adco Chem. Co.*, 689 F.2d 424, 429 (3d Cir. 1982).

[33] *See HLTH v. Agricultural Excess & Surplus Inc. Co.*, 2008 Del. Super. LEXIS 280, at ** 28-29, n. 29.

B. Plaintiffs Have Failed To State A Claim For Contractual Indemnification

According to Plaintiffs, the contracts that would give rise to a contractual indemnification claim are between Fenestra and Mortell. These contracts take the form of purchase orders or similar contracts and "relate back to a period beginning in 1966 and continu[ing] through the mid 1970s."[34] Plaintiffs explain that they no longer have copies of these contracts but feel certain they could locate them during discovery.[35] They argue that they should be given this opportunity before the Court determines whether their contractual indemnification claim stands up. Defendants counter that Fenestra's contracts with Mortell, assuming they exist, cannot form the basis of a contractual indemnification claim in this case.

As among Fenestra, Marmon and TRH, only Marmon paid any amount to settle the *Lagrone* litigation.[36] The indemnification complaint and Marmon's answer in *Lagrone*, however, confirm that Fenestra and Marmon have no legally significant relationship with each other.[37] As Marmon maintained no contractual relationship

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[34]Pls. Opp. Brief at 21.

[35]*Id.*

[36]Indem. Compl. at ¶ 20.

[37]Indem. Compl. at ¶ 1; Marmon Ans. To Lagrone Compl. at ¶ 63 ("Marmon Group, Inc. is not the successor in interest to Finestra Corporation. Marmon Group, Inc. is not liable for the liabilities, acts or omissions of Finestra Corporation.").

with either Mortell or Dow, and has asserted no legal basis to avail itself of the alleged contract between Fenestra and Mortell, it cannot sustain a claim for contractual indemnification against the Defendants as a matter of law.[38] For their part, neither Fenestra nor its alleged successor in interest, TRH, have paid any amounts in settlement of a claim for which they may seek indemnification from Defendants. While Fenestra may well have had contracts with Mortell which provided for indemnification, the indemnification complaint confirms that Fenestra (and its alleged successor in interest, TRH) have incurred no indemnifiable loss.[39] Consequently, none of the Plaintiffs have plead an actionable claim for contractual indemnification.[40]

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[38]*See Howard, Needles, Tammen & Bergendorff v. Steers, Perini & Pomeroy,* 312 A.2d 621, 624 (Del. Super. Ct. 1973)("when the parties to a contract have entered into a written agreement expressly setting forth one party's indemnity liability, there is no room for any enlargement of that obligation by implication").

[39]Indem. Compl. at ¶ 20.

[40]It is important to note that Plaintiffs have not plead any facts that would allow the Court to infer that the contracts to which they refer, if they exist, would somehow extend to third parties, such as Marmon. Nor have they offered any legal authority in their brief or at oral argument for the proposition that amounts paid by Marmon to settle *Lagrone* can be recovered as damages by entities which have no apparent contractual or other legally significant relationship with Marmon. Accordingly, the Court can discern no justification for allowing Plaintiffs to amend their indemnification complaint in the hopes of pleading a sustainable claim for contractual indemnification. *Cartanza v. LeBeau*, 2006 WL 903541, at *5 (Del. Ch. Apr. 3, 2006)("Court will not grant a motion to amend if the amendment would be futile.").

C. As A Volunteer, Marmon Is Not Entitled To Indemnity

In Count II of their indemnification complaint, Plaintiffs allege that they "were exposed to liability in the *Lagrone* litigation solely as a result of Fensestra's incorporation of Mortell's asbestos-containing [sound deadener] into Fenestra's own product."[41] Fenestra manufactured the fire doors that allegedly injured Mr. Lagrone, not Marmon.[42] Marmon is not the successor-in-interest to Fenestra and Plaintiffs have plead no other basis upon which Marmon could seek indemnification for a liability that was Fenestra's (or it's actual successor-in-interest, TRH's) to bear.[43] At best, Marmon, Fenestra and now TRH are affiliated companies "within The Marmon Group umbrella of companies."[44] This affiliation, however, does not cause the affiliates to share rights or liabilities.[45] When Marmon settled *Lagrone*, it did so as a volunteer, i.e., it paid the settlement on Fenestra's behalf without any legal or contractual obligation to do so. Volunteers have no right to seek indemnification for

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[41]Indem. Compl. at ¶ 30.

[42]*Id.* at ¶¶ 7-9.

[43]*Id. at* ¶ 1.

[44]Pls. Opp. Br. at 24.

[45]*See Allied Capital Corp. v. GC-Sun Holdings LP,* 910 A.2d 1020, 1039 n.45 (Del. Ch. 2006)(noting that subsidiaries are "separate entities").

payments they could not otherwise have been compelled to make.[46] For this reason alone, Marmon's indemnification claims, both contractual and implied, fail as a matter of law.

D. Marmon's Settlement Of A Claim Of Active Negligence Precludes Plaintiffs' Claim For Implied Indemnification

"Indemnity in its most basic sense means reimbursement and may lie when one party discharges a liability which another rightfully should have assumed, and it is based on the principle that everyone is responsible for his or her own wrongdoing, and if another person has been compelled to pay a judgment which ought to have been paid by the wrongdoer, then the loss should be shifted to the party whose negligence or tortious act caused the loss."[47] The right to indemnification can rest on any one of three grounds: (1) an express contract; (2) a contract implied-in-fact; or (3) equitable concepts arising from the tort theory of indemnity, i.e., indemnification implied-in-law.[48]

The Court already has determined that no contractual basis exists to impose an indemnity obligation upon the Defendants. The Court also has determined that

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[46] *See Kemper Nat'l P&C Cos. v. Smith,* 615 A.2d 372, 376 (Pa. 1992)("It is well settled that voluntary payments in exchange for the compromise of a claim are not compulsory and do not entitle the paying party to a claim for subrogation or indemnity.").

[47] 41 AM. JUR. 2D *INDEMNITY* §1 (2008).

[48] *Id.* at §2.

neither Fenestra nor TRH have sustained an indemnifiable loss, and that Marmon cannot seek indemnity for a payment it was not obliged, or could not be obliged, to make. The parties expended much time and energy addressing whether Marmon has plead a viable claim for implied indemnification under the laws of either Illinois, Delaware, Maryland or Pennsylvania.[49] In order to resolve all issues joined in the motion, the Court will consider this issue as well.

"No single definition or rule of law identifies all instances in which one of two persons, who are liable in tort for the same legally cognizable harm, will be able [through an implied right] to totally shift the loss to the other party."[50] Throughout the country, courts have wrestled with the lack of precision that has become a hallmark of the common law of implied indemnification, and many have been struck by the confusion that has followed efforts to supply definitive guidance in this area.[51]

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[49]Plaintiffs have not alleged that implied indemnification is available to them under the so-called "special relationship" theory, and it is clear from the pleadings that no such relationship exists as a matter of law. *See SW (Delaware), Inc. v. American Consumers Indus., Inc.*, 450 A.2d 887, 890 (Del. 1980)(recognizing that relationship between "manufacturer/seller and a purchaser/user" is not a "special relationship" for implied indemnity purposes). Accordingly, the Court will not address whether implied indemnification is appropriate under this theory.

[50]*Franklin v. Morrison*, 711 A.2d 177, 183-84 (Md. Ct. App. 1998).

[51]*See Vertecs Corp. v. Reichold Chems., Inc.,* 661 P.2d 619, 624 (Alaska 1983)("The attempt to manufacture standards for decision and the resulting labels of 'active-passive' or 'primary-secondary' negligence left the indemnity jurisprudence of many states in disarray."); *Dole v. Dow Chem. Co.*, 282 N.E.2d 288, 291 (N.Y. Ct. App. 1972)("The 'active-passive' test to determine when indemnification will be allowed by one party held liable for negligence against another negligent party has in practice proven elusive and difficult of fair application.").

To be sure, "[n]on-contractual implied indemnity has been the most troublesome development in the indemnity area."[52] In their seminal treatise, Professors Prosser and Keaton recognized that although rigid standards are not a part of the implied indemnification jurisprudence, it is clear that a party asking a court to imply a right to indemnification must demonstrate that it is significantly less culpable than the joint tortfeasor from whom it seeks indemnity:

> It is extremely difficult to state any general rule or principle as to when indemnity will be allowed and when it will not. It has been said that it is permitted only where the indemnitor has owed a separate duty to the indemnitee; that it is based on a 'great difference' in the gravity of the fault of the two tortfeasors; or that it rests upon a disproportion or difference in character of the duties owed by the two to the injured plaintiff.[53]

In Delaware, Maryland, and Pennsylvania, like many other states, the courts sought to characterize the "great difference in the gravity of fault of the two tortfeasors" by drawing a distinction between "active" and "passive" negligence.[54] "Active negligence" connotes affirmative negligent conduct; "passive negligence" connotes

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[52]*See* J. Cheap, *Contribution and Indemnity Collide With Comparative Negligence - The New Doctrine of Equitable Indemnity*, 18 Santa Clara Law Rev. 779, 783 (1978).

[53]W.P. Keeton, et al., PROSSER & KEETON ON THE LAW OF TORTS §51 (5TH ED. 1984).

[54]*See Ianier v. University of Delaware,* 255 A.2d 687, 692 (Del. Super. Ct. 1969)(distinguishing between "active and passive negligence" for purposes of implied indemnification); *Franklin,* 711 A.2d at 184 (Maryland - same); *Builders Supply Co. v. McCabe,* 77 A.2d 368, 371 (Pa. 1951)(same).

vicarious liability or the failure to discover the negligence of another.[55] This distinction, while at times difficult to apply to case-specific facts, typically occupies the center of any controversy over the right to implied indemnification. Indeed, it is at the center of the controversy *sub judice*.

Judge Bifferato was the first Delaware judge to articulate the prerequisites of implied indemnification in *Ianire v. University of Delaware*.[56] There, the court considered the validity of a claim for implied indemnification in the context of allegations that one co-defendant (the party seeking indemnification) was, at best, "passively negligent," while the co-defendant against whom indemnification was sought was arguably "actively negligent."[57] In this context, the Court identified the following scenarios in which implied indemnification might be available:

> (1) Where the one seeking indemnity has only a derivative or vicarious liability for damage caused by the one sought to be charged;
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> (2) Where the one seeking indemnity has incurred liability merely because of failure, even though negligent, to discover or prevent the misconduct of the one sought to be charged;
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> (3) Where the one seeking indemnity has incurred liability because of a breach of duty owed to him by the one sought to be charged;

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[55] *Id.*

[56] 255 A.2d 687 (Del. Super. Ct. 1969).

[57] *Ianire*, 255 A.2d at 691.

> (4) Where the one seeking indemnity has incurred liability merely because of failure, even though negligent, to discover or prevent the misconduct of the one sought to be charged; and
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> (5) Where there is an express contract between the parties containing an explicit undertaking to reimburse for liability of the character involved.[58]

Plaintiff alleged that the University of Delaware failed to detect a defect in an underground electrical system caused by the negligence of another and that the resulting failure to warn of the defect was a proximate cause of injury to the plaintiff. The court characterized this conduct as "passive [in] character."[59] The allegations against the third party defendant, Diamond Electric, from whom the University sought indemnification, on the other hand, were that Diamond knew that it would be working in close proximity to electrical systems but failed to direct the University to de-energize those systems - - arguably "active negligence."[60] Because the allegations against the University involved only "passive negligence," the court concluded that the University could pursue an implied indemnity claim against the arguably "actively negligent" Diamond.[61]

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[58] *Id.* at 692. *See also Franklin,* 711 A.2d at 184 (Maryland - identifying several scenarios, similar to *Ianire*, in which a party may be liable for implied indemnification); *McCabe,* 77 A.2d at 371 (Pennsylvania - same).

[59] *Id.*

[60] *Id.*

[61] *Id.* at 695-96.

Ianire emphasized a fundamental feature of implied indemnification - - the remedy is not available to joint tortfeasors who allegedly are concurrently liable for active negligence.[62] In such instances, an allocation of fault and contribution in accordance with the allocation is the appropriate and exclusive remedy among joint tortfeasors.[63] Indemnification is available as a common law remedy only when the putative indemnitee faces liability of a different character than that faced by the putative indemnitor.[64] The distinction is a matter of *character* of fault, not *degree* of fault.[65] To be clear, the indemnitee must be liable only for "passive negligence" and the indemnitor must be liable for "active negligence." On this point, Delaware, Maryland and Pennsylvania are in accord.[66]

In this case, there can be no doubt that at the time it settled with the Lagrones, Marmon was defending allegations that it was actively negligent in a manner that

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[62]*Diamond State Tel. Co. v. University of Delaware,* 269 A.2d 52, 56 (Del. 1970).

[63]*Id. See also Franklin,* 711 A.2d at 186 ("cases of concurrent [active] negligence ... are not generally treated as giving rise to a right to indemnity."); *Siarianni v. Nugent Bros., Inc.,* 506 A.2d 868, 871 (Pa. 1986)("the common law right of indemnity is not a fault sharing mechanism....").

[64]*Franklin,* 711 A.2d at 186.

[65]*Id.; Diamond State Tel. Co.,* 269 A.2d at 56.

[66]*See Shiles v. Reed Trucking Co.,* 1995 WL 790974, *3 (Del. Super. Ct. Dec. 5, 1995)(concurrent active negligence "properly addressed through joint tortfeasor liability and contribution," not "equitable indemnity"); *Franklin,* 711 A.2d at 186 (same); *Siarianni,* 506 A.2d at 871 (same).

proximately caused injury to Mr. Lagrone. The *Lagrone* amended complaint contained claims of active negligence against all defendants which included allegations of failure to warn and negligent product design.[67] Thereafter, in several motion papers, the Lagrones charged that Fenestra fire doors contained "asbestos millboard" installed by Fenestra, in addition to the Mortell sound deadener, and that this millboard "would release considerable dust" when the doors were fabricated for custom use.[68] At trial, the Lagrones vigorously claimed, and Marmon vigorously disputed, that asbestos millboard within the Fenestra doors contributed to Mr. Lagrone's mesothelioma.[69] Thus, at the time of Marmon's settlement with the Lagrones, it cannot be disputed that it was defending claims of active negligence. Plaintiffs' allegations to the contrary in their indemnification complaint are not well plead.[70]

Notwithstanding that the *Lagrone* settlement occurred in the face of allegations that Marmon and Fenestra were actively negligent, Plaintiffs would have the Court reopen discovery and allow the parties to litigate the parties' respective culpability

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[67]Lagrone Compl. at ¶¶ 8,12.

[68]*See e.g.* Pl. Resp. To Marmon Mot. for Summ. Judg., at 2-3; Pl. Resp. To Marmon Mot. in Limine, ID 15024508 at 5-6; Pl. Resp. to Marmon Mot. in Limine, ID 15020393 at 2.

[69]*See e.g.* Trial Trans. 7/23/07 at 10, 143-44; Trial Trans. 7/25/07 at 72-73, 75.

[70]*Accord Frank,* 32 A.2d 299 (plaintiff's allegation of lack of knowledge of unpaid dividends in complaint not well plead when contradicted by matters in the court's record).

anew, conducting a trial, if necessary, to resolve the matter. Defendants counter that Plaintiffs are bound by the state of the record at the time of the Lagrone settlement and cannot now seek to reshape that record with further litigation. According to the Defendants, as the "last man standing" at trial, Marmon had the option to seek a determination as to both the character and degree of its fault in order to perfect its implied indemnification and/or contribution claims against settled co-defendants. It chose, instead, to cap its exposure and resolve its dispute with the Lagrones pre-verdict/judgment. This tactical decision, say Defendants, should mark the end of the litigation.

In *Ianire*, the court allowed implied indemnification only after concluding that the indemnitee, the University, had "not *entered any settlement* or had judgment entered against it on the basis of *allegations* of active negligence."[71] When drawing the distinction between the conduct of indemnitee and indemnitor, *Ianire* focused on the allegations against the parties as set forth in the pleadings, not the proof to be offered at a yet-to-be-convened trial, to determine that the claim of implied indemnification was viable.[72] In doing so, the court distinguished a case relied upon by Diamond in seeking summary judgment on the University's implied

[71] *Ianire*, 255 A.2d at 692 (emphasis supplied).

[72] *Id.*

indemnification claim, *Blockston v. United States*,[73] where the court dismissed the United States' implied indemnification claim after finding "that the negligence with which the government was charged, and which formed the basis of the settlement, was failure to give warnings of a dangerous condition," i.e., active negligence.[74] Judge Bifferato held that *"Blockston* is of no aid to Diamond because, unlike the government in that case, University has not *entered any settlement* or had judgment entered against it on the basis of *allegations* of active negligence."[75]

As noted in *Blockston*, a settlement of a disputed personal injury claim does not establish the character or degree of fault of the settling party or even whether the settling defendant is a joint tortfeasor with previously settled defendants.[76] The only available evidence, therefore, upon which to measure the nature of the putative indemnity's fault after a settlement is the plaintiff's complaint in the underlying action.[77] In *Blockston,* like here, the underlying complaint charged the putative

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[73]278 F. Supp 576 (D. Md. 1968).

[74]*Ianire,* 255 A.2d at 691 (explaining facts of *Blockston).*

[75]*Id.* at 692 (emphasis supplied).

[76]*Blockston,* 278 F. Supp. at 587-88.

[77]*Id.*

indemnitee with active negligence.[78]

At the time Marmon entered into its settlement with the Lagrones, it was a potential joint tortfeasor with Mortell and any other co-defendant against which it had brought a cross claim.[79] It sought to defend *Lagrone* by contending that it was not negligent in any respect in the design or manufacture of the fire doors and that, if any entity was negligent, such negligence must fall at the feet of Mortell for supplying a defective component part. If successful, Marmon would have received a judgment in its favor. If unsuccessful, judgment would have been rendered against it and, depending upon the jury's answers to special interrogatories regarding the nature of Marmon's/Fenestra's fault, the Plaintiffs' claim for implied indemnification would be sustainable or not sustainable.[80] Rather than take the matter to verdict, however, Marmon chose to settle in the midst of trial without any notice to Mortell or any other defendant. Now it has filed a complaint which, if proven, would simply establish "a complete defense to the original action, rather than a basis for implied

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[78] *Id. See also Lakeside Oakland Devel. Co. v. H & J Beef Co.,* 644 N.W. 2d 765, 772 (Mich. App. 2002)("a party may not seek common-law indemnity where the primary complaint alleges active, rather than passive, liability.").

[79] *See* 10 *DEL. CODE* § 6301 (defining joint tortfeasor).

[80] Marmon could have asked the Court to supply special interrogatories to the jury that would have directed the jury to determine the nature of Marmon's and/or Finestra's fault, if any.

indemnification."[81] As in *Williams,* the Court will not countenance the Plaintiffs' effort to employ a new indemnification claim as a vehicle to litigate anew its defense of a case that Marmon chose to settle.[82] Marmon's decision to settle *Lagrone* before the jury passed on its defense marks the end of the litigation.[83] The Defendants here, who had no notice or opportunity to be heard before Marmon settled with the Lagrones, are entitled to that finality.[84]

VI.

Based on the foregoing, Defendants' motion to dismiss Plaintiffs' indemnification complaint must be, and hereby is, **GRANTED.**

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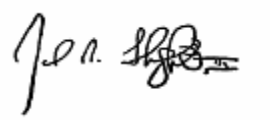
[81] *Williams v. Unit Handling Systems Div. Of Litten Systems, Inc.,* 416 N.W.2d 704, 707 (Mich. App. 1987), *aff'd*, 449 N.W.2d 669 (Mich. 1989).

[82] To hold otherwise would be to allow a defendant with a pending cross claim for indemnification to settle with the plaintiff in the midst of trial of the underlying dispute, based on an assessment that its trial presentation is somehow deficient, comforted by the assurance (here given) that it could try the exact case again, hopefully with better results, against the putative indemnitor/co-defendant. The Court's process is not intended to offer such strategic advantages to one defendant at the expense of another. *See Id.* at 707 ("[I]n the third-party [indemnification] complaint, Litton has merely alleged a complete defense to the original action, rather than a basis for implied contractual indemnification. Where there are no allegations of vicarious liability and a primary defendant seeks to disprove his own active negligence, he should do so against the primary plaintiff who brought the claim.").

[83] *Id.*

[84] *Cf. Tracey v. Franklin*, 70 A.2d 250, 251 (Del. 1949)("Public policy demands that there be finality to litigation.").

IT IS SO ORDERED.



Judge Joseph R. Slights, III

Original to Prothonotary