

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR KENT COUNTY**

|                                 |   |                      |
|---------------------------------|---|----------------------|
| HOME INSURANCE COMPANY,         | ) |                      |
| CADILLAC FAIRVIEW SHOPPING      | ) |                      |
| CENTER PROPERTIES               | ) |                      |
| (DELAWARE), INC., JMB RETAIL    | ) |                      |
| PROPERTIES COMPANY, a/k/a JMB   | ) | C.A. No.: 97C-04-024 |
| RETAIL PROPERTIES CO., a/k/a    | ) |                      |
| JMB RETAIL PROPERTIES CO.,      | ) |                      |
| INC., JMB RETAIL PROPERTIES     | ) |                      |
| COMPANY, INC. JMB PROPERTIES    | ) |                      |
| COMPANY, a/k/a JMB PROPERTIES   | ) |                      |
| CO., a/k/a JMB PROPERTIES CO.,  | ) |                      |
| a/k/a JMB PROPERTIES CO., INC., | ) |                      |
| a/k/a JMB PROPERTIES COMPANY,   | ) |                      |
| INC., and CFUS PROPERTIES, INC. | ) |                      |
|                                 | ) |                      |
| Plaintiffs,                     | ) |                      |
| v.                              | ) |                      |
|                                 | ) |                      |
| AMERICAN INSURANCE GROUP,       | ) |                      |
| a/k/a AIG, a/k/a AIAC, NATIONAL | ) |                      |
| UNION FIRE INSURANCE            | ) |                      |
| COMPANY OF PITTSBURGH, PA,      | ) |                      |
| and ABACUS CORPORATION, t/a     | ) |                      |
| ABACUS SECURITY SERVICES,       | ) |                      |
|                                 | ) |                      |
| Defendants.                     | ) |                      |

Submitted: July 17, 2003  
Decided: October 30, 2003

**ORDER**

On Plaintiff's Post-Trial Motion on the  
Duty to Defend. Granted in part; Denied in part.

William D. Sullivan, Esquire, and Mark L. Reardon, Esquire, of Elzufon, Austin, Reardon, Tarlov & Mondell, P.A., Wilmington, Delaware for the Plaintiffs.

William J. Cattie, III, Esquire, of Cattie & Fruehauf, Wilmington, Delaware for the Defendants.

WITHAM, J.

*Introduction*

Before this Court is Plaintiffs' Post-Trial Motion on the Duty to Defend. Defendants filed an Answering Brief. The issue is whether Defendant National Union Insurance Company of Pittsburgh, PA ("National Union") had a duty to provide a defense for Plaintiffs Dover Mall and their insurer Home Insurance Company ("Home").

*Background*

On August 30, 1992, Jane L. Rose ("Rose"), the Plaintiff in the underlying case, was abducted from the Dover Mall parking lot at 10:40 a.m. on her way to work at Sears. Rose filed suit against the owners and operators of the Dover Mall and Abacus Security Services ("Abacus"), the security company with whom Dover Mall had contracted. Dover Mall was separately named as a defendant in Rose's complaint in March 1993, but did not request that National Union provide a defense until January 27, 1997. National Union rejected the demand. Shortly before trial was to commence, Rose settled her claims with both Dover Mall and Abacus. National Union refused Dover Mall's demand for indemnification for its share of the settlement and reimbursement of defense costs.

In the underlying litigation, National Union defended Abacus in accordance with their liability insurance policy. Dover Mall was defended by Risk Enterprise Management Limited ("REM")<sup>1</sup>, as National Union did not provide a defense for

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<sup>1</sup> REM is Home's third-party administrator. The parties agreed that Home, as the liability insurer, is the true party in interest.

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Dover Mall. Dover Mall and Home contend that National Union should have defended them pursuant to an additional insured endorsement that Abacus purchased for Dover Mall on Abacus' insurance policy. The applicable portion of the security contract between Dover Mall and Abacus stated:

Should any person not a party to this agreement commence litigation against Abacus Security Services and/or client allegedly arising out of the security services being provided hereunder, the rights of the respective parties hereto shall be as follows:

Abacus Security Services hereby agrees to defend, indemnify and hold harmless [Dover Mall] from any and all claims against [Dover Mall] alleging that injury to person or property was directly caused by Abacus Security Services or its employees.

Dover Mall was listed as an additional insured on Abacus' policy, "but only with respect to liability arising out of security operations agreed to be performed for [Dover Mall] by or on behalf of [Abacus]."

Dover Mall and REM initiated a complaint for declaratory judgment alleging that Dover Mall should have been defended pursuant to the liability policy that Abacus purchased for Dover Mall. Specifically, they sought reimbursement for attorney's fees and costs related to the defense of Dover Mall and reimbursement for amounts they paid in settlement on behalf of Dover Mall. This Court granted summary judgment for Dover Mall and REM, ordering National Union to reimburse Dover Mall for attorney's fees and costs and indemnify Dover Mall for its share of

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any judgment resulting from the underlying action.<sup>2</sup>

The Supreme Court reversed the decision, stating that this Court “must ultimately determine whether the tortious conduct asserted against Dover Mall arose out of security operations performed by Abacus.”<sup>3</sup> In addition, the Supreme Court instructed this Court to hear “the issue of defense cost allocation [not] effectively raised below.”<sup>4</sup> Defendants Abacus and National Union then moved for partial summary judgment, requesting dismissal of certain plaintiffs and seeking defense cost allocation. This Court concluded that summary judgment would not be appropriate and the issue raised regarding defense cost allocation was not ripe.<sup>5</sup>

\_\_\_\_\_A jury trial was conducted from March 25, 2003 to April 1, 2003, on the factual dispute with the remaining issues. The jury responded to the special interrogatories as follows:

- a. Do you find that Abacus Security had contracted to patrol the area where the kidnapping took place at the time it occurred?

Answer: No.

2. Do you find that Abacus Security had contracted to

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<sup>2</sup> *Risk Enterprise Mgmt Ltd. v. American Insurance Group*, 1999 Del. Super. LEXIS 529.

<sup>3</sup> *American Insurance Group v. Risk Enterprise Mgmt. Ltd.*, 761 A.2d 826, 829 (Del. 2000).

<sup>4</sup> *Id.* at 830.

<sup>5</sup> *Home Insurance Co. v. American Insurance Group*, 2002 Del. Super. LEXIS 53.

provide security recommendations over the course of its contract with the Dover Mall?

Answer: Yes.

3. Do you find that Abacus Security had an additional duty to provide recommendations on security as part of its contract with the Dover Mall?

Answer: Yes.

4. Do you find that the Dover Mall breached a duty owed to Ms. Rose on Sunday, August 30, 1992?

Answer: Yes.

5. Do you find that Abacus Security breached a duty under its contract with the Dover Mall?

Answer: No.

6. If you have answered Questions 4 or 5 or both in the affirmative, do you find that the breach by that party or both parties proximately caused the injuries suffered by Ms. Rose?

Concerning the Plaintiff

Answer: No.

Dover Mall and Home conceded in their Opening Brief that, based on the jury's finding of lack of proximate cause as to either party, there is no duty on the part of

Abacus, though National Union, to indemnify Dover Mall for the settlement paid to Rose in the underlying litigation. National Union conceded in their Answering Brief that the Findings of Fact by the jury bring some of the allegations in the Complaint within the language of the insurance policy, thus triggering the duty to defend with respect to those allegations.

The issues before this Court are:

(1) Whether the tortious conduct alleged in the *Rose* Complaint arose out of the security operations performed by Abacus;

(2) When National Unions's duty to defend Dover Mall arose;

(3) Which allegations within the *Rose* Complaint are covered by National Union's duty to defend Dover Mall; and

(4) Whether Plaintiffs are entitled to reimbursement for costs and fees incurred in pursuing enforcement of National Union's duty to defend.

### ***Discussion***

The interpretation of a contract, including an insurance contract, is a question of law to be decided by the Court.<sup>6</sup> Generally an insurance policy is construed to give effect to the plain meaning of all of the provisions in the policy.<sup>7</sup> However, because an insurance contract is a contract of adhesion, any ambiguous language

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<sup>6</sup> *O'Brien v. Progressive Northern Insurance Co.*, 785 A.2d 281 (Del. 2001).

<sup>7</sup> *Continental Ins. Co. v. Burr*, 706 A.2d 499 (Del. 1998).

is construed against the insurance company.<sup>8</sup> The jury has decided the factual issues between the parties, therefore the role of this Court to apply those factual findings to provisions of this insurance policy.

An insurer's duty to defend is limited to suits which assert claims for which it has assumed liability under the policy.<sup>9</sup> A court usually looks to the allegations in the complaint to decide whether the duty to defend has been triggered.<sup>10</sup> When the demand for indemnification or defense is made after development of a complete discovery record, this Court should not limit its analysis solely to the allegations in the complaint.<sup>11</sup>

**The tortious conduct asserted against Dover Mall arose out of the security operations performed by Abacus.**

The first issue to address is whether the tortious conduct asserted against Dover Mall arose out of security operations performed by Abacus. The Supreme Court advised this Court to be guided by previous Supreme Court holdings interpreting the phrase "arising out of."<sup>12</sup> Whether the conduct arose out of the security operations turns on the causal connection between the tortious conduct and

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<sup>8</sup> *Id.* at 500-501.

<sup>9</sup> *Continental Casualty Co. v. Alexis I. duPont School District*, 317 A.2d 101 (Del. 1974).

<sup>10</sup> *American Insurance Group*, 761 A.2d at 829.

<sup>11</sup> *Id.* at 827.

<sup>12</sup> *Id.* at 830.

the security operations. “The connection must be more than incidental or fortuitous...the injury must be foreseeably identifiable.”<sup>13</sup>

The jury concluded that although Abacus had not contracted to patrol the parking lot on the day and time of the incident, it had contracted to provide security recommendations to Dover Mall. However, the jury also concluded that Abacus did not breach a duty under its contract with Dover Mall. The Plaintiff’s complaint in the underlying action alleged that Dover Mall and Abacus

- (a) failed to provide adequate security in the parking lot...;
- (b) failed to properly use and monitor surveillance cameras in the Dover Mall parking lot...;
- (c) failed to provide adequate security personnel in the parking lot area and to adequately patrol the parking lot in visible and clearly marked security vehicles;
- (d) failed to establish and/or enforce internal operating standards and procedures designed to protect shopping mall customers and employees...from foreseeable criminal assault;
- (e) failed to employ adequate security procedures, patrols, equipment, personnel and other reasonable measures in the Dover Mall parking lot;
- (f) failed to warn Plaintiff of prior criminal activity in the Dover Mall parking lot and in the parking lots of other commercial

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<sup>13</sup> *Nationwide General Insurance Co. v. Royal*, 700 A.2d 130 (Del. 1997) *citing Auto Owners Insurance Co. v. Rucker*, 188 Mich. App. 125, 469 N.W. 2d 1 (1991).



retail malls;

(g)[knew that Sears employees, including Plaintiff, were required] to park their vehicles in a designated area of the Dover Mall parking lot, which they knew or should have known exposed such persons to increased hazards of foreseeable criminal assaults.<sup>14</sup>

The complaint alleges that Ms. Rose's injuries were the result of the combined negligence of Abacus and Dover Mall. The contractual agreement provided that Abacus was to provide security and security recommendations to Dover Mall. Each of the allegations above could have been resolved if Abacus had provided adequate recommendations. Attacks in parking lots are foreseeable when proper security measures are not taken. As such, each of the allegations falls within the contractual language "arising out of" the security operations.

Abacus contractually agreed to provide a defense to Dover Mall if a suit was filed that alleged injury arising out of the contract for security measures between Dover Mall and Abacus. The injury alleged by Ms. Rose was her abduction and rape. Even though the jury concluded that Abacus did not breach its duty under the contract with Dover Mall, the allegations in the complaint remained unresolved throughout the litigation until the settlement agreement was reached. As such, the allegations in the Complaint make it clear that Dover Mall's conduct arose out of the security arrangement undertaken by Abacus. National Union acknowledges in

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<sup>14</sup> *Plaintiff's Amended Complaint, Rouse v. Cadillac Fairview Shopping Center Properties (Delaware) Inc.*, C.A. 94C-03-024.

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its Answering Brief that the findings of fact by the jury were sufficient to bring the allegations within the policy language, thus triggering the duty to defend.

Based on the allegations in the Complaint, the prior case law interpreting the phrase “arising out of,” and the findings of fact by the jury, this Court concludes that the allegations against Dover Mall arose out of the security operations performed by Abacus. As such, Abacus and National Union were responsible for providing a defense to Dover Mall.

**National Union’s duty to defend Dover Mall did not arise when the Complaint was filed.**

Next the Court must determine whether the filing of the *Rose* Complaint was sufficient notice to Abacus and National Union to trigger the duty to defend or whether a request for a defense must have been made to trigger the duty. The National Union insurance policy stated

If a claim is made or “suit” is brought against any insured, you must:

- (1) Immediately record the specifics of the claim or “suit” and the date received; and
- (2) Notify us as soon as practicable.

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No insured will, except at their own cost, voluntarily make a payment, assume any obligation, or incur any expense other than for first aid, without our consent.

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The Delaware Supreme Court has never decided what type of notice must be given to trigger the duty to defend. Other jurisdictions are divided on the issue.

The New Hampshire Supreme Court has adopted the approach that “the insured need only put the insurer on notice of the claim, thereby at least implicitly tendering the defense.”<sup>15</sup> However, that Court also stated that there could be special circumstances where the insured’s actions would negate the insurer’s duty to defend, such as when the insured tenders the defense to another co-insurer or primary insurer.<sup>16</sup> Under New Hampshire law, National Union received sufficient notice through the pleadings to trigger the duty to defend, however this case would fall under one of the “special circumstances” under New Hampshire law, because Dover Mall tendered its defense to Home, its insurer, rather than National Union. Home controlled Dover Mall’s defense for three years, until National Union settled on behalf of Abacus. Normally, the burden would be on National Union to establish the discharging factor<sup>17</sup>, however, the fact that Dover Mall tendered its defense to Home is undisputed. Thus, National Union would not have had a duty to defend Dover Mall under this law prior to January 1997.

Other jurisdictions have adopted a two-part test in determining whether an insurer has a duty to defend. These jurisdictions “require the insurer to know not

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<sup>15</sup> *White Mountain Cable Construction Co. v. Transamerica Insurance Co.*, 137 N.H. 478, 484, 631 A.2d 907, 910 (1993).

<sup>16</sup> *Id.* at 484.

<sup>17</sup> *West Haven v. Liberty Mutual Insurance Co.*, 639 F. Supp. 1012 (D. Conn. 1986).

only that the suit is potentially within the policy's coverage, but also that the insured desires the insurer's assistance."<sup>18</sup> Such notice was not given to National Union in this case until January 1997, when Dover Mall requested that National Union provide it with a defense. Thus, under Michigan law, the duty to defend would not arise until the insurer was notified and the insured actually requested a defense, in this case this occurred in January 1997.

Under either rule discussed above and discussed by the Delaware Supreme Court<sup>19</sup>, National Union would not have been required to provide a defense to Dover Mall prior to January 1997. In their Answering Brief, Defendants concede that they are liable for a prorated portion of the costs of defending the *Rose* lawsuit from the Plaintiffs' tender letter in January 1997 until the settlement of that suit. Defendants contend that they should only be required to pay the claims covered under the National Union policy arising out of the security operations. However, as this Court previously concluded, each of the allegations in the Complaint arise out of the security operations undertaken by Abacus. As such, National Union is responsible for all defense costs after January 1997 incurred in the *Rose* lawsuit.

**Costs and Fees related to this action.**

Plaintiffs contend that National Union should be responsible for paying the

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<sup>18</sup> *Id.* at 483. See *Hartford Accident and Indemnity Co. v. Gulf Insurance Co.*, 776 F.2d 1380 (7<sup>th</sup> Cir. 1985) and *American Mutual Liability Insurance Co. v. Michigan Mutual Liability Co.*, 64 Mich. App. 315, 235 N.W.2d 769 (1975).

<sup>19</sup> *American Insurance Group*, 761 A.2d at 830.

fees and costs associated with the filing of the Declaratory Judgment because this case was necessary to recover their defense costs in the underlying litigation. In support of this, Dover Mall relies upon *Pike Creek Chiropractic Center, P.A. v. Robinson*,<sup>20</sup> in which the Supreme Court permitted the indemnitee to recover attorneys' fees and costs associated with enforcing the indemnification agreement. The agreement provided that the employee would hold the employer harmless for all expenses, including attorneys' fee resulting from any acts or omissions of the insured. The Supreme Court concluded that this meant expenses incurred in the enforcement action.

The clause in the contract between Abacus and Dover Mall provided that Abacus agreed to hold Dover Mall harmless only in actions commenced against Dover Mall alleging that Abacus was responsible for the injuries. The action seeking to enforce the duty to defend does not fall within that contractual language. Attorneys' fees will not be awarded unless clearly provided for by contract or statute.<sup>21</sup> Attorneys' fees were not provided for in the contract between Dover Mall and Abacus in the event of a suit to enforce the defense obligation. In *Pike Creek*, the agreement specifically provided for attorneys' fees. That is not the case here.

Therefore, the request for costs and fees associated with the action seeking to enforce the duty to defend is denied.

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<sup>20</sup> 637 A.2d 418 (Del. 1994).

<sup>21</sup> *Honaker v. Farmers Mutual Insurance Co.*, 313 A.2d 900 (Del. Super. 1973).

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***Conclusion***

In conclusion, the Plaintiffs' motion to recover defense costs incurred in the *Rose* litigation is denied in part and granted in part. That is, the Plaintiffs may recover their defense costs incurred following the tender letter mailed on January 21, 1997 until the settlement of that lawsuit. The Plaintiffs' motion to recover costs and fees incurred in seeking enforcement of the duty to defend is denied.

/s/ William L. Witham, Jr.  
J.

WLW/dmh  
oc: Prothonotary  
xc: Order Distribution  
File