IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

DELMARVA POWER & LIGHT COMPANY, Plaintiff, v. PARSONS EC CONSTRUCTORS, INC., AND NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, Defendants.	)	C.A. No. 03C-04-039 WCC NON-ARBITRATION CASE

Submitted: March 26, 2004
Decided: August 30, 2004

Upon Defendant Parsons EC Constructors' Motion for Summary Judgment. Granted In Part.
Upon Defendant National Union Fire Insurance Company of Pittsburgh, PA's Motion for Summary Judgment. Granted In Part.

MEMORANDUM OPINION

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CARPENTER, J.

I. Introduction

Defendants Parsons E&C Constructors, Inc. ("Parsons") and National Union Fire Insurance Company of Pittsburgh, PA ("National Union") have filed a Motion for Summary Judgment against Plaintiff Delmarva Power & Light Company ("Delmarva"). For the reasons set forth below, the motions for summary judgment are GRANTED in part and DENIED in part.

II. Facts/Background

Delmarva commenced this suit based on a judgment rendered against it in an underlying personal injury litigation. As such, a review of the facts of the underlying litigation is necessary for the disposition of the instant motions. In February of 2000, Craig Bounds ("Bounds") was employed by Parsons (formerly known as GAICO) as an electrician. Pursuant to a contract between Parsons and Delmarva, Parsons was required to perform maintenance and overhaul services and take certain steps to ensure safety for its workers, including Bounds, at the Indian River Power Plant, which is owned by Delmarva. On April 7, 2000, Bounds slipped and fell at the Indian River Power Plant while carrying an 80-pound object and exiting an elevator. Consequently, in July of 2001, Bounds filed a personal injury suit (the "*Bounds*

Action")[1] against Delmarva for injuries he suffered.[2] This suit was filed in Kent County and was assigned to Judge Vaughn.

In the *Bounds* Action, Delmarva was the only named defendant and Delmarva chose not to join Parsons, National Union or any other entity as an additional defendant or to move to consolidate the present case with the Kent County matter.[3] The *Bounds* trial began on May 19, 2003 and continued until June 3, 2003, when the jury found that Delmarva was negligent and that such negligence proximately caused Bounds' injuries. Specifically, the jury awarded 1.5 million in damages and apportioned negligence to Mr. Bounds at 12% contributorily negligent and 88% as the negligence to Delmarva.[4] Thereafter, Delmarva filed various post-trial motions,

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[1]Bounds and his wife filed suit against Delmarva in Superior Court in Kent County, which is captioned *Bounds v. Delmarva Power & Light Co.*, C.A. No. 01C-07-028 JTV.

[2]Specifically, Bounds alleged "that on April 7, 2000, he slipped and fell while carrying an 80-pound welding cable shortly after he exited an elevator at the Indian River Power Plant." Complaint, at ¶ 9.

[3]Delmarva acknowledged that by the time of the *Bounds* trial, the instant action had already been filed and Delmarva "determined that it would not have been in the best interest of its defense to attack [Parsons]," as Parsons was the party with which it contracted to perform safety functions at the Indian River Power Plant. Answering Brief of Delmarva In Opposition to Parsons' Motion for Summary Judgment at 11. Delmarva also explained that it took no action to consolidate the instant suit and the *Bounds* Action because doing so would have "increased the complexity of the trial significantly, injected insurance issues and may have been totally unnecessary if there had been a defense verdict." *Id.* at 14. Delmarva also asserted that 19 *Del. C.* § 2304, the workmen's compensation bar, prevented a third-party suit against Parsons.

[4]*See* Defendant Parsons' Motion for Summary Judgment, Ex. D (Verdict Form). The jury awarded Mr. Bounds 1.5 million dollars for damages proximately caused by Delmarva's negligence. Mrs. Bounds received $275,000 for loss of consortium. As a result of the jury finding of Bounds' contributory negligent, the damages owed by Delmarva were reduced by 12%.

which were denied and subsequently, Delmarva filed a Notice of Appeal with the Delaware Supreme Court.[5]

On April 4, 2003, just over a month before the Bounds trial, Delmarva filed suit in New Castle County against Defendant Parsons seeking indemnification for any damages that may be awarded by the jury in the *Bounds* Action. Delmarva also alleges that Parsons breached the IRMC 93 Agreement Related to Supplemental Maintenance Services at Delmarva's Indian River and Vienna Power Stations (the "Agreement") between Delmarva and Parsons by failing to obtain the insurance coverages required by the Agreement.[6] As to National Union Delmarva argued that they should provide insurance coverage to Delmarva for its liability in the *Bounds* Action based on a contract between Delmarva and Parsons.[7]

Included in the contract between Parsons and Delmarva was an indemnification provision:

> [Parsons] shall indemnify, defend and hold harmless

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[5]On June 17, 2003, Delmarva filed a Motion for a New Trial, or in the Alternative, Remittitur and a Motion for a New Trial, or in the Alternative, Alteration or Amendment of the Judgment and supporting brief. Thereafter, the court denied all the motions on January 29, 2004. On February 27, 2004, Delmarva filed a Notice of Appeal.

[6]According to Delmarva, the Agreement required that Parsons obtain comprehensive general liability insurance with Delmarva as an additional insured and obtain a waiver of subrogation from its comprehensive general liability and workmen's compensation insurers. The Agreement also required Parsons to investigate the accident and provide Delmarva with prompt notice of an accident and any injuries. *See* Answering Brief of Delmarva In Opposition to Parsons' Motion for Summary Judgment at 23.

[7]At all relevant times, National Union was the general liability insurer of Parsons.

> Delmarva from and against any and all claims . . . arising from injury to third parties . . . resulting solely from the negligence of [Parsons] and its subcontractors in its performance under this agreement. [Parsons] shall not be responsible for, and Delmarva shall indemnify, defend and hold harmless [Parsons] from and against, any and all claims . . . arising from injury to third parties, resulting solely from the negligence of Delmarva. In the event that [Parsons] and Delmarva are jointly or concurrently liable, there shall be an apportionment of responsibility by [Parsons] and Delmarva in accordance with degree of fault of each.[8]

The contract also included a reference as to Parsons' obligation to provide insurance. Section 19.10 of the contract references the minimum levels of insurance required to be carried by Parsons.

> 19.10 Insurance
>
> > 19.10.1 GAICO[9] shall carry insurance in minimum limits as follows:
> >
> > 19.10.1.1. Workman's Compensation - Statutory; and Employer's Liability - $100,000 per accident.
> >
> > 19.10.1.2. Comprehensive General Liability, Bodily Injury and Property Damage, including Contractual Liability, in a combined single limit - $1,000,000 per occurrence.
> >
> > 19.10.1.3. This policy must be endorsed to name OWNER as an additional insured.
> >
> > 19.10.1.4. This item requires a Waiver of Subrogation against OWNER.

It is these provisions that Plaintiff based its indemnification and insurance claims.

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[8]Complaint at ¶ 7.

[9] Parsons was formerly known as GAICO.

III. Standard of Review

Summary judgment is appropriate when the moving party has shown there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law.[10] In considering such a motion, the court must evaluate the facts in the light most favorable to the non-moving party.[11] Summary judgment will not be granted when the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.[12]

IV. Discussion

Parsons moved for summary judgment on two grounds: (1) the indemnification claim asserted by Delmarva against Parsons is barred by 6 *Del. C.* § 2704(a) and by the doctrines of estoppel and/or res judicata; and (2) the breach of contract claim asserted by Delmarva is also barred by 6 *Del. C.* § 2704(a).

A. The Negligence Claim

In support of its motion, Parsons first argues that Delmarva is estopped from asserting a claim for indemnification because Delmarva failed to implead Parsons as

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[10] *See Moore v. Sizemore*, 405 A.2d 679 (Del. 1979).

[11] *See id.*

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

a third-party defendant in the *Bounds* Action and the *Bounds* jury already apportioned percentages of fault regarding the negligence attributable to Bounds' injuries. A claim for indemnification would unnecessarily disturb the apportionment of fault and liability for Bounds' injuries. Parsons cites to *Delaware Electric Coop., et. al. v. EMT Construction Corp., et. al.*[13] ("*Delaware Electric*") as controlling precedent on this precise issue.

Delmarva counters that its claim for indemnification is not barred by the doctrine of defensive collateral estoppel,[14] Delmarva outlines four elements, which must be established before the doctrine can be invoked and Delmarva asserts that Parsons has not established them. The elements are as follows: (1) identity of issues; (2) actual litigation of the issue; (3) determination of the issue; and (4) a final judgment.[15] Specifically, Delmarva argues that the first requirement of identical issues cannot be satisfied because the issue in the *Bounds* Action was the negligence of Delmarva and not Parsons' negligence. Here, Delmarva argues they are simply seeking to litigate the negligence of Parsons.

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[13]2003 Del. Super. LEXIS 158.

[14]Defensive collateral estoppel occurs when a defendant seeks to prevent a plaintiff from asserting a claim a plaintiff has previously litigated and lost against another defendant.

[15]*See* Answering Brief in Opposition to Parsons' Motion for Summary Judgment at 18 (citing *Messick v. Star Enterprise*, 655 A.2d 1209, 1211 (Del. 1995)).

Delmarva further argues that *Delaware Electric* is distinguishable from the instant facts and as a result, it should not guide the Court's decision. It argues that in the underlying suit related to this litigation, the trial court did not permit evidence of Parsons' direct or superseding negligence to be presented to the jury and further asserts that 19 *Del. C.* § 2304[16] ("§ 2304"), which is commonly known as the workers' compensation bar, prevented it from asserting a contribution claim against Parsons because Parsons paid workmen's compensation benefits to Bounds. Moreover, Delmarva asserts that it was not required to implead and/or join Parsons to the *Bounds* Action under any applicable law.[17]

Notwithstanding Delmarva's arguments to the contrary, the Court finds that

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[16]Section 2304 provides:

> [e]very employer and employee, adult and minor, except as expressly excluded in this chapter, shall be bound by this chapter respectively to pay and to accept compensation for personal injury or death by accident arising out of and in the course of employment, regardless of the questions of negligence and to the exclusion of all other rights and remedies.

DEL. CODE ANN. tit. 19, § 2304 (2004).

[17]Delmarva explains that under the Superior Court Civil Rules, the impleading rule is permissive rather than mandatory so Delmarva contends that it was not under a obligation to implead Parsons and/or National Union in the *Bounds* Action. Superior Court Civil Rule 14(a) provides,

> [a]t any time after commencement of the action a defending party, as a third-party plaintiff, *may* cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or party of the plaintiff's claim against the third-party plaintiff.

DE Sup. Ct. Civ. R. 14(a) (2004) (emphasis added).

Delaware Electric is controlling and that Parsons status as an employer of the injured party does not prevent the indemnification claim to be pursued in the underlying tort action. To be clear, neither *Delaware Electric* or this case overrules the normal bar associated with the exclusive workmen's compensation remedy between the employer and employee found in 19 *Del. C.* § 2304. That bar to tort litigation remains. However, when a defendant believes that another person or corporation's negligent conduct contributed to the injury and that defendant has a contractual indemnification provision with that other person or corporation, they may as a litigation strategy decide not to include that party in the underlying tort action, but they do so at the risk of the jury proportioning negligence only to them and not that other party. Once a defendant has made that litigation decision and it has backfired, they may not come again to the court and ask that the same case be relitigated to now determine an additional party's negligence. Simply put, they took the risk and must accept the jury's decision. If this Court was to accept plaintiff's arguments, it would result in a series of multiple litigations involving similar facts with the only difference being a different defendant. This is exactly what Delmarva is asking the Court to do here and it is not only a waste of limited judicial resources but was simply unnecessary.

This is not a situation where a party was surprised by what occurred in the trial or lacked knowledge regarding the relationship between the tortfeasor and the

employer. Delmarva clearly had before it full knowledge of the facts of the case and its relationship with Parsons and their decision not to include them was simply a part of their litigation strategy. While a party is allowed to have their day in court to determine the negligent conduct and fault of all who are involved, they are not allowed to manipulate the process simply to gain a litigation advantage in one case to the detriment of the overall judicial system. As in *Delaware Electric*, allowing this litigation to proceed forward would most certainly disrupt the findings of fault found by the jury in the underlying litigation and potentially would result in inconsistent verdicts. The Court is not required to allow that result. As such, the plaintiff's complaint as to this area will be dismissed.

Parsons further asserts that Delmarva's indemnification claim is barred by 6 *Del. C.* § 2704(a)[18] ("§ 2704(a)") because under Delaware law, a contractual

[18]Title 6 of the Delaware Code, section 2704(a), states, in pertinent part,

> [a] covenant, promise, agreement . . . in connection with or collateral to, a contract or agreement . . . relative to the construction, alteration, repair or maintenance of a road, highway . . . purporting to indemnify or hold harmless the promisee or indemnitee or others, or their agents, servants and employees, for damages arising from liability for bodily injury or death to persons . . . caused partially or solely by, or resulting partially or solely from, or arising partially or solely our of the negligence of such promisee or indemnitee or others than the promisor or indemnitor, or its subcontractors, agents, servants or employees, is against public policy and is void and unenforceable, even where such covenant, promise . . . is crystal clear and unambiguous in obligating the promisor or indemnitor to indemnify or hold harmless the promisee or indemnitee from liability resulting from

provision that requires one party to indemnify another party for the second party's own negligence is against Delaware's public policy and as a result, any such agreement is void and unenforceable.[19] Delmarva filed the instant suit seeking indemnification for damages awarded in the *Bounds* Action, but those damages represent the amount for which the jury found Delmarva liable. Parsons' position is that essentially, Delmarva is seeking indemnification from Parsons for Delmarva's negligence as determined by the *Bounds* jury and Delmarva is acting in violation of Delaware's public policy.

In response, Delmarva asserts that § 2704(a) does not bar its indemnification claim because issues related to Parson's negligence were not before the *Bounds* jury. Delmarva contends that it is entitled to a determination of whether Parsons was concurrently negligent with Delmarva and if so, an apportionment should be made as to Parsons' negligence. Delmarva stresses that it is not seeking indemnification for Delmarva's negligence, but rather, it seeks indemnification for Parsons' negligence,

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such promisee's or indemnitee's own negligence.
DEL. CODE ANN. tit. 6, § 2704(a) (2004).

[19]*See J. S. Alberici Const. Comp., Inc. v. Mid-West Conveyor Comp., Inc.*, 750 A.2d 518, 521 (Del. 2000) (holding that contractual indemnification for one's own negligence is repugnant to legislatively-defined public policy of Delaware).

which is not void under Delaware public policy.[20]

The fallacy of the plaintiff's argument is that because the underlying litigation distributed all of the potentially available negligence relating to this action, by definition, there is no more negligence to be distributed or attributable to Parsons. As such, the only logical and possible remedy that is being sought here by the plaintiff is indemnification of Delmarva's own negligence. There is no dispute that in the context of a tort action, this would clearly be against public policy and is not available to the plaintiff or enforceable under Delaware law.

Therefore, based upon the above, claim III of the Complaint is dismissed.

B. <u>The Contract Claim</u>

The second issue before the Court is whether in spite of the Court's earlier rulings, Delmarva still has a valid contractual claim against Parsons and National Union Fire Insurance Company. The contract at issue here references the insurance obligation of Parsons in Section 19.10 of the contract.[21] Specifically the contract requires a comprehensive liability policy of a million dollars per occurrence and a

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[20]The Court notes that in response to Parsons, Delmarva fails to acknowledge that § 2704(a) applies to the Agreement between Delmarva and Parsons. However, in Delmarva's Response to National Union's Motion, Delmarva acknowledges that 6 *Del. C.* § 2704(a) applies to said Agreement. However, Delmarva asserts that §2704(b), commonly known as the insurance savings clause, permits coverage for the judgment in the *Bounds* Action notwithstanding the bar in § 2704(a).

[21] *See* p. 5 of this Opinion.

request that Delmarva be named as an additional insured under the policy. The Court has also been provided the insurance policy executed between Parsons and National Union Fire Insurance Company. This policy provides for coverage up to 1.5 million dollars per occurrence related to personal injuries. The personal injury liability section is defined as "Coverage A" and states:

> I. Coverage A - Personal Injury Liability
>
> To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages (including liability assumed under contract) because of personal injury sustained by any person caused by an occurrence as defined herein, which is first discovered by the Risk Manager and claim is made against the Insured during the policy period.

Section III of the policy defines insured as follows:

> The unqualified word **Insured** includes the named insured and also includes the following:
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> (3) if specifically required to be included as an Insured, any person or organization to whom the named insured is obligated by virtue of a contract, entered into before loss, to provide insurance such as is afforded by this policy, but only to the extent required by said contract and not to exceed the coverages and the limits of liability afforded by this policy;

Thus the issues now before the Court are whether (a) there is an enforceable insurance policy applicable to Delmarva's claim and (b) if there is no such policy in effect, can Parsons be held liable as contractual provisions for its failure to obtain

such insurance. The Court believes the answers to both of these questions is yes.

The issue as to enforceability of contractual terms requiring insurance coverage for another's negligent conduct has been resolved by the Supreme Court in *Chrysler Corp. v. Merrell & Garaguso, Inc.,* 796 A.2d 648 (Del. 2002). Justice Walsh, writing for the Court *en banc* stated:

> In the final analysis, however, the insurance savings provision reflected in § 2704(b) is a statement of legislative purpose that cannot be negated by an all-encompassing construction of the anti-indemnification policy set forth in § 2704(a).

This decision was reaffirmed by Judge Herlihy in *Daimler-Chrysler Corp. v. Pennsylvania National Mut. Cas. Ins. Co.*[22] In discussing the issue of public policy and the indemnification provisions, the Court cited the New York Court of Appeals decision of *Kinney v. G.W. Lisk Co., Inc.,*[23] which stated:

> An agreement to procure insurance is *not* an agreement to indemnify or hold harmless, and the distinction between the two is well recognized. Whereas the essence of an indemnification agreement is to relieve the promisee of liability, an agreement to procure insurance specifically anticipates the promisee's "continued responsibility" for its own negligence for which the promisor is obligated to furnish insurance. Moreover this particular distinction is what renders indemnification, but not insurance procurement, agreements violative of the public policies underlying [the New York indemnity statute]. While an agreement

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[22] 2003 WL 1903766 (Del. Super.).

[23] 556 N.E. 2d 1090 (N.Y. 1990).

> purporting to hold an owner or general contractor free from liability for its own negligence undermines the strong public policy of placing and keeping responsibility for maintaining a safe workplace on those parties, the same cannot be said for an agreement which simply obligates one of the parties to a construction contract to obtain a liability policy insuring the other.[24]

Judge Herlihy further affirmed the enforceability of the contract to obtain insurance by stating:

> While there is not an insurance policy here which Chrysler can enforce, some of these same public policy reasons the Supreme Court cited where insurance exists, apply to an unmet contract requirement to obtain insurance. First, the enforceability of insurance coverage, despite the ban on indemnification, is to provide protection for the worker. The requirement to obtain insurance or make a party an additional insured accomplishes the same goal. By sustaining a cause of action for a breach of that requirement and by allowing Chrysler to successfully sue for breach of contract makes the contract meaningful and not just words.

Following these decisions,[25] this Court finds that Section 2704 does not prevent the contractual causes of action presented in this litigation to proceed forward. There continues to be factual and legal issues surrounding the interpretation of these contractual provisions entered into by the parties and whether the insurance policy provided the intended coverage for the events underlying this litigation. As such, the defendant's motion for summary judgment must be denied and the case will be

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[24] *Daimler-Chrysler Corp.*, 2003 WL 1903766, at *3 (*citing Kinney*, 556 N.E. 2d at 1092 (citations omitted)(emphasis in the original)).

[25] *See St. Paul Fire & Marine Ins. Co. v. Elkay Mfg. Co.*, 2003 WL 139775 (Del. Super.).

allowed to proceed as to the first and second counts set forth in the complaint.

Since it has not been asked, the parties should not consider this ruling as the Court making definitive findings as to the meaning of the provisions set forth in the contract with the policy or whether they are applicable to the facts of this case. I'm sure such a request will be made at the appropriate time after additional discovery by the parties. However, the Court does find that Section 2704 does not prevent this cause of action from going forward.

V. Conclusion

The motion for summary judgment as to the plaintiff's third claim of relief is hereby granted. As to the plaintiff's first and second claim for relief, defendants' motion for summary judgment is denied.

IT IS SO ORDERED.

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Judge William C. Carpenter, Jr.