IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CONSOLIDATED RAIL CORPORATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C. A. No. 97C-10-001 CHT
	)	
LIBERTY MUTUAL INSURANCE COMPANY and PACIFIC INSURANCE COMPANY and JAMES JULIAN INC.,	)	
	)	
Defendants.	)	

Opinion and Order in Response to Motions by Liberty Mutual Insurance Company, Pacific Insurance Company and James Julian Inc. For Summary Judgment and Declaratory Relief

Initial Briefing Completed June 3, 2003
Oral Argument: September 9, 2003
Final Submission: April 2, 2004
Decided: April 30, 2004

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TOLIVER, JUDGE

Before the Court are several motions filed by the parties arising out of the costs of defending and ultimately settling the claims of the plaintiffs in the Flowers[1] and Fydenkevez[2] wrongful death actions against Consolidated Rail Corporation ("Conrail") and James Julian, Inc. ("Julian"). The matter having been briefed and argued, that which follows is the Court's resolution of the issues so presented.

FACTS

In August 1987, the Delaware Department of Transportation ("DelDOT") began plans to improve and widen portions of Delaware Route 15 as well as the construction of certain related drainage improvements (the "Route 15 Project"). That roadway crossed a portion of the Delmarva Secondary Tract at Boyd's Corner in Mount Pleasant, Delaware. The Delmarva Secondary Tract is a railway which runs from Newark, Delaware to Indian River, Delaware. It is owned by Conrail.

DelDOT accepted bids from various contractors for the project. Julian was the successful bidder on the Route 15 Project and entered into a contract with DelDOT on February

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[1] Flowers v. Consol. Rail Corp., et al., C. A. No. 94C-01-056 (CHT).

[2] Fydenkevez v. James Julian, Inc., et al., C. A. No. 94C-01-055 (CHT).

10, 1992 ("DelDOT/Julian contract"). Julian's task was to rebuild, widen, reconfigure and resurface portions of Route 15. Because the improvements were in part federally funded and involved Conrail's right of way at Boyd's Corner, Conrail was directly involved in the planning, design and implementation of some of the work. A notice to proceed with the project was issued on March 6, 1992 and it appears that the first day of work on the project by Julian was March 18. In any event, all the construction and/or changes called for were completed by the end of the Fall of 1992.[3]

The Federal Highway Administration required that for any "construction projects located in whole or in part within a railroad right-of-way, railroad protective liability insurance shall be purchased on behalf of the railroad by the contractor."[4] In addition to the federal mandate, the State of Delaware imposed a similar insurance requirement. DelDOT and Conrail entered into a contract mandating that all contractors working on projects involving Conrail grade crossings obtain "liability insurance of the type and amount

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[3] Conrail's October 1, 1997 Compl. at ¶ 26.

[4] 23 U.S.C. §130, 23 CFR §646.107. ("In connection with highway projects for elimination of hazards of railroad-highway crossing and other highway construction projects located in whole or in part within railroad right-of-way, railroad protective liability insurance shall be purchased on behalf of the railroad by the contractor." Id.)

as set forth in FHPM, Volume 6, Chapter 6, Section 2, Subsection 2, entitled 'Railroad-Highway Insurance Protection Required of Contractors.'"[5] Accordingly, DelDOT made obtaining Railroad Protective Public Liability Insurance ("RPPLI") by Julian, on behalf of Conrail, a part of the Route 15 Project.[6] That increased the insurance policies required for the project to be three. To be specific, Julian was required to have: (1) contractor's public liability insurance policy covering Julian for its operations, (2) contractor's protective public liability insurance policy covering the operations of Julian's subcontractors and (3) RPPLI insuring Conrail against any liability arising out of Julian's construction activities at or near the Mt. Pleasant Crossing.[7]

Subsequent to being awarded the contract, Julian purchased two successive primary "Commercial General Liability" policies from Liberty Mutual Insurance Company ("Liberty") which covered Julian's liability for personal injury arising out of Julian's participation in the Route 15

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[5] Opening Br. In Supp. Of Conrail's Mot. For Partial Summ. J. As To Def. Liberty's Duty-To-Defend, Appendix A-11.

[6] The terms "railroad protective liability insurance" and "railroad protective public liability insurance" appear to have been used interchangeably by the parties. In the absence of any evidence to the contrary, the Court will assume that the terms are synonymous and will refer to both as "RPPLI."

[7] DelDOT/Julian Contract, No. 86-061-20 at 149.

Project.[8] Julian also purchased two excess liability policies from Liberty which provided an additional $10 million in coverage on top of each of the two primary policies. However, Julian did not purchase RPPLI, as required.[9]

The primary policies stated that:

> We [Liberty] will pay those sums that the insured becomes obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We [Liberty] will have the right and duty to defend any 'suit' seeking those damages . . . .[10]

The primary and excess policies purchased from Liberty also included an "Additional Insured - Blanket" provision, which read in pertinent part:

> WHO IS AN INSURED is amended to include as an insured any person or organization for whom you have agreed in writing to provide ***Liability*** insurance, ***but only with respect to liability arising out of your operations or premises owned by or rented to you***. [emphasis added]
>
> This insurance does not apply to any person or organization for whom you have procured separate liability insurance while such

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[8] Policy No. TB1-131-44322-021 (July 1, 1991-1992) and TB1-131-44322-022 (July 1, 1992-1993). Each policy provided coverage of $1 million per occurrence, $2 million in the aggregate, and lists Julian as the named insured.

[9] Julian admitted that it did not purchase the RPPLI as required under the DelDOT/Julian contract. Julian's Ans. Brief In Opp'n To Consol. Rail Corp.'s Mot. For Summ. J. For Breach Of Contract at 10-11, 14.

[10] Liberty Commercial General Liability Coverage Form, pg. 1.

insurance is in effect . . . .[11]

In addition, the Liberty policy contained an "Other Insurance" provision under Section IV., which states in pertinent part:

> 4. Other Insurance
>
> . . .
>
> a. Primary Insurance
>
> This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary . . . .
>
> b. Excess Insurance
>
> This insurance is excess over any of the other insurance, whether primary, excess, contingent or on any other basis:
>
> (1) That is Fire, Extended Coverage . . . . or similar coverage for 'your work';
>
> (2) That is Fire insurance for premises rented to you; or
>
> (3) If the loss arises out of the maintenance or use of aircraft, 'autos' or watercraft . . . .[12]

The second part of the Route 15 Project involved Conrail. More specifically, DelDOT required Conrail to improve the Mt.

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[11] Liberty Policy, Additional Insured - Blanket.

[12] Liberty Commercial General Liability Coverage Form, pg. 7.

Pleasant Crossing in order to accommodate the widening of Route 15. The improvements involved widening the crossing surface, relocating warning light poles, installing longer cantilevered arms for the overhead lights, installing new rails over the crossing, installing new signal circuitry and a new building for such circuitry as well as installing new flashing lights. Conrail commenced construction under the DelDOT/Conrail contract in April 1992.

At that time, Conrail was insured with "Railroad Force Account Insurance" issued by Pacific Insurance Company ("Pacific").[13] The policy provided:

> The Company [Pacific] will pay on behalf of the Insured [Conrail] for Ultimate Net Loss which the Insured must legally pay as compensatory damages and Defense Expenses because of Bodily Injury . . . which results from an Incident which commences during the applicable Policy period, arising out of or resulting from the Force Account Work conducted by the Named Insured.[14]

The policy further defined "force account work" under Section IV.15 as:

> [w]ork or operations performed by employees of the Named Insured [Conrail] for federal, state, municipal or other political sub-divisions or

[13] Pacific Railroad Force Account Insurance Policy, No. PRR-001580.

[14] Id., pg. 1.

governmental legal entities or for companies.[15]

Similar to the Liberty policy, the Pacific policy contained an "Other Insurance" provision in Section III:

> 12. OTHER INSURANCE
>
> > If the Insured is entitled to be indemnified or otherwise insured in whole or in part by any other insurance for any Claim or Incident which otherwise would have been covered in whole or in part by this policy, the Limit of Liability . . . shall apply in excess of, and shall not contribute to, any Claim or Incident covered by such other insurance.
> >
> > This does not apply to insurance which is purchased by the Insured specifically to apply in excess of this policy.[16]

During the course of the construction and improvements at Route 15 and the Mt. Pleasant Crossing, there were two collisions which resulted in deaths at the site. On May 27, 1992, Bruce D. Flowers was driving eastbound on Route 15 when his vehicle collided with a southbound Conrail freight train at the Mt. Pleasant Crossing. Mr. Flowers died as a result of the injuries sustained. Another accident occurred on July 12, 1992, when Lynn S. Saunders was driving her vehicle westbound on Route 15 and collided with a northbound Conrail

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[15] Id., pg. 24.

[16] Id., pg. 15.

freight train at the Mt. Pleasant Crossing. Ms. Saunders and her two passengers, Lori J. White and Kathryn A. Fydenkevez, died from the injuries received in the accident. In 1994, wrongful death actions were filed against Julian and Conrail by the decedents' estates and survivors.[17] Both complaints alleged that Julian and Conrail were negligent in their work execution and the proximate cause of the deaths of the aforementioned individuals.

The Flowers and Fydenkevez complaints make identical allegations against Conrail. Specifically, the plaintiffs in Flowers alleged that Conrail:

> 15. . . . employed defective flashing lights, created a confusing and dangerous condition during the road construction at the railroad-highway grade crossing and permitted trees, bushes, undergrowth and other vegetation to obstruct the view of the railroad tracks . . . .
>
> . . .
>
> 20. . . . failed to exercise reasonable care to eliminate the dangerous condition which had been created or to otherwise protect the safety of the highway users.
>
> . . .
>
> 22. . . . was also negligent in that it:

[17] Amended Flowers Compl., C. A. No. 94C-01-056 and Amended Fydenkevez Compl., C. A. No. 94C-01-055.

. . .

(b) . . . improperly placed flashing lights, warning signs and other warning signals at the railroad-highway grade crossing;

(c) . . . failed to post adequate warning devices at the railroad-highway grade crossing.

. . .

(g) . . . failed to utilize a flagman at the railroad-highway grade crossing;

(h) . . . failed to light the railroad-highway grade crossing adequately . . . .[18]

The complaints against Julian were similarly premised upon negligence. The plaintiffs alleged:

13. Defendant, James Julian, Inc., was negligent in that it, among other things:

(a) failed to post adequate warning signs and signals at and around its work site;

(b) obstructed [railroad crossing] warning signs and signals designed to notify highway users of the existence of the railroad-highway grade crossing and the approach of an oncoming train;

(c) removed [railroad crossing] warning signs and signals designed to notify highway users of the existence of the railroad-highway grade crossing and

[18] The identical allegations are set forth in ¶s 13, 18, 20(b), 20(c), 20(g) and 20(h), respectively, of the Fydenkevez complaint.

> the approach of an oncoming train;
>
> (d) failed to warn highway users of the existence of the railroad-highway grade crossing . . . ;
>
> . . .
>
> (f) created a dangerous condition which distracted highway users' attention away from the railroad-highway crossing; [and]
>
> . . .
>
> (i) abandoned its work site, leaving it in an unreasonably dangerous condition.[19]

In any event, the claims against Julian and Conrail in the Flowers and Fydenkevez litigation were settled short of trial in the latter part of 1997. However, Conrail did not relinquish its right to seek contribution against Julian or its breach of contract claim against Julian for the latter's failure to obtain RPPLI in the name of Conrail as required under the DelDOT/Julian contract. After the settlement had been completed, the only remaining issues before the Court involved the resolution of the cross-claims between the defendants, which were consolidated with this litigation on October 8, 1997.

[19] Amended Flowers Compl. at ¶ 13, Amended Fydenkevez Compl. at ¶ 11.

NATURE AND STAGE OF THE PROCEEDINGS

Conrail sought coverage for the costs of its defense and related expenses, first from Liberty, under the policy issued to Julian, and then, from Pacific, under the railroad force account policy issued to Conrail. Both insurance companies denied coverage. As a result, Conrail filed the instant action against Liberty Mutual and Pacific on October 1, 1997, seeking a declaratory judgment in its favor based upon the contention that the two insurers had wrongfully refused to defend and indemnify it for costs incurred in defending and resolving the Flowers and Fydenkevez tort claims.

On December 28, 2000, Conrail filed a motion for summary judgment in this action against Julian contending that Julian's failure to procure RPPLI constituted a breach of the DelDOT/Julian contract of which Conrail was a third party beneficiary. On February 20, 2001, Julian filed a motion to dismiss Conrail's breach of contract cause of action and noticed its opposition to Conrail's motion on the merits. Julian argued that no such claim had ever been raised against it and that the claim was now barred by the applicable statute of limitations. Finally, Julian stated that it had

never been made a party to the litigation up to that point in time other than except for purposes of addressing the Flowers and Fydenkevez cross-claims.

On February 14, 2001, Conrail, apparently persuaded by Julian's argument in this regard, filed an amended complaint against Julian, alleging that when Julian breached its contract with DelDOT, Conrail, as a third party beneficiary, suffered damages. On September 6, 2002, this Court granted Julian's motion finding that Conrail's breach of contract claim was in fact time-barred. That decision prompted the parties to focus on the essence of the instant dispute, i.e., the extent of the obligations to provide coverage and/or a defense for Conrail and Julian in the Flowers and Fydenkevez litigation.

Presently before the Court are six motions filed by the parties. Pacific has filed two motions. The first seeks a declaration that Pacific has no obligation to reimburse Conrail for the costs of defending the Flowers and Fydenkevez actions and the second, to construe the "Other Insurance" provisions in the Liberty and Pacific policies.[20] Conrail has

[20] While Pacific has styled these pleadings as motions seeking a "declaration," given the arguments and authorities cited therein, they must be treated as motions for summary judgment. Superior Court Civil Rule 56, therefore, governs their disposition in the same manner as the other pending motions which are styled as motions for summary judgment.

filed two motions as well. They seek to determine the existence and extent of the duties of Liberty and Pacific to defend Conrail in the Flowers and Fydenkevez actions. Julian has filed a similar motion against Liberty to determine the extent of Liberty's obligation to provide coverage for all of Julian's losses since litigation has begun. Lastly, Liberty has filed a cross-motion for summary judgment, in essence, to determine the extent of its obligation to defend and/or indemnify Conrail.

This opinion will address all of the foregoing except for Julian's motion against Liberty, which will be addressed separately. Of those five, the Court will direct its attention first to the contention that Pacific was primarily responsible for the defense of Conrail in the Flowers and Fydenkevez litigation. Liberty's obligation in that regard, if any, will then be reviewed. Finally, if both insurers are determined to have had an obligation to defend Conrail, the order or priority of those coverages will be addressed.

DISCUSSION

As noted, Conrail filed this action as one seeking a declaratory judgment concerning its rights under the Liberty and Pacific policies as well as against Julian. Disposition by means of declaratory relief is warranted when the following factors are satisfied:

> (1) [i]t must be a controversy involving the rights or other legal relations of the party seeking declaratory relief;
>
> (2) it must be a controversy in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claims;
>
> (3) the controversy must be between parties where interests are real and adverse; and
>
> (4) the issue involved in the controversy must be ripe for judicial declaration.[21]

None of the parties dispute that this action is one which is ripe for resolution by such means.

In terms of the pending motions, it is well established that summary judgment may be granted only when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law.[22] The moving party

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[21] Id. *citing* Playtex Family Products, Inc. v. St. Paul Surplus Lines Ins. Co., et al., 564 A.2d 681 (Del. Ch. 1989).

[22] Davis v. West Center City Neighborhood Planning Advisory Comm., Inc., 2003 WL 908885, at *1 (Del. Super.) citing Dale v. Town of Elsmere, 702 A.2d 1219, 1221 (Del. 1997).

bears the initial burden of going forward meeting that burden.[23] Once that burden is satisfied, the burden shifts to the non-moving party to establish the existence of disputed material issues of fact.[24] The facts must be viewed most favorably to the nonmoving party and if there is but one reasonable interpretation, summary judgment is appropriate. The moving party is entitled to summary judgment if the non-moving party fails to make a sufficient showing on an essential element of its case with respect to which it will bear the burden of proof at trial.[25]

A. **The Pacific Force Account Policy Coverage**

Pacific advances three arguments in support of its motion that Conrail is not entitled to coverage under the policy at the center of the instant controversy. First, Pacific contends that Liberty has an obligation to reimburse Conrail, and not Pacific. Conrail is considered an "additional insured" under the Liberty policy and therefore entitled to coverage. Second, Pacific argues that even if Conrail is not

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[23] Moore v. Sizemore, 405 A.2d 679, 680 (Del. 1979).

[24] Albu Trading, Inc. v. Allen Family Foods, 2003 WL 21327486, at *1 (Del. Supr.) citing Brzoska v. Olson, 668 A.2d 1355, 1364 (Del. 1995).

[25] Id.

considered an "additional insured" under the Liberty policy, Conrail cannot manufacture coverage under the Pacific Force Account Policy by speculating as to possible claims that could have been asserted, but were not. The Flowers and Fydenkevez plaintiffs failed to allege that the accidents "arose out of or resulted" from the force account work conducted by Conrail. Without a causal connection between Conrail's work and the accidents, coverage is not owed by Pacific. Third, Pacific proposes that Pennsylvania law governs the interpretation and construction of the Pacific Force Account Policy, and supports Pacific's entitlement to the relief sought.

It should be noted at the outset that Pacific does not dispute the fact that the accidents resulting in the deaths of the Flowers and Fydenkevez plaintiffs, were 'incidents' which took place during the effective dates of the Pacific force account policy.[26] Nor does Pacific contest the allegation that "Conrail's relocation or re-installation of new flashing lights constituted 'force account work' within the meaning of the Pacific policy."[27] However, the issue

[26] Br. of Pacific Ins. Co. In Supp. Of Its Mot. For A Decl. That It Has No Obligation To Reimburse Conrail For Defense Expenses Incurred In The Flowers and Fydenkevez Wrongful Death Actions at 11.

[27] Id.

remains, in so far as Pacific is concerned, whether the Flowers and Fydenkevez complaints allege that the accidents were ones "arising out of or resulting from the Force Account Work conducted by [Conrail]".

Conrail agrees that Pennsylvania law applies, but argues that Pacific's duty to defend arose when at least one claim in the underlying complaint was potentially within the scope of coverage. To avoid this duty, Pacific must prove that the Flowers and Fydenkevez complaints presented no potentially covered claims or that the claims were entirely within an exclusion from coverage under the policy. Conrail insists that the claims in the underlying complaints show a causal connection between Conrail's actions and the accidents. Furthermore, the words "force account work" need not be used so long as the allegations involve Conrail force account work and explain how it contributed to the deaths. Since all claims were potentially covered under the policy and no exclusions applied, Pacific had a duty to defend Conrail, which it breached, causing Conrail to incur the costs of defending those actions.

As conceded by both parties, Pennsylvania law governs the interpretation of the Pacific policy and will be applied by

this Court. The interpretation of an insurance contract in Pennsylvania is a matter of law for a court to decide, not a jury.[28] Such disputes are frequently resolved by virtue of a declaratory judgment action.[29] In terms of the instant controversy, it is equally apparent that the Pennsylvania courts define and distinguish between an insurer's duty to defend and its duty to provide coverage or indemnify.[30] The two obligations are totally separate and apart from one another, and an insurer's duty to defend is broader than its duty to indemnify.[31] The duty to defend does not arise every time a lawsuit is brought against an insured, but rather only when the underlying dispute falls within the coverage terms of the policy.[32] The duty to indemnify arises when the insured is determined to be liable for damages within the

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[28] American Rehab. And Physical Therapy, Inc. v. American Motorists Ins. Co., 829 A.2d 1173, 1176 (Pa. Super. Ct. 2003) *quoting* Cordero v. Potomac Ins. Co. of Illinois, 794 A.2d 897, 900 (Pa. Super. Ct. 2002).

[29] Harleysville Mut. Ins. Co. v. Madison, 609 A.2d 564, 566 (Pa. Super. Ct. 1992).

[30] Erie Ins. Exch. v. Transamerica Ins. Co., 533 A.2d 1363, 1368 (Pa. 1987).

[31] Berlin v. Maryland Cas. Co., 60 Pa. D. & C.4th 457, 468, 2002 WL 32129507 (Pa. Ct. Com. Pl. 2002) *citing* Atlantic Mut. Ins. Co. v. Brotech Corp., 857 F.Supp. 423 (E.D. Pa. 1994), *aff'd* 60 F.3d 813 (3d Cir. 1995).

[32] The Philadelphia Contributorship Ins. Co. v. Shapiro, 798 A.2d 781, 786 (Pa. Super. Ct. 2002) *citing* Britamco Underwriters, Inc. v. Grzeskiewicz, 639 A.2d 1208, 1210 (Pa. Super. Ct. 1994).

terms of the policy.[33]

Pennsylvania courts have consistently held that the obligation to defend arises whenever the claims advanced by the injured party "***may potentially***" come within the coverage of the policy.[34] The question of whether a complaint "may potentially" be covered under the policy is based on the nature of the claim.[35] When deciding whether a duty to defend exists, the court "must compare the allegations in the complaint with the provisions of the insurance contract and determine whether, if the complaint allegations are proven, the insurer would have a duty to indemnify the insured."[36] Furthermore, "[i]n making this determination, the factual allegations of the complaint are taken to be true and the complaint is to be liberally construed with all doubts as to whether the claims may fall within the coverage of the policy to be resolved in favor of the insured."[37] If the complaint

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[33] Berlin, *supra* note 31 at 468 *citing* Britamco Underwriters, Inc. v. Stokes, 881 F.Supp. 196 (E.D. Pa. 1995).

[34] Erie, *supra* note 30 at 1368 *quoting* Gedeon v. State Farm Mutual Automobile Ins. Co., 188 A.2d 320 (Pa. 1963).

[35] Berlin, *supra* note 31 at 468.

[36] Unionamerica Ins. Co., Ltd. v. J.B. Johnson, 806 A.2d 431, 433 (Pa. Super. Ct. 2002) *citing* Keystone Spray Equip., Inc. v. Regis Ins. Co., 767 A.2d 572 (Pa. Super. Ct. 2001).

[37] Id. *citing* Cadwallader v. New Amsterdam Cas. Co., 152 A.2d 484 (Pa. 1959).

alleges a cause of action which may fall within the coverage of the policy, the insurer is obligated to defend.[38] That obligation so arises and continues until such time as the claim is confined to a recovery that the policy does not cover."[39]

The Court will first address the issue as to whether Pacific had a duty to defend Conrail during the Flowers and Fydenkevez litigation. The initial inquiry in that regard is whether the work performed by Conrail personnel at the Mt. Pleasant Crossing constituted "force account work," as defined in the Pacific Force Account Policy. If the answer is in the affirmative, the question which results is whether the complaints allege a causal connection to the force account work and losses sustained by the plaintiffs in those actions.

It is clear that the work performed at the Mt. Pleasant Crossing by Conrail personnel constituted force account work. Upon inspection, both complaints reveal an allegation that Conrail "employed defective flashing lights," which, among other things, "created an unreasonably dangerous condition"

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[38] Id. *citing* Germantown Ins. Co. v. Martin, 595 A.2d 1172 (Pa. Super. Ct. 1991).

[39] Erie, *supra* note 30 *citing* Cadwallader, 152 A.2d 484.

at the Mt. Pleasant Crossing.[40] In its opening brief, Pacific specifically concedes that "DelDOT's requirement that Conrail relocate or re-install new flashing lights, constituted 'force account' work within the meaning of the policy."[41] This statement alone would be enough to trigger Pacific's obligation to defend Conrail because if the flashing lights had not been defective or properly positioned, the Flowers and Fydenkevez plaintiffs allege that these deaths would not have occurred. Therefore, by Pacific's own admission, at least one claim was potentially covered under the policy and entitled to coverage.

Pacific insists that the Flowers and Fydenkevez claims arise from routine operations, which are not covered within the definition of "force account work." The Court does not agree. The work being conducted at the Mt. Pleasant Crossing was not "routine," but was clearly part of the Route 15 Project. Nor has Pacific presented any evidence for this Court to find otherwise. Conrail's activities in that regard must therefore be deemed as "work or operations" for the State of Delaware within the meaning of the Pacific policy

[40] Amended Flowers Compl. at ¶ 15, Amended Fydenkevez Compl. at ¶ 13.

[41] Def. Pacific's Opening Br. In Supp. Of Its Mot. Seeking A Decl. at 11.

referred to above.[42] Having reached that conclusion, the Court must now focus on the existence of the causal connection, if any, between the allegations raised and losses claimed in the underlying tort litigation.

In this regard, all the allegations against Conrail pertain to precautions which, Flowers and Fydenkevez plaintiffs seemed to argue, should have been taken during the construction at the Mt. Pleasant Crossing. For example, had flagmen been present at the job site or proper warning signals been installed, notice sufficient to have avoided the collisions in questions may have been provided. Moreover, viewing the allegations set forth in the Flowers and Fydenkevez complaints in their entirety, the Court is convinced that **all** of the claims so raised were causally connected, in some fashion, to Conrail's force account work personnel and their duty to protect the public while on site. It is readily apparent, as a result, that a causal connection between Conrail's force account work and the deaths in question have been pled with sufficient particularity so as to require that Pacific had an obligation to defend Conrail.[43]

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[42] Pacific Railroad Force Account Insurance Policy, pg. 24.

[43] Parker v. State of Delaware, 2003 WL 22383714, at *8 (Del. Super.).

No exclusion has been alleged by either party or found by this Court which would otherwise interfere with the performance of Pacific duties under the policy in question. Pacific therefore had a duty to defend Conrail unless and/or until any claims being pursued were determined to be beyond the coverage of the policy and its motion must be denied. For the same reasons, Conrail's motion seeking the entry of partial summary judgment as to Pacific's duty to defend Conrail should be granted.[44]

B. **The Liberty General Commercial Liability Policy**

As noted above, Liberty filed a cross-motion for summary judgment, as well as a response to the Conrail and Pacific motions. The essence of Liberty's claim is that Delaware law applies to the construction of the Liberty policy and that Conrail is not an additional insured under that policy. Accordingly, Liberty had no duty to defend and/or indemnify Conrail for any defense expenses incurred in defending the

[44] Conrail filed a supplemental brief, on April 2, 2004, in support of its motion for partial summary judgement as to Pacific's duty to defend. However, the arguments raised therein had no bearing on the Court's resolution of this case. Although interesting, the fact that Pacific provided Conrail with a defense in other litigation in which the claims were "far more ambiguous" than those asserted in Flowers and Fydenkevez does not affect this litigation. The decision whether to provide a defense is to be made on a case-by-case basis. Therefore, this Court must base its decision on the facts and circumstances specific to this case alone.

Flowers and Fydenkevez litigation. Liberty goes on to argue that the additional insured provision was not intended to apply to the case at hand and Conrail's claim to coverage is based solely upon Julian's failure to procure RPPLI, which does not constitute an insured event or "occurrence" under the Liberty policy.[45] When the Liberty policy is so viewed, no other conclusion is legally viable.

The first question to be addressed, therefore, is whether Conrail falls within the definition of an "additional insured" under the plain meaning of the Liberty policy. The question is not whether the claims against Conrail were covered under the Liberty policy, but rather whether Conrail was entitled to coverage at all. It is in that context that Liberty's motion will be reviewed.[46]

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[45] Liberty cites two cases to support this argument, Pace Construction Co. v. United States Fidelity And Guaranty Ins. Co.,934 F.2d 177 (8th Cir. 1991) and Office Structures, Inc. v. Home Ins. Co., 503 A.2d 193 (Del. 1985). In Pace, the United States Court of Appeals Eighth Circuit held that a subcontractor's breach of its contractual duty to procure insurance for the prime contractor was not an "occurrence" within the meaning of the subcontractor's general liability and umbrella policy. In addition, the Delaware Supreme Court held in Office Structures that the breach of a contractual obligation to provide liability insurance does not enlarge the coverage to be provided by a liability insurer.

[46] As an aside, the date stipulated to by the parties and approved by the Court for filing motions for summary judgment was February 22, 2002. Liberty filed its motion on March 15, 2002. To the extent that Conrail has intimated that Liberty's motion should not be considered because it was not timely filed, Conrail has failed to identify any prejudice arising from the resultant delay and none is apparent to the Court. Without more, fundamental fairness dictates that the late filing be excused and that the motion be addressed on its merits.

The parties agree that Delaware law must be applied when interpreting the Liberty liability policy. In the State of Delaware, like Pennsylvania, the interpretation of an insurance contract is a question of law in the absence of any dispute of material fact.[47] In construing an insurance policy, "the expressed intent of the parties is to be ascertained by examining the policy as a whole."[48] "All provisions of a policy are to be read together and construed according to the plain meaning of the words involved, as to avoid ambiguity while at the same time giving effect to all provisions."[49]

The language of the "additional insured" clause is not ambiguous. It does provide for coverage of another entity or person for which Julian has agreed to provide insurance coverage, but that coverage was limited to liability which arose out of activities by Julian or in connection with property owned or rented by it. Indeed, Liberty does not appear to dispute the fact that the accidents which occurred

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[47] Collins v. State Farm Mut. Auto. Ins. Co., 830 A.2d 1241, 1245 (Del. Super. Ct. 2003) *citing* Judge v. State Farm Ins. Cos., 1993 WL 1611307 (Del. Super.).

[48] Hercules Inc. v. Onebeacon America Ins. Co., 2004 WL 249592, at *1 (Del. Super.) *citing* Continental Cas. Co. v. Signal Ins. Co., 580 P.2d 372 (Ariz. Ct. App. 1978).

[49] Id. *citing* Delaware County Constr. Co. v. Safeguard Ins. Co., 228 A.2d 15 (Pa. Super. Ct. 1967).

at the Mt. Pleasant Crossing, would have been covered under its policy, had they been caused by Julian or someone specifically named as an "additional insured" under the policy. That coverage would not include any person or entity for which separate liability insurance had been procured and was in effect at the time the liability arose.

Given the lack of ambiguity, the plain meaning of the language of the Liberty policy will control. It has already been established that Julian did not procure RPPLI in the name of Conrail. The additional insured provision in the Liberty policy, by its expressed terms, would provide coverage for Conrail, ***but only with respect to liability arising out of Julian's operations***. If the Flowers or Fydenkevez complaints had contained allegations that Conrail's liability was based solely upon Julian's operations or personnel, Conrail would appear to be covered under the "plain language and meaning" of the policy. The policy would only provide coverage for Conrail where Conrail could be held responsible via the acts of Julian thru Julian's employees or agents, based upon some legal relationship with Julian, e.g., agency or *respondeat superior.* Where liability is based upon the acts of Conrail by and thru Conrail's agents or

employees, Conrail would not be an additional insured under the Liberty policy.

Again, while Conrail's participation in the Route 15 Project appears to have been intertwined with Julian's effort, the alleged negligence of Conrail was separate and distinct from the allegations made against Julian. It did not "arise out of or result" from Julian's operations. Each entity was alleged to have been at fault in its own way, and the liability of Conrail is not premised upon its relationship with Julian. Liberty is therefore not required to defend or insure Conrail for liability which arose out of its own negligence. The duty to defend assumes that the party or entity seeking coverage is already considered an "insured" under the policy.[50] If Conrail was never an insured under the "plain language" of the policy, as this Court has concluded, then no duty to defend was ever an issue.

Alternatively and to the extent that Liberty argues that Julian's failure to procure RPPLI did not constitute an

[50] In the case law cited by the parties, it appears that the status of the parties, as "insureds", was not contested. *See* Opening Br. In Supp. Of Conrail's Mot. For Partial Summ. J. As To Def. Liberty's Duty-To-Defend at 16-17; Reply Br. Of Conrail In Supp. Of Its Mot. For Summ. J. As To Def. Liberty Mutual's Duty To Defend at 7-8. Indeed, the only questions being litigated were whether the claims so presented were covered under the relevant policies of insurance, which is not the case here. This is a critical distinction in the present context where the controversy involves both issues.

insured "occurrence" under the Liberty policy, this Court agrees. The Liberty policy provides:

> [t]his insurance applies to 'bodily injury' and 'property damage' only if:
>
> > (1) The 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory'. . . .[51]

An "occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."[52] Using the analysis set forth in Pace[53] and Office Structures[54], this Court finds that Julian's breach of contract, i.e., the failure to purchase RPPLI, would not qualify as an "occurrence" under the policy. Had RPPLI been purchased by Julian as it was obligated to do by virtue of its contract with DelDOT, coverage and/or status as an insured would be denied on that basis as well.[55]

Finally, even if the foregoing interpretation of the Liberty policy is flawed, the Flowers and Fydenkevez claims would not be covered for another reason. The insurance in

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[51] Liberty Commercial General Liability Coverage Form, pg. 1.

[52] Id., pg. 9.

[53] 934 F.2d 177 (8th Cir. 1991).

[54] 503 A.2d 194 (Del. 1985).

[55] Liberty Policy, Additional Insured - Blanket.

question provided coverage for liability assumed by virtue of an "insured contract".[56] An "insured contract" is defined in relevant part as an agreement pursuant to which the insured has assumed the tort liability of another for injury to or loss of a third party. Accepting for present purposes that Julian contractually assumed any such liability that might be imposed on Conrail arising out of its portion of the Route 15 Project, the policy excludes injuries and other losses which take place "within 50 feet of any railroad property and affecting any railroad . . . tracks, road-beds . . . or crossing."[57] That language would obviously encompass the location of the accidents underlying this litigation.

Regardless of how the situation is viewed, coverage is not available under the Liberty policy. Accordingly, Conrail's motion for partial summary judgment as to Liberty must be denied, and Liberty's cross-motion for summary judgment, granted.

C. The Remaining Motion For "Other Insurance"

Pacific contends that if the Court were to conclude that

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[56] Liberty Commercial General Liability Coverage Form, pg. 9.

[57] Id.

both Liberty and Pacific have an obligation to reimburse Conrail for its defense costs, then Liberty's obligation is "primary," and Pacific applies on an "excess" basis." In the alternative, Conrail admits that "if the Court were to find on the other pending motions that neither or only one of Liberty and Pacific has an obligation to reimburse Conrail's defense costs, then the 'other insurance' provisions of the policies would be inapplicable and this motion would be mooted."[58] Liberty argues that if the Court were to determine that both Liberty and Pacific had an obligation to defend and reimburse for defense costs, those costs would be shared by both parties under the terms of the Liberty policy and Delaware law.

Notwithstanding the aforementioned arguments, the Court need not resolve this aspect of the instant controversy. Since this Court has concluded that Pacific alone had a duty to defend Conrail and that Conrail is not an insured for purposes of the Liberty policy, the motion is moot. There is only one policy to which Conrail can look. The "other insurance" provisions of the Liberty and Pacific policies are simply not applicable as a result. Any other interpretation

[58] Br. of Pacific Ins. Co. In Supp. Of Its Motion On The "Other Insurance" Provisions In The Liberty And Pacific Policies at 1, fn 1.

would be superfluous.

CONCLUSION

Based upon the foregoing, the Court enters judgment as follows:

A. Pacific's Motion For A Declaration That It Has No Duty To Reimburse Conrail For Defense Expenses Incurred in the Flowers & Fydenkevez Wrongful Death Actions must be, and hereby is, **denied.**

B. Conrail's Motion For Partial Summary Judgment As To Defendant Pacific's Duty-To-Defend must be, and hereby is, **granted.**

C. Conrail's Motion For Partial Summary Judgment As To Defendant Liberty's Duty-To-Defend must be, and hereby is, **denied.**

D. Liberty's Cross-Motion For Summary Judgment On Behalf Of Liberty must be, and hereby is, **granted.**

E. Pacific's Motion On The "Other Insurance" In The Liberty And Pacific Policies must be, and hereby is, **moot**, because this Court has found that Pacific, alone, had a duty to defend Conrail.

IT IS SO ORDERED.

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TOLIVER, JUDGE