

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

PREMIER PARKS, INC. )  
(n/k/a Six Flags, Inc.), a Delaware )  
corporation, )  
 )  
Plaintiff, )  
 )  
v. ) C.A. No. 02C-04-126-PLA  
 )  
TIG INSURANCE COMPANY, )  
a Texas corporation, )  
 )  
Defendant. )

Submitted: October 23, 2006  
Decided: November 1, 2006

**ORDER GRANTING LEAVE TO APPEAL  
FROM INTERLOCUTORY ORDER**

Defendant, TIG Insurance Company (“TIG”), has made an application pursuant to Delaware Supreme Court Rule 42 for an order certifying an appeal from the interlocutory order of this Court dated September 21, 2006. The Court’s Order denied TIG’s motion for summary judgment and granted Premier Parks, Inc. n/k/a Six Flags, Inc.’s (“Six Flags”) motion for summary judgment.<sup>1</sup>

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<sup>1</sup> See *Premier Parks, Inc. v. TIG Ins. Co.*, 2006 WL 2709235 (Del. Super. Ct. Sept. 21, 2006).

This is an ongoing declaratory judgment action whereby TIG is the insurer and Six Flags is the insured. TIG initially filed this case seeking a declaratory judgment on the coverage of a lawsuit against Six Flags which resulted in a jury award for the plaintiffs (“*Williams* action”).<sup>2</sup> Six Flags counterclaimed for declaratory judgment relief to determine the extent of TIG’s duty to indemnify Six Flags for a settlement amount in a different lawsuit against Six Flags (“*Armendarez* action”). The coverage of the *Armendarez* action was the subject of the Order at issue here.

TIG and Six Flags filed cross motions for summary judgment with respect to the issue of coverage in the *Armendarez* action. TIG sought a declaration that it was liable only for an allocated share of the settlement Six Flags entered into in the *Armendarez* action. Because the settlement agreement did not allocate the damages as between covered and non-covered claims, as determined by Six Flags’ insurance policy, TIG requested that this Court ascertain which claims were covered under the policy and hold TIG liable only for those covered claims. Six Flags sought a declaration that TIG was liable for the entire settlement amount, including attorney’s fees, because TIG’s coverage position came too late, in that if TIG desired an

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<sup>2</sup> This Court decided the coverage issue in the *Williams* action by Order granting summary judgment in favor of Six Flags. See *TIG Ins. Co. v. Premier Parks, Inc.*, 2004 WL 728858 (Del. Super. Ct. Mar. 10, 2004).

allocation of the settlement by claim, it should have been involved in the settlement process and requested an apportionment of the claims.

The Court determined that TIG was responsible for the total amount of the negotiated settlement in the *Armendarez* action, and that it was to bear the defense costs incurred by Six Flags in defending *Armendarez*. In support of its decision, the Court relied upon Oklahoma law,<sup>3</sup> which placed the burden upon the insurer, and not the insured, to establish what portion of the settlement is allocable to covered claims.<sup>4</sup> The Court determined that TIG failed to meet this burden, and that it was estopped from denying Six Flags coverage for the entire settlement amount of the applicable coverage period, including all applicable attorney's fees, regardless of the fact that an allocation of the claims never occurred.

TIG timely filed its application for certification of an interlocutory appeal. It argues that interlocutory review of this Court's Order is appropriate under Rule 42 for two principal reasons: (1) the Order determines substantial issues and establishes the parties' legal rights as to the scope of coverage provided under the policy for *Armendarez*; and (2)

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<sup>3</sup> In the course of this litigation, the Court previously determined that the insurance contract in issue is controlled by Oklahoma law under a choice of law analysis. *See TIG*, 2004 WL 728858, at \*4. The Court, therefore, continued to apply substantive Oklahoma law and Delaware procedural law.

<sup>4</sup> *See Gay & Taylor v. St. Paul Fire Marine Ins. Co.*, 550 F. Supp. 710 (W.D. Okla. 1981).

interlocutory review of the Court’s rulings on insurance coverage may dispose of the case in its entirety because Six Flags’ remaining claims (bad faith and breach of fiduciary duties) are only viable if Six Flags is successful on its insurance coverage claims (the subject of the Court’s Order).<sup>5</sup> Six Flags responds by contending that the Court’s Order does not represent an “extraordinary case” and, therefore, an interlocutory appeal will only cause delay, be a waste of judicial resources, and not resolve the litigation or serve the interests of justice.<sup>6</sup>

“The oft-repeated test of the appealability of an interlocutory order is that it must determine a substantial issue and establish a legal right.”<sup>7</sup> “Additionally, the interlocutory appeal must satisfy one of the five criteria listed in Delaware Supreme Court Rule 42(b).”<sup>8</sup>

“The extent of insurance coverage as a matter of law is a substantial issue for purposes of interlocutory appeal.”<sup>9</sup> Therefore, because the Court

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<sup>5</sup> See Docket 194.

<sup>6</sup> See Docket 195.

<sup>7</sup> *Castaldo v. Pittsburgh-Des Moines Steel Co., Inc.*, 301 A.2d 87 (Del. 1973).

<sup>8</sup> *In Re: Asbestos Litigation*, 2006 WL 1579782, at \*1 (Del. Super. Ct. June 7, 2006).

<sup>9</sup> *Shook & Fletcher Asbestos Settlement Trust v. Safety Nat’l Cas. Corp.*, 2005 WL 3007806, at \*2 (Del. Super. Ct. Oct. 27, 2005) (citing *Rhone-Poulenc Chem. Co. v. Am. Motorists Ins. Co.*, 606 A.2d 73, 74 (Del. 1992)). See also *AT&T Corp. v. Clarendon Am. Ins. Co.*, 2006 WL 1360934, at \*1 n. 1 (Del. Super. Ct. May 18, 2006) (providing a list of

determined the extent of insurance coverage required to be provided to Six Flags in defending and eventually settling the *Armendarez* action, the Court is satisfied that its Order determined a substantial issue and established a legal right.<sup>10</sup> The Court also finds that Rule 42(b)(v) is satisfied in that a review and reversal of this Court's Order may terminate the litigation. Moreover, considerations of justice would be served by interlocutory review because this case involves millions of dollars of insurance coverage.<sup>11</sup>

For the foregoing reasons, the Court's Order of September 21, 2006, is hereby certified to the Delaware Supreme Court for disposition in accordance with Rule 42 of that Court.

**IT IS SO ORDERED.**

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**Peggy L. Ableman, Judge**

Original to Prothonotary

cc: Clerk of the Supreme Court of Delaware; Richard L. Horowitz, Esquire; Sarah E. DiLuzio, Esquire; Terri L. Combs, Esquire; Rikke A. Dierssen-Morice, Esquire; Carmella P. Keener, Esquire; Thomas J. Judge, Esquire; Samuel L. Hendrix, Esquire

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cases where the interpretation of insurance policies and determination of coverage was considered a "substantial issue").

<sup>10</sup> See *State Farm Mut. Auto. Ins. Co. v. Abramowicz*, 386 A.2d 670, 671 (Del. 1978) ("[T]he ruling in this case ... established a *legal right* of plaintiff to recover her damages pursuant to the insurance policy.") (emphasis supplied).

<sup>11</sup> See *AT&T*, 2006 WL 1360934, at \*1 ("Considerations of justice would be served by interlocutory review because ... [t]his case involves hundreds of millions of dollars of insurance coverage.").