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

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| LISA ROBERTS,<br><br>Plaintiff,<br><br>v.<br><br>DELMARVA POWER & LIGHT COMPANY, d/b/a/ Connectiv Power Delivery, BENJAMIN CLENDANIEL, CHESWOLD AIRPORT, DELAWARE RIVER AND BAY AUTHORITY and JAMES JOHNSON,<br><br>Defendants. | : | CONSOLIDATED CASE<br>C.A. No: 05C-09-015 (RBY) |
| BARBARA L. AUBREY, Individually and Executor of the Estate of James R. Aubrey, Deceased, and JENNIFER L. AUBREY,<br><br>Plaintiffs,<br><br>v.<br><br>DELAWARE RIVER AND BAY AUTHORITY and DELAWARE AIRPARK and PEPCO HOLDINGS, INC. and DELMARVA POWER & LIGHT f/k/a CONNECTIV POWER DELIVERY and DIAMOND AVIATION INC., and HARLAN DURHAM,<br><br>Defendants. | : | |

**Submitted: June 1, 2007**
**Decided: August 6, 2007**

***Upon Consideration of Defendant Delmarva Power and Light's Rule 12(b)(7) Motion to Dismiss***
**DENIED**

John Grady, Esq., Grady & Hampton, Dover, Delaware for Plaintiff Lisa Roberts.

Gary W. Aber, Esq., Aber, Goldlust, Baker & Over, Wilmington, Delaware for Plaintiff Jennifer Aubrey.

David K. Sheppard, Esq., Blank, Rome, LLP, Wilmington, Delaware for Plaintiff Barbara Aubrey.

Lisa C. McLaughlin, Esq., Phillips, Goldman & Spence, P.A., Wilmington, Delaware for Defendant Delmarva Power & Light Co.

Stephen P. Casarino, Esq., Casarino, Christman & Shalk, Wilmington, Delaware for Defendants James Johnson, Benjamin Clendaniel, Cheswold Airport and Delaware River & Bay Authority.

Christian J. Singewald, White and Williams, LLP, Wilmington, Delaware for Defendant Precision Airmotive, LLC.

Todd L. Goodman, Esq., Pepco Holdings, Inc., Wilmington, Delaware for Defendants Pepco and Delmarva Power & Light Company.

Thomas G. Whalen, Esq., Stevens & Lee, Wilmington, Delaware for Defendant Harlan Durham.

## OPINION AND O R D E R

Young, J.

The Defendant, Delmarva Power and Light, has filed a Motion to Dismiss this entire action pursuant to Superior Court Civil Rules 12(b)(7) and 19. For the following reasons, the Defendant's Motion is **DENIED**.

## FACTS

On October 12, 2003, James Aubrey, a certified pilot, and his daughter, Jennifer Aubrey, took off from the Delaware Airpark in his single-engine, Piper Cherokee 180. The Aubreys left the airport in Cheswold, Delaware and proceeded to Hazleton, Pennsylvania. Shortly before sunset, the Aubreys left the Hazleton Municipal Airport to return to Delaware. When they arrived in Cheswold it was dark. On final approach, the aircraft struck a utility pole. The right wing separated from the fuselage, which crashed into the ground. As a result of the impact, both of the Aubreys sustained personal injuries; James Aubrey ultimately died from his injuries.

This incident resulted in the filing of two separate actions in Delaware stemming from the alleged wrongful death of James Aubrey. In the first, Lisa Roberts, another daughter of James Aubrey, sought to recover for her father's wrongful death in a lawsuit filed in Kent County. In the second, Barbara Aubrey, the widow and executor of the Estate of James Aubrey, and Jennifer Aubrey (collectively "the Aubrey Plaintiffs") filed a wrongful death action in New Castle County. In this same action Jennifer Aubrey also made claims for the personal injuries she sustained in the crash.

Ms. Roberts seeks damages from Defendants, Delmarva Power and Light Company, Benjamin McDaniel a/k/a Benjamin Clendaniel ("Clendaniel"), Delaware Airpark, James Johnson, Delaware River and Bay Authority. The Aubrey Plaintiffs

seek damages from Defendants Delmarva Power and Light Company, Pepco Holdings, Inc., Delaware Airpark, Delaware River and Bay Authority, Diamond Aviation, Inc., and Harlan Durham. On April 7, 2006, this Court ordered that the New Castle County action be consolidated into the Kent County action.

In addition to filing a lawsuit in Delaware, the Aubrey Plaintiffs seek redress in the Pennsylvania Court of Common Pleas, Philadelphia County, and the New York Supreme Court, New York County, against separate defendants who purportedly are not subject to personal jurisdiction in Delaware.[1] In the Pennsylvania action, the Complaint states that the Aubrey Plaintiffs are suing Avco Corp. and its Textron Lycoming Reciprocating Engine Division[2], Superior Air Parts, Inc.[3], Precision Airmotive, LLC, Precision Airmotive Corp., Precision Aerospace Corp., Precision Aerospace Services, LLC, Precision Aviation Products Corp., Precision Products, LLC[4], and Mark IV Industries[5] under the theories of strict liability, breach of warranty, negligence and failure to warn. In the New York action, the Aubrey Plaintiffs are suing Penn Yaro Aero Service, Inc. and Penn Yaro Aero Leasing Corp.

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[1] However, the Court notes that the complaints filed in these other states indicate that some of these defendants are, in fact, Delaware corporations.

[2] The Aubrey Plaintiffs aver, in the Pennsylvania Complaint, that the Avco defendants are a Delaware corporation.

[3] The Aubrey Plaintiffs aver, in the Pennsylvania Complaint, that Superior is a Texas corporation.

[4] The Aubrey Plaintiffs aver, in the Pennsylvania Complaint, that all of the Precision defendants are organized under the laws of the State of Washington.

[5] The Aubrey Plaintiffs aver, in the Pennsylvania Complaint, that Mark IV Industries is a Delaware corporation.

alleging strict liability, breach of warranty and negligence. The damages sought by the Aubrey Plaintiffs as to James Aubrey in these actions are those damages that are recoverable for his wrongful death.

A group consisting of all of the defendants in the Pennsylvania action[6] ("the Intervenors"), filed a Motion to Intervene pursuant to Superior Court Civil Rule 24(b)(2). On March 13, 2007, the Court granted intervention. The Court's decision did not make the Intervenors parties to the action in the traditional sense. Instead, it provided the means for the Intervenors to bring claims against the existing parties or for the existing parties to bring claims against the Intervenors. Following the decision, the Court held a scheduling conference. At the conference it was agreed that the parties had until May 1, 2007 to add or amend the Complaint, and that the parties had until May 15, 2007 to bring any third party claims. Neither of those actions has occurred. Rather, Defendant Delmarva Power and Light has filed this Motion to Dismiss pursuant to Superior Court Civil Rules 12(b)(7) and 19. Defendants Diamond Aviation, Inc. and Harlan Durham and Defendants Delaware River and Bay Authority and Delaware Airparks urge the Court to grant Defendant Delaware Power and Light's Motion.

## STANDARD OF REVIEW

Recently, in *Fedirko v. G&G Construction, Inc.*[7], the Superior Court set out the

[6] The Court can say this because, according to the representations of Counsel for the Proposed Intervenors, the Aubrey Plaintiffs have executed a stipulation of dismissal as to Superior Air Parts, Inc.

[7] 2007 WL 1784184 (Del. Super.)

standard of review for a Motion to Dismiss pursuant to Superior Court Civil Rule 19. For purposes of this Motion, the Court adopts that standard, set out in *Fedirko* as follows:

Superior Court Civil Rule 12(b)(7) provides that a Court may dismiss a plaintiff's claim for failing to join a party pursuant to Superior Court Civil Rule 19.[8] In order to determine whether a plaintiff has failed to join a party pursuant to Rule 19,[9] the Court undertakes a two pronged inquiry.[10] First, the Court inquires whether the party is a necessary party under Rule 19(a).[11] A party is necessary if:

> "(1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest."[12]

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[8] *Graham v. State Farm Mut. Ins. Co.*, 2006 WL 1600949, at *1 (Del. Super.).

[9] To the extent Delaware Courts have not addressed the mechanics of Rule 19, the Court refers to federal sources. *See Wolhar v. General Motors Corp.*, 712 A.2d 464, 469 (Del. Super. 1997) ("Construction of federal rules is generally persuasive in the construction of Superior Court Civil Rules.").

[10] *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399, 404 (3d Cir. 1993).

[11] *Id.* ("The present version of Rule 19 does not use the word "necessary." It refers to parties who should be joined if *feasible.* The term *necessary* in referring to a Rule 19(a) analysis harks back to an earlier version of Rule 19. It survives in case law at the price of some confusion.").

[12] *Id.* (quoting Federal Rule of Civil Procedure 19(a), which Delaware Superior Court Civil Rule 19(a) tracts word for word.).

If the party is necessary, it must be joined if feasible to do so.[13] It is not feasible to join a party when the party is not subject to service of process and joining the party would deprive the Court of subject matter jurisdiction.[14] If the party is necessary and joinder is feasible, then the Court shall order that the person be made a party.[15] If the person should join the action as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff.[16] The Rule does not provide for dismissal at this stage.[17]

Second, if the party is "necessary" under Rule 19(a), but joinder is not feasible, then the Court must determine[18] whether "in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent party being thus regarded as indispensable."[19] In making this assessment, the Court is to consider the following factors:

> (1) to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a

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[13] *Id.*

[14] Delaware Superior Court Civil Rule 19(a).

[15] *Id.*

[16] *Id.*

[17] *John Hancock Property & Cas. Co. v. Hanover Ins. Co.*, 859 F.Supp. 165, 168 (E.D. Pa. 1994).

[18] *Janney Montgomery Scott, Inc.*, 11 F.3d at 404.

[19] Delaware Superior Court Civil Rule 19(b).

> judgment rendered in the person's absence will be adequate; and (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.[20]

When presented with a Rule 12(b)(7) motion, the Court places an initial burden on the party raising the defense to show that the person who was not joined is needed for a just adjudication.[21] "However, when an initial appraisal of the facts reveals the possibility that an unjoined party whose joinder is required under Rule 19 exists, the burden devolves on the party whose interests are adverse to the unjoined party to negate this conclusion and a failure to meet that burden will result in the joinder of the party or dismissal of the action."[22]

When presented with such a motion, the Court "will consider all well-pleaded facts in the complaint and accept them as true."[23] In viewing the facts, the Court must draw "all reasonable inferences in favor of the non-movant."[24] The Court may consider documents that are "integral to the plaintiff's claim and incorporated in the complaint" in deciding a motion to dismiss.

## DISCUSSION

The Defendant argues for the dismissal of the entire case based on Rule 19(b)

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[20] *Id*. *See also*, *Graham*, 2006 WL 1600949, at *1.

[21] *John Hancock Property & Cas. Co*., 859 F.Supp. at 168.

[22] 7 *Federal Practice and Procedure Civ. 3d* § 1609. *See also*, *Boles v. Greeneville Housing Authority*, 468 F.2d 476, 478 (6th Cir. 1972).

[23] *AT&T Corp. v. Clarendon America Ins*., 2006 WL 2685081, at *3 (Del. Super. 2006).

[24] *Id*.

because the Plaintiffs, Lisa Roberts, Barbara Aubrey and Jennifer Aubrey, have failed to join indispensable parties, the Intervenors. Alternatively, the Defendant argues that the Intervenors are necessary parties under Rule 19(a). The Court will address the Defendant's second argument first, for, as stated above, the Court cannot address Rule 19(b) unless it has first found the Intervenors necessary and their joinder not feasible.

As the Plaintiffs point out, it is well settled law that joint tortfeasors are not necessary parties whose joinder is mandatory, but are merely permissive parties.[25] Furthermore, the Advisory Committee made it clear that Federal Rule 19 was "not at variance with the settled authorities holding that a tortfeasor with the usual 'joint-and-several' liability is merely a permissive party to an action against another with like liability. Joinder of these tortfeasors continues to be regulated by Rule 20; compare Rule 14 on third-party practice."[26]

The Defendant urges the Court to use its equitable powers to order dismissal under Rule 19(b) or joinder under Rule 19(a). However, the only equitable powers the Defendant cites are those found in Rule 19(b). The Court cannot access those equitable powers unless it can reach the Rule 19(b) issue: indispensability. Here, the

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[25] *See Temple v. Synthes Corp., Ltd.*, 498 U.S. 5, 7-8 (1990) (Where the Court stated, "It has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit." The Court then held that the potential joint tortfeasors where not necessary parties under Rule 19(a), but were permissive parties under Rule 20.); *Hurwitch v. Adams*, 155 A.2d 591, 595 (Del.1959) (Where the Court held, "Rule 19 of the Superior Court requires that parties having a joint interest must be joined, while Rule 20 permits the joinder of parties against whom claims are asserted which arise out of the same occurrence. The claims asserted in No. 45, 1959 are in tort and, as such, they are several.")

[26] Federal Rule of Civil Procedure 19.

general rule that tortfeasors are not necessary parties under Rule 19(a) prevents the Court from even reaching the Rule 19(b) issue and accessing the equitable power in Rule 19(b).[27] While a few courts have found exceptions to the general rule, and thereby found joint tortfeasors to be necessary parties, these cases are rare, and the actions of these courts are universally distinguished and disfavored by subsequent courts.[28]

Thus, the Court can find no legally persuasive case law that alters the general rule that joint tortfeasors are not necessary parties whose joinder is mandatory. Certainly, the best course of action here is to combine in one action all the claims and parties arising out of a single incident. However, the Court will not ignore established case law and its own rules of civil procedure to do so.

Here, the Intervenors are, arguably, joint tortfeasors. Thus, pursuant to the common law and the intent underlying our rules of civil procedure, they are not necessary parties under Rule 19(a). As stated previously, this Court need not determine whether the Intervenors are indispensable parties under Rule 19(b). Therefore, the Defendant's Motion to Dismiss pursuant to Rule 19 should be **DENIED**.

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[27] Even if the Court were to hold the Intervenors were necessary parties, the Court would not have to reach the Rule 19(b) issue because joinder would be feasible since there would be no service of process issue or subject matter jurisdiction issue. Thus, the Court could not access the equitable power of Rule 19(b).

[28] *See Whyham v. Piper Aircraft Corp.*, 96 F.R.D. 557 (M.D. Pa. 1982); *Leick v. Schnellpressenfabrick Ag Heidelberg,* 128 F.R.D. 106 (S.D. Iowa 1989); *Kern v. Jeppesen Sanderson, Inc.*, 867 F.Supp. 525 (S.D.Tex. 1994); *Bailey ex rel. Bailey v. Toyota Motor Corp.*, 2003 WL 23142185, at *1 (S.D.Ind. 2003).

**SO ORDERED.**

/s/ Robert B. Young
J.

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