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

ST. PAUL FIRE & MARINE INSURANCE COMPANY a/s/o HOME FOR AGED WOMEN - MINQUADALE HOME, INC. t/a GILPIN HALL,	)	C.A. No. 98C-11-262 WCC
	)	ARBITRATION CASE
Plaintiffs,	)	TRIAL BY JURY OF TWELVE DEMANDED
v.	)	
ELKAY MANUFACTURING COMPANY, HALSEY TAYLOR CORPORATION & VOLAIR CONTRACTORS, INC.,	)	
Defendants	)	

WOHLSEN CONSTRUCTION CO.	)	
Plaintiff,	)	C.A. No. 99C-11-144 WCC
v.	)	ARBITRATION CASE
HALSEY TAYLOR CORPORATION, ELKAY MANUFACTURING CO., JOHN GUEST CO., and VOLAIR CONTRACTORS, INC.,	)	TRIAL BY JURY OF TWELVE DEMANDED
Defendants.	)	

Submitted: July 3, 2002
Decided: January 17 , 2003

MEMORANDUM OPINION

On Defendant Volair Contractors, Inc.'s Motion for Summary Judgment.
Granted in Part; Denied in Part.
On Defendant John Guest Co.'s Motion for Summary Judgment.
Granted in Part; Denied in Part.

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CARPENTER, J.

Defendant Volair Contractors, Inc., ("Volair") has filed a Motion for Summary Judgment pursuant to Superior Court Civil Rule 56 as to all claims asserted against it in two separate but related actions, one by plaintiff St. Paul Fire & Marine Insurance Company ("St. Paul"), and the other with plaintiff Wohlsen Construction Company ("Wohlsen"). Subsequently, defendant John Guest Company ("John Guest") filed for summary judgment against plaintiff Wohlsen Construction Company. For the foregoing reasons, defendant Volair's motion is granted in part, and denied in part; and defendant John Guest's motion is granted in part, and denied in part.

BACKGROUND

Wohlsen was the general contractor hired to construct a new three story wing to the Gilpin Hall building, a nursing home facility owned and operated by the Home for Aged Women - Minquadale Home, Inc., trading as Gilpin Hall ("Gilpin Hall"). During the construction, Wohlsen hired Volair to install water chillers which subsequently leaked causing significant flooding to the property. St. Paul is Gilpin Hall's property insurer. Under the contract between Gilpin Hall and Wohlsen, Gilpin Hall was required to provide property insurance to cover the work that Wohlsen performed under the contract. This requirement was satisfied by having the project covered by a builder's risk policy issued to Wohlsen by the Marine Office of America

Corporation (MOAC), a subsidiary of Continental Insurance Company. The contract between Gilpin Hall and Wohlsen also contained a "waiver of subrogation" clause which provides for a waiver of claims against, among others, the subcontractors. Through another clause in the contract, this waiver was extended to damage to property other than the "work" under the contract if that property damage was covered by other property insurance held by Gilpin Hall.

Wohlsen hired Volair, a plumbing contractor, to install various equipment in the building, including four water chillers which were to be used to cool water at the facility. Under the contract, Volair was required to purchase a comprehensive general liability insurance policy and to name Wohlsen as an insured on the policy. Like the contract between Gilpin Hall and Wohlsen, Volair's contract contained a "waiver of subrogation" clause. Likewise, this clause waived all claims to the extent the damages were covered and collected by property insurance provided under the contract documents, except such rights as they may have to the proceeds of such insurance. A separate provision required Volair to indemnify, hold harmless, and defend Wohlsen for any and all claims, expenses and costs, including but not limited to attorneys' fees, resulting from damages caused in whole or in part by Volair's negligence.

The water chillers and related accessories to be installed by Volair were purchased by Volair from Halsey Taylor Corporation, ("Halsey Taylor") a division of Elkay Manufacturing Co. ("Elkay"), who also manufactured the water chillers. Included as a component part of the water chillers was a plastic slip-on coupling, the Super Speedfit fitting, manufactured by John Guest.

During the installation of the water chiller, Volair used chrome-plated copper tubing with the Super Speedfit fitting. Subsequently, on November 27, 1997, a water leak occurred in Gilpin Hall which not only affected the third floor where the water fountains were located, but also the first and second floors. It was the combination of the chrome plated copper tubing with the plastic slip-on coupling that caused the coupling to fail and consequently, the resulting water damage to the property. It is undisputed that the coupling was not defective,[1] nor was the coupling altered, assembled, incorporated or attached to the water chiller in any way. Rather, it was packaged separately and was to be used by the ultimate consumer when installing the water chiller to the piping at the facility.

Wohlsen alleges that the water chiller that it purchased did not contain any

[1] In a letter dated February 14, 1997 and a February 18, 1997 report, Plaintiff's expert, Frederic M. Blum, a mechanical engineer, stated that the plastic coupling with metal barbs was used with chrome-plated copper where a standard brass compression coupling should have been used. Furthermore, a report from Stephen Gatz of Elkay found that the Super Speedfit fitting should not be used with "hard" tubing, such as chrome-plated copper tubing, because the Super Speedfit fitting has stainless steel "teeth" designed to dig into soft metal.

warnings advising against the use of the plastic Super Speedfit fitting with chrome-plated copper tubing. Wohlsen also alleges that if John Guest provided warnings to Halsey Taylor advising against the use of the Super Speedfit fitting with chrome-plated copper tubing, those warnings were not passed on to the ultimate consumer.

As a result of the leak, Wohlsen incurred damages totaling $46,652.80, and St. Paul Fire and Marine Insurance Co., a/s/o Home For Aged Women-Minquadale Home, Inc., t/a Gilpin Hall incurred damages in the amount of $5,142.00 as the insurance carrier for Gilpin Hall. Volair asserts that the losses of both Gilpin Hall and Wohlsen were covered by their respective property insurers. Specifically, Volair argues that Gilpin Hall's property insurer, St. Paul, paid for damage to "non work" property, and that the damage to Wohlsen's work was covered by the property coverage in MOAC's builder's risk policy. John Guest contends that a company such as itself, that supplies a component part to another company who in turn integrates that component into the product that is being put out on the market, is not responsible for warning the consumer. The dispute as to the liability of the parties and the obligation of the insurance carriers lead to the present litigation.

STANDARD OF REVIEW

A motion for summary judgment may only be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[2] If a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts to clarify the application of the law, summary judgment is inappropriate.[3] Moreover, if it appears to the Court that there is any reasonable hypothesis by which the nonmoving party might recover, the motion will be denied.[4] The Court is required to examine all pleadings, affidavits and discovery material provided to the Court,[5] and accept all non-disputed facts as true, and must accept the non-movant's version of any disputed facts.[6]

DISCUSSION

A. VOLAIR'S MOTION FOR SUMMARY JUDGMENT

Gilpin Hall and Wohlsen entered into a contract which included a "waiver of subrogation" clause, whereby they agreed to waive the right to sue Volair in the event

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[2] *See Pierce v. International Ins. Co. of Ill.*, 671 A.2d 1361, 1363 (Del. 1996); *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979); *Schueler v. Martin*, 674 A.2d 883, 885 (Del. Super. Ct. 1996).

[3] *Kysor Industrial Corp. v. Margaux, Inc.*, 674 A.2d 889, 894 (Del. Super. Ct. 1996).

[4] *Vanaman v. Milford Memorial Hospital, Inc.*, 272 A.2d 718, 720 (Del. 1970).

[5] *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322 (Del. Super. Ct. 1973).

[6] *Merrill v. Crothall-American, Inc.*, 606 A.2d 96 (Del. 1992).

that a loss occurred which was covered by their property insurance. This contract incorporated by reference the 1987 version of the American Institute of Architects Document A201 ("AIA A201"). Paragraph 11.3.7 of AIA A201 states in relevant part:

> **11.3.7 Waivers of Subrogation** The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other . . . for damages caused by fire or other perils to the extent covered by property insurance obtained pursuant to this Paragraph 11.3 or other property insurance applicable to the Work . . . .

Further, Paragraph 11.3.5 of the AIA A201 provides that Gilpin Hall's waiver of claims against subcontractors such as Volair extends to damage to property other than the work under the contract if that property damage is covered by other property insurance held by Gilpin Hall:

> **11.3.5** If during the Project construction period the Owner insures properties, real or personal or both, adjoining or adjacent to the site by property insurance under policies separate from those insuring the Project, or if after final payment property insurance is to be provided on the completed Project through a policy or policies other than those insuring the Project during the construction period, the Owner shall waive all rights in accordance with the terms of Subparagraph 11.3.7 for damages caused by fire or other perils covered by this separate property insurance. All separate policies shall provide this waiver of subrogation by endorsement or otherwise.

The contract entered into between Volair and Wohlsen also contained a "waiver of subrogation" clause. Volair alleges that the clause in their contract with

Wohlsen contains the same provision, whereby Wohlsen agreed to waive the right to sue Volair in the event that a loss occurred which was covered by their property insurance. The contract between Wohlsen and Volair provides in relevant part:

> **8.8 Waiver of Subrogation** Wohlsen and the Subcontractor waive all rights against each other and against the Owner and all other Subcontractors for damages caused by fire or other perils to the extent covered and collected by Property Insurance provided under the Contract Documents, except such rights as they may have to the proceeds of such insurance.
>
> Wohlsen and the Subcontractor further mutually waive all rights against each other for damages (direct and consequential) arising out of the negligence of either party to the extent that either party is indemnified by insurance.

Further, "Contract Documents" in the agreement were defined as the contract between Wohlsen and Gilpin Hall.

Volair argues that St. Paul and MOAC, as subrogees, are bound by their subrogors' waiver of claims. As a result of the water damage to the property, all losses were covered by property insurance except for a $500 deductible in the Gilpin Hall policy and a $1,000 deductible in the Wohlsen policy.

St. Paul opposes this argument under various theories. First, they assert that under title 6, section 2704(a) of the Delaware Code and the rationale of the Delaware

Supreme Court in *Alberici*,[7] that it would be against public policy for the waiver of subrogation clause to be enforced. Second, St. Paul argues that it was not notified of the waiver. Finally, they contend that the waiver does not apply to its claim because the waiver is limited to "work areas," and the damage that St. Paul paid for was for non-work.

Similarly, Wohlsen opposes the motion for three reasons. First, they assert the same argument as St. Paul, that the waiver of subrogation clause cannot be enforced under section 2704 for public policy reasons as discussed in *Alberici*.[8] Second, Wohlsen argues that it is entitled to the benefit of the insurance policy procured by Volair naming Wohlsen as a policy holder and that there is a right of contribution among co-insurers. Finally, Wohlsen argues that it is entitled to attorneys' fees and costs pursuant to paragraph 8.7 of their contract with Volair, which requires Volair to indemnify Wohlsen for claims against Wohlsen. The Court will now address the parties' contentions grouped by issue.

(a) Title 6, Del. C. § 2704

Both St. Paul and Wohlsen argue that section 2704(a) applies and acts as an accountability statute, which has as part of its public policy the purpose of preventing

[7] *J.S. Alberici Construction Co., Inc. v. Mid-West Conveyor Co., Inc.*, 750 A.2d 518 (Del. 2000).

[8] 750 A.2d 518 (Del. 2000).

anyone involved in the construction industry the ability to avoid responsibility for their own negligence. They argue that it forbids any agreement or provision in a contract which allows a contractor or subcontractor to avoid that responsibility, and that the waiver of subrogation clause at issue does essentially the same thing. In support of this, both plaintiffs rely on *Alberici*.[9] In *Alberici*, the Delaware Supreme Court interpreted section 2704(a), holding that any preconstruction or construction contractual covenant purporting to indemnify or hold harmless one party for damages arising as a result of their own negligence is against public policy and is void and unenforceable even where such provision is crystal clear and unambiguous.[10]

However, the Delaware Supreme Court has recently revisited this statute in *Chrysler Corporation v. Merrell & Garaguso, Inc.*[11] Title 6, section 2704(b) of the Delaware Code provides: "(b) Nothing in subsection (a) of this section shall be construed to void or render unenforceable policies of insurance issued by duly authorized insurance companies and insuring against losses or damages from any causes whatsoever." In *Chrysler*, the Court concluded that "[i]n the final analysis, however, the insurance savings provision reflected in 2704(b) is a statement of

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[9] 750 A.2d 518 (Del. 2000).

[10] *See J.S. Alberici Const. Co., Inc. v. Mid-West Conveyor, Co., Inc.*, 750 A.2d 518 (Del. 2000).

[11] 796 A.2d 648 (Del. 2002).

legislative purpose that cannot be negated by an all-encompassing construction of the anti-indemnification policy set forth in 2704(a)."[12] Consequently, as clearly set forth by the Delaware Supreme Court, and despite the policy-laden arguments made by St. Paul and Wohlsen, this Court finds that the waiver of subrogation clauses must be enforced. As the Supreme Court stated:

> Insurance companies are sophisticated entities who can protect their own interests either in refusing to issue additional insured coverage or restricting such coverage with notice to the insured to third parties.
> ***
> The savings provision has meaning only if it cannot be used as a shield by insurers to decline coverage for insurance once purchased and duly issued to any insured, however identified or designated.[13]

Thus, the waiver of subrogation clauses included in the contracts between Gilpin Hall and Wohlsen, and between Wohlsen and Volair, prevents any claims against Volair from being asserted for damages which have already been covered by insurance. Consequently, under the rationale of *Chrysler*, the principals asserted in *Alberici* do not apply to this instance with respect to the waiver of subrogation clauses.

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[12] *Id*. at 653.

[13] *Id*.

Further, this Court notes that at issue in this case is a standardized waiver of subrogation clause in a construction contract. Upon review of the case law, there has been no hesitancy in upholding and enforcing such waiver provisions in both federal and state courts throughout the United States.[14] As noted by numerous courts interpreting similar provisions, the clauses are intended to limit a party's recovery when that property loss or damage is covered by insurance.[15] Thus, as reasoned by the New Hampshire Supreme Court, these clauses "are not designed to unilaterally relieve one party from the effects of its future negligence, thereby foreclosing another party's avenue of recovery. Instead, they work to ensure that . . . damage incurred during the construction project [is] covered by the appropriate types and limits of

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[14] *See, e.g.*, *Nat'l Union Fire Ins. Co. v. Engineering-Science, Inc.*, 884 F.2d 1208 (9th Cir. 1989); *Commercial Union Ins. Co. v. Bituminous Casualty Corp.*, 851 F.2d 98 (3d Cir. 1988); *Tokio Marine & Fire Ins. Co. Ltd. v. Employers Ins. of Wausau*, 786 F.2d 101, 104 (2d Cir. 1986); *Richmond Steel, Inc. v. Legal and Gen. Assurance Society*, 821 F.Supp. 793 (D. Puerto Rico 1993); *Mission Nat'l Ins. Co. v. Hartford First Ins. Co.*, 702 F.Supp. 543 (E.D. Pa. 1989); *Behr v. Hook*, 787 A.2d 499 (Vt. 2001); *Chadwick v. CSI, Ltd.*, 629 A.2d 820 (N.H. 1993); *Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Const., Inc.*, 831 P.2d 724 (Wash. 1992); *Industrial Risk Insurers v. Garlock Equipment Co.*, 576 S.2d 652 (Ala. 1991); *St. Paul Fire & Marine Ins. Co. v. Freeman-White Assoc. Inc.*, 366 S.E.2d 480 (N.C. 1988); *Blue Cross of Southwestern Virginia v. McDevitt & Street Co.*, 360 S.E.2d 825 (Va. 1987); *Bd. Of Educ. v. Valden Assoc. Inc.*, 389 N.E.2d 798 (N.Y. 1979); *Travelers Ins. Co. v. Impastato*, 607 So.2d 722 (La. Ct. App. 1992); *Len Immke Buick, Inc. v. Architectural Alliance*, 611 N.E.2d 399 (Ohio Ct. App. 1992); *United States Fidelity and Guar. Co. v. Farrar's Plumbing and Heating Co. Inc.*, 762 P.2d 641 (Ariz. Ct. App. 1988); *Village of Rosemont v. Lentin Lumber Co.*, 494 N.E.2d 592 (Ill. App. Ct. 1986); *Haemonetics Corp. v. Brophy & Phillips Co., Inc*, 501 N.E.2d 524 (Mass. App. Ct. 1986); *School Alliance Ins. Fund v. Fama Construction Co.*, 801 A.2d 459, 464 (N.J. Super. Ct. Law Div. 2001).

[15] *See IRMA v. O'Donnell, Wicklund, Pigozzi & Peterson Architects, Inc.*, 692 N.E.2d 739, 744 (Ill. App. Ct. 1998); *see also Behr,* 787 A.2d at 503; *Chadwick*, 629 A.2d at 825-26.

insurance. . . ."[16] Furthermore, these clauses seek to avoid "the prospect of extended litigation which would interfere with construction" by shifting the risk of loss to the insurance company regardless of which party is at fault.[17] Therefore, such clauses are "useful in construction projects 'because . . . [they] avoid[] disruption and disputes among the parties to the project' by eliminating [the] need for lawsuits and protecting contracting parties from loss by bringing all property damage under builder's all-risk property insurance."[18] Further, "[b]ecause the insurer presumably has considered the risk of loss in establishing its premiums, the insurer should not have the ability to recoup that loss by subrogation against the other parties allegedly causing the loss."[19] Finally, public policy considerations also favor these types of agreements which avoid higher overall costs resulting from the multiplicity of insurance policies and overlapping coverage.[20]

In conclusion, the language of the contracts evidenced an intent of the parties

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[16] *See Chadwick*, 629 A.2d at 825-26, *Behr*, 787 A.2d at 503 (Vt. 2001) (citing *Chadwick v. CSI, LTD.*, 629 A.2d 820, 825-26 (N.H. 1993)).

[17] *Behr*, 787 A.2d at 503 (quoting *IRMA*, 692 N.E.2d at 744).

[18] *Id*. (citing *Tokio Marine & Fire Ins. Co. Ltd.*, 786 F.2d at 104); *see also Richmond Steel, Inc.*, 821 F.Supp. at 800.

[19] *School Alliance Ins. Fund*, 801 A.2d at 464.

[20] *Behr*, 787 A.2d at 503-04 (citing *Fairchild Square Co. v. Green Mountain Bagel Bakery, Inc.*, 658 A.2d 31, 36 (Vt. 1995)).

to allocate construction risks to their insurers, and thus insurance is the exclusive remedy available. The actions here were not an attempt to avoid responsibility for negligent conduct by contractors and their subcontractors, but simply a business decision as to who would pay if negligent conduct was found. Such risk shifting is not only appropriate but is the foundation upon which the insurance industry was created and upon which their premium rates are determined. Accordingly, this Court concludes that the waiver of subrogation clauses effectively abrogate any right of St. Paul or Wohlsen to seek additional compensation from Volair beyond that which is covered by insurance.

(b) Notice

St. Paul's second argument that it was not notified of the waiver can be quickly dismissed. This argument carries no weight in the present motion. The Court again notes that the provisions of these contracts appear to be common and standard in the industry, and are ones that insurance companies would commonly be familiar. As such, any complaint that St. Paul has concerning the failure of Gilpin Hall to notify them of the waiver is misdirected at Volair. If St. Paul wishes to allege that they were inappropriately forced to pay insurance proceeds due to Gilpin Hall's failure to notify them of the waiver, this complaint lies against Gilpin Hall, and not Volair.

(c) Non-work areas

St. Paul's final argument is that the waiver does not apply because the waiver is limited to "work areas" and they are seeking subrogation to "non-work" areas. Both St. Paul and Volair rely upon *St. Catherine of Sienna Catholic Church v. J.R. Pini Electrical Contractors Inc.*,[21] as illustrative of their respective contentions. St. Paul contends that in *St. Catherine*, Judge Toliver acknowledges that there is a distinction between "work" and "non-work" areas for purposes of subrogation clauses.[22] Under this rationale, St. Paul alleges that paragraph 11.3.7 of AIA A201 pertains only to the "work" and that the waiver of subrogation in the contract does not specifically apply to the non-work areas that are at issue.

The parties are correct that there is a distinction between "work" and "non-work" areas. However, the Court finds the facts in the present case to be distinguishable from *St. Catherine*.[23] The contractual language relied upon by St.

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[21] 2000 WL 1211146 (Del. Super. Ct.), *aff'd*, 781 A.2d 695 (Del. 2001).

[22] *Id*. at *2, stating:

> Generally speaking, an agreement between the building owner and construction company to waive all rights against each other for damages to work under the contract caused by fire or other perils "to the extent covered by insurance," does not relieve the construction company form liability for negligently inflicted harm to "non-work" areas.

Id. (citations omitted).

[23] 2000 WL 1211146 (Del. Super. Ct.).

Paul in *St. Catherine* is from a different and earlier version of the 1987 AIA contract form. This form has since been modified by paragraph 11.3.5. Paragraph 11.3.5, quoted at length above, provides that if property adjoining or adjacent to the site is insured by property insurance by the owner, that the owner shall then "waive all rights in accordance with the terms of Subparagraph 11.3.7 for damages caused by fire or other perils covered by this separate property insurance." Consequently, under the contract entered into between Gilpin Hall and Wohlsen, paragraph 11.3.5 effectively extended the waiver of subrogation to non-work areas which have been covered by separate property insurance. As such, because the property damaged by the flooding falls within this provision, St. Paul's argument must fail.

(d) Volair's Insurance Policy

Wohlsen's second argument is that it is entitled to the benefit of the insurance policy that Volair was required to procure on its behalf, and that there is a right of contribution among co-insurers. Wohlsen contends that Volair was required to procure a comprehensive general liability policy and name Wohlsen as an additional insured, and that the waiver of subrogation provision in their contract with Volair expressly provides that Wohlsen and Volair "waive all claims against each other . .

. except such rights as they may have to the proceeds of such insurance."[24] Wohlsen contends that there are two insurance policies that cover the claim at issue. The first policy is the Penn National Insurance Co. policy that Volair was required to procure naming Wohlsen as an additional insured; the second policy is a Continental Insurance Co. policy which Wohlsen procured on its own behalf. Therefore, Wohlsen argues that when two insurance policies both cover a claim for the same insured, they are required to split the loss equally.[25] Under this rationale, Wohlsen contends that it could have looked to either policy to provide coverage, and that after covering the claim, the insurance company that provides such coverage would then be entitled to recover half of the amount paid from the other policy. Here, Wohlsen collected from the MOAC policy following the property damage.[26]

It appears to the Court that Volair complied with the conditions of its contractual relationship with Wohlsen by obtaining a comprehensive general liability policy in which Wohlsen was listed as an additional insured. Since the contract subsequently provided for a waiver of claims between Wohlsen and Volair to the

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[24] Wohlsen actually misquotes this provision in their brief, stating that the parties had "not waived the rights as they may have to proceed [to] insurance." *See* Pl. Wohlsen Construction Co.'s Opp'n to Volair Contractors, Inc.'s Mot. for Summ. J. at 2-3.

[25] *See, e.g.*, *Pettinaro Const. Co., Inc. v. Utica Mutual Ins. Co.*, 2001 WL 641072 (D. Del.); *Liberty Mutual Ins. Co. v. Fireman's Fund Ins. Co.*, 479 A.2d 289 (Del. Super. Ct. 1983).

[26] MOAC is a subsidiary of the Continental Insurance Company.

extent they were covered by insurance, any contribution claims must be filed against the insurance company that issued the policy and not Volair. Since Penn National Insurance Co. is not a party to this litigation, the Court cannot resolve this claim now made by Wohlsen. If Wohlsen or MOAC desire to look to the Penn National policy for contribution they should proceed, to the extent they can, to perfect litigation against them. Only then would the Court have before it the proper parties with full notice and an opportunity to be heard as to whether the claim is covered under the policy.

(e) Attorney's Fees and Costs

Wohlsen's final argument is that it is entitled to attorney's fees and costs pursuant to paragraph 8.7 of their contract with Volair, which requires Volair to indemnify Wohlsen for claims against Wohlsen. Included in the costs sought by Wohlsen is a $1,000 insurance deductible from Wohlsen's Continental Insurance policy. Paragraph 8.7 of the Wohlsen / Volair agreement provides:

> **8.7 Indemnification** To the fullest extent permitted by law, the Subcontractor shall indemnify, hold harmless, and defend Wohlsen, Owner, and Architect, and all of their agents and employees from and against all claims, damages, lawsuits, and expenses, including but not limited to attorney's fees, resulting from personal injury, sickness, disease, or death, or patent infringement, or from property damage including the loss of use resulting therefrom, provided that any such claim, damage, loss or expense is caused in whole or in part by any negligent act or omission of the Subcontractor or anyone directly or

> indirectly employed, or anyone for whose acts it may be liable, or is caused by or arises out of the use of any products, material, or equipment furnished by the Subcontractor, regardless of whether it is caused in part by a party indemnified hereunder. In any and all claims against Wohlsen, Owner, or Architect or any of their agents or employees, by any employee of the Subcontractor or anyone directly or indirectly employed by the Subcontractor, or anyone for whose acts Subcontractor may be liable, the indemnification obligation under this article shall not be limited in any way by any limitation on the amount or type of damages, compensation, or benefits payable by or for Subcontractor under Worker's Compensation Acts, Disability Benefit Acts, or other employee benefit acts.

Upon review, this Court must agree that Wohlsen is entitled to seek compensation for the $1,000 insurance deductible. However, the language of the indemnification provision in paragraph 8.7 provides that "the Subcontractor shall indemnify, hold harmless and *defend* Wohlsen . . . from and against all claims, damages, lawsuits and expenses . . . ." Indemnity clauses such as that found in paragraph 8.7 are commonly found in construction contracts and are clearly intended to protect the general contractor (as well as the owner and architect) from suits brought by third parties who are injured by acts of the subcontractors, as opposed to claims among the contracting parties against each other.[27] Here, the indemnitee Wohlsen is asserting a claim against the indemnitor Volair. The Court must construe a contract of indemnity to give effect to the parties intent so that "only losses which reasonably appear to have been intended by the parties are compensable" under the

[27] *Oliver B. Cannon & Son, Inc. v. Dorr-Oliver, Inc.*, 394 A.2d 1160, 1165 (Del. 1978).

contract.[28] Under the language of the indemnification clause, the Court cannot conclude that Wohlsen is entitled to indemnification for attorneys' fees for losses incurred in an action which they instituted. This loss was simply not within the coverage of the indemnification clause.[29]

(B) JOHN GUEST'S MOTION FOR SUMMARY JUDGMENT

John Guest moves for summary judgment against all claims brought against it by plaintiff Wohlsen. In its complaint, Wohlsen asserts claims of breach of contract, breach of warranty and for negligence for failure to warn. John Guest contends that Wohlsen lacks standing to bring a breach of contract or breach of express warranty claim against it as Plaintiffs are non-natural. Furthermore, John Guest alleges that a company such as itself, that supplies a component part to another company who in turn integrates that component into the product that is being put out on the market, is not responsible for warning the consumer. Rather, John Guest argues that responsibility lies with the company that puts the end product out into the market.

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[28] *Id.*

[29] Further, there is no indication in the record that Wohlsen incurred attorney fees from a third party action.

(a) Breach of Contract; Breach of Warranty

The Court is persuaded by John Guests' arguments that (1) John Guest as a supplier of a component part, was not in direct contractual privity with Wohlsen; and (2) Wohlsen, as a corporation, lacks standing as a third-party beneficiary of a contractual warranty under title 6, section 2-318 of the Delaware Code.

John Guest alleges that there was no contractual relationship between itself and Wohlsen, and Wohlsen's written Response and their oral arguments presented to this Court have shown nothing to the contrary. Further, upon review of the record, the Court fails to find any evidence of a contract entered into between John Guest and Wohlsen. Consequently, as contractual privity is absent, Wohlsen's ability to proceed with their claims of breach of contract and breach of warranty depend upon their qualifying as a third-party beneficiary.

Under section 2-318, "any *natural person* who may reasonably be expected to use, consume or be affected by the goods" may establish third-party beneficiary status.[30] However, the legislature has specifically defined "natural person" to exclude corporations.[31] Delaware case law provides further guidance to the Court, holding that absent privity, section 2-318 does not extend warranty protection to

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[30] DEL. CODE ANN. tit. 6 § 2-318 (1999) (emphasis added); *S&R Associates, L.P., III v. Shell Oil Co.*, 725 A.2d 431 (Del. Super. Ct. 1998).

[31] *See S&R Associates*, 725 A.2d at 437-438 (analyzing title 6, section 2-318 of the Delaware Code and its history).

corporations.[32] Accordingly, Wohlsen, as a corporation, lacks standing to bring a claim under section 2-318 and John Guests' motion for summary judgment on the claims of breach of contract and breach of warranty must be GRANTED.

(b) Negligence (Failure to Warn)

John Guest alleges that they simply manufactured a component part, the Super Speedfit fitting, which was incorporated into the final product, the chiller, sold by Elkay. Further, John Guest alleges that it is undisputed that the coupling was not defective, as attested to in the letter and report of Frederic Blum. Rather, it was the combination of the plastic coupling with metal barbs with the "hard" chrome-plated copper tubing, which resulted in the property damage. This, John Guest contends, is supported by the report of Stephen Gatz of Elkay.[33]

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[32] *S&R Associates*, 725 A.2d at 438 (citing *Dover Downs, Inc. v. Koppers Co. Inc.*, Del. Super., C.A. No. 80C-0C-2, Wright, J., (Feb. 8, 1984)); *see also Transpolymer Ind., Inc. v. Chapel Main Corp.*, 1990 WL 168276 (Del. Supr.) (stating that in regards to a corporation's need to be represented by counsel, that "[a] corporation, though a legally recognized entity, is regarded as an artificial or fictional entity, and not a natural person.").

[33] The report of Stephen Gatz states in part:

> The stainless steel teeth of the Super Speedfit fittings withstand pressure and vibration when used in combination with "soft" tubing such as copper or polyethylene.
> ***
> This failure appears to be the direct result of the use of an inappropriate tubing style i.e. chrome plated tubing, with a fitting which is not suitable for use with this tubing style. In effect, the plumber used whatever was available instead of an appropriate tube type. The remainder of the connections in the fountain waterway were made with unplated copper and the plumber failed to recognize this factor.

Mot. of Def., John Guest Co., for Summ. J. against Pl. Wohlsen Const. Co. at Ex. "D" (Report from Steven Gatz of Elkay).

Wohlsen opposes John Guests' motion, asserting that the coupling "was not altered, assembled, incorporated or attached to the water chiller in any way. It was packaged separately and was to be used by the ultimate consumer when installing the water chiller to the piping at the facility."[34] Wohlsen alleges that John Guest knew that the coupling could not be used with chrome-plated tubing, and that John Guest warned against the use of this particular coupling with copper-plated tubing in its catalog. However, Wohlsen asserts that no warnings were provided to the ultimate consumer who would be installing the chiller utilizing the packaged coupling. As such, Wohlsen contends that a factual issue exists as to whether John Guest had an obligation to provide warnings to the ultimate consumer.

The Court is persuaded by Wohlsen's argument. Initially, it must be noted that the line of cases relied upon by John Guest are distinguishable from the case at bar.[35] These cases deal with a component part manufacturer's duty to warn when their component part has been *incorporated* into a final product by another. Here, John Guest's coupling was packaged *separately* and was to be used by the ultimate consumer when installing the water chiller to the piping at the facility. Consequently, a factual dispute remains as to whether the business relationship between Halsey

[34] Pl.'s Opp'n to Def. John Guest Co.'s Mot. for Summ. J. at ¶ 4.

[35] *See, e.g., Steffen v. Colt Industries Operating Corp.*, 1987 WL 8689 (Del. Super. Ct.); *Angelini v. Abell-Howe Company*, 1991 WL 215720 (Del. Super. Ct.).

Taylor/Elkay and John Guest was such that they were aware that the Super Speedfit fitting would be included with their water chiller and whether their knowledge reasonably mandated a warning to the consumer that the coupling would not be used with copper-plated tubing. The Court does not believe John Guest can hide behind their business relationship and turn a blind eye to potential damages when it was clear that their fitting would be packaged with the chiller and would be considered by the consumer as an integral component part in the installation process. As such, the Court must deny John Guest's motion for summary judgment pertaining to the claim of negligence.

CONCLUSION

Therefore, for the foregoing reasons, Volair's motion for summary judgment is granted in part as to plaintiff St. Paul and granted in part as to plaintiff Wohlsen. Wohlsen's claims for the recovery of the $1000 deductible for its Continental Insurance policy, and St. Paul/Gilpin Hall's claim for recovery of the $500 deductible for its policy with St. Paul shall remain. Furthermore, this granting of partial summary judgment shall not affect the cross-claims filed by John Guest and Elkay/Halsey Taylor, whose claims shall remain.

Further, John Guest's motion for summary judgment is granted in part as to plaintiff Wohlsen's claims of breach of contract and breach of warranty. However,

Wohlsen's claim of negligence shall remain.

IT IS SO ORDERED.[36]

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Judge William C. Carpenter, Jr.

[36] The Court recognizes that defendant John Guest's motion in limine to preclude the testimony of Robert Blum still remains. However, the Court is hopeful that the ruling made today may aid in resolving the litigation and if not, will decide the motion in limine prior to the start of trial.