IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CIVIL DIVISION

FREDERICK L. KREAMER, JR. AND, TERRI LEE KREAMER, HIS WIFE, Plaintiffs	:	
v.	:	NO. 12-2274
LOBAR, INC., Defendant	:	

LOBAR, INC., Third Party Plaintiff	:	
v.	:	
CHOWNS FABRICATION AND RIGGING, INC. Third Party Defendant	:	

John J. Delcasale, Esquire	Counsel for the Kreamers
Walter H. Swayze III, Esquire	Counsel for Lobar
Jared B. Shafer, Esquire	Counsel for Lobar
Peter J. Dolan, Esquire	Counsel for Chowns

MEMORANDUM OPINION

Nanovic, P.J. – September 2 , 2015

On July 26, 2011, Frederick L. Kreamer, Jr., an employee of Chowns Fabrication and Rigging, Inc. ("Chowns"), sustained a work-related injury during the construction of an addition and renovations to the Carbon County Area Vocational Technical School (the "Project") located in Jim Thorpe, Carbon County, Pennsylvania. The general contractor for this Project was Lobar, Inc. ("Lobar"). Lobar subcontracted the structural steel work for the Project to Chowns pursuant to an agreement dated April 14, 2009 (the "Subcontract"). Kreamer was injured when he fell from a ladder while trying to remove a makeshift plywood cover erected by another subcontractor at the job site.

Kreamer and his wife, Terri Lee Kreamer, (collectively the "Plaintiffs"), thereafter brought suit against Lobar for personal injuries and loss of consortium. Lobar, who, pursuant to the Subcontract, was to be named as an additional insured under Chowns' general liability policy, tendered the defense of Plaintiffs' claim to Pennsylvania National Mutual Casualty Insurance Company ("Penn National"), Chowns' general liability carrier. After Penn National denied coverage, Lobar filed a third party joinder complaint against Chowns, alleging, *inter alia*, that Chowns had breached its contract with Lobar in failing to provide insurance coverage protecting Lobar against claims, such as Plaintiffs', arising out of Chowns' operations under the Subcontract.

At issue in this dispute is the scope of additional-insured coverage owed to Lobar under the Subcontract and whether it has been provided.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs filed their complaint against Lobar on October 22, 2012, after Kreamer's workers' compensation claim as an employee of Chowns had been fully and finally adjudicated. In this complaint, Plaintiffs sought damages solely as result of Lobar's alleged negligence. Specifically, the complaint alleges that Lobar was negligent, *inter alia*, in failing to (1) establish policies and standards regarding site safety and the

erection of plywood structures in the area where employees of Chowns would be working; (2) implement a safety plan; (3) appoint sufficient supervisory personnel; (4) adequately train personnel on site safety; (5) require the workers who constructed the plywood structure during the School renovations to remove it; (6) adequately inspect the job site for safety hazards; (7) inform Kreamer of the dangers involved with removing the plywood structure; (8) provide assistance to Kreamer in removing the plywood structure; and (9) provide a safe means of accessing the plywood structure, such as a scissor lift. (Complaint, ¶ 16).

Prior to the filing of Plaintiffs' complaint, Plaintiffs' counsel notified Lobar's commercial general liability insurance carrier, The Hartford, of Plaintiffs' intent to commence suit. After its review of this potential claim, The Hartford wrote to Chowns on August 10, 2012, and requested that Chowns' general liability insurer assume the defense of Plaintiffs' claim against Lobar as an additional insured under Chowns' general liability policy. In explaining its request, The Hartford relied upon the following language from Paragraph 3 of the Subcontract as creating a contractual obligation on Chowns to obtain liability insurance protecting Lobar against Plaintiffs' claim:

> INSURANCE. [Chowns] shall purchase and maintain insurance that will protect [Chowns] from claims

> arising out of [Chowns'] operations under this Agreement, whether the operations are by [Chowns], or any of [Chowns'] consultants or anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable. Prior to starting any work under this Agreement, [Chowns] shall obtain insurance in accordance with the General Requirements of the Contract from a responsible insurance company or companies and shall provide two (2) certificates of insurance to [Lobar] naming [Lobar] and Owner as an additional insured and evidencing coverage in accordance with the above referenced requirements.

Subcontract, Paragraph 3.

By letter dated September 7, 2012, Penn National denied Lobar's request noting that since Plaintiffs had yet to file any litigation necessitating a defense, this request was premature. In response, Lobar's counsel wrote on October 31, 2012, that based upon the additional insured requirements of the Subcontract, Penn National, as Chowns' liability carrier, "owed a duty to Lobar in the same manner it would owe a duty to its insureds, even in the pre-litigation, claim investigation stage"; that if Chowns had failed to name Lobar as an additional insured under the Penn National policy, then Chowns would be in breach of the Subcontract and liable to Lobar for its damages; and that if Plaintiffs brought suit against Lobar, Lobar would join Chowns in the litigation as an additional defendant for breach of contract.

Plaintiffs' complaint was filed on October 22, 2012. After further communication between Lobar and Penn National, Penn

National denied Lobar's request to defend against Plaintiffs' claim. In a letter dated February 7, 2013, Penn National stated that Lobar did not qualify as an additional insured under the policy it issued to Chowns and, therefore, no duty to defend existed.

Lobar filed its joinder complaint against Chowns on June 13, 2013. In this complaint, Lobar claimed Chowns breached the insurance requirements of the Subcontract by failing to name Lobar as an additional insured in its general liability policy. The complaint quotes in full Paragraph 3 of the Subcontract recited above, alleges that the policy Chowns obtained from Penn National does not provide the insurance coverage safeguarding Lobar required by the Subcontract, and asserts under Count I, which is entitled "Breach of Contract" and is the only count in the complaint, that pursuant to the Subcontract Chowns was to have Lobar named as an additional insured under its commercial general liability policy with Penn National, that it appeared Lobar was not named as an additional insured in the policy, and that if this were true, then Chowns was in breach of the Subcontract. (Joinder Complaint, ¶¶ 9, 11, 17, 18 and 19).

Chowns' answer to the joinder complaint was filed on September 18, 2013. With the exception of Chowns' response to the quoted language from Paragraph 3 of the Subcontract, which was admitted, Chowns denied each of the other above-identified

averments as a conclusion of law to which no response was required. Notwithstanding these denials, by opinion letter dated September 16, 2014, addressed to Lobar's counsel, Penn National's independent counsel acknowledged that Lobar was in fact an additional insured under the policy issued by Penn National to Chowns by virtue of an endorsement to the policy entitled "Automatic Additional Insureds - Owners, Contractors and Subcontractors (Ongoing Operations)" ("Additional Insured Endorsement") which provides, in part, as follows:

> This endorsement modifies insurance provided under the following:
>
> COMMERCIAL GENERAL LIABILITY COVERAGE PART
>
> A. The following provision is added to SECTION II-WHO IS AN INSURED
>
> 1. Any person(s) or organizations(s) ... with whom you are required in a written contract or agreement to name as an additional insured, but only with respect to liability for "bodily injury" ... caused, in whole or in part, by:
>
> (1) Your [Chowns'] acts or omissions; or
>
> (2) The acts or omissions of those acting on your behalf;
>
> in the performance of your ongoing operations for the additional insured(s) at the location or project described in the contract or agreement.

Additional Insured Endorsement, Part A, Section 1.[1] That Lobar

[1] In West Bend Mut. Ins. Co. v. MacDougall Pierce Const., Inc., 11 N.E.3d. 531 (Ind.Ct.App. 2014), the Indiana Court of Appeals stated:

> CGL [i.e., Commercial General Liability] insurance policies are designed to protect an insured against certain losses arising out of

was in fact an additional insured under the Penn National policy pursuant to this Endorsement is not in dispute at this time.

This notwithstanding, Penn National's independent counsel also opined in his letter of September 16, 2014, that Penn National nevertheless owed no duty to defend Lobar as an additional insured under the coverage provided by the Additional Insured Endorsement. Specifically, counsel noted that since this Endorsement only protects Lobar as an additional insured if Plaintiffs suffered bodily injury resulting from an act or omission by Chowns, or by someone acting on its behalf, Penn National's duty to defend Lobar as an additional insured arises only if Plaintiffs claim their injuries were caused in whole or in part by the acts or omissions of Chowns, or the acts or omissions of someone acting on its behalf, and that this determination is to be made solely from the "four corners" of Plaintiffs' complaint against Lobar. Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co., 908 A.2d 888, 896-97 (Pa. 2006) (holding that an insurer's duty to defend a suit is determined solely by comparing the averments of the

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> business operations. Most CGL policies are written on standardized forms developed by an association of domestic property insurers known as the Insurance Services Office ("ISO"). These policies begin with a broad grant of coverage, which is then limited in scope by exclusions. Exceptions to exclusions narrow the scope of the exclusion and, as a consequence, add back coverage. However, it is the initial broad grant of coverage, not the exception to the exclusion, that ultimately creates (or does not create) the coverage sought.

Id. at 538 (internal quotation marks and citations omitted). The Additional Insured Endorsement in the Penn National policy is on a standard form prepared by the Insurance Services Office.

underlying complaint against the insured with the policy terms and limitations to determine whether coverage exists for the claim made); *see also* Am. & Foreign Ins. Co. v. Jerry's Sport Ctr., Inc., 2 A.3d 526, 541 (Pa. 2010) ("The question of whether a claim against an insured is potentially covered is answered by comparing the four corners of the insurance contract to the four corners of the complaint."); Am. States Ins. Co. v. State Auto Ins. Co., 721 A.2d 56, 59-60 (Pa.Super. 1998).[2]

In making this evaluation, Penn National's independent counsel observed that Plaintiffs' complaint alleges direct negligence against Lobar only; no negligence is claimed against Chowns;[3] and the complaint specifically disclaims any fault by either Plaintiff. (Plaintiffs' Complaint, ¶ 14). Citing Dale Corp. v. Cumberland Mut. Fire Ins. Co., 2010 WL 4909600 (E.D.Pa. Nov. 30, 2010), in which virtually the same additional insured policy language appeared as is present in the instant Endorsement, counsel opined that for coverage to exist under this language, the Plaintiffs' injuries must be shown to have

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[2] In this case, the Superior Court described the following two-step analysis for determining whether a complaint triggers an insurer's duty to defend:

> The first step in a declaratory judgment action concerning insurance coverage is to determine the scope of the policy's coverage. After determining the scope of coverage, the court must examine the complaint in the underlying action to ascertain if it triggers coverage.

Am. States Ins. Co. v. State Auto Ins. Co., 721 A.2d 56, 59-60 (Pa.Super. 1998) (citations and quotation marks omitted).

[3] This is likely because Chowns was Kreamer's employer and could not be held liable under Pennsylvania's workers' compensation laws.

been "proximately caused" as a result of Chowns' negligent acts or omissions, and that a "but for" showing – that the injury arose or resulted because of Chowns' work under the Subcontract – was not sufficient. In sum, Penn National's counsel argued that for Plaintiffs' claim against Lobar to be covered under Penn National's policy, Kreamer's accident must have been caused in whole or in part by Chowns' acts or omissions - not simply that the accident was related to or arose out of Chowns' operations (*i.e.*, that the policy Endorsement provides "caused by" not "arising out of" coverage).

Because nothing in Plaintiffs' complaint suggests that Plaintiffs' injuries were caused by any acts or omissions of Chowns, or anyone on its behalf, counsel concluded that no coverage exists under the policy with respect to Plaintiffs' claim against Lobar. As a corollary conclusion, no coverage is provided by the policy for injuries or damages caused solely by the negligence of Lobar. In this regard, as also noted by counsel, obtaining additional insured status for Lobar does not create blanket insurance coverage under the Penn National policy for every claim made against Lobar. *See also* Graziano Const. and Dev. Co. v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 2011 WL 2409883 *5, *6 (Pa.Super. May 26, 2011), also cited in independent counsel's coverage opinion. In Graziano, the identical additional insured endorsement language as is at issue

here, issued by the same insurer – Penn National - was examined. Under this language, the Court found that "any organization that [Chowns] was required by contract to name as an additional insured becomes an insured if a person suffers bodily injury resulting from an act or omission by [Chowns] or by someone acting on [Chowns'] behalf." *Id.* at *5.[4]

Lobar does not dispute Penn National's independent counsel's interpretation of the Additional Insured Endorsement as applied to the averments of Plaintiffs' complaint against Lobar. Lobar argues, however, that the insurance protection Chowns was obligated to provide for Lobar's benefit under Paragraph 3 of the Subcontract was broader than that actually provided under the Additional Insured Endorsement. As argued by Lobar, Chowns' contractual obligation under the Subcontract was to procure insurance naming Lobar as an additional insured for claims "arising out of [Chowns'] operations" such that Lobar would be insured against all liability arising in connection with Chowns' work, including Lobar's own negligence.[5] In contrast, Chowns argues that its obligation under Paragraph 3 of the Subcontract is limited to providing insurance coverage

[4] Although Graziano is an unpublished memorandum opinion and, therefore, not binding on us, Commonwealth v. Phinn, 761 A.2d 176, 179 (Pa.Super. 2000), we find its analysis of this same endorsement persuasive.

[5] As argued by Lobar, based on an "arising out of"/"but for" analysis, it is undisputed that Kreamer's injuries arise from Chowns' work on the Project since the focus of an "arising out of" clause is not on who caused the accident but on what caused the accident, that is, the general nature of the operation or work in the course of which the injury was sustained. Here, Kreamer was engaged in Chowns' work when he was injured.

protecting Lobar from liability actually "caused by" Chowns' acts or omissions, and that it has met this obligation. This difference is the focus of the respective Motions for Summary Judgment filed by Lobar and Chowns with respect to Lobar's joinder complaint against Chowns for breach of contract and which we now address.[6]

DISCUSSION

The issue presented is whether Paragraph 3 of the Subcontract required Chowns to obtain liability insurance, with Lobar named as an additional insured, insuring Lobar against all liability for claims arising out of Chowns' operations, such

[6] Summary judgment in Pennsylvania is appropriate when, after the relevant pleadings are closed, there is no genuine issue of any material fact as to a necessary element to establish a cause of action. *See* Pa.R.C.P. 1035.2. Specifically, the court shall, upon motion of any party, render summary judgment as a matter of law in two situations: (1) whenever there is no genuine issue of any material fact, as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or (2) if, after the completion of discovery relevant to the motion, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury. *Id.* "Thus, a record that supports summary judgment either (1) shows the material facts are undisputed or (2) contains insufficient evidence of facts to make out a *prima facia* cause of action or defense." Petrina v. Allied Glove Corp., 46 A.3d 795, 798 (Pa.Super. 2012) (quoting Chenot v. A.P. Green Servs., 895 A.2d 55, 61 (Pa.Super. 2006)).

A motion for summary judgment is based on an evidentiary record that entitles the moving party to a judgment as a matter of law. *See* Fine v. Checcio, 870 A.2d 850, 857 (Pa. 2005). Hence, even disputed evidence may allow for the grant of summary judgment if the evidence is so clear that reasonable minds could not differ on a factual question. Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co., 908 A.2d 888, 896 (Pa. 2006). Specific to this case, because the construction and interpretation of a contract is a question of law, it is one particularly appropriate for summary judgment provided the contract is clear and unambiguous.

The fact that cross motions for summary judgment have been filed, does not affect our standard or scope of review. Rather, each motion must be separately evaluated to determine if the moving party is entitled to judgment as a matter of law.

that Lobar would be protected not only against claims made for injury caused by Chowns, but also for claims alleging injury caused by Lobar relative to Chowns' work, even if based on negligence attributable to Lobar alone, and regardless of whether Chowns' conduct was a contributing factor to the injury.[7]

[7] Preliminarily, Chowns requests that its Motion for Summary Judgment be granted on procedural grounds, that the basis of Lobar's claim for breach of contract identified in its joinder complaint against Chowns is fundamentally different from the breach it now claims and which has not been pled. Specifically, Chowns argues that while the joinder complaint may have averred broadly a breach of contract because Chowns did not procure insurance protection for Lobar as mandated by the Subcontract, the exact nature of the breach claimed was Chowns' failure to have Lobar named as an additional insured on Chowns' insurance policy with Penn National. (Joinder Complaint, ¶¶ 17-20). However, at this time, Lobar no longer argues it was not named as an additional insured on Chowns' general liability policy, Chowns having proven otherwise, but now claims Chowns breached the Subcontract by procuring insurance which only protects Lobar from liability for damages caused by Chowns or for which it is vicariously liable, whereas the Subcontract required Chowns to procure insurance coverage protecting Lobar as an additional insured for claims arising out of Chowns' operations.

Whether the variance between what Lobar has pled and what it now argues precludes this reconstituted claim depends largely on whether Chowns has been surprised or prejudiced by Chowns shift in the focus of its claim. While the joinder complaint specifically identified Chowns' alleged failure to have Lobar named as an additional insured on its policy with Penn National, the complaint also alleged generally that Chowns breached Paragraph 3 of the Subcontract by not obtaining insurance coverage for Lobar in accordance with this provision. Further, the joinder complaint quoted Paragraph 3 verbatim in the body of the complaint and attached copies of the Subcontract and Penn National's policy as exhibits to the pleading. Moreover, the theory of liability upon which relief may be granted need not be explicitly stated in the pleadings if it can be gleaned from the facts averred and the applicable law. *See e.g.*, Ecksel v. Orleans Const. Co., 519 A.2d 1021, 1026 (Pa.Super. 1987) (finding trial court properly held defendant had breached the implied warranty of habitability, even though plaintiffs had only pled a breach of the written terms of a home construction contract).

In finding Chowns has been neither prejudiced nor surprised by the shift in focus of the nature of the breach claimed, we note first that prior to the filing of the joinder complaint on June 13, 2013, both Chowns and its insurer, Penn National, balked at providing Lobar with a copy of the Penn National Policy despite being asked to do so, and that approximately four months before the joinder complaint was filed Penn National denied Lobar's requested defense of Plaintiffs' claim, writing that Lobar did not qualify as an additional insured under the policy issued to Chowns. Not until September 16, 2014, less than a month before Lobar filed its Motion for Summary Judgment on October 14, 2014, did Penn National, through its independent counsel, acknowledge that Lobar was named as an additional insured in the policy but claimed the scope of the insurance coverage available to Lobar as an additional insured under this policy did not protect Lobar against

Cf. Township of Springfield v. Ersek, 660 A.2d 672, 676-77 (Pa.Cmwlth. 1995) (holding liability insurance policy naming Springfield Township as an additional insured "with respect to liability arising out of operations performed by the named insured" required insurer to defend and indemnify Springfield Township for injuries connected or related to the named insured's activities, regardless of whether the negligence which gave rise to the claim was that of the named insured or the Township). In effect, Lobar argues the language of the Subcontract required Chowns to provide Lobar with general liability coverage equal to that provided to Chowns as the named insured.

In examining the Subcontract, we construe this agreement as we would any other contract. Our primary objective in doing so is to ascertain and give effect to the parties' intent as expressed by the words they have chosen to effectuate their agreement. Shovel Transfer & Storage, Inc. v. Pennsylvania Liquor Control Bd., 739 A.2d 133, 137-38 (Pa. 1999) ("When the words of a contract are clear and unambiguous, the intent is to

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Plaintiffs' claim. Moreover, at the time Lobar filed its Motion for Summary Judgment, Lobar was under a court ordered deadline of October 13, 2014, by which to file dispositive motions.

It is also clear in reviewing Chowns' Motion for Summary Judgment and its supporting brief that Chowns understood the nature of the breach of contract claimed by Lobar and briefed this issue. Both parties have treated the question as one of law and neither has claimed that any extrinsic evidence needs to be introduced to clarify or interpret the meaning of the Subcontract's provisions regarding its requirements for the type or scope of the insurance coverage to be obtained by Chowns. Accordingly, we find Lobar's claim to be allowed under the pleadings and circumstances as they exist and will address its merits.

be found only in the express language of the agreement."). To that end, we give the words in the Subcontract their natural, plain, and generally accepted meaning unless the contract indicates that the parties intended the language to impart a technical or different meaning. J.K. Willison, Jr. v. Consolidation Coal Co., 637 A.2d 979, 982 (Pa. 1994).

We consider the Subcontract as a whole, seeking to reconcile all provisions and render none meaningless. *See* International Organization Masters, Mates and Pilots of America, Local No. 2 v. International Organization Masters, Mates and Pilots of America, Inc., 439 A.2d 621 (Pa. 1981) (noting that, in construing a contract, each and every part of it must be taken into consideration and given effect, if reasonably possible). If the Subcontract uses unambiguous language, we will construe it as a matter of law and enforce it as written. Currid v. Meeting House Restaurant, Inc., 869 A.2d 516, 519 (Pa.Super. 2005), *appeal denied*, 882 A.2d 478 (Pa. 2005). Further,

> [w]hen interpreting contract language, specific provisions ordinarily will be regarded as qualifying the meaning of broad general terms in relation to a particular subject. Thus, where specific or exact terms seem to conflict with broader or more general terms, the former is more likely to express the meaning of the parties with respect to the situation than the general language.

A.G. Cullen Const., Inc. v. State System of Higher Education,

898 A.2d 1145, 1168 (Pa.Cmwlth. 2006) (internal quotation marks and citations omitted).

Contractual terms are ambiguous "if they are subject to more than one reasonable interpretation when applied to a particular set of facts." Madison Const. Co. v. Harleysville Mut. Ins. Co., 735 A.2d 100, 106 (Pa. 1999). In determining whether the terms are ambiguous, the court cannot distort the plain meaning of the words found in the agreement. *Id.* Whether a contract is ambiguous is a question of law for the court to decide by looking at the contract as a whole in light of the circumstances present when the contract was entered.[8] In addition, "[w]here a contract is ambiguous, it is undisputed that the rule of *contra proferentem* requires the language to be construed against the drafter." Commonwealth, Dep't of Transp. v. Semanderes, 531 A.2d 815, 818 (Pa.Cmwlth. 1987).[9]

Paragraph 3 of the Subcontract, the provision upon which both parties rely for their respective interpretations, consists

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[8] If, and only if, the language in the written contract is "ambiguous may extrinsic or parol evidence be considered to determine the intent of the parties." Commonwealth, Dep't of Transp. v. Brozzetti, 684 A.2d 658, 663 (Pa.Cmwlth. 1996).

[9] By agreement, the doctrine of *contra proferentem* does not apply to the Subcontract. Paragraph 14 of this contract states:

> JOINT DRAFTING. The parties expressly agree that this Agreement was jointly drafted, and that they both had opportunity to negotiate terms and to obtain assistance of counsel in reviewing terms prior to execution. This Agreement should be construed neither against nor in favor of either party, but should be construed in a neutral manner.

Subcontract, Paragraph 14.

of two sentences. The first describes the scope of coverage Chowns must obtain to protect itself and its employees/agents:

> Subcontractor shall purchase and maintain insurance that will protect Subcontractor from claims arising out of Subcontractor operations under this Agreement, whether the operations are by Subcontractor, or any of Subcontractor's consultants or anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable.

This sentence, which requires Chowns to obtain insurance which fully protects it "from claims arising out of [its] operations under [the Subcontract]," says nothing about the nature or scope of insurance Chowns is required to obtain on Lobar's behalf.

It is the second sentence of Paragraph 3 which is at issue in this case and which governs the requirement that Lobar be named as an additional insured:

> Prior to starting any work under this Agreement, Subcontractor shall obtain insurance in accordance with the General Requirements of the Contract from a responsible insurance company or companies and shall provide two (2) certificates of insurance to Contractor naming the Contractor and Owner as an additional insured and evidencing coverage in accordance with the above-referenced requirements.

This sentence literally requires Chowns to obtain "insurance in accordance with the General Requirements of the Contract" and to provide two certificates of insurance naming Lobar and the Project owner, here the Carbon County Area Vocational Technical School Authority, as additional insureds with respect to this insurance.

Both parties agree that the General Requirements of the Contract are those found in the General Conditions of the Contract for Construction (AIA Document No. A201-2007) (hereinafter referred to as the "General Conditions") which were expressly incorporated by reference and made part of the prime contract between the Carbon County Area Vocational Technical School Authority, as owner, and Lobar, as the general contractor.[10] Section 5.3 of the General Conditions provides that:

> the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities, including the responsibility for safety of the Subcontractor's Work, which the Contractor, by these Documents, assumes toward the Owner and Architect.

The Subcontract itself also incorporates the General Conditions of the prime contract. In accordance with Section 5.3 of the General Conditions, the Subcontract requires that to the extent the terms of the prime contract between the owner and contractor apply to the work of the subcontractor, the subcontractor assumes toward the contractor all obligations, rights, duties, and redress that the contractor assumes toward

[10] The agreement between the Authority and Lobar utilizes the Standard Form of Agreement Between Owner and Contractor (AIA Document No. A101–2007) prepared by the American Institute of Architects. Similarly, the General Conditions of the Contract for Construction (AIA Document No. A201-2007) incorporated by reference in the prime contract were prepared by the American Institute of Architects. The Subcontract, by contrast, utilizes a form developed by the Associated General Contractors of America (AGC Document No. 604).

the owner and also, that the contractor assumes toward the subcontractor all obligations, rights, duties, and redress that the owner assumes toward the contractor. (Subcontract, Paragraph 1, p.1). The Subcontract also provides that "[i]n the event of conflicts or inconsistencies between provisions to this Agreement and the prime agreement, this Agreement shall govern." (Subcontract, Paragraph 1, p.1).

Article 11 of the General Conditions is entitled "Insurance and Bonds." It sets the standard for insurance required under the Subcontract. Substituting the term "Contractor" for "Owner" and the term "Subcontractor" for "Contractor" to reflect the application of these General Conditions to the Subcontract and the roles of the parties in the instant dispute, Section 11.1.1 of the General Conditions provides:

> The [Subcontractor] shall purchase from and maintain in a company or companies lawfully authorized to do business in the Commonwealth of Pennsylvania . . . such insurance as will protect the [Subcontractor] from claims ***set forth below*** which may arise out of or result from the [Subcontractor's] operations and completed operations under the [Subcontract] and for which the [Subcontractor] may be legally liable, whether such operations be by the [Subcontractor] or by a [Sub-Subcontractor] or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable.

(emphasis added). This requirement corresponds closely with the first sentence of Paragraph 3 of the Subcontract. However, rather than listing the nine categories of claims which are "set

forth below" in the General Conditions, the Subcontract simply states that the subcontractor will purchase and maintain insurance to protect itself against claims arising out of its operations. To the extent this is different than the General Conditions, the Subcontract's terms replace and supersede those in the General Conditions.

When similarly edited to reflect the roles of the parties in this litigation, Section 11.1.2.1 of the General Conditions provides:

> The insurance required by [Section] 11.1.1 shall name the [Contractor] [and] the [Contractor's] consultants . . . as additional insured. If coverage is written on a "claims made" basis, [Subcontractor] warrants the purchase of an extended reporting period of not less than two (2) years.

With respect to naming the general contractor as an additional insured, this language corresponds roughly with the second sentence in Paragraph 3 of the Subcontract and appears to some degree to support Lobar's position. Significantly, this language does not describe the scope of the protection the contractor is to have as an additional insured, and whether such coverage is to be on a "primary" or "derivative" basis, the latter entitling the additional insured only to coverage for that conduct of the named insured for which it is vicariously liable, as distinguished from direct, primary liability for its own acts of negligence. As written, the language in this section of the

General Conditions does not address one way or another whether the protection to be provided is to include insurance coverage for the contractor's independent acts of negligence.

This question, however, is answered, at least with respect to commercial liability coverage, by a more specific section of the General Conditions, Section 11.1.4, which states:

> The [Subcontractor] shall cause the commercial liability coverage required by the Contract Documents to include (1) [the Contractor] as [an] additional insured[ ] for claims caused in whole or in part by the [Subcontractor's] negligent acts or omissions during the [Subcontractor's] operations; and (2) the [Contractor] as an additional insured for claims caused in whole or in part by the [Subcontractor's] negligent acts or omissions during the [Subcontractor's] completed operations.

When read in context, the insurance provisions of the General Conditions require the subcontractor to obtain commercial liability insurance naming the contractor as an additional insured for claims "caused in whole or in part by" the subcontractor's negligent acts or omissions.[11]

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[11] To paraphrase the International Risk Management Institute's ("IMRI") insurance glossary, in liability insurance, additional insured status is commonly used in conjunction with an indemnity agreement between the named insured (the indemnitor) and the additional insured (the indemnitee). Having the rights of an insured under the indemnitor's commercial general liability policy is a common means by which indemnitors back up their promise of indemnification. If the indemnity agreement proves unenforceable for some reason, the indemnitee may still be able to obtain coverage for its liability by making a claim directly as an additional insured under the indemnitor's general liability policy. IMRI, Additional Insured - Insurance Glossary, http://www.irmi.com/online/insurance-glossary/terms/a/additional-insured.aspx (last visited Sept. 1, 2015).

Paragraph 11 of the Subcontract provides the following with respect to Chowns' obligation to indemnify and hold harmless Lobar:

As so construed, the Subcontract requires Chowns to obtain commercial liability insurance protecting Lobar from liability for those claims "caused in whole or in part by" Chowns. It does not require Chowns to procure commercial liability insurance naming Lobar as an additional insured for any claim "arising out of" Chowns' operations, which insures Lobar to the same extent Chowns is insured under the policy, or which insures Lobar against all liability, including that for its own negligence. This carve out for commercial liability coverage in the General Conditions is critical to the parties' dispute since the provisions of Penn National's policy being examined are those for commercial general liability coverage. More particularly, Part A, Section 1 of the Additional Insured Endorsement insures Lobar as an additional insured for claims "caused by" Chowns' operations. It provides:

> A. The following provision is added to SECTION II – WHO IS AN INSURED
>
> 1. Any person(s) or organizations(s) (referred to below as additional insured) with

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> INDEMNITY. To the fullest extent permitted by law, Subcontractor shall defend, indemnify and hold harmless Contractor, Contractor's other subcontractors, Architect/Engineer, Owner and their agents, consultants, employees and others as required by this Agreement from all claims for bodily injury and property damage that may arise from performance of Subcontract Work to the extent of the negligence attributed to such acts or omissions by Subcontractor, Subcontractor's subcontractors or anyone employed directly or indirectly by any of them or by anyone for whose acts any of them may be liable.

Subcontract, Paragraph 11. This language reinforces our interpretation of the requirements of the General Conditions with respect to commercial liability coverage and that the coverage owed to the contractor need only include coverage against the contractor's vicarious liability for the acts or omissions of the subcontractor.

> whom you are required in a written contract or agreement to name as an additional insured, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by
>
> (1) Your acts or omissions; or
>
> (2) The acts or omissions of those acting on your behalf;
>
> in the performance of your ongoing operations for the additional insured(s) at the location or project described in the contract or agreement.

Additional Insured Endorsement, Part A, Section 1. As already discussed, this additional insured provision requires a showing that Chowns' acts or omissions were a proximate cause of Plaintiffs' injuries in order to trigger coverage for Lobar under the policy. *See* Dale Corp., 2010 WL 4909600 *7.

CONCLUSION

For the foregoing reasons, we will deny Lobar's Motion for Summary Judgment requesting that we find Chowns in breach of the Subcontract and, for the same reasons, grant Chowns' Motion for Summary Judgment to dismiss Lobar's joinder complaint.

BY THE COURT:

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P.J.