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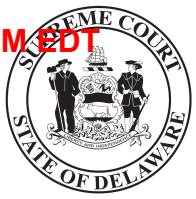

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DANIELI CORPORATION, Plaintiff Below, Appellant, v. ARCELORMITTAL LAPLACE, LLP, formerly known as and/or successor in interest to BAYOU STEEL CORPORATION, Defendant Below, Appellee.	)	No C.A. No. 467, 2013 Court Below, Superior Court of the State of Delaware C.A. No. N13C-03-126 JRJ

OPENING BRIEF OF PLAINTIFF BELOW, APPELLANT, DANIELI CORPORATION

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Dated: October 24, 2013

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NATURE OF THE PROCEEDINGS

Plaintiff Below-Appellant Danieli Corporation (hereinafter "Danieli") brought suit against Defendant Below-Appellee ArcelorMittal LaPlace, LLC, formerly known as and/or successor in interest to Bayou Steel Corporation (hereinafter "ArcelorMittal") seeking indemnification for certain amounts paid and incurred by Danieli in defending and ultimately resolving litigation brought in Louisiana by Melvin Batiste ("the Batiste litigation"). Mr. Batiste was an employee of Defendant's predecessor, Bayou Steel Corporation (hereinafter "Bayou Steel") who was injured in an accident that occurred on August 27, 2004 at Bayou Steel's facility in LaPlace, Louisiana.

Danieli's Complaint seeking indemnification for all costs and fees incurred in defending the Batiste litigation and for reimbursement of those amounts expended in settling the litigation was filed in the Superior Court on March 12, 2013. (A1-A153). Copies of the relevant documents demonstrating the agreement entered into regarding indemnification and also actual notice and participation in the Batiste litigation by ArcelorMittal were attached as Exhibits to the Complaint. (A16-A31).

On April 11, 2013, Defendant filed its Answer to the Complaint (A154-A166). That Answer contained certain admissions which demonstrated that ArcelorMittal had actual notice of the Batiste Litigation.

As the issue to be determined, the duty to indemnify, was a matter of application of the law to undisputed facts, on June 3, 2013, Danieli filed a Motion for Judgment on the Pleadings. (A167-A339). Defendant filed a Cross-Motion for Judgment on the Pleadings on June 14, 2013. (A340-A346).

Danieli filed its Response to the Cross-Motion on June 21, 2013 (A347-A353) and Defendant filed its Opposition to Danieli's Motion that same day. (A354-A357). The parties proceeded to Oral argument before Judge Jan R. Jurden on June 26, 2013, at which time the Court took the matter under advisement. (A358-A373).

On August 6, 2013, Judge Jurden issued her decision denying Danieli's Motion for Judgment on the Pleadings and granting Defendant's Cross-Motion for Judgment on the Pleadings. A copy of the Decision being appealed is attached hereto as Exhibit "A". (A374-A377).

Danieli timely filed its Notice of Appeal on September 5, 2013. A briefing schedule was issued on September 24, 2013, setting a deadline for the filing of Danieli's Opening Brief and Appendix of October 24, 2013. This is Danieli's Opening Brief on Appeal.

SUMMARY OF ARGUMENT

I. THE SUPERIOR COURT ERRED WHEN IT HELD THAT PLAINTIFF DANIELI CORPORATION WAS NOT ENTITLED TO INDEMNIFICATION FOR THE CLAIMS ASSERTED IN THE BATISTE LITIGATION AND GRANTED THE CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS.

STATEMENT OF FACTS

In the late summer/early fall of 1998 Danieli contracted with Bayou Steel for the supply and installation of Electric Arc Furnace Equipment ("EAFE") at the Bayou Steel minimill in LaPlace, Louisiana. A subsequent contract was executed on December 1, 1998 for the installation of a Ladle Metallurgical Facility at the Bayou Steel minimill.

On November 12, 1999, Bayou Steel initiated litigation against Danieli arising out of the upgrades to the EAFE (the "EAFE litigation"). Suit was brought in the United States District Court for the Eastern District of Louisiana. That litigation was ultimately resolved in 2001 when an Agreement of Settlement and Mutual General Release (the "Agreement of Settlement") was executed. (A16-A31). That Agreement of Settlement is significant for it provides the basis of the indemnification claim at dispute herein. The Agreement of Settlement provides in part:

> Indemnity by Bayou Steel. From and after the effective date of this Agreement, if any Bayou Steel employee(s) (the "Bayou Steel Employees") bring(s) an action or claim against Danieli for personal injury, property damage, or otherwise, arising out of or in any way related to the EAFE, the EAFE Contract, the LMF and/.or LMF Contract, regardless of whether caused in whole or in part by the fault, negligence, gross negligence, breach of contract, breach of warranty, strict liability and/or product liability of Danieli, Bayou Steel agrees to defend, indemnify and hold harmless Danieli from and against any loss or damage (including attorneys' fees) arising out of any such action or claim by such Bayou Steel Employees (the "Bayou Steel

Employees' Claim").

(A22-A23). Additionally, paragraph 17 of the Agreement of Settlement specifically denotes that the law applicable to the interpretation of the agreement is Delaware law. (A24).

In 2008, ArcelorMittal acquired Bayou Steel, including the minimill in LaPlace, Louisiana, the facility at the heart of the prior EAFE litigation and subsequent Agreement of Settlement. (A13-A14).

In August of 2004, Melvin Batiste was an employee of Bayou Steel when he was injured as result of a fall from the superstructure of the EAFE. Mr. Batiste brought a personal injury lawsuit on September 28, 2005 against Bayou Steel and Danieli. Zurich North America insured Danieli at the time of the subject accident and retained counsel and began defending Danieli in approximately November 2005. (A38-A39).

Bayou Steel was served with and received actual notice of a lawsuit in November 2005. (A40). Counsel for Bayou Steel entered their appearance and began defending Bayou Steel in June of 2006. (A41). The firm and attorney that were required to receive notice of the Batiste Litigation under the Agreement of Settlement were active participants in the Batiste Litigation until 2010, when the Louisiana Supreme Court reversed the lower court's denial of their Motion for Summary Judgment. (A41-A143).

Danieli subsequently retained the firm of Goldberg Segalla, LLP to become involved as personal counsel for Danieli in the Batiste litigation. Subsequent to Goldberg Segalla, LLP's involvement, on or about February 14, 2012, Frank J Ciano, Esquire tendered the defense of Danieli to ArcelorMittal and requested indemnification of Danieli by ArcelorMittal. (A144-A145). ArcelorMittal refused that tender of defense and demand for indemnification alleging that the proper timely notice as required by the 2001 Agreement of Settlement was not provided by Danieli to ArcelorMittal. (A148).

This litigation ensued as Danieli avers that no second notice is required under Delaware law where an entity with a duty to indemnify has actual notice of the claim for which indemnification is sought.

In the Complaint which gives rise to the current appeal, Danieli sought three separate recoveries against ArcelorMittal. First, Danieli seeks recovery of those amounts which it was compelled to pay Mr. Batiste in settlement of the Batiste Litigation. (A9). That settlement was reached in 2013 by Danieli after ArcelorMittal rejected Danieli's tender of defense and after ArcelorMittal refused to participate in any settlement discussions with Mr. Batiste, despite being offered the opportunity to participate. Second, Danieli seeks to recover their costs and fees incurred in defending the Batiste Litigation. (A10). Lastly, Danieli seeks to recover their costs and fees incurred in prosecuting the present action. (A10).

As the motion below was a Motion for Judgment on the Pleadings, the admissions set forth by the Defendant in its Answer are significant. In its Answer, ArcelorMittal makes several admissions which enable this Court to render judgment in this matter in favor of Danieli. Specifically, ArcelorMittal admits that Mr. Batiste was an employee of Bayou Steel when he fell from the A phase electrode arm of the Electric Arc Furnace Equipment. (A159). Defendant further admits in response to Paragraph 22 of the Complaint that Bayou Steel was a party to the Batiste Litigation. (A161). Further, ArcelorMittal admits that it had actual knowledge of the Batiste Litigation as it was a party defendant in that action. (A160-A162). It was also admitted that Howard E. Sinor, Jr., Esquire, of Gordon Arata McCollam Duplantis & Eagan LLC was the party involved in the drafting of the Agreement of Settlement and was counsel for Bayou Steel and then ArcelorMittal in both the Electric Arc Furnace Equipment litigation which resulted in the preparation of and signature of the Agreement of Settlement as well as the litigation brought by Mr. Batiste. (A157-A161). The undisputed facts in this case are that ArcelorMittal had actual notice of the loss and the attorney and firm who were required to receive notice pursuant to the Agreement of Settlement and Mutual General Release had actual notice and was an active participant in the litigation on behalf of Bayou Steel and ArcelorMittal.

ARGUMENT

I. THE SUPERIOR COURT ERRED WHEN IT HELD THAT PLAINTIFF DANIELI CORPORATION WAS NOT ENTITLED TO INDEMNIFICATION FOR THE CLAIMS ASSERTED IN THE BATISTE LITIGATION AND GRANTED THE CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS

A. Question Presented

Did the Superior Court below commit legal error when it denied Danieli's Motion for Judgment on the Pleadings and granted the Cross-Motion for Judgment on the Pleadings filed by ArcelorMittal?

Danieli's position regarding this issue of law is contained in Motion for Judgment on the Pleadings (A167-A339) and Opposition to the Cross-Motion for Judgment on the Pleadings filed below. (A347-A353).

B. Scope Of Review

The Supreme Court of Delaware reviews questions of law *de novo*. *Evans v. Lee*, 996 A.2d 793 (Del. 2010); *Dambro v. Meyer*, 974 A.2d 121, 129 (Del. 2009); *citing Delaware Bay Surgical Serv. v. Swier*, 900 A.2d 646, 652 (Del. 2006). Where the Court overrides or misapplies the law in reaching its decision, it has abused its discretion. *Pitts v. White*, 109 A.2d 786, 788 (Del. 1954).

As this Court must determine whether the Superior Court erred as a matter of law in determining whether separate notice of the Batiste Litigation was required apart from the actual notice received by Bayou Steel, this Court's review shall be *de novo*.

C. The Merits

The core issue evaluated by the Court below is whether separate notice was required from the actual notice ArcelorMittal received of the Batiste Litigation. This Court's determination on this issue is a preliminary determination that must be made for the Court to determine the issue of the obligation of Defendant to indemnify Danieli for the settlement payment made to Mr. Batiste as well as the other two recoveries sought. Danieli contends that this Court's holding in *Harleysville Ins. Co. v. Church Ins. Co.* is controlling on the issue of whether separate notice is required wherein the party with the contractual indemnification obligation has actual notice of the loss for which indemnification is owed. 892 A.2d 356 (Del. 2005). The facts in *Harleysville* are very similar to the case at bar and warrant discussion. Plaintiff Charles Brown ("Brown") was injured when a ladder attached to and part of a fire escape that was poorly maintained fell causing significant injuries. The ladder/fire escape was attached to a building owned by defendant Cathedral Community Services Inc. ("Cathedral") who was insured by The Church Insurance Co. ("Church Ins."). Property management was provided by Capital Management Company ("Capital") who was insured by Harleysville Insurance Company ("Harleysville").

After Mr. Brown sustained injuries, he filed suit against both Capital and Cathedral. *Brown v. Capital Mgt. Co.*, C.A. No. 99C-10-210 RRC (Del. Super.).

Capital tendered its defense to its insurer Harleysville, while Cathedral tendered its defense to its insurer Church. Harleysville retained counsel on behalf of Capital who provided a defense of Capital up through and including trial. Church provided a defense to Cathedral, although they settled prior to trial at mediation.

The issue of possible additional insured status for Capital under the Church policy was raised for the first time after mediation and just four (4) days prior to trial via letter asking whether Capital was "named as an additional insured" in the Church policy. Church replied that Capital was not an "additional insured". The determination that Capital was not an "additional insured" appears to have been based upon the lack of a written contract for the provision of property management services. The Church policy however provided for property managers to be entitled to coverage under the Church policy. Despite that response denying that Capital was an additional insured, three days prior to trial, Harleysville tendered the defense of Capital to Church, said tender of defense being refused.

The case then proceeded to trial and the jury entered a verdict for the plaintiff in the amount of $2.25 million and apportioned liability 60% against Capital and 40% against Cathedral. The case was then appealed to this Court. This Court in its decision of December 18, 2002 affirmed the judgment below and found no errors of record that would warrant reversal of the jury's verdict. *Capital Mgt. Co. v. Brown*, 813 A.2d 1094 (Del. 2002).

Plaintiff Brown then filed an action against Church, Harleysville and Cathedral's umbrella/excess insurer National Union Fire Insurance Company of Pittsburgh. *Brown v. Church Ins. Co.*, C.A. No. 02C-06-196 RRC (Del. Super.). Following discovery in the second lawsuit, motions for summary judgment and cross-motions for summary judgment were filed by the various insurers attempting to determine the issue of primacy of coverage of the various policies as well as addressing issues of additional insured status, the tender of defense, waiver of a defense and entitlement to indemnity. The Superior Court in its ruling held that despite Capital not providing notice of the lawsuit to Church, the lack of notice by Capital was not a bar to the claim of Capital for indemnity. Specifically, the court noted "where an insurer receives proper and timely notice of [an] accident from the named insured including particulars sufficient to identify the additional insured, it is not necessary that another notice be given by the additional insured." *Brown v. Church Ins. Co.*, C.A. No. 02C-06-196 RRC, 2005 Del. Super. LEXIS 400, at *24 (Del. Super., March 24, 2005). The Court specifically stated that "Capital was not required to give additional notice to Church because the notice requirement was fulfilled when Cathedral notified Church of the Brown's claim and requested indemnity." *Id.* The Superior Court ruled that as Church had notice from its named insured, Cathedral, Church had a duty to indemnify Capitol up to the remaining limits of the Church policy.

The ruling was then appealed to this Court which affirmed the ruling of the Court below on the issue of a duty of Church to indemnify Capital up to Church's remaining policy limits. *See e.g. Harleysville*, 892 A.2d 356 (Del. 2005). In applying the holding of *Harleysville* to the case at hand, the obligation to indemnify Danieli for the settlement payment to Mr. Batiste would clearly arise. As in *Harleysville*, *supra*, ArcelorMittal had actual notice of the loss and knew at that time that Danieli was entitled to indemnification. The naming of Bayou Steel as a defendant and the involvement of Mr. Sinor and his firm, the attorneys who represented Bayou Steel in the EAFE Litigation and negotiated the Agreement of Settlement, as counsel for ArcelorMittal in the Batiste litigation establishes actual notice of the litigation to ArcelorMittal such that they knew of their duty to indemnify Danieli.

As Judge Cooch noted, when an insurer has actual notice of a claim against its insured but is unsure whether the insured requires assistance, "the insurer can simply ask the insured if the insurer's involvement is desired, thus eliminating any uncertainty on the question." *Brown*, 2005 Del. Super. LEXIS 400, at *29, *citing Cincinnati Cos. v. West Am. Ins. Co.*, 701 N.E. 2d 499 (Ill. 1998). Here all ArcelorMittal and Mr. Sinor need do at the outset of the litigation is inquire whether a defense is requested. As the record makes clear, this was not done. While counsel for ArcelorMittal argued that the Defendant was entitled to consider

the lack of a tender a rejection and/or waiver of the duty to indemnify, that argument runs contra the holding in *Harleysville*, wherein the obligation fell upon the indemnifying party to determine if indemnification was being sought or rejected.

At argument, Counsel and the Court confused the issue of waiver raised by Judge Cooch with regards to the right to be reimbursed for costs and fees incurred in defending the Batiste Litigation as compared to the ability to obtain reimbursement of the amounts paid in settlement. (A358-A373). The argument made was that the right to be reimbursed (indemnified) for the settlement paid was waived, as was the right to recover prior costs and fees. Clearly, the holding in *Harleysville* sets forth that the right to recover the amounts paid in settlement or verdict are not waived and the right to recover those amounts exists as Defendant had actual notice of the obligation to indemnify Danieli.

Where the issue of waiver arises relates to the right to recover costs and fees incurred during the defense of the Batiste Litigation. In its opinion, this Court specifically wrote separately to "clarify why Harleysville waived its right to recoup its defense costs in this case." *Harleysville*, 892 A.2d at 361. The Court noted that the court below was correct when it held that "Capital was not required to give additional notice to Church because the notice requirement was filled when Cathedral notified Church of Brown's claim and requested indemnity." *Id.* at 361.

This Court also noted that the court below was correct when it held that "Church knew or should have known from the investigation it performed that Capital was a real estate manager and was potentially an additional insured under the Cathedral policy." *Id.* This Court then held that, "Church, therefore, had the initial duty to notify Capital that it was potentially an additional insured under the Church's policy." *Id.* The Court then sought to further explain how the conduct of Harleysville constituted a knowing waiver of the right to a defense of Capital by Church. The Court specifically looked to the conduct of discovery, or lack thereof as between Capital and Church on the issue of insurance. The Court also looked to the answers to form 30 interrogatories filed by Cathedral which identified Church as Cathedral's insurer. As such, Harleysville and Capital were deemed to be on constructive notice of the existence of the Church policy as of that date. The Court found disturbing the lack of discovery to determine whether Capital was an insured under the Church policy prior to the trial of the underlying personal injury case.

This Court noted that "[o]nce a right is waived, it is gone forever." *Id.* at 364, *citing Hanson v. Fidelity Mut. Ben. Corp.*, 13 A.2d 456, 460 (Del. Super. 1940). Specifically, this Court noted that Harleysville failed "to use the available informal investigative and formal discovery process to resolve the issue of which carrier owed Capital a defense before the discovery period closed, motion practice ended, and trial began." *Id.* at 364. Ultimately, this Court held that "Church was

arguably entitled to interpret Harleysville's actions as a waiver of the right to a defense." *Id.* As such, Capital and Harleysville were not entitled to be reimbursed their costs of defense by Church.

While this ruling would appear to foreclose Danieli's right to recover its costs and fees in the Batiste Litigation, subsequent decisions have refined the issue of waiver and determine whether a waiver, once effectuated, may be rescinded or retracted. The Court of Chancery, in *Roam-Tel Partners v. AT&T Wireless Operations Holdings, Inc.*, discussed and attempted to clarify the interplay between the doctrine of waiver and estoppel. C.A. 5745-VCS, 2010 Del. Ch. LEXIS 247 (Del. Ch., Dec. 17, 2010). The Court stated that "waiver can be retracted before the other party has materially changed his position in reliance thereon, [but] [o]nce it is established that an estoppel exists, [the waiver] cannot be revoked." *Id.* at 34-35, *citing* 31 *C.J.S. Estoppel and Waiver* §93 (2010). Further, the court held that Delaware courts "will look to whether the non-waiving party has been prejudiced by the waiving party's attempt to rescind its prior waiver." *Id.* at 35. A written tender was made in February 2012, over a year in advance of trial, which provided ArcelorMittal with ample opportunity to take both strategic and financial control of the defense. ArcelorMittal however chose not to take control and cannot now be heard to complain that it was denied the ability to control the defense of the matter and any settlement that was subsequently reached.

In *Amirsaleh v. Board of Trade of the City of New York*, this Court cited to and adopted the Vice Chancellor's ruling when it held that "[a] waiving party is typically prohibited from retracting its waiver if the non-waiving party has suffered prejudice or has relied to his detriment on the waiver." 27 A.3d 522 (Del. 2011), *citing Bailey v. State*, 525 A.2d 582 (Del. 1987); *Roam-Tel*, 2010 Del.Ch. LEXIS 247. This Court further held that "the waiving party may retract the waiver by giving reasonable notice to the non-waiving party before that party has suffered prejudice or materially changed his position." *Id.* at 530. In the present case, ArcelorMittal can show no facts to establish that it changed its position based upon any purported waiver. It argued throughout the Batiste Litigation that Mr. Batiste's claim was barred by the doctrine of workers' compensation exclusivity. That contention never changed regardless of any position asserted or omitted by Danieli. Further, ArcelorMittal was an active participant in the litigation, had notice of all pleadings, discovery and other events occurring in the litigation. The record as it exists demonstrates no prejudice which would have affected ArcelorMittal and acted as a bar from it taking over the defense in advance of trial. Lastly, this Court must then also address the recoverability of attorneys' fees for prosecuting the present action. This issue, while raised in the moving papers, was not addressed in the Court below's ruling that *Harleysville* was inapplicable. This Court was confronted with the issues of recoverability of what is often referred to

as "fees on fees" in *Pike Creek Chiropractic Ctr., P.A. v. Robinson*, 637 A.2d 418 (Del. 1994). In *Pike Creek*, the employer, Pike Creek, sought to recover costs and attorneys' fees it was forced to incur in defending a personal injury lawsuit brought by Brenda Evans ("Evans") against itself and its employee, Robinson. A contract existed between the Pike Creek and Robinson, whereby Robinson agreed to indemnify and hold harmless Pike Creek for all liabilities and expenses, including attorneys' fees that arose as a result of the acts of Robinson.

At the outset of the litigation brought by Ms. Evans, Pike Creek tendered its defense to Robinson and his insurer. That tender was denied. After Ms. Evans stipulated that her only claim against Pike Creek arose out of the doctrine of *respondeat superior*, Pike Creek again tendered its defense to Robinson and his insurer. Robinson thereafter agreed to defend Pike Creek, but refused to indemnify Pike Creek for the costs and fees incurred prior to that date. After suit was filed by Pike Creek against Robinson, seeking to recover the costs and fees incurred after the first tender, but prior to the second tender and acceptance of same, the Superior Court granted summary judgment to Robinson holding that Pike Creek was not entitled to be indemnified for its attorneys' fees incurred prior to the stipulation being executed by Ms. Evans narrowing the claims against Pike Creek to just *respondeat superior*. On Appeal, this Court reversed and remanded, holding that

Pike Creek was entitled to be indemnified for the attorneys' fees and costs it incurred in defending the claims asserted by Ms. Evans.

This Court then addressed the recoverability of "fees on fees", looking to the specific language of the indemnification agreement that required Robinson to hold harmless and indemnify Pike Creek against "any liabilities and expenses, including attorney's fees." *Pike Creek*, 637 A.2d at 422. This Court adopted the reasoning of the Alaska Supreme Court that, "[t]he [indemnitee] is not held harmless if it must incur costs and attorney's fees in bringing suit to recover on the indemnity clause. The [indemnitor] on the other hand can avoid such costs and attorney's fees by paying the amount due without the necessity of suit." *Pike Creek*, 637 A.2d 422-423, *citing Manson-Osberg Co. v. State*, 552 P.2d 654, 660 (Alaska 1976). The Court then ordered that Pike Creek was entitled to recover the costs and attorneys' fees it had incurred in enforcing its right to indemnification from Robinson.

This Court again confirmed the right to recover costs and fees incurred in enforcing an indemnification agreement in *Delle Donne & Assoc., LLP v. Delmont Partners, LLP*, 840 A.2d 1244 (Del. 2004). This Court again held that "where, as here, a party such as Millar is contractually entitled to be held harmless, that party is entitled to its costs and attorneys' fees incurred to enforce the contractual indemnity provision." *Id.* at 1256. As the Agreement of Settlement requires

Bayou Steel to "defend, indemnify and hold harmless Danieli from and against any loss or damage (including attorneys' fees)" Danieli contends that a holding that Danieli is entitled to be indemnified for the settlement paid in the Batiste Litigation militates that Danieli also be awarded its costs and fees in the present action.

Where the quintessential disagreement arises is whether a contract for indemnification is substantially different from the contractual indemnification provided in an insurance policy such that the *Harleysville* holding is inapplicable. Specifically, whether the notice provision in an indemnification contract should be treated differently than a notice provision contained in an insurance contract which provides for indemnification. Danieli contends that insurance policies are contracts, like the one contract encapsulated in the Agreement of Settlement, which provide certain bargained for rights and benefits. Inherent in the benefits provided are the right to a defense and to be indemnified up to the amount of benefit obtained. There exists a wealth of decisions by Court's in this state discussing how insurance policies are to be interpreted and that their interpretation is a matter of law. *See e.g,. Deakyne v. Selective Ins. Co. of Am.*, 728 A.2d 569 (Del. Super. 1997). Because of the non-negotiated nature of insurance contracts, the court has developed the doctrine of *contra proferentem*, in construing insurance policies against the drafter. *Steigler v. Ins. Co. of N. Am.*, 384 A.2d 398 (Del. 1978). That doctrine however leads to no different result herein from the result previously

reached in *Harleysville*. The Court below at both argument and in its decision discussed the issues of not only notice, but the obligation to afford the opportunity to participate in the defense and cooperate with the indemnitor and its insurer. What was overlooked however is that these exact tenets of notice, cooperation and participation are the cornerstones of every insurance policy which encapsulates contractual obligations to indemnify. In fact, the issue of notice, participation in the defense and cooperation are the exact issues addressed in detail by this Court in *Harleysville* and then found that actual notice is sufficient to trigger the duty to indemnify.

The Superior Court relied upon *Federal Home Loan Mortg. Corp. v. Scottsdale Ins. Co.*, cited by Defendant, as determinative on the proposition that the indemnity agreement at issue herein should be subject to different rules of interpretation than an insurance contract requiring indemnification. 316 F.3d 431 (D. N.J. 2003). Unfortunately, the language cited by the Defendant and subsequently by the Court is only a portion of the operative language regarding interpretation of insurance policies under New Jersey law. The complete principle applied by New Jersey Courts in interpreting issues of a duty to indemnify under New Jersey law is:

> Although insurance policies are contractual in nature, they are not ordinary agreements; they are contracts of adhesion and, as such, are subject to special rules of interpretation ... Consequently, we are

> directed to take a broad and liberal view so that the policy is construed in favor of the insured...

Federal Home Loan Mortg. Corp., 316 F.3d at 444. This is nothing more than New Jersey's statement of the doctrine of *contra proferentem*. This holding does not however mandate or militate that this Court hold that *Harleysville* is inapplicable and that actual notice to an indemnitor is insufficient to trigger the duty to defend. What also appears to have been overlooked by Defendant and the Court below is the holding in *Federal Home Loan Mortg. Corp.* that the defendant was estopped from asserting that it had no duty to indemnify plaintiff for "the settlements that have been entered." *Id.* at 446. Stated otherwise, the New Jersey Court, just like this Court, required the indemnitor to reimburse the party seeking indemnity for amounts paid in resolving the underlying litigation for which indemnification was sought.

In its ruling, the Superior Court adopted and cited the cases cited by Defendant which, upon careful review and evaluation are inapplicable and factually divergent from the case at hand. ArcelorMittal and the Court discuss the requirement of "proper notice", quoting that language from *Pike Creek*, 637 A.2d 418, 423 (Del. 1994). At the outset, it should not be overlooked that *Pike Creek* was decided over ten years prior to this Court's decision in *Harleysville*, which held that proper notice occurs when the entity with the indemnification obligation receives actual notice of the claim. What the Court below overlooked is that the

persons to whom notice was to be provided are the persons who received actual notice of the Batiste litigation and then actively defended the litigation. ArcelorMittal argues that it was denied the opportunity to participate in the defense of Danieli and that Danieli failed to cooperate with ArcelorMittal and its insurer. As Judge Cooch indicated in *Brown v. Church Ins., Co.*, all that ArcelorMittal needed do once it received notice of the suit was inquire if their "involvement is desired, thus eliminating any uncertainty on the question." 2005 Del. Super. LEXIS 400, at *29. ArcelorMittal at no time ever asked of Danieli whether a defense was desired. Further, ArcelorMittal can demonstrate no evidence of record that it ever made a request that Danieli cooperate with the defense of the Batiste Litigation and that request was rejected by Danieli. To the contrary, it was ArcelorMittal who refused to participate in the defense prior to trial and refused to participate in the discussions that led to the Settlement of the Batiste Litigation. As such, Defendant cannot now be heard to complain that they did not have a chance to participate in litigation of which it had actual notice, entered and defended against the claims of the Bayou Steel employee, Mr. Batiste, and failed to simply ask if a defense was requested.

ArcelorMittal and the Court below also cited to *Central Mortgage Co. v. Morgan Stanley Mortgage Capitol Holdings, LLC* as supporting the contention that "fair notice" or "proper notice" was not provided to ArcelorMittal. C.A. No. 5140–

CS, 2012 Del.Ch. LEXIS 171 (Del. Ch., August 7, 2012). At the outset, this Court must note that New York law, not Delaware law was the controlling law in determining the substantive claims in that matter. *Central Mortgage Co. v. Morgan Stanley Mortgage Capitol Holdings, LLC,* 27 A.3d 531, 536 (Del. 2011). This Court reversed the Court of Chancery and remanded the matter, specifically rejecting the Chancellors decision on the sufficiency of specific notice to satisfy the notice requirements of the parties contract. Contrary to the position asserted by Defendant, the holding in *Central Mortgage Co.* was that "[w]hether this notice was sufficient as a matter of fact is an inquiry more appropriate for a later stage of the proceeding." 27 A.3d at 538.

Chancellor Strine, in his decision on remand, specifically noted that he was bound by this Court's decision and would not address the legal sufficiency of the pleadings on the issue of contractual notice. *Central Mortgage Co.*, 2012 Del.Ch. LEXIS 171 at *45. As such, the issue of what constituted proper notice was never decided following the reversal and remand to the Chancellor, because this Court specifically directed that the issue of notice was to be determined at a later stage, not at the motion to dismiss stage. Given that the Court never renders a decision on the issue of what constitutes notice under the contract in question, *Central Mortgage Co.* is of no precedential value as to the interpretation of the issue of notice in dispute in the present action. Further, even if one were to follow the

decision of the Chancellor, which was rejected by this Court, the facts are distinguishable in that *Central Mortgage Co.* involved numerous bundled mortgage loans while the present matter involves actual notice of Mr. Batiste's lawsuit, same being actually received by ArcelorMittal and the designated attorney for receipt of notice. As the issue of notice was not reached by the Chancellor, the Superior Court relied upon this decision in error.

It should also be noted that New York has a separate Contract law applicable to contractual indemnification provision. *New York Contract Law* §26:22. Under New York law, the objective of notice is to give the indemnitor the opportunity to settle or defend a claim. *Mitsubishi Power Systems Americas, Inc. v. Babcock & Brown Infrastructure Group US, LLC*, C.A. No. 4499-VCL, 2010 Del. Ch. LEXIS 11 (Del. Ch., January 22, 2010). To avoid the duty to indemnify, under New York law, there is a requirement that "actual prejudice" be established to substantiate the defense of breach of a notice provision. *Mitsubishi Power Systems Americas, Inc.*, 2010 Del. Ch. LEXIS 11, at *22, *citing Am. Home Ins. Co. v. Int'l Ins. Co.*, 684 N.E. 2d 14, 16 (N.Y. 1997). The undisputed facts in the present action demonstrate actual notice to ArcelorMittal at which time it had the opportunity to determine if it was going to defend and indemnify Danieli. Rather than perform the simple inquiry as posited by Judge Cooch, it took no action. It then subsequently refused to defend Danieli over a year prior to trial and refused to

participate in any settlement discussions. If there is prejudice, same having not been established, then any prejudice arose as a result of ArcelorMittal's conduct and as such, under New York law, ArcelorMittal can not avoid its duty to defend and indemnify Danieli.

ArcelorMittal and the Court below cite to *Prudential Ins. Co. of Am. v. Barclays Bank PLC*, a New Jersey District Court opinion, which specifically addresses a Motion for Remand and the issue of "related to" bankruptcy jurisdiction. C.A. No. 12-584 (WJM), 2013 U.S. Dist LEXIS 8992. Further, the decision again notes that the applicable law is New Jersey, not Delaware, and as to the issue of a contractual notice, no decision was reached. Instead, the Court noted:

> That renders Plaintiffs' claims against Defendants at best 'a precursor' to a second dispute between Defendants and the Bankrupt Originators over coverage under the indemnification agreement. It is therefore clear that another action is required in order for Defendants to establish any indemnification rights vis-à-vis the Bankrupt Originators.

Prudential Ins. Co. of Am., 2013 U.S. Dist LEXIS 8992, at *12-13. Put simply, a careful reading of the Report and Recommendation demonstrates that the cited case does not render a holding on the issue of what constitutes notice, let alone a binding decision of what constitutes notice under Delaware law. As such, reliance by the Court below on this decision was error.

ArcelorMittal and the Court also cited to *Purvis v. Hartford Accident & Indem. Co.*, an Arizona Court of Appeals decision as supporting the proffered position on the type of notice required to obtain indemnification. 877 P.2d 827 (Ariz. Ct. App. 1994). At the outset, Danieli notes that the Superior Court rejected this Court's decision on the issue of notice in an insurance indemnification setting as instructive in the present case. The Court below then accepted as precedential the decision of the Arizona Court of Appeals in a case interpreting the issue of notice as applicable to an insurance policy in rendering its decision herein. What further compounds the error in so relying is that the Arizona Court's decision is in direct conflict with this Court's holding in *Harleysville*. Specifically, *Purvis* places the obligation on the person seeking indemnity from its insurer to provide an unequivocal and explicit demand to undertake the defense before the duty to indemnify arises. *Id.* at 830. This Court specifically rejected the requirement of such a demand when it held that an insurer's notice of the litigation triggers that insurer's duty to indemnify regardless of whether a second notice is provided by the additional entity seeking indemnification. As such, *Purvis* is neither controlling nor persuasive and it was error for the Superior Court to rely upon the decision in reaching its decision.

Due to the Superior Court's misapplication of Delaware law, its decision granting the Cross-Motion for Judgment on the Pleadings should be reversed and

the Motion for Judgment on the Pleadings granted with the matter being remanded for the purpose of an inquisition hearing on the issue the amount of indemnity to which Danieli is entitled.

CONCLUSION

For the foregoing reasons, the Court should reverse the Superior Court's Order of August 6, 2013 and enter an Order finding in favor of Plaintiff Danieli Corporation that once Defendant had actual notice of the litigation, no further notice was required to trigger Defendant's duty to indemnify Danieli Corporation for the claims asserted in the Batiste Litigation.

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