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IN THE SUPREME COURT OF THE STATE OF DELAWARE

DANIELI CORPORATION,)	
Plaintiff Below, Appellant,)	No C.A. No. 467, 2013
v.)	Court Below, Superior Court of the State of Delaware
ARCELORMITTAL LAPLACE, LLP,)	C.A. No. N13C-03-126 JRJ
formerly known as and/or)	
successor in interest to)	
BAYOU STEEL CORPORATION,)	
D 0 1 . D 1)	
Defendant Below,)	
Appellee.)	

REPLY BRIEF OF PLAINTIFF BELOW, APPELLANT, DANIELI CORPORATION

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Dated: December 10, 2013

TABLE OF CONTENTS

TAB	LE OF	AUTHORITIES	ii
INTE	RODU	CTION	1
ARG	UMEN	NT	3
I.		TELI CORPORATION IS ENTITLED TO INDEMNIFICATION THE CLAIMS ASSERTED IN THE BATISTE LITIGATION	3
	A.	The Intent of the Contract	3
	В.	ArcelorMittal Cannot Now Be Heard to Complain Where it Failed t Simply Ask if a Defense was Requested	
	C.	The Decisions of other States and Jurisdictions Interpreting Insurance Policies are Inapplicable and Should be Given no Precedential Weight	6
CON	CLUS	ION	8

TABLE OF AUTHORITIES

Cases	Page
Brown v. Church Ins. Co., C.A. No. 02C-06-196 RRC, 2005 Del. Super. LEXIS 400 (Del. Super., March 24, 2005)	3
E.I. DuPont de Nemours & Co. v. Shell Oil Co., 498 A.2d 1108, 1113 (Del. 1985)	3
Erie Ins. Exch. V. V.I. Enters., 264 F. Supp 2d 261 (D.V.I. 2003)	6
Harleysville Ins. Co. v. Church Ins. Co., 892 A.2d 356 (Del. 2005)	1
Purvis v. Hartford Accident & Indem. Co., 877 P.2d 827 (Ariz. Ct. App. 1994)	6

INTRODUCTION

This appeal by Plaintiff Below-Appellant Danieli Corporation (hereinafter "Danieli") presents the rather straight forward issue to be resolved of whether actual notice of a lawsuit by the party contractually obligated to provide a defense and indemnity and their designated counsel for receipt of notice is sufficient to trigger the duty to defend and indemnify.

Defendant Below-Appellee ArcelorMittal LaPlace, LLC, formerly known as and/or successor in interest to Bayou Steel Corporation (hereinafter "ArcelorMittal") argues that this Court, despite the explicit holding of this Court in *Harleysville Ins. Co. v. Church Ins. Co.*, should rule that actual notice by the entity with the contractual obligation to indemnify and their attorney designated to receive notice is not sufficient to trigger the duty to defend and indemnify. ¹ 892 A.2d 356 (Del. 2005).

Both at the Motion stage below and in this appeal, ArcelorMittal argues that this court should ignore prior precedent because *Harleysville* involves an insurance contract and the duties and obligations contained in same. Yet at the same time, a

¹ In the Answering Brief, an objection was raised to certain assertions made in the Opening Brief as not being part of the record below. Danieli disagrees with the assertion for the entire docket for the proceeding in Louisiana was attached as an Exhibit to the Complaint making it part of the record below. The affiliations of counsel and the arguments made before the trial Court are properly part of the record in this matter. Conversely, should the Court hold that the argument asserted by ArcelorMittal that workers' compensation exclusivity is not properly part of this record on appeal, then their arguments regarding the nature of certain cross-claims filed in the

close review of both the arguments below and those raised in the Answering Brief by ArcelorMittal repeatedly cite to cases involving insurance policies and the duties under same. Interestingly, the cases cited which involve the interpretation of insurance policies and the triggering of a duty to defend and indemnify as their factual predicate are from jurisdictions other than Delaware and are therefore of limited precedential value based upon this Court's holding in *Harleysville*. Put simply, ArcelorMittal cannot have it both ways. On the one hand, they argue that this Court's decisions regarding the duty to defend and indemnify in the insurance context are inapplicable. Yet, on the other, their brief is replete with non-binding and openly conflicting decisions from other jurisdictions interpreting the duties to defend and indemnify in an insurance policy context.

This Court has already decided what notice is required and that actual notice is enough. The attempted reliance on precedents that are repugnant to the clearly stated precedent of this Court simply seeks to obscure the issue to be decided herein.

Louisiana action are similarly improper and should not be considered by the Court. (Ans. Brief. at 15).

ARGUMENT

I. DANIELI CORPORATION IS ENTITLED TO INDEMNIFICATION FOR THE CLAIMS ASSERTED IN THE BATISTE LITIGATION

A. The Intent of the Contract

The clear intent of the contract entered into between Danieli and ArcelorMittal was to insure that ArcelorMittal received notice of all personal injury claims where it had a duty to indemnify Danieli. The docket from the court in Louisiana, where the Batiste litigation was prosecuted, clearly demonstrates that ArcelorMittal had actual notice of the Batiste litigation at its inception and that it was an active participant in the litigation. (A224-A327). The receipt of actual notice satisfies the parties' intent of ArcelorMittal having notice of those matters wherein its indemnification obligation is triggered.

"The basic rule of contract construction gives priority to the intention of the parties." *E.I. DuPont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985). Contrary to the assertions of ArcelorMittal, the intention of notice was satisfied when ArcelorMittal received actual notice of the litigation, actively participated in the litigation and was then involved in settlement discussions, albeit from the perspective of protecting its workers compensation lien. This is not a case where years after litigation was commenced, the party with the indemnification duty first learns of the claim, but instead is one where ArcelorMittal has had knowledge of the claim since its inception.

The intent of the parties, to insure notice is received, would be frustrated should the court hold that actual notice of a claim is not sufficient.

B. ArcelorMittal Cannot Now Be Heard to Complain Where it Failed to Simply Ask if a Defense was Requested

ArcelorMittal argues that it was prejudiced because it had no opportunity to participate in Danieli's defense and that somehow Danieli failed to cooperate in a defense provided by ArcelorMittal. As a practical matter, the record demonstrates no evidence of a failure by Danieli to cooperate in the defense of Danieli. To the contrary, there is no evidence that ArcelorMittal ever attempted to provide a defense and that those efforts were somehow frustrated by Danieli. As Judge Cooch indicated, and this Court affirmed, if there was any ambiguity in ArcelorMittal's mind about whether a defense was desired, all they need do is simply ask. *Brown v. Church Ins. Co.*, C.A. No. 02C-06-196 RRC, 2005 Del. Super. LEXIS 400 (Del. Super., March 24, 2005) at *29.

What is clear from the record is that ArcelorMittal, despite receiving notice of the lawsuit, and having their attorney designated to receive notice actively litigate the case, never once did ArcelorMittal ask whether a defense was desired. Further, ArcelorMittal took no efforts at any stage to defend Danieli. In fact when afforded the opportunity to participate in the defense of Danieli, in advance of trial, ArcelorMittal rejected the opportunity to participate in Danieli's defense.

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By way of example, had ArcelorMittal truly desired to direct the litigation, a common practice is for a defense to be provided under a reservation of rights, a concept noted in the cases cited in opposition to the present appeal. In effect providing a defense, but reserving the right to determine the duty to indemnify for a later date. Rather than undertaking even as routine an approach as that, ArcelorMittal instead chose to simply refuse any participation on behalf of Danieli.

Further, while the opportunity to participate and duty to cooperate are raised as arguments contra a finding of the duty to indemnify, those arguments ring hollow. There is no evidence of record that any defense provided by ArcelorMittal would have deviated from that provided by counsel for Danieli. Further, had there been a true desire to protect ArcelorMittal's rights to influence the case's resolution, when negotiations were ongoing in the weeks prior to trial, ArcelorMittal, who had notice of the settlement discussions, would have at that point stepped up and become involved in the ongoing settlement discussions, to protect its interests. Instead, the only involvement at that juncture was ArcelorMittal actively seeking to protect its workers' compensation lien, by asserting same against the very entity whom they were obligated to indemnify.

The record as it exists demonstrates that ArcelorMittal sat silent and did not in any way attempt to determine if a defense was desired, let alone direct, control or even suggest the manner in which the defense of Danieli was undertaken.

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Ultimately, these factors asserted by ArcelorMittal are not compelling and do not support the denial of the relief sought.

C. The Decisions of other States and Jurisdictions Interpreting Insurance Policies are Inapplicable and Should be Given no Precedential Weight

ArcelorMittal in its Answering Brief again attempts to rely upon *Purvis v*. *Hartford Accident & Indem. Co.*, 877 P.2d 827 (Ariz. Ct. App. 1994). *Purvis* however is clearly at odds with the holding in *Harleysville*, wherein the obligation fell upon the indemnifying party to determine if indemnification was being sought or rejected. The *Purvis* decision also predates *Harleysville* by over ten years and applies Arizona Law, not Delaware law and as such is not of assistance in resolving the issue of how Delaware interprets the effect of actual notice of litigation.

ArcelorMittal also cites to *Erie Ins. Exch. V. V.I. Enters.*, 264 F. Supp 2d 261 (D.V.I. 2003) as supporting its position that ArcelorMittal did not have an obligation to ask if a defense was requested when it received actual notice of the Batiste litigation. Here again however, the inquiry and analysis undertaken by the District Court is inapplicable in light of this Court's ruling that the entity with the duty to defend and indemnify, once on notice of a claim from any source, should resolve any ambiguity as to the level of assistance sought by simply inquiring.

Further, the cases cited by ArcelorMittal, as evident from their captions, involve insurers and their obligations under insurance contracts which include obligations to defend and indemnify. The import of the continued efforts to rely upon cases interpreting duties and obligations under insurance policies when those decisions support ArcelorMittal's arguments and yet arguing that this Court's prior holdings interpreting insurance policies are inapplicable are difficult to conceptually reconcile.

ArcelorMittal cannot have it both ways. It cannot argue in the first instance that prior precedent involving the interpretation of an insurance contract and the duty to defend and indemnify is inapplicable to the facts at hand and then in the same breath argue that case law interpreting insurance policies are instructive when those decisions are clearly in conflict with the holdings of this Court.

Danieli has argued throughout and continues same herein that actual notice received by ArcelorMittal regarding a claim which gives rise to an indemnity obligation is sufficient to trigger the obligation to defend and indemnify. No second notice is required of Danieli once ArcelorMittal and their designated counsel for receipt of notice received actual notice of the litigation and the Batiste litigation triggered the duties sought to be enforced by Danieli.

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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