

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
TRIAL DIVISION—CIVIL**

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<b>IRWIN &amp; LEIGHTON, INC.</b>	:	November Term, 2008
	:	
and	:	Case No. 04701
	:	
<b>ZURICH AMERICAN INSURANCE COMPANY</b>	:	
	:	
<i>Plaintiffs</i>	:	
	:	
v.	:	Commerce Program
	:	
<b>HOWARD McCUNE AND DEBORAH McCUNE</b>	:	
	:	
and	:	
	:	
<b>LOVETT LANDSCAPING, INC.</b>	:	
	:	
<b>d/b/a/ LOVETT CONTRACTING</b>	:	
	:	
<b>AND</b>	:	Control Nos. 10072383,
	:	10072404
	:	
<b>NAUTILUS INSURANCE COMPANY</b>	:	
	:	
<i>Defendants</i>	:	

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**MEMORANDUM OPINION**

Before the Court are a Motion for Summary Judgment of Defendant Nautilus Insurance Company, and a Motion for Partial Summary Judgment of Plaintiffs Irwin & Leighton, Inc. and Zurich Insurance Company. Both motions require this Court to determine whether Defendant Nautilus Insurance Company owed a duty to defend Plaintiff Irwin and Leighton, Inc. in an underlying action. For the reason below, the Court finds that Nautilus Insurance Company owed a duty to defend Irwin & Leighton, Inc. in the underlying action.

## **Background**

Plaintiff, Irwin & Leighton, Inc. (“I&L,”) is a construction company based in King of Prussia, Pennsylvania. Plaintiff, Zurich American Insurance Company, (“Zurich,”) is an insurance company licensed to do business in Pennsylvania. At all times relevant herein, Zurich provided commercial liability insurance to I&L, policy No. GLO-3867160-00.

Defendant, Lovett Landscaping, Inc. d/b/a/ Lovett Contracting, (“Lovett,”) is a demolition company based in Bensalem, Pennsylvania. Defendant Nautilus Insurance Company, (“Nautilus,”) is an insurance company licensed to do business in Pennsylvania. At all times relevant herein, Nautilus provided Defendant Lovett with commercial liability insurance under policy No. BK00114780.

Defendants Howard and Deborah McCune (the “McCunes,”) were Plaintiffs in an underlying personal injury action, and are nominal defendants in the instant declaratory judgment action.

In March 2007, I&L entered into a contract to provide construction work for the renovation of a retail store in Langhorne, Pennsylvania. In April 2007, I&L entered into a sub-contract with Lovett. Pursuant to the sub-contract, Lovett agreed to perform demolition work on behalf of I&L, and to “remove and dispose ... all demolition items” and to convey “all debris from building to dumpsters.”<sup>1</sup> The sub-contract also required Lovett to procure insurance coverage for the benefit of I&L, and to “defend, indemnify and save harmless [I&L] ... from all loss, damage, cost and expense which [I&L] may suffer ... arising ... out of the

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<sup>1</sup> Contract No. 0555-021 between I&L and Lovett, Exhibit B to the Complaint at ¶ 1, Schedule B at Article 1.

performance of this subcontract.”<sup>2</sup> Pursuant to this requirement, Lovett obtained coverage for I&L as an additional insured under the policy provided by Nautilus.

The pertinent section of the Nautilus policy states:

**Additional Insured—Owners, Lessees or Contractors—**

\* \* \*

**A. Section II—Who Is An Insured** is amended to include as an additional insured an person or organization for whom [Lovett] is performing operations when [Lovett] and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on [Lovett’s] policy. Such person or organization is an additional insured only with respect to liability for “bodily injury,” “property damage” or “personal and advertising injury” caused, in whole or in part by:

1. [Lovett’s] acts or omissions; or
2. The acts or omissions of those acting on your behalf.<sup>3</sup>

On June 5, 2007, Howard McCune was driving a delivery truck within the construction site managed by I&L and Lovett. McCune stepped out of the truck, tripped over a chunk of concrete debris, and suffered physical injury. In June 2008, he and his wife filed a lawsuit asserting negligence solely against I&L.<sup>4</sup> Subsequently, the McCunes filed another Complaint asserting the claims of negligence against I&L and Lovett.<sup>5</sup> In the new Complaint, Plaintiffs asserted that I&L and Lovett, jointly or severally, had negligently failed to maintain a safe

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<sup>2</sup> Contract No. 0555-021 between I&L and Lovett, Exhibit B to the Complaint at ¶ 13.

<sup>3</sup> Endorsement to Commercial General Liability Policy No. CG 20 33 07 04 for Additional Insureds—Owners, Lessees or Contractors, attached as exhibit A to the Complaint.

<sup>4</sup> Howard McCune and Deborah McCune, H/W, v. Irwin & Leighton, Inc., case No. 0806-05341, Court of Common Pleas, Philadelphia County.

<sup>5</sup> Complaint, Howard McCune and Deborah McCune v. Irwin & Leighton, Inc. and Lovett Contracting, Case No. 0905-02718, Court of Common Pleas, Philadelphia County.

construction site. Defendant I&L filed an answer and new matter to the new Complaint, and asserted a cross claim against Defendant Lovett.<sup>6</sup> Thereafter, upon a motion filed by the McCunes, the Court consolidated the two lawsuits under a new caption titled Mc Cune et ux. v. Irwin & Leighton et al. , Case No. 0806-05341.<sup>7</sup>

On December 18, 2008, I&L, as additional insured of Lovett, tendered to Nautilus its claim for defense and indemnification.<sup>8</sup> On November 30, 2009, I&L and its insurer, Zurich, filed the instant Declaratory Judgment Action against Lovett and Nautilus. The instant action seeks to compel Lovett to defend and indemnify I&L through the Nautilus policy.<sup>9</sup> On January 7, 2010, Nautilus agreed to defend I&L pursuant to a reservation of rights. The reservation of rights stated that Nautilus would not indemnify I&L “for any independent acts of negligence assessed against I&L” alone.<sup>10</sup> On February 19, 2010, Howard and Deborah McCune settled with Lovett and signed a Release. The Release states that in consideration for the sum of \$310,000, the McCunes “forever release and discharge Lovett Contracting, Inc. ... from all manner of liability ... or other damages ... alleged as a result of an accident which occurred on June 5, 2007.”<sup>11</sup> Notwithstanding the settlement and Release, Lovett remained a defendant in the underlying litigation to the end of trial.

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<sup>6</sup> Answer with New Matter Directed to Plaintiff, and Cross-Claim directed against Lovett Contracting, Inc., Case No. 0905-02718, Docket entry dated October 6, 2009. .

<sup>7</sup> Order dated July 16, 2009, Jacqueline Allen, J., Case No. 0806-05341.

<sup>8</sup> Tender of Claim dated December 18, 2008, attached as Exhibit D to the Motion for Summary Judgment of Defendant Nautilus.

<sup>9</sup> Declaratory Judgment Complaint, Irwin & Leighton and Zurich American Insurance Company, case No. 0911-04701.

<sup>10</sup> Letter of Acceptance of Tender of Claim, Exhibit G to the Motion for Summary Judgment of Defendant Nautilus.

<sup>11</sup> Joint Tortfeasor Release attached as Exhibit F to the Motion for Summary Judgment of Plaintiffs I&L and Zurich.

On April 26, 2010, Nautilus sent a letter to I&L on behalf of Lovett. The letter disclaimed any obligation by Lovett and Nautilus to defend or indemnify I&L. The letter stated:

now that Nautilus has settled McCune's claim against Lovett, the only claims remaining against I&L are those that relate solely to [I&L's] independent negligence. Because these claims are not covered by the subject policy's additional insured endorsement, Nautilus is entitled to withdraw its defense of I&L as of the date of the settlement.<sup>12</sup>

On August 5, 2010, I&L moved to bifurcate its cross-claim against Lovett.

The motion was granted.<sup>13</sup> The remainder of the underlying action was tried, and the Jury received a Questionnaire before it retired for deliberations. The Questionnaire asked the Jury to determine whether I&L and Lovett had been jointly or severally negligent.<sup>14</sup> On August 12, 2010, the Jury returned its verdict and found that Lovett had not been negligent. The Verdict entry on the Docket states:

JURY VERDICT IN FAVOR OF PLAINTIFFS HOWARD McCUNE  
AND DEBORAH McCUNE AND AGAINST IRWIN & LEIGHTON,  
INC.

\* \* \*

THE JURY ALLOCATED NEGLIGENCE BETWEEN DEFENDANT  
IRWIN & LEIGHTON, INC. AND ... PLAINTIFF HOWARD  
McCUNE IN THE AMOUNT OF 90% AND 10% RESPECTIVELY.

\* \* \*

JURY VERDICT IN FAVOR OF DEFENDANT LOVETT  
CONTRACTING, INC. AND AGAINST PLAINTIFFS HOWARD ...  
AND DEBORAH McCUNE.

\* \* \*

LEFT UNRESOLVED WERE IRWIN & LEIGHTON'S CROSS-  
CLAIMS AGAINST DEFENDANT LOVETT CONTRACTING AND  
THE COURT ORDERED THE PARTIES TO FILE BRIEFS

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<sup>12</sup> Letter from Nautilus/Lovett to I&L, dated April 26, 2010, attached as Exhibit H to the Motion for Summary Judgment of Plaintiffs I&L and Zurich.

<sup>13</sup> Order granting bifurcation dated September 22, 2010 Case No. 0806-05341.

<sup>14</sup> Questionnaire to the Jury, attached to Jury Trial Sheet Docketed on September 22, 2010, Case No. 0806-05341.

ADDRESSING THE CROSS-CLAIMS. AFTER REVIEWING THE PAPERS SUBMITTED BY THE PARTIES, IT IS CLEAR THAT, IN LIGHT OF THE JURY'S DETERMINATION THAT DEFENDANT LOVETT CONTRACTING WAS NOT NEGLIGENT, IRWIN & LEIGHTON'S CROSS-CLAIMS AGAINST LOVETT CONTRACTING HAVE NO BASIS IN FACT OR LAW.<sup>15</sup>

In the instant action, Defendant Nautilus moves for Summary Judgment.

The motion of Defendant Nautilus asks the Court to rule that any duty to defend I&L in the underlying action ended as soon as Howard and Deborah McCune released Lovett from any liability. Plaintiffs I&L and Zurich also move for Partial Summary Judgment. Their motion asks the Court to rule that Lovett and Nautilus had a duty to defend I&L throughout the underlying action, notwithstanding the settlement and Release obtained from the underlying Plaintiffs.<sup>16</sup>

### **Discussion**

Summary judgment may be granted only in the clearest cases where the record demonstrates there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.<sup>17</sup>

Under the Rules [of Civil Procedure], a motion for summary judgment is based on an evidentiary record that entitles the moving party to a judgment as a matter of law. For purposes of summary judgment, the record includes any pleadings, interrogatory answers, depositions, admissions, and affidavits.<sup>18</sup>

Defendant Nautilus argues that the Release signed by the McCunes

“extinguished the only type of exposure for which the Nautilus Policy would have provided coverage for Plaintiff I&L.”<sup>19</sup> Nautilus asserts that under the policy provided to Lovett, Nautilus had an obligation to extend coverage to additional

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<sup>15</sup> Jury Verdict entries dated September 22, 2010, at 7.51 A.M. and 8.00 A.M., Docket No. 0806-05341.

<sup>16</sup> Memorandum in Support of the Motion for Partial Summary Judgment of Plaintiffs I&L and Zurich, Question Presented, § II, case control No. 10072383.

<sup>17</sup> Trowbridge v. Scranton Artificial Limb, 747 A.2d 862, 864 (Pa. 2000).

<sup>18</sup> Scalice v. Pa. Emples. Benefit Trust Fund, 883 A.2d 429, 435 (Pa. 2005).

<sup>19</sup> Reply Brief of Nautilus in support of its Motion for Summary Judgment at 1, control No. 10072404.

insured I&L for damage exclusively “caused in whole or in part by [Lovett’s] acts or omissions or the acts ... or omissions of those acting on [Lovett’s] behalf.”<sup>20</sup>

Nautilus concludes that its coverage obligations to I&L ended the moment Lovett secured a Release which eradicated any possibility of damages caused in whole or in part by Lovett’s acts or omissions.

The insurer's obligation to defend is fixed solely by the allegations in the underlying complaint.... The duty to defend is limited to only those claims covered by the policy. The insurer is obligated to defend if the factual allegations of the complaint on its face comprehend an injury which is actually or potentially within the scope of the policy.<sup>21</sup>

The task of interpreting an insurance contract is generally performed by a court rather than by a jury. The goal of that task is, of course, to ascertain the intent of the parties as manifested by the language of the written instrument. Where a provision of a policy is ambiguous, the policy provision is to be construed in favor of the insured and against the insurer, the drafter of the agreement. Where, however, the language of the contract is clear and unambiguous, a court is required to give effect to that language.<sup>22</sup>

In the underlying action, Plaintiffs asserted that I&L and Lovett were jointly and severally liable in negligence for the injuries suffered by Howard McCune. The allegation in the underlying complaint triggered Lovett’s duty to defend its additional insured, I&L, because the insurance policy obtained by Lovett unambiguously provided coverage to I&L for “property damage ... caused in whole or in part by ... [Lovett’s] acts or omissions ... in the performance of [Lovett’s] ongoing operations for the additional insured. In the underlying action, the

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<sup>20</sup> Memorandum of Law in support of the Motion for Summary Judgment of Defendant Nautilus, p. 9 (citing Insurance Policy CG 20 333 07 04 Endorsement—Additional Insured).

<sup>21</sup> *Erie Ins. Exch. v. Muff*, 851 A.2d 919, 926, (Pa. Super. 2004).

<sup>22</sup> *Madison Constr. Co. v. Harleysville Mut. Ins. Co.*, 735 A.2d 100, 106 (Pa. 1999).

allegation of negligence against Lovett was an issue of fact before the jury because the Questionnaire delivered to the jury specifically stated:

1. Do you find the defendants were negligent?

Irwin & Leighton, Inc.	<b>YES</b> [ <input type="checkbox"/> ]	<b>NO</b> [ <input type="checkbox"/> ]
Lovett Contracting, Inc.	<b>YES</b> [ <input type="checkbox"/> ]	<b>NO</b> [ <input type="checkbox"/> ] <sup>23</sup>

The Jury received the Questionnaire, retired for deliberations, and rendered a verdict favorable to Lovett. The Questionnaire shows that the claim of negligence asserted against Lovett was a viable issue of fact to be decided by the jury, and Lovett had an obligation under the Nautilus policy to defend I&L until such a decision was rendered. Indeed, the underlying Complaint claimed liability against I&L for its failure to make certain that Lovett had left the workplace clean and safe for deliverymen such as McCune. This theory of direct liability against I&L clearly encompassed personal injury caused “in part” by Lovett. Only until the jury rendered its verdict was direct liability of I&L for personal injury caused “in part” by Lovett eliminated.

**By The Court,**

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**Mark I. Bernstein, J.**

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<sup>23</sup> Questionnaire to the Jury, attached to Jury Trial Sheet Docketed on September 22, 2010, Case No. 0806-05341.