

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**SHAWN R. WATSON, Executor of the
Estate of Richard Watson, Deceased,
Plaintiff,**

v.

**ALLIED TUBE & CONDUIT
CORPORATION, and
ATKORE INTERNATIONAL,
Defendants/Third Party Plaintiffs,**

v.

**GYPSUM EXPRESS, LTD.,
Third Party Defendant.**

CIVIL ACTION

NO. 15-1770

ORDER

AND NOW, this 9th day of September, 2016, upon consideration of Third Party Defendant's Motion for Summary Judgment (Doc. No. 22, filed March 2, 2016), third party plaintiffs Allied Tube & Conduit Corporation and Atkore International's (collectively "Allied") Response in Opposition to Third Party Defendant's Motion for Summary Judgment (Doc. No. 31, filed June 30, 2016), and Reply in Support of Third Party Defendant's Motion for Summary Judgment (Doc. No. 32, filed July 14, 2016), **IT IS ORDERED** that Third Party Defendant's Motion for Summary Judgment is **GRANTED**.

IT IS FURTHER ORDERED that the caption of the case is **AMENDED** to delete reference to Gypsum Express, Ltd. as a third party defendant.

The decision of the Court is based on the following:

INTRODUCTION

1. The pertinent facts are not in dispute and are taken from the pleadings and the deposition of plaintiff's decedent Richard Watson. On or about December 3, 2012, Watson, an

employee of third party defendant, Gypsum Express, Ltd. (“Gypsum”), drove a Gypsum tractor to Allied’s loading facility to pick up a trailer containing framed aluminum. Watson Dep. 19:21-22:23, Oct. 9, 2014. Allied’s facility was located at 11350 Norcom Road, Philadelphia, Pennsylvania. Pl. Compl. ¶ 5. Prior to Watson’s arrival, the trailer was loaded by Allied and maintained by Allied. Watson Dep. 23:13-18. While covering the load for transport, Watson fell from the trailer. Watson Dep. 29:25-31:16. He suffered serious injuries, including a fractured nose and fractured ribs, a punctured lung, and a torn rotator cuff. Pl. Compl. ¶¶ 12-15. In his Complaint against Allied, Watson alleged that the accident was the result of Allied’s improper loading or storage of the trailer. Third Party Pl. Br. in Opp’n to Mot. at 2. Allied subsequently impleaded Gypsum. Id. at 2.

At the time of Watson’s accident, Allied and Gypsum were operating under the terms of a written contract—the Transportation Agreement. Third Party Pl. Compl. ¶ 9. The Transportation Agreement contained a choice of law provision specifying that the “[a]greement shall be subject to and shall be interpreted in accordance with federal law and the laws of the State in which Allied is domiciled.” Allied has its principal place of business in Illinois. Id. at ¶ 2.

The Transportation Agreement also contained a provision regarding indemnity.

Paragraph 11 of Carrier Responsibilities provided, in relevant part, that:

[Gypsum] agrees to defend, indemnify and save harmless [Allied], its directors, officers, employees, agents and shareholders from any and all loss, liability, damages, claims, demands, or judgments arising out of (a) death or injury to persons or property caused by [Gypsum’s] acts or omissions or the acts or omissions of [Gypsum’s] agents, employees, drivers or others furnished by [Gypsum], (b) the services provided by [Gypsum] under this Agreement or in any way arising out of [Gypsum’s] performance of its obligations under this Agreement . . . (d) assertions or claims under Workers’ Compensation or similar acts made by persons furnished by [Gypsum] or its subcontractors.

2. Allied asserts claims for noncontractual indemnity, contribution, and contractual indemnity against Gypsum. Third Party Pl. Br. in Opp'n. to Mot. at 2. Allied agrees that the contractual indemnity provision does not apply to Allied's own acts of negligence but only to damages "in an amount corresponding to [Gypsum's] degree of fault." Third Party Pl. Br. in Opp'n to Mot. at 8.

3. Presently before the Court is Gypsum's Motion for Summary Judgment under Federal Rule of Civil Procedure 56. Gypsum argues that Allied's claims against it for noncontractual indemnity and contribution fail as a matter of law because (1) the statute of limitations bars Gypsum's liability to Allied and (2) the Pennsylvania Workers' Compensation Act ("PWCA") bars any claim against Gypsum. Gypsum further contends that Allied's claim for contractual indemnification fails as a matter of law because the contractual indemnification provision in the Transportation Agreement is (1) statutorily void under the Illinois Workers' Compensation Act, (2) lacks the requisite specificity to waive the protection of the PWCA, and (3) does not indemnify Allied against its own negligence.

LEGAL STANDARD

4. The Court will grant a motion for summary judgment if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A factual dispute is material when it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* "[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether . . . there is sufficient evidence favoring the nonmoving party for

a jury to return a verdict for that party.” *Id.* at 249. Existence of a “mere scintilla” of evidence in support of the nonmoving party is insufficient. *Id.* at 252. In considering a motion for summary judgment, “the [C]ourt is required to examine the evidence of record in the light most favorable to the party opposing summary judgment, and resolve all reasonable inferences in that party’s favor.” *Wishkin v. Potter*, 476 F.3d 180, 184 (3d Cir. 2007).

CHOICE OF LAWS ISSUES

5. The Court must first determine whether Illinois or Pennsylvania law applies to Allied’s claims. In deciding that issue, the Court applies Pennsylvania choice of law rules. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 497 (1941) (holding that a federal court exercising diversity jurisdiction must apply the choice of law rules of the forum state). Under Pennsylvania law, “[c]ontractual choice of law provisions . . . do not govern tort claims between contracting parties unless the fair import of the provision embraces all aspects of the legal relationship.” *Jiffy Lube Int’l, Inc. v. Jiffy Lube of Pa., Inc.*, 848 F. Supp. 569, 576 (E.D. Pa. 1994); *see Milton Home Sys., Inc. v. Sur Developers and Builders, Inc.*, No. 0683, 2015 WL 4597080, at *3 (Pa. Ct. Com. Pl. July 29, 2015) (differentiating between the applicability of choice of law provisions to contractual indemnification claims versus noncontractual indemnification and contribution claims). When a choice of law provision refers to the agreement but not to claims arising from the contract, application of the contractually chosen law is only required for the construction, interpretation, and enforcement of the agreement. *Jiffy Lube*, 848 F. Supp. at 576.

The choice of law clause in the Transportation Agreement provides that the “[a]greement shall be subject to and shall be interpreted in accordance with” Illinois law. It applies only to the Transportation Agreement, not to Allied’s noncontractual claims.

6. To determine whether Illinois or Pennsylvania law applies to Allied's noncontractual indemnification and contribution claims against Gypsum, the Court must "determine whether a true conflict exists between the laws of the two states, and, if a true conflict is present, [the Court must] analyze the governmental interests underlying the issue and determine which state has the greater interest in application of its law." *Messier v. Smith*, No. 1768, 1995 WL 808342, at *4 (Pa. Ct. Com. Pl. Feb. 6, 1995). A true conflict exists between the laws of two states if the application of one state's law "would result in a different outcome[]" than application of the other state's law. *Getek v. Ohio Cas. Ins. Co.*, 868 F. Supp. 751, 755 (E.D. Pa. 1994) (holding that a true conflict existed between Pennsylvania's and New Jersey's workers' compensation laws because Pennsylvania barred subrogation while New Jersey permitted it).

7. In this case, a true conflict exists because the application of Pennsylvania law would lead to a different outcome than the application of Illinois law to Allied's noncontractual indemnification and contribution claims. Under the PWCA, a third party may not seek contribution or indemnification from an employer unless the employer expressly waives protection in an indemnification clause. *Kennedy v. Shuwa Invs. Corp.*, 825 F. Supp. 712, 712 (E.D. Pa. 1993). However, under the Illinois Workers' Compensation Act, a third party may maintain suit against an employer for contribution arising out of a covered employee's damages, despite the fact that an injured employee may not bring a civil suit against the employer directly. *Virginia Sur. Co. v. N. Ins. Co. of N.Y.*, 866 N.E.2d 149, 154 (Ill. 2007). Thus, Allied's claims for noncontractual indemnity and contribution are barred under Pennsylvania law unless the indemnification provision expressly waives the protection of the PWCA. However, Allied's claims would not be barred under Illinois law.

8. “If a true conflict exists, [the Court must] . . . determine which jurisdiction has the greater interests, considering the qualitative contacts of the states, the parties, and the controversy” to conclude which state’s law should apply. *Marks v. Redner’s Warehouse Mkts.*, 136 A.3d 984, 988 (Pa. Super. Ct. 2016). The contacts to be considered include: (1) “the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (4) the place where the relationship, if any, between the parties is centered.” *Id.* at 988.

9. The Court concludes that Pennsylvania has a greater interest in the application of its laws to this case because it has the most significant relationship to the parties and the accident. Watson’s accident occurred at an Allied loading facility in Pennsylvania. While Allied and Gypsum are domiciled in other states, the accident arose out of their conduct in Pennsylvania. Allied loaded and stored the trailer in Pennsylvania. Watson resided and was employed in Pennsylvania, and Gypsum is subject to the PWCA. Accordingly, Pennsylvania has a greater interest than Illinois in the application of its law to this case. The Court will apply Pennsylvania law to the noncontractual indemnification and contribution claims asserted by Allied.¹

¹ Gypsum contends that Allied’s indemnification and contribution claims are barred by the two year statute of limitations for torts. The Court rejects this argument. Under Pennsylvania law, the statute of limitations for contribution does not begin to run until judgment is entered in favor of the original plaintiff. *Schiele v. Simpson Safety Equip., Inc.*, No. 91-1872, 1992 WL 73588, at *2 (E.D. Pa. Apr. 7, 1992). An indemnity claim does not accrue until the indemnitee pays damages for the negligence of another. *Circuit City Stores v. Citgo Petroleum Corp.*, No. 92-7394, 1995 WL 129210, at *2 (E.D. Pa. Mar. 24, 1995). Thus, the statute of limitations has not begun to run on such claims.

ALLIED’S NONCONTRACTUAL INDEMNIFICATION AND CONTRIBUTION CLAIMS

10. “Under Pennsylvania law, indemnity is available only: (1) where there is an express contract to indemnify, or (2) where the party seeking indemnity is vicariously or secondarily liable for the indemnitor’s acts.” *Allegheny Gen. Hosp. v. Philip Morris Inc.*, 228 F.3d 429, 448 (3d Cir. 2000) (citation omitted). If an express contract to indemnify exists, common law indemnification is not available. *Eazor Express, Inc. v. Barkley*, 272 A.2d 893, 895 (Pa. 1971); *see also EQT Prod. Co. v. Terra Servs., LLC*, No. 14-1053, 2016 WL 1435448, at *7 (W.D. Pa. Apr. 12, 2016).

11. Under *Eazor Express* and *EQT Prod. Co.*, *supra*, Allied’s claim for common law indemnity fails as a matter of law because the Transportation Agreement contains a contractual indemnification provision. Paragraph 11 of the Transportation Agreement between Allied and Gypsum constitutes an express contract to indemnify. The provision provides that “[Gypsum] agrees to defend, indemnify, and save harmless [Allied].” Both parties agree that Paragraph 11 is a contractual indemnification provision.²

12. The Court concludes that Allied’s contribution claim, based on Gypsum’s alleged negligence, also fails. Contribution “is not a recovery for the tort, but rather it is the enforcement of an equitable duty to share liability for the wrong done by both.” *Swartz v. Sunderland*, 169 A.2d 289, 290 (Pa. 1961). Under Pennsylvania law, contribution is only available among joint tortfeasors. 42 Pa. Cons. Stat. Ann. § 8324(a) (West 2016). In order to be joint tortfeasors, the parties must either act together in committing the wrong, or their acts, if independent of each

² The Court does not address Gypsum’s argument concerning the PWCA bar on common law indemnity claims.

other, must unite in causing a single injury. *Foulke v. Dugan*, 212 F.R.D. 265, 270 (E.D. Pa. 2002).

13. Allied states in its Third Party Complaint that “the damages described in [p]laintiff’s Complaint, if any, were the proximate result of the negligence, fault, wrongful conduct, or other acts and omissions of [Gypsum].” However, the only evidence of negligence presented is evidence of Allied’s negligence. Allied did not present any evidence of acts or omissions by Gypsum that caused Richard Watson’s accident. The Court thus concludes that no reasonable jury could return a verdict in favor of Allied on its contribution claim. Accordingly, the Court does not reach the issue of whether or not Allied’s contribution claim is barred by the PWCA.

ALLIED’S CONTRACTUAL INDEMNIFICATION CLAIM

14. As to Allied’s contractual indemnity claim, this Court must determine if Pennsylvania or Illinois law applies to the enforcement of the indemnification provision of the Transportation Agreement. Gypsum contends that the PWCA should govern the enforcement of the indemnity provision. This Court agrees. Courts in Pennsylvania generally enforce choice of law provisions in contracts executed by the parties. *Smith v. Commonwealth Nat’l. Bank*, 557 A.2d 775, 777 (Pa. Super. Ct. 1989). When, as in this case, the parties resolve the issue of indemnity by an explicit provision in the contract, the choice of law provision in the contract should be applied unless “the application of that state’s law would be contrary to the public policy of the state with a materially greater interest.” *Hudson v. Harris Corp.*, No. 4131, 2010 WL 1140285, at *1 (Pa. Ct. Com. Pl. Feb. 24, 2010). In cases concerning the PWCA, “a choice of law provision that imposes another state’s law that conflicts with provisions of the Pennsylvania Workers Compensation Act offends public policy where the injury occurred in

Pennsylvania.” *Finnery v. CSX Transp., Inc.*, No. 09-3040, 2009 WL 3719382, *2 (E.D. Pa. Nov. 5, 2009). “Pennsylvania’s workers’ compensation scheme is premised on employer participation in its insurance program in return for employer immunity against liability for the work-related injuries of its employees. Any extraterritorial law that contravenes that purpose violates the legislative intent of the Workers’ Compensation Act.” *Hudson*, 2010 WL 1140285, at *1.

15. Allied contends that Illinois law, not the PWCA, applies to enforcement of the indemnity provision. Under the PWCA, Allied could not seek indemnification from Gypsum unless Gypsum expressly waived protection in an indemnification clause. *Kennedy*, 825 F. Supp. at 712. However, under Illinois workers’ compensation law, Allied’s claim against Gypsum for contractual indemnification would not be barred. *See Virginia Sur. Co.*, 866 N.E.2d at 154. In this case, the accident occurred in Pennsylvania, the injured party was a Pennsylvania resident, and Gypsum is subject to the PWCA. Pennsylvania therefore has a materially greater interest than Illinois in this case. In addition, application of Illinois law would eliminate the employer immunity granted to Gypsum by the PWCA. Thus, the public policy of Pennsylvania mandates application of the PWCA to the indemnity provision of the Transportation Agreement.³

16. Under the PWCA, a third party may not seek indemnification from the employer of a PWCA covered employee unless the employer and third party agreed to an express provision for indemnity in a written contract. *Bester v. Essex Crane Rental Corp.*, 619 A.2d 304,

³ The Court notes that Allied’s contractual indemnification claim against Gypsum would also fail under Illinois law. Allied contends that it only seeks contractual indemnification for Gypsum’s negligence, but Allied presents no evidence of Gypsum’s negligence or any acts or omissions of Gypsum that caused Richard Watson’s accident. The accident occurred on Allied property and involved an Allied trailer that was loaded by Allied. With the exception of a conclusory statement in its Third Party Complaint, Allied has not presented any evidence in support of its contractual indemnification claim.

306-07. To be enforceable, an indemnification provision “must clearly and unequivocally express the employer’s intent to indemnify against [its] employees’ claims.” *Finney*, 2009 WL 3719382, at *3. “[G]eneral indemnity language such as ‘any or all’ or ‘any nature whatsoever’ is insufficient.” *Bester*, 619 A.2d 304 at 307.

17. The indemnification provision of the Transportation Agreement uses the general “any and all loss” language referenced in *Bester*. It does not unequivocally express intent by Gypsum to indemnify Allied against tort claims made by Gypsum employees. While the provision does indemnify Allied against workers’ compensation claims made by Gypsum employees, the provision does not address indemnification for damages arising out of tort suits filed by Gypsum employees. Thus, Allied’s claim for contractual indemnification against Gypsum is barred by the PWCA.

BY THE COURT:

/s/ Hon. Jan E. DuBois
DuBOIS, JAN E., J.