

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

NORMAN ZITOMER, ET AL. : CIVIL ACTION
:
v. :
:
THE MEDICAL PROTECTIVE :
CORPORATION, ET AL. : NO. 03-3642

MEMORANDUM

Padova, J.

June 1, 2004

Plaintiffs, Norman Zitomer and Elissa Young, have brought this action seeking a declaration that Defendants are responsible for payment of all delay damages and post-judgment interest awarded in Young v. Zitomer, et al., Philadelphia County Court of Common Pleas, March Term 1999, No. 1993 ("Young v. Zitomer"). Before the Court are Defendants' Motion for Summary Judgment and Plaintiffs' Motion for Partial Summary Judgment. For the reasons which follow, Plaintiffs' Motion is granted and Defendants' Motion is granted in part and denied in part.

I. BACKGROUND

Norman Zitomer is a physician who practices in Philadelphia. (2d Am. Compl. ¶ 1.) In 1996 he purchased medical malpractice insurance policy no. 547080 from The Medical Protective Company ("MedPro") with a term from July 7, 1996 to July 7, 1997 (the "Policy"). (Defs.' Ex. B.) The Policy is an occurrence policy which provides coverage in the amount of \$200,000 per occurrence, with a total annual aggregate limit of \$600,000. (Id.) On March 15, 1999, Dr. Zitomer and six other defendants were sued in the Court

of Common Pleas of Philadelphia County for medical malpractice by Elissa Young, one of Dr. Zitomer's patients, for negligence that occurred in April and May 1997, during the policy period. (Pls.' Ex. A.) Ms. Young alleged in her complaint that, as a result of the negligent care provided by the defendants, including Dr. Zitomer, she suffered from multiple septic emboli and her left foot was amputated. (Id. ¶¶ 16, 30, 33, 34.) MedPro retained Kevin Wright, Esquire to represent Zitomer in Young v. Zitomer. (Defs.' Ex. C.) On October 1, 2001, five weeks prior to the November 5, 2001 trial of Young v. Zitomer, MedPro sent a letter to Zitomer enclosing a consent/non-consent to settle form. (Id.) The letter notified Zitomer that he had the right to consult his own attorney, at his own expense, regarding the case, and asked him to indicate on the form whether he consented to MedPro entering into a settlement discussion if MedPro determined it to be reasonable to do so. (Id.) Defendants claim that Zitomer did not consent to settle. (Defs.' Statement of Undisp. Facts ¶ 14.) Zitomer disputes this. (Pls. Resp. to Defs. Statement of Undisp. Facts ¶ 14.)

Young v. Zitomer went to trial in November 2001. A MedPro claims representative approached Zitomer during the trial regarding settlement and claims that Zitomer did not give his consent to settle. (Defs.' Ex. D.) Plaintiffs maintain that the claims representative did not give Zitomer all of the information he

needed to make a decision about settlement and did not ask him to consent to settle. (Zitomer Dep. at 29, Alff Dep. at 43-44, 49-50.) On November 16, 2001, the jury returned a verdict in favor of Young and against all defendants in the amount of \$20,800,000. Young v. Zitomer, Corrected Order (July 29, 2002). The jury apportioned 60% of fault to Zitomer. (Id.) On July 29, 2002, the trial court molded the jury verdict to include an award of delay damages in the amount of \$3,140,236.99 in accordance with Pennsylvania Rule of Civil Procedure 238.¹ (Id.) Judgment was then entered as follows:

on the molded verdict in favor of the Plaintiff, Elissa L. Young, and against the Defendants, Norman Zitomer, M.D., Mohammad (Ahmer) Kashif, M.D., Allegheny University Hospitals - Hahneman [sic] Division, Allegheny United Hospitals, Inc., and Allegheny Health, Education and Research Foundation, jointly and severally, in the sum of \$24,210,236.99 and against the Defendant, Norman Zitomer, M.D., to the extent of sixty (60%) percent of the causal liability apportioned by the jury in the sum of \$14,526,142.19.

(Id.) On July 11, 2001, Wright filed a Petition to Reduce Security for Purposes of Appeal, asking the court to reduce the amount of security that had to be paid into the court for the appeal to act

¹Delay damages are a form of prejudgment interest governed by Pennsylvania Rule of Civil Procedure 238, which provides that, "at the request of the plaintiff in a civil action seeking monetary relief for bodily injury, death or property damages, damages for delay shall be added to the amount of compensatory damages awarded against each defendant . . . found to be liable to the plaintiff in the verdict . . . and shall become part of the verdict. . . ." Pa. R. Civ. P. 238(a)(1).

as a *supersedeas* pursuant to Pennsylvania Rule of Appellate Procedure 1731(a). (Defs.' Ex. F.) The Petition stated that MedPro would "pay its share of the verdict, \$200,000, plus its proportionate share of delay damages . . . or \$32,791.00, into Court pending the appeal." (Id. ¶ 11.) On August 14, 2002, Wright filed a motion seeking permission to pay into court the policy limits of the Policy (\$200,000) and MedPro's proportionate share of delay damages and post-judgment interest as calculated by MedPro (\$42,970.00). (Defs.' Ex. G.)

This action was filed in the Philadelphia County Court of Common Pleas on September 30, 2002 and Young was named as one of the Defendants. On March 13, 2003, Young settled her malpractice action against the defendants in Young v. Zitomer in return for the payment of \$551,435.00, the promise of payment of \$2,501,790.00 from the Medical Care Availability and Reduction of Error Fund (the "MCARE Fund"), and the assignment of Zitomer's rights against MedPro. (Defs.' Ex. I.) Young executed a "Limited Release" pursuant to which she agreed not to satisfy any part of the judgment in Young v. Zitomer against the personal assets of any of the defendants to that action, released the MCARE Fund of any further obligation, retained her right to proceed against the estate of the PHICO Insurance Company pursuant to a previously filed proof of claim, and preserved her right to proceed in this action against MedPro "and to file and proceed with any other claim

defendant Zitomer may have against said insurance company." (Id.) Defendants subsequently moved to realign Young as a Plaintiff in this action. That motion was granted and Defendants removed to this Court on June 13, 2003.

II. LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id.

at 325. After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. The Court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255. However, "[s]peculation, conclusory allegations, and mere denials are insufficient to raise genuine issues of material fact." Boykins v. Lucent Technologies, Inc., 78 F. Supp. 2d 402, 407 (E.D. Pa. 2000). Indeed, evidence introduced to defeat or support a motion for summary judgment must be capable of being admissible at trial. Callahan v. AEV, Inc., 182 F.3d 237, 252 n.11 (3d Cir. 1999)(citing Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1234 n.9 (3d Cir. 1993)). "Where, as here, cross-motions for summary judgment have been presented, we must consider each party's motion individually. Each side bears the burden of establishing a lack of genuine issues of material fact." Reinert v. Giorgio Foods, Inc., 15 F. Supp. 2d 589, 593-94 (E.D. Pa. 1998).

III. DISCUSSION

The Second Amended Complaint asserts causes of action for declaratory judgment (Count I), breach of contract (Count II) and indemnification (Count III). The Second Amended Complaint demands, in connection with each Count, a declaration that Defendants are "responsible for paying the full measure of delay damages (prejudgment interest) and post-judgment interest presently owed to Ellisa Young under Pennsylvania law. . . ." (2d Am. Compl. at 10, 12, 14.)

A. Joint and Several Liability

Plaintiffs have moved for summary judgment on Counts I and II on the grounds that MedPro is obligated under the Policy to pay all of the delay damages awarded in Young v. Zitomer and all of the post-judgment interest which has accrued on the judgment in that case because Zitomer is jointly and severally liable for the entire amount of the judgment. Defendants have moved for summary judgment on Counts I and II on the grounds that MedPro cannot be held jointly and severally liable for delay damages and post-judgment interest.

On July 29, 2002, judgment was entered jointly and severally against Zitomer, and the other Young v. Zitomer defendants, on the molded verdict of \$24,210,236.99, which includes delay damages in the amount of \$3,410,236.99. (Defs.' Ex. I.) The Pennsylvania Supreme Court has held that delay damages can be awarded against

tortfeasors jointly and severally:

we hold that as a general precept Rule 238 damages awarded against all defendants in a negligence action are properly aggregated with the verdict such that the defendants are jointly and severally liable for the aggregated delay damages. The fact that delay damages under Rule 238 may be calculated in the first instance on an individualized basis before being aggregated with the general liability verdict does not alter the analysis.

Allen v. Mellinger, 784 A.2d 762, 766 (Pa. 2001); see also, Tindal v. Southeastern Pennsylvania Transportation Authority, 560 A.2d 183, 189 (Pa. Super. Ct. 1989) (en banc) ("Liability normally follows verdict. Therefore, appellants are jointly and severally responsible for the entire amount of delay damages because they are jointly and severally liable for the entire amount of the verdict.").

Plaintiffs argue that the Policy requires MedPro to pay all of the delay damages and post-judgment interest awarded in Young v. Zitomer. The Policy contains the following provisions relevant to MedPro's obligation to pay delay damages and post-judgment interest:

B. Upon receipt of notice the Company shall immediately assume its responsibility for the defense of any such claim. Such defense shall be maintained until final judgment in favor of the Insured shall have been obtained or until all remedies by appeal, writ of error or other legal proceedings deemed reasonable and appropriate by the Company shall have been exhausted at the Company's cost and without limit as to the amount expended. However, the Company shall not be obligated to defend any

claim after the applicable limit of the Company's liability has been exhausted by payment of judgments or settlements.

(Policy ¶ B.) The Policy as originally written contained a Paragraph E which limited MedPro's liability for pre-judgment interest. That paragraph was deleted, and replaced with the following Endorsement 424:

The first paragraph of Paragraph E is deleted and the following is added:

E. Except as respects the cost of defense provided under paragraph B and the premium on any bond furnished under paragraph C, the Company's liability is limited as follows. Regardless of the number of (a) insureds or interests named in this contract or any endorsement or (b) persons or organizations who sustain damages or (c) claims made or suits brought on account of such injury or damage, or (d) the number of policy years involved, the Company's liability for damages shall not exceed the stated amount for any one occurrence and, subject to the same limit for each occurrence, the Company's total liability during any one policy year shall not exceed the stated annual aggregate.

(Id., Endorsement 424.) The Court finds that the Policy, including these provisions, is ambiguous with respect to MedPro's obligation to pay prejudgment interest (delay damages) and post-judgment interest. Indeed, Endorsement 424, which sets out MedPro's limitations on liability, "makes no mention of interest generally, prejudgment interest, post-judgment interest, or delay damages." Livornese v. The Medical Protective Co., 253 F. Supp. 2d 821, 824 (E.D. Pa. 2003).

Plaintiffs argue that, because this policy language is ambiguous, it should be interpreted against Defendants and MedPro should be held liable for payment of all delay damages and post-judgment interest in Young v. Zitomer. Plaintiffs rely on Incollingo v. Ewing, 379 A.2d 79 (Pa. 1977), in which the Pennsylvania Supreme Court considered provisions of a MedPro policy that were very similar to Paragraph B and Endorsement 424.² The Incollingo court found that these provisions were ambiguous and must, therefore, be construed against MedPro:

Medical Protective's policy . . . makes no reference to the payment of interest. Rather, it provides that Medical Protective will

² The MedPro insurance policy at issue in Incollingo contained the following relevant provisions:

B. Upon receipt of notice the Company shall immediately assume its responsibility for the defense of any such claim or suit and shall retain legal counsel, who shall defend in conjunction with the legal department of the Company. Such defense shall be maintained until final judgment in favor of the Insured shall have been obtained or until all remedies by appeal, writ of error or other legal proceedings shall have been exhausted at the Company's cost and without limit as to the amount expended.

E. The Company's liability for damages shall not exceed the minimum amount herein stated in any one claim or suit and subject to the same limit for each claim or suit the Company's total liability, during one policy year, shall not exceed the maximum amount herein stated; such amount being in addition to the cost of the unlimited defense provided under Paragraph B and the premium on any bond furnished under paragraph C.

Id. at 81.

furnish a defense until "all remedies by appeal . . . shall have been exhausted at the Company's cost and without limit as to the amount expended. . . ." In connection with the policy limits, the policy states, "such amount (the policy limits) being in addition to the cost of the unlimited defense provided. . . ." In our opinion, these provisions are, at the least, ambiguous as to interest, and thus must be construed against Medical Protective.

Id. at 85 (citing Cadwallader v. New Amsterdam Casualty Co., 152 A.2d 484 (1959)). The Incollingo Court further found that, "[t]he costs of a full defense may reasonably include interest, which is as much a cost of conducting a defense as court costs, attorneys' fees, filing fees and the like. See 12 P.S. § 781. The language in Medical Protective's policy can reasonably be construed to include interest. . . ." Id. at 86. Since the insured in Incollingo was "liable as a joint tortfeasor for the entire amount of the judgment entered on behalf of plaintiff" and was therefore liable as a joint tortfeasor for the full payment of interest, the Incollingo court held "that Medical Protective is obligated to pay interest on the entire verdict." Id. at 85-86. This Court finds, consistent with the Incollingo court's interpretation of similar policy language, that the Policy is ambiguous with respect to MedPro's obligation to pay delay damages and post-judgment interest and, therefore, must be construed against MedPro. See id. at 86. Consequently, the Court finds that the MedPro is obligated to pay the full amount of delay damages and post-judgment interest awarded in Young v.

Zitomer pursuant to the Policy. See Livornese, 253 F. Supp. 2d at 824 (finding that the MedPro policy is ambiguous with respect to MedPro's obligation to pay interest, construing that ambiguity against MedPro, and holding that MedPro was, therefore, obligated to pay delay damages on behalf of its insureds.)

Defendants argue that they are entitled to summary judgment on Counts I and II, notwithstanding any ambiguity in the Policy, because MedPro's obligation to pay delay damages is governed by the former Pennsylvania Health Care Services Malpractice Act, 40 Pa. Stat. § 1301.101, *et seq.*, ("Malpractice Act") which, before it was repealed, governed the administration of the Medical Professional Liability Catastrophe Loss Fund ("CAT Fund"). See 40 Pa. Stat. Ann. § 1301.702 (West 1999).³ The Malpractice Act required health care providers to obtain professional liability insurance and created the CAT Fund as a contingency fund to pay "all awards, judgments and settlements for loss or damages against a health care provider entitled to participate in the fund as a consequence of any claim for professional liability brought against such health care provider . . . to the extent such health care provider's share exceeds its basic coverage insurance. . . ." 40 P.S. § 1301.701 (a) and (d). The CAT Fund was an executive agency of the Commonwealth of Pennsylvania and not an insurance carrier.

³This statute was repealed effective October 1, 2002 and replaced by 40 Pa. Stat. § 1303.714 (part of the Medical Care Availability and Reduction of Error Act).

See Butterfield v. Giuntoli, 670 A.2d 646, 654 (Pa. Super. Ct. 1996), appeal denied 683 A.2d 875 (Pa. 1996). Health care providers were required to participate in the CAT Fund by statute and, accordingly, did not have a contractual relationship with the CAT Fund. Finkbiner v. Medical Professional Liability Catastrophe Loss Fund, 546 A.2d 1327, 1329 (Pa. Commw. Ct. 1988), aff'd, 565 A.2d 157 (Pa. 1989).

Defendants maintain that a basic insurance carrier's obligation to pay delay damages on behalf of its insured is limited by 40 Pa. Stat. § 1301.702(j), the section of the Malpractice Act which controlled the amount of delay damages and post-judgment interest paid by the CAT Fund. Section 1301.702(j) states as follows:

Delay damages and postjudgment interest applicable to the fund's liability in a case shall be paid by the fund and shall not be charged against the insured's annual aggregate limits. The basic insurance carrier or self-insurer shall be responsible for its proportionate share of delay damages and post-judgment interest.

40 P.S. § 1301.702(j) (West 1999), repealed effective October 1, 2002. Section 1301.702(j) became effective on November 26, 1996, more than four months after the effective date of the Policy. Id.; see also Willet v. Pennsylvania Medical Catastrophe Loss Fund, 702 A.2d 850, 855 n.10 (Pa. 1998). The Malpractice Act does not clearly state that this section is to apply retroactively. Consequently, this section cannot be applied retroactively to

affect Zitomer's and MedPro's rights under the Policy. See Morabito's Auto Sales v. Dep't of Transp., 715 A.2d 384, 386 (Pa. 1998) ("A statute will not generally be construed to be retroactive unless clearly and manifestly so intended by the legislature.") (citation omitted). Consequently, 40 Pa. Stat. § 1301.702(j) cannot be applied to limit MedPro's obligation to pay the delay damages awarded, and post-judgment interest accrued, on the judgment in Young v. Zitomer.

Even if this statute could be construed to apply retroactively, it would not apply to limit MedPro's liability for delay damages and post-judgment interest in this case. Defendants argue that this statute limits MedPro's liability for delay damages and post-judgment interest to its "proportionate share," a percentage they claim is calculated by dividing the \$200,000 MedPro paid on the jury's verdict by the total amount of the verdict. Proportionate share is not defined by Section 1301.702(j).

Federal courts adjudicating a case under the law of the Commonwealth of Pennsylvania must apply Pennsylvania law as interpreted by that state's highest court, or, in the absence of guidance from the Pennsylvania Supreme Court, its intermediate appellate court. See Gares v. Willingboro Township, 90 F.3d 720, 725 (3d Cir. 1996). Defendants admit that no Pennsylvania appellate court has interpreted subsection (j) of 40 P.S. § 1301.702. (Defs. Mem. at 12.) The only authority which Defendants

have identified as supporting their position is a 2003 opinion of the Philadelphia County Court of Common Pleas, Caruso v. Neumann Medical Center, Philadelphia County Court of Common Pleas, Feb. Term 1998, No. 1060, 2003 WL 1861580 (Pa. Com. Pl. Apr. 8, 2003). The primary issue before the court in Caruso was the extent of the obligation of the CAT Fund to pay delay damages in a case in which it was a named defendant. The Caruso court focused on the special nature of the CAT Fund as an executive agency of the Commonwealth of Pennsylvania to distinguish the CAT Fund's obligation to pay delay damages from the obligation of an insurance carrier to pay delay damages on behalf of its insured. Id. at *2-8. The Caruso court recognized that, although delay damages may ordinarily be assessed against defendants jointly and severally, delay damages cannot be assessed jointly and severally against the CAT Fund because "in causes of action in tort, the rule of joint and several liability does not apply to a defendant that is a Commonwealth party. . . ." Id. at *16-17 (citing Allen v. Mellinger, 784 A.2d 762, 789 (Pa. 2001)). The Caruso Court also noted that, unlike an insurance carrier, the CAT Fund does not "stand in the shoes" of a tortfeasor who is jointly and severally liable because there is no contract of indemnification between the tortfeasor and the CAT Fund. Id. at *18. Since the plain language of the statute states that the CAT Fund is required to pay delay damages "applicable to the fund's liability in a case," and the CAT Fund cannot be held

jointly and severally liable for delay damages, the Caruso court determined that the percentage of delay damages paid by the CAT Fund (i.e., its "proportionate share") would be equal to the percentage of the compensatory award paid by the CAT Fund. Id. at *19.⁴ The Caruso court concluded that, since the CAT Fund and the basic insurance carrier could not be held jointly and severally liable for delay damages, "[e]ach should be held responsible, at the most, only for its own separate and independent proportionate share of those damages" and calculated the basic insurance carrier's proportionate share using the formula it used in calculating the CAT Fund's proportionate share. Id. at 20.

Defendants contend that this formula should be used to determine MedPro's obligation to pay delay damages and post-judgment interest in Young v. Zitomer, even though the CAT Fund was not a named defendant in that case. Caruso is not, however, binding on this Court. See Keeley v. Loomis Fargo & Co., 183 F.3d 257, 269 n.9 (3d Cir. 1999)(noting that trial court decisions are at most persuasive, but not binding, authority); see also Wirtz v. Phillips, 251 F. Supp. 789, 796 (W.D. Pa. 1965) ("[W]here the only

⁴Caruso calculated the CAT Fund's obligation to pay delay damages pursuant to Section 1301.702(j) by first dividing the amount of the compensatory award for which the CAT Fund was responsible by the total amount of the compensatory award to find the percentage of the compensatory award attributable to the CAT Fund; the total amount of delay damages was then multiplied by that percentage to determine the CAT Fund's liability for delay damages. Id.

decisions on an issue are those of courts of common pleas, which are not binding on other courts of the state, they are not binding upon federal courts under this section. This applies even in diversity cases where federal courts sit in effect as state courts, and so are not bound to follow common pleas court decisions.") (citations omitted). Moreover, the instant action is factually dissimilar to Caruso and the factors which led the Caruso court to interpret Section 1301.702(j) to limit the proportionate share of delay damages paid by the basic insurance carrier do not appear in this case. The instant action does not concern the allocation of delay damages between the CAT Fund and other defendants. This Court, unlike the Court of Common Pleas, need not be concerned about either the CAT Fund's special status as an executive agency of the Commonwealth of Pennsylvania or the non-contractual relationship between the CAT Fund and the covered health professional. MedPro is a professional liability insurer and the Policy is a contract which requires MedPro to "stand in the shoes" of Zitomer, a tortfeasor who is jointly and severally liable for delay damages and post-judgment interest.

Furthermore, there is nothing in the plain language of Section 1301.702, the provision which describes the administration and obligations of the CAT Fund, that limits the liability of basic insurance carriers to pay delay damages or post-judgment interest unless the CAT Fund is also obligated to pay a portion of delay

damages and post-judgment interest. Defendants have not cited any authority which requires the application of Section 1301.702(j) in a case where the CAT Fund is not a defendant and this Court has found none. Accordingly, in the absence of any other authority to the contrary, the Court will follow the plain language of Section 1301.702(j) rather than Defendants' interpretation of that statute. See Gares, 90 F.3d at 725-26 (In determining how the state courts would interpret a statute, the federal court considers "'analogous decisions, considered dicta, . . . and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand.'" We begin with the plain language of the statute.") (quoting McGowan v. University of Scranton, 759 F.2d 287, 291 (3d Cir. 1985)). The Court finds, therefore, that 40 Pa. Stat. § 1301.702(j) does not limit MedPro's liability for delay damages and post-judgment interest in this case. As the Court has found that MedPro is obligated, under the Policy, to pay all delay damages and post-judgment interest in Young v. Zitomer, Plaintiffs' Motion for Summary Judgment is granted with respect to Counts I and II of the Second Amended Complaint and Defendants' Motion for Summary Judgment is denied with respect to those Counts.

B. Common Law Indemnity

Defendants have moved for summary judgment on Count III of the Second Amended Complaint, which asserts a claim for indemnification based on Pennsylvania common law. The Second Amended Complaint

alleges that MedPro exercised exclusive control over the first \$200,000 of basic insurance coverage on behalf of Zitomer, refused to enter into settlement negotiations with Young, never asked Zitomer for consent to settle, and did not tender its policy until after the jury's verdict. (Id. ¶¶ 58-59, 65-67.) The Second Amended Complaint also alleges that, as a result of MedPro's refusal to settle, Zitomer became responsible to pay substantial delay damages and post-judgment interest which he is unable to pay. (Id. ¶ 64.)

"Indemnity is a common law equitable remedy that shifts the entire loss from one who has been compelled to pay a judgment to another who should bear it." Fleck v. KDI Sylvan Pools, Inc., 981 F.2d 107, 122 (3d Cir. 1992) (citing Builder's Supply Co. v. McCabe, 77 A.2d 368, 370 (Pa. 1951); Restatement of Restitution § 76 (1962)); see also City of Wilkes-Barre v. Kaminski Bros., Inc., 804 A.2d 89, 92 (Pa. Commw. 2002) (describing common law indemnity as a "fault-shifting mechanism that comes into play when a defendant held liable by operation of law seeks to recover from a defendant whose conduct actually caused the loss"). Defendants argue that they are entitled to the entry of summary judgment in their favor on Count III because Zitomer has not paid any of the delay damages and post-judgment interest in Young v. Zitomer. The law is well settled that, "before any right of indemnification arises, the indemnitee must in fact pay damages to a third party.

The reason for this is obvious: since indemnity shifts the loss, no right accrues until one suffers a loss by paying damages to a third party." Fleck, 981 F.2d at 122 (citing F.J. Schindler Equipment Co. v. The Raymond Co., 418 A.2d 533, 534 (Pa. Super. Ct. 1980); National Liberty Ins. v. Kling Partnership, 504 A.2d 1273, 1278 (Pa. Super. Ct. 1986)). Plaintiffs do not deny that Zitomer has not paid any of the delay damages and post-judgment interest in Young v. Zitomer. Accordingly, the Court finds that Zitomer has no right to common law indemnity. Defendants' Motion for Summary Judgment is therefore granted with respect to Count III of the Second Amended Complaint.

C. Defendants' Counterclaim

Defendants have asserted a Counterclaim against Plaintiffs seeking a declaration that MedPro's total liability is "limited to \$200,000, plus its pro rata share of delay damages, if any." (Defs.' Countercl.) Defendants seek summary judgment in their favor on the Counterclaim. For the reasons stated in Section III.A. above, the Court finds that Defendants are not entitled to summary judgment on their counterclaim because MedPro is obligated, under the Policy, to pay the full amount of delay damages awarded and post-judgment interest accrued in Young v. Zitomer. Defendants' Motion for Summary Judgment is therefore denied with respect to the Counterclaim.

IV. CONCLUSION

For the reasons stated above, summary judgment is granted in favor of Plaintiffs and against Defendants on Counts I and II of the Second Amended Complaint. Summary judgment is also granted in favor of Defendants and against Plaintiffs on Count III of the Second Amended Complaint. Defendants' Motion for Summary Judgment on the Counterclaim is denied.

An appropriate order follows.

entered in favor of Defendants and against Plaintiffs on Count III of the Second Amended Complaint.

4. Defendants' Motion is **DENIED** with respect to Defendants' Counterclaim.
5. An assessment of damages hearing will be held on June 16, 2004 at 1:30 p.m. in Courtroom 6A, 6th Floor, United States Courthouse, 601 Market Street, Philadelphia, PA 19106.

BY THE COURT:

John R. Padova, J.