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

ZAZA ABUTIDZE AND YELENA MASHKEVICH, H/W	:	CIVIL ACTION
	:	04-1578
v.	:	
HAROLD FISHER & SONS, INC, d/b/a "DELANCO TARPS" and ENTERPRISE RUBBER, INC.	:	
v.	:	
ALERT MOTOR FREIGHT, INC.	:	
v.	:	
UNITED STATES LIABILITY INSURANCE GROUP ("Mount Vernon Fire Insurance Company") and REPUBLIC WESTERN INSURANCE CO., jointly, severally and in the alternative.	:	

MEMORANDUM AND ORDER

Joyner, J. **January 10, 2007**

Presently before the Court is Third Party Defendant Mount Vernon Fire Insurance Company's ("Mt. Vernon") Motion for Summary Judgment (Doc. No. 54), Third Party Plaintiff Alert Motor Freight, Inc.'s ("Alert Motor") opposition and Cross Motion for Summary Judgment (Doc. Nos. 57, 58), and Mt. Vernon's reply thereto (Doc. No. 59).[1] Mt. Vernon is moving to dismiss Alert

[1] Not to be left out, another Third Party Defendant insurer, Republic Western Insurance Co. ("Republic Western"), filed a "response" (Doc. No. 62) to Mt. Vernon's "suggestion" that Republic Western should defend and/or indemnify Alert Motor. Mt. Vernon did not, however, move for summary judgment against Republic Western. This is not the least bit surprising because Republic Western has no claims pending against Mt. Vernon. The Court also did not solicit Republic Western's views on Mt. Vernon's position. And so the Court accordingly disregards this

Motor's declaratory judgment action that it owes a duty to defend and/or indemnify Alert Motor for claims arising out of an injury to Plaintiff Zaza Abutidze ("Abutidze"). For the reasons below, the Court GRANTS Mt. Vernon's Motion for Summary Judgment and DISMISSES WITH PREJUDICE Alert Motor's Joinder Complaint (Declaratory Judgment action) against Mt. Vernon.[2]

Background[3]

More than four years ago, a rubber strap struck Abutidze's left eye while he checked to see that the loads of coil he was

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filing.

[2] Alert Motor, along with the Third Party Defendant insurers, have filed a flurry of motions (and cross motions) for summary judgment. The Court previously granted Third Party Defendants Continental Casualty Company's and Travelers Property Casualty Company's Motion for Summary Judgment. See Abutidze v. Harold Fisher & Sons, Inc., 04-1578, 2006 U.S. Dist. LEXIS 68169 (E.D. Pa. Sept. 20, 2006). Third Party Defendant Republic Western (Alert Motor's purported commercial automobile carrier) has filed a motion for summary judgment (Doc. No. 61) seeking resolution of whether it owes a duty to defend and/or indemnify Alert Motor in this action. Additionally, Alert Motor, in its opposition to Mt. Vernon's motion for summary judgment, moved for summary judgment against each of the insurers, or in the alternative for the Court to dismiss it from this case. Defendants Harold Fisher & Sons, Inc. (d/b/a Delanco Tarps) and Enterprise Rubber, Inc oppose Alert Motor's motion for dismissal. For the sake of clarity, the Court will address those motions for summary judgment separately.

[3] Except where noted, the parties are in substantial agreement as to the basic facts underlying Abutidze's action. Compare Mt. Vernon Fire Insurance Company's Memorandum of Law in Support of Summary Judgment ("D. Memo.") at 2-3 with Alert Motor's Memorandum of Law in Opposition to Motion for Summary Judgment by Mt. Vernon ("P. Memo.") (Doc. No. 58) at 4.

transporting were secure.[4] He (along with his wife) then sued Harold Fisher & Sons, Inc. (d/b/a Delanco Tarps) ("Harold Fisher") and Enterprise Rubber, Inc. ("Enterprise"), the respective manufacturers of the leather tarps and straps that were used to secure the coils, alleging product liability claims and negligence. Discovery commenced under the assumption that Alert Motor employed Abutidze. Before long, however, it became apparent to all involved that Omni Financial Services, Inc. ("Omni"), and not Alert Motor, might be Abutidze's actual employer. Because of this uncertainty, the Court granted leave to allow a third-party complaint to be filed against Alert Motor (Doc. Nos. 14).[5] Alert Motor, in turn, filed a Joinder Complaint

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[4] The parties agree that Abutidze was transporting coils on behalf of Alert Motor. Although Mt. Vernon contends that Abutidze was "functioning as an employee of Alert [Motor]" on the day of the incident, this fact is still very much in dispute. D. Memo. at 2. Nevertheless, whether Abutidze was or was not an employee of Alert Motor has no bearing on the Court's disposition of Mt. Vernon's motion.

[5] Enterprise filed its third party complaint on December 15, 2004 (Doc. No. 15). As best the Court can determine, Enterprise is alleging that Alert Motor negligently handled and maintained the rubber straps and hooks which it manufactured and supplied to Alert Motor. And it was these acts of negligence that caused Abutidze's injuries. So Enterprise is, of course, seeking contribution from Alert Motor in the event Enterprise is found liable in the underlying action. Harold Fisher did not file a third party complaint against Alert Motor; rather it filed a "cross claim" (Doc. No. 18). Not only did this filing not state any claims against Alert Motor, but Rule 13 of the Federal Rules of Civil Procedure does not permit for cross claims to be made against a person made a party under Rule 14. See Fed. R. Civ. P. 13(g) ("A pleading may state as a cross-claim any claim by one party against a co-party . . . ."); id 13(h) ("Persons

(Doc. No. 21) against four insurance companies seeking a defense and/or indemnification against all claims it faces in this litigation.

Most relevant to this motion is Alert Motor's assertion that it is entitled coverage (i.e. defense and/or indemnification) under the commercial general liability insurance policy ("the Policy") issued by Mt. Vernon. See P. Memo. at 2-6. Mt. Vernon offers several arguments in response as to why it does not owe Alert Motor coverage. First, Mt. Vernon argues that the Policy's "Aircraft, Auto, and Watercraft Exclusion" excludes coverage for the claims asserted by Abutidze in the underlying action. See D. Memo. at 2. Second, Mt. Vernon contends that the injuries sustained by Abutidze are not covered by the "Product-Completed Operations Hazard" provision. See id.[6]

Discussion

I. Standard of Review

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other than those made parties to the original action may be made parties to a . . . cross-claim in accordance with the provisions of Rules 19 and 20."). To be clear then, Harold Fisher *does not* have any claims pending against Alert Motor in this action.

[6] Mt. Vernon makes a third argument that Alert Motor is not entitled to coverage because the general commercial policy includes an exclusion for claims brought by employees performing duties related to the conduct of the insured's business. See D. Memo. at 2, 18-25. Because the Court resolves the issue of Mt. Vernon's coverage with respect to Abutidze's claims on other grounds, it does not address this argument. Accordingly, the Court makes no determination as to which entity (Omni, Alert Motor, or one of the others mentioned in the various insurance policies) alone (or perhaps jointly) employed Abutidze.

In deciding a motion for summary judgment under Fed. R. Civ. P. 56, a court must determine "whether there is a genuine issue of material fact and, if not, whether the moving party is entitled to judgment as a matter of law." Medical Protective Co. v. Watkins, 198 F.3d 100, 103 (3d Cir. 1999) (internal citation omitted). Rule 56(c) provides that summary judgment is appropriate:

> . . . if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). On a motion for summary judgment, "the court must view the evidence in the light most favorable to the party against whom summary judgment is sought and must draw all reasonable inferences in [its] favor." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587(1986).

The moving party bears the initial burden of demonstrating the absence of a disputed issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Upon such a showing, the burden shifts to the non-moving party to present "specific facts showing the existence of a genuine issue for trial." Fed. R. Civ. P. 56(e). In doing so, the party opposing summary judgment

cannot simply rest on the allegations contained in its pleadings and must establish that there is more than a "mere scintilla of evidence in its favor." Anderson, 477 U.S. at 249. Showing "that there is some metaphysical doubt as to the material facts" is insufficient to defeat a motion for summary judgment. Matsushita Elec. Indus. Co., 475 U.S. at 586. If the non-moving party fails to create "sufficient disagreement to require submission [of the evidence] to a jury," the moving party is entitled to judgment as a matter of law. Anderson, 477 U.S. at 251-52.

II. Choice of Law

Abutidze was injured in Pennsylvania. The parties agree, however, that the insurance contract was made in New Jersey and thus New Jersey law governs the legal issues raised in this motion. See, e.g., J.C. Penney Life Ins. Co. v. Pilosi, 393 F.3d 356, 360-61 (3d Cir. 2004) ("Under Pennsylvania choice of law rules, an insurance contract is governed by the law of the state in which the contract was made.") (citations omitted).[7]

[7] Mt. Vernon's citation to National Starch and Chemical Corp. v. Great American Ins. Cos., 743 F. Supp. 318 (D.N.J. 1990), is irrelevant to the choice of law analysis. When a district court's subject matter jurisdiction is founded upon diversity, it applies the choice of law rules of the state in which it sits. See, e.g., Klaxon Co. v. Stentor Co., 313 U.S. 487, 494 (1941); Shuder v. McDonald's Corp., 859 F.2d 266, 269 (3d Cir. 1988). Because a New Jersey-based federal district court decided *National Starch*, it applied (correctly) New Jersey's choice of law rules to resolve a conflict. Seeing as this Court sits in Pennsylvania, that case is obviously of no help.

III. Analysis

A. *New Jersey's Standards for Interpreting Insurance Policies*

Whether Mt. Vernon owes a duty to defend and/or indemnify Alert Motor is basically a contract question; namely, it requires a court to interpret an insurance policy. Under New Jersey law, courts should give an insurance policy's words "their plain ordinary meaning." Zacarias v. Allstate Ins. Co., 168 N.J. 590, 595 (2001). The New Jersey Supreme Court has observed, however, that when interpreting insurance policies courts must "assume a particularly vigilant role in ensuring their conformity to public policy and principles of fairness." Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 175 (1992). But despite this and the further recognition that insurance contracts are 'contracts of adhesion,' New Jersey courts will not "write for the insured a better policy of insurance than the one purchased" in the absence of any ambiguities in the policy. Gibson v. Callaghan, 158 N.J. 662, 669 (1999)(quoting Longobardi v. Chubb Ins. Co., 121 N.J. 530, 537 (1990)); see also Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1965) ("When the terms of an insurance contract are clear, it is the function of a court to enforce it as written and not to make a better contract for either of the parties."). Ambiguities (if found) are, however, interpreted in favor of the insured. See, e.g., Cruz-Mendez v. ISU/Ins. Servs., 156 N.J. 556, 571 (1999).

When an insurer (as in the case of Mt. Vernon) relies upon a policy exclusion to avoid coverage, the insurer bears the burden of proving that the exclusion applies. See, e.g., Princeton Ins. Co. v. Chunmuang, 151 N.J. 80, 95 (1997) (citation omitted). And in considering the applicability of an exclusion, courts are to construe it narrowly. See, e.g., Burd v. Sussex Mut. Ins. Co., 56 N.J. 383, 399 (1970). Nevertheless, exclusionary provisions are considered presumptively valid and will be given effect if "specific, plain, clear, and not contrary to public policy." Doto v. Russo, 140 N.J. 544, 559 (1995). This is consistent with the understanding that "insurance polices must be construed to comport with the reasonable expectations of the insured." Gibson, 158 N.J. at 671 (citations omitted). And it is only in exceptional circumstances that New Jersey courts will interpret an unambiguous contract in a manner contrary to its plain meaning in order "to fulfill the reasonable expectations of the insured." Werner Indus., Inc. v. First State Ins. Co., 112 N.J. 30, 35-36 (1988).

B. Does the "Aircraft, Auto, and Watercraft" exclusion apply?[8]

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[8] Mt. Vernon has apparently conceded that but for the Policy's exclusionary provisions, it would owe a duty to defend and/or indemnify Alert Motor against Enterprise's claim for contribution. The commercial general liability policy issued by Mt. Vernon provides that:

> [Mt. Vernon] will pay those sums that [Alert Motor] becomes legally obligated to pay as damages because of 'bodily injury' or

The Policy includes an "Aircraft, Auto, and Watercraft" exclusion ("Auto exclusion") that excludes from coverage:

> "Bodily injury" . . . ***arising out*** of the ownership, maintenance, use or entrustment to other of any . . . "auto" . . . owned or operated by or rented or loaned to [Alert Motor]. ***Use includes*** operation ***and*** "loading and unloading".

Mt. Vernon Policy at 7 (emphasis added) (all page references are to the electronically filed copy). Section V (Definitions) of the Policy further defines "auto" and "loading and unloading," respectively, as:

> "Auto" means a land motor vehicle, trailer or semi-trailer designed for travel on public roads, including ***any attached*** machinery or equipment.
>
> "Loading and unloading" ***means the handling*** of property:

> 'property damage' to which this insurance applies. [Mt. Vernon] will have the right and duty to defend the insured against any 'suit' seeking those damages.

D. Memo, Ex. D. ("Mt. Vernon Policy") at 5 (Section I - Coverages; Coverage A - Bodily Injury and Property Damage) (all page references are to the electronically filed copy). Because Abutidze did not sue Alert Motor in the underlying action, the "suit" in question that Mt. Vernon would have to defend is Enterprise's third-party action against Alert Motor for contribution. The Court's analysis therefore proceeds with the understanding that both Mt. Vernon and Alert Motor interpret the above provision as follows: If a jury were to conclude that Alert Motor was jointly responsible with Enterprise for causing Abutidze's injuries, then Enterprise would seek contribution for the percentage of damages attributable to Alert Motor's negligence - thus triggering the need for coverage under the Policy.

> a. After it is moved from the place where it is accepted for movement into or onto an . . . "auto"; or
>
> b. ***While*** it is in or ***on*** an . . . "auto"; or
>
> c. While it is being moved from an . . . "auto" to the place where it is finally delivered[.]

Mt. Vernon Policy at 14-16 (emphasis added).

For the exclusion to apply, Mt. Vernon has the burden of establishing that Abutidze's injury "arose from the use of an auto." The parties do not dispute that the tractor trailer on which the coils were being transported (and checked) at the time of Abutidze's accident qualifies as an "auto" under the policy. Therefore, whether the Auto exclusion applies depends upon whether Abutidze was "using" the tractor trailer when he was injured.

Mt. Vernon candidly acknowledges that there are no cases (New Jersey or otherwise) on point involving the same factual scenario as this one. See D. Memo. at 15. It argues, however, that there is ample case law both interpreting similarly worded exclusionary provisions and determining whether a particular activity constitutes loading and unloading. And in its view, this case law can guide the Court to only one conclusion - the Auto exclusion applies. Indeed, Mt. Vernon details over several pages in its brief that New Jersey courts have consistently (and liberally) construed the phrase "use of an automobile" to include

acts of "loading and unloading." See id at 15-17 (citing among other authorities Maryland Casualty v. N.J. Manufacturers Ins. Co., 137 A.2d 577, *aff'd*, 28 N.J. 17 (1958)). Interestingly, Alert Motor effectively concedes that Mt. Vernon's position is correct. See P. Memo. at 7 ("[I]n all candor, Kennedy would seem to support Mt. Vernon's position [that the Auto exclusion applies.]") (citing Kennedy v. Jefferson Smurfit Co., 147 N.J. 394, 398-401 (1997) (discussing extensively that use of an 'auto' includes loading and unloading)); see also Kennedy, 147 N.J. at 398 ("[T]he concept of 'use of a vehicle' includes the acts of loading and unloading the vehicle is well settled.").

Putting aside momentarily Alert Motor's apparent concession, Mt. Vernon is basically urging this Court to hold, as a matter of law, that Abutidze's act of checking the coils constitutes use of an auto because it involved an act of "loading and unloading." The Court declines to do so. Mt. Vernon needs only the language of the Policy to establish that the exception applies.[9]

[9] While the Court resolves the issue of whether Mt. Vernon owes a duty to defend and/or indemnify Alert Motor on the basis of the Policy's language, it is important to note that the Court could not have simply granted summary judgment on behalf of Mt. Vernon because of Alert Motor's concession that Mt Vernon's reading of the "loading and unloading" cases is correct. Whether Mt. Vernon correctly interprets and applies those cases is quite obviously a question of law. So whether Mt. Vernon is correct requires a legal determination – one that a court must make independently. And so while it might be relevant (or even helpful) that a party concedes a legal position, to do so is an insufficient reason to rule in favor of one party or another as a matter of law.

First, the Auto exception itself defines use of an auto to include acts of "loading and unloading." Second, the definition of "loading and unloading" includes the "handling of property . . . while it is on an . . . auto." Mt. Vernon Policy at 15-16. In this case, it is uncontested that Abutidze was *handling property* - the tarps and rubber straps as he checked the coils – while they were *on* the back of the tractor trailer (an "auto") he was operating. Therefore, by checking the tarps, straps and coils Abutidze was performing an act that the *Policy* unambiguously defines as one of "loading or unloading." See Mt. Vernon Policy at 15 ("'Loading or Unloading' means the handling of property . . . while it is . . . on an 'auto'"). And so Abutidze must have been using an auto when he was injured because the *Policy's* Auto exclusion defines the use of an auto to include acts of "loading or unloading." See id at 7 ("Use includes operation and 'loading and unloading'"). Because Abutidze's bodily injuries "arose out of the use"[10] of an auto, the Court concludes that the "specific,

[10] New Jersey courts have consistently held that a party demonstrates that an injury 'arises out of the use of an auto' by showing that "a substantial nexus [exists] between the injury and the use of the vehicle." Westchester Fire Ins. Co. v. Eisner, 312 A.2d 664, 669 (N.J. Super. Ct. App. Div. 1973), *aff'd per curiam,* 65 N.J. 152 (1974); see also Lindstrom by Lindstrom v. Hanover Ins. Co. ex rel. New Jersey Auto. Full Ins. Underwriting Ass'n, 138 N.J. 242 (1994) (quoting approvingly *Westchester Fire's* interpretation of 'arising out of'), *overruled on other grounds by*, Shaw v. City of Jersey City, 174 N.J. 567 (2002). In other words, it was unnecessary for Mt. Vernon to show that Abutidze's injuries were the "direct and proximate result, in a strict legal sense, of the use of an automobile [i.e. tractor trailer]" for

plain, [and] clear" language of the Auto exception applies and Mt. Vernon does not owe a duty to defend and/or indemnify Alert Motor in this action. Doto, 140 N.J. at 559.

This holding is consistent with the understanding that courts are to treat an exclusionary provision as presumptively valid under New Jersey law. It is only when such a provision precludes coverage in a manner contrary to public policy that a court should refuse to apply it as written. See, e.g., Prudential Prop. & Cas. Ins. Co. v. Brenner, 795 A.2d 286, 289 (N.J. Super. Ct. App. Div. 2002). Alert Motor fails to offer a single reason why the Auto exclusion violates New Jersey public policy. But this silence is understandable; no New Jersey court has ever hinted that such a provision (or those similarly worded) is antithetical to New Jersey public policy. And so this Court must give the Auto exception's unambiguous language its full effect. Mt. Vernon owes no duty to defend and/or indemnify Alert Motor for any damages that it may face because of Abutidze's injuries.[11]

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the Auto exception to apply. Westchester Fire Ins. Co., 312 A.2d at 668-69.

[11] The Court emphasizes that its holding rests solely on the language of the Policy issued by Mt. Vernon. It expresses no opinion either as to: (1) whether Abutidze's act of checking the tarps and rubber straps falls within the ambit of New Jersey's "loading and unloading" cases; or (2) whether the allegedly negligent acts of Alert Motor, Enterprise or Harold Fisher that caused Abutidze's injury constitute an integral part of the "loading and unloading" process.

C. Do Abutidze's injuries trigger the "Products-Completed Operations Hazard" coverage?

Mt. Vernon also seeks a determination that the "Products-Completed Operations Hazard" coverage does not apply to Enterprise's claims against Alert Motor. See D. Memo at 25-28. This provision is basically a type of product liability coverage. See id at 27. For reasons not absolutely clear to the Court, Mt. Vernon seemingly reads Enterprise's allegations that Alert Motor "was involved in the assembl[y], distribut[ion], service, supply, maintenance or other handling of the rubber strap(s) and tarp(s) involved in [Abutidze's] accident" as stating a claim that implicates the Products-Completed Hazard coverage.[12] Third Party Complaint of Defendant Enterprise Rubber, Inc. ("Enterprise Compl.") at ¶ 6; Reply of Mt. Vernon ("D. Rep.") (Doc. No. 59) at 4. There is a difference, however, between a party making generalized allegations and actually stating a claim.

Enterprise's lone claim against Alert Motor is for contribution.[13] See id at ¶ 10 ("[Enterprise] believes and therefore averts that [Alert Motor] is liable to the [P]laintiffs, is liable over to [Enterprise] on the claims set forth in [Plaintiffs'] Complaint . . . by way of contribution

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[12] For products liability or something else is unclear.

[13] Presumably this claim is premised on the theory that Alert Motor's alleged negligence caused (or contributed to) Abutidze's injury.

and/or indemnity."). Thus any damages that Alert Motor would owe Enterprise (by way of contribution) would be those resulting from Abutidze's injuries. But the Court has already concluded that Mt. Vernon does not owe a duty to defend and/or indemnify Alert Motor for damages arising out of Abutidze's accident. Since Enterprise has no other claims for "bodily injuries" or "property damage" pending against Alert Motor, there is nothing else in its Complaint that would trigger the Products-Completed Operations Hazard coverage.[14]

Conclusion

For the foregoing reasons, the Court GRANTS Mt. Vernon's Motion for Summary Judgment and DISMISSES WITH PREJUDICE Alert Motor's Complaint against it. The Court DENIES Alert Motor's Motion for Summary Judgment. An appropriate Order follows.

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[14] Indeed, Alert Motor does not even seek coverage under this provision. See P. Memo. at 14 ("One is hard pressed to fathom how this exclusion has any bearing on [the] relevant facts pertaining to this case."). The Court additionally observes that the Products-Completed Operations Hazard coverage does not extend to "'bodily injur[ies]' . . . occurring away from premises you own or rent and arising out of 'your product' . . . that are still in your physical possession." Mt. Vernon Policy at 16. The Policy defines "your product" as: "***any goods or products***, other than real property, manufactured, sold, ***handled***, distributed or disposed of by [Alert Motor]." Id at 17 (emphasis added). The parties agree that Abutidze was injured while handling goods and products - the tarps and straps – that were still in Alert Motor's physical possession (they were aboard a vehicle operated by Alert Motor) at the time of his accident. Therefore, Abutidze's injuries are not covered under this provision. And were this not the case, the Auto exception would do little to delimit the scope of Mt. Vernon's coverage.

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HAROLD FISHER & SONS, INC, d/b/a "DELANCO TARPS" and ENTERPRISE RUBBER, INC.	:	
v.	:	
ALERT MOTOR FREIGHT, INC.	:	
v.	:	
UNITED STATES LIABILITY INSURANCE GROUP ("Mount Vernon Fire Insurance Company"), and REPUBLIC WESTERN INSURANCE CO., jointly, severally and in the alternative.	:	

ORDER

AND NOW, this 10th day of January, 2007, upon consideration of Third Party Defendant Mount Vernon Fire Insurance Company.'s ("Mt. Vernon") Motion for Summary Judgment (Doc. No. 54), Third Party Plaintiff Alert Motor Freight, Inc.'s ("Alert Motor") opposition and Cross Motion for Summary Judgment (Doc. Nos. 57, 58), and Mt. Vernon's reply thereto (Doc. No. 59), it is hereby ORDERED that:

1. Mt. Vernon's Motion for Summary Judgment is GRANTED, and

2. Alert Motor's Motion for Summary Judgment with respect to Mt. Vernon is DENIED,

and

3. Alert Motor's complaint against Mt. Vernon seeking a declaratory judgment for coverage under its commercial general liability insurance policy is DISMISSED WITH PREJUDICE.

It is FURTHER ORDERED that JUDGMENT is ENTERED in favor of Mt. Vernon that it does not owe a duty to defend and/or indemnify Alert Motor in the above captioned matter. Third Party Defendant Mt. Vernon is hereby DISMISSED from this matter.

BY THE COURT:

s/J. Curtis Joyner
J. CURTIS JOYNER, J.