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

MILTON HOME SYSTEMS, INC.,	:	**MAY TERM, 2013**
Plaintiff,	:	**NO. 0683**
vs.	:	**COMMERCE PROGRAM**
SUR DEVELOPERS AND BUILDERS, INC.,	:	
Defendant.	:	**Control No.: 15042723**

ORDER

AND NOW, this 28th day of July, 2015, upon consideration of Defendant's motion for summary judgment filed under control number 15042723, Plaintiff's response in opposition thereto, and the opinion of the Court entered simultaneously herewith, it is hereby **ORDERED** and **DECREED** that the motion is **GRANTED IN PART** and **DENIED IN PART**. Maryland substantive law shall apply, but genuine issues of material fact regarding whether Miguel Castaneda-Escobar was contributorily negligent and/or assumed the risk of injury preclude Defendant from being entitled to summary judgment in whole.

BY THE COURT:

McINERNEY, J.

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MILTON HOME SYSTEMS, INC.,	:	**MAY TERM, 2013**
Plaintiff,	:	**NO. 0683**
vs.	:	**COMMERCE PROGRAM**
SUR DEVELOPERS AND BUILDERS, INC.,	:	
Defendant.	:	**Control Nos.: 15042723, 15042725, and 15042726**

OPINION

BY: Patricia A. McInerney, J. July 28, 2015

Plaintiff Milton Home Systems, Inc. ("Milton Home"), a Pennsylvania corporation, primarily seeks contribution from Defendant Sur Developers and Builders, Inc. ("Sur Developers"), a Maryland corporation, toward the settlement of claims involving injuries suffered by Miguel Castaneda-Escobar ("Escobar") in Maryland on Sur Developers' property and job site during the installation of a modular home that was being installed by Escobar's employer Ralph M. Construction, Inc. ("Ralph M.") after Milton Home built it in Pennsylvania and shipped it to Maryland.

With the pleadings and discovery being closed, Sur Developers has filed three motions for summary judgment. In its first motion, Sur Developers argues it is entitled to summary judgment because Maryland substantive law should apply to this case and under Maryland law, Escobar was contributorily negligent and/or assumed the risk of his injuries, thus precluding Milton Home from obtaining contribution. In its second motion, assuming Pennsylvania

substantive law were to apply, Sur Developers argues it is entitled to summary judgment because as a mere property owner, it cannot be held liable for injuries occurring to an employee of an independent contractor. In its third motion, assuming Pennsylvania substantive law were to apply, Sur Developers argues it is entitled to summary judgment because even if Milton Home proves its allegations that Sur Developers was also the general contractor for the installation of the modular home and hired Escobar's employer, Ralph M., as a sub-contractor to install/set the home, Sur Developer's would be entitled to statutory employer immunity.

For reasons that follow, this court has concluded Maryland law should determine whether Milton Home has a right to contribution against Sur Developers, but that genuine issues of material fact regarding whether Escobar was contributorily negligent and/or assumed the risk of injury prevent Sur Developers from being entitled to summary judgment in whole. And as the court has concluded Maryland law should determine whether Milton Home has a right to contribution against Sur Developers, the court has also concluded Sur Developer's second and third motions citing Pennsylvania law should be dismissed as moot.

I. BACKGROUND

In February 2010, Sur Developers, a Maryland corporation, entered into a sales agreement with Milton Home, a Pennsylvania corporation, wherein Sur Developers agreed to buy and Milton Home agreed to manufacture a six-box modular home. Modular homes are constructed in boxes or modules in a factory-like setting. The boxes or modules are then transported on trailers to a job site where a crane is used to assemble and "set" the boxes on a foundation and finishing work is completed. In this case, Milton Home manufactured the home in its production facility in Pennsylvania and then shipped the home to a property in Bethesda, Maryland owned by Sur Developers.

Milton Home used its standard 43-page contract for the sale of the modular home to Sur Developers. Milton Home's standard 43-page contract contained a 2-page written warranty/warranty registration. The warranty started, "[Milton Homes], (hereinafter known as the Manufacturer) has entered into a Sales Contract for a Manufactured Modular Housing Unit with _____ (here after known as the Builder); and the Builder has entered into a Construction Contract with: _____ (hereafter known as Customer)[.]" (Pl.'s Resp. re Contributory Negligence Ex. A.) Thus, in this case, the warranty identified Sur Developers as both the "Builder" and the "Customer" and Milton Homes as the "Manufacturer."

After listing a number of warranties and disclaimers, the warranty then proceeded to provide:

> Your builder is an independent contractor with special knowledge in the nature of the work you have chosen him to perform. He is not an agent or employee of the Manufacturer and he alone bears the final responsibility for the set up and satisfactory completion of you[r] manufactured modular housing unit.
>
> **Concurrent with the Builder's status as an independent contractor, he alone, separate and apart from the Manufacturer, is responsible for the satisfactory setting of the modular housing unit upon the foundation and final completion of all facets of the finished manufactured modular housing unit for the [C]ustomer.**

(*Id.* (emphasis original).) The written warranty also contained an arbitration provision, which provided, in part, that "[t]his contract and any dispute arising from it shall be governable by the laws of Pennsylvania." (*Id.*)

In this case, Ralph M., a Pennsylvania corporation, was hired to "set" the modular home Sur Developers purchased from Milton Home. At the time, Escobar was an employee of Ralph M.

On May 12, 2010, while working as a member of the "set crew" installing the six modular units at the Sur Developers' job site in Maryland, Escobar, without the aid of any fall protection, fell from the roof and was severely injured. The incident was investigated by Maryland's Office of Occupational Safety and Health ("MOSH"). MOSH issued a number of citations against Escobar's employer, Ralph M., but did not issue any citations against Sur Developers.

In April 2012, Escobar sued Milton Home in relation to his fall and subsequent injury. In his complaint, Escobar asserted two counts; one for negligence and one for strict liability. In his count for negligence, Escobar asserted Milton Home was negligent in, *inter alia*, (1) "[f]ailing to guard or ensure that there was a suitable fall protection system[] to address the potential danger of falling from the roof during [the modular home's] installation" and (2) "[r]equiring that its [modular homes] be installed in a short time frame, and pressuring [the] contractor to complete the work in a rushed manner, thereby increasing the likelihood that the contractor would not devote time to ensure safety[.]" (Def.'s Mot. re Contributory Negligence Ex A.) In his count for strict liability, Escobar asserted Milton Home was strictly liable because, among other things, the modular home "was designed, manufactured, sold, and supplied in a defective and unsafe condition, unreasonably dangerous to [Escobar] and to others … ." (*Id.*)

In May 2013, Milton Home filed the instant action against Sur Developers for contribution in relation to the *Escobar* matter. Without adopting them, Milton Home incorporated by reference all the allegations contained in the *Escobar* complaint and added, among other things, that as the owner of and general contractor for the work site, Sur Developers "should have provided, or otherwise assured that, appropriate training, warning, equipment and instruction was provided by Ralph M. … to its employees prior to the erection of the pre-

fabricated housing unit ..." or "direct[ed] the foremen of Ralph M. ... to either provide fall protection to Escobar or order him to safely return to the ground." (Def.'s Mot. re Contributory Negligence Ex. B.) In its count for contribution and indemnity, Milton Home then asserted that it denies "that there was any dangerous or defective condition in connection with the multi-story prefabricated modular housing unit, and den[ies] any liability in connection with the *Escobar* [c]omplaint[,]" but that "[i]f it is judicially determined that there was any dangerous or unsafe condition associated with the ... modular housing unit, or with the worksite as alleged in the *Escobar* [c]omplaint, then it is ... Defendant S[ur] Developers [who] is directly responsible, as alleged above, and therefore, Defendant S[ur] Developers is jointly and severely liable with [Milton Home], or is liable to [Milton Home] for contractual and/or common law indemnification ... ." (*Id.* (italicization added).)

In May 2014, on the eve of trial for the underlying action, Milton Home settled Escobar's claims against it by: (1) tendering and paying Escobar the insurance coverage available to Milton Home; (2) assigning Escobar the contribution rights of Milton Home that are being asserted against Sur Developers in this case; and (3) assigning Escobar potential insurance coverage Milton Home may have as "Named Additional Insureds" under two Liberty Mutual policies.

In June 2014, Raynes McCarty, counsel for Escobar in the underlying action, entered its appearance in the instant action on behalf of Milton Home so that it could prosecute the contribution rights assigned to Escobar. In April 2015, Sur Developers filed three separate motions for summary judgment against Milton Home, which are currently pending before this court.

In its first motion, Sur Developers argues for the application of Maryland substantive law. Regarding choice of laws, Sur Developers first argues there is a true conflict in this case because Maryland is a contributory negligence state rather than a modified comparative negligence state like Pennsylvania, and with contributory negligence, Escobar's own negligence would have barred his own recovery in the underlying action and would thus preclude any right to contribution against Sur Developers in the instant action. Regarding choice of laws, Sur Developers next argues "Maryland's qualitative contacts greatly outweigh[] Pennsylvania's qualitative contacts and therefore Maryland has priority of interest in the application of its rule of law." (Def.'s Mem. re Contributory Negligence 7.)[1] Specifically, asserting "Milton Home[] is essentially asking the court to determine what, if any, duties and responsibilities a Maryland business entity (Sur Developers) owed it and/or Escobar with regard[] to work place safety[,]" "Maryland's qualitative contacts include but are not limited to:

> 1) the accident occurred in Maryland; 2) the investigation was conducted by Maryland's Office of Occupational Safety and Health; 3) Sur Developers is a Maryland [c]orporation; 4) any alleged act or omission by Sur Developers or Milton Home[] occurred in Maryland; and, 5) the alleged failure to provide fall protection equipment occurred in Maryland.

(*Id.*)

Sur Developers then proceeds to argue under Maryland law, Escobar must be found to have been contributorily negligent and/or assumed the risk of his injuries, thus precluding Milton Home from obtaining contribution and/or indemnity and warranting summary judgment in favor of Sur Developers. In terms of contributory negligence and assumption of the risk, Sur Develops points to Escobar's deposition testimony that he was aware there was a risk of falling involved in working on a roof and/or its own expert's report that concludes a primary factor in Escobar's fall

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[1] Sur Developers' memoranda of law were unnumbered. For ease of reference, the court will cite them as if they were numbered.

was his decision to violate workplace safety standards by working more than six feet aloft without fall protection.

In response to Sur Developers' first motion for summary judgment, Milton Home argues Pennsylvania law should apply. As a preliminary matter, citing the choice of law provision in the warranty, Milton Home contends Sur Developers has agreed by contract to the application of Pennsylvania law in the instant action. As a secondary matter, Milton Home argues even if Sur Developers is not bound by contract to the application of Pennsylvania law, our choice of doctrine requires Pennsylvania law be applied in this case. Here, Milton Home cites to the federal court case of *Breskman v. BCB, Inc.*, 708 F. Supp. 655 (E.D. Pa. 1988), in which Pennsylvania choice of law rules were applied and it was determined the substantive law of Pennsylvania should be applied over the substantive law of Maryland or North Carolina, which is also a contributory negligence state, where the plaintiff was from Pennsylvania, the defendant was from North Carolina, and the car accident between the two occurred in Maryland.

However, even if Maryland substantive law was to be applied in this case, it is Milton Home's final position that there are genuine issues of material fact on the issues of contributory negligence and assumption of the risk, which would make entry of summary judgment inappropriate. Here, Milton Home points to evidence that (1) Escobar's employer, Ralph M., did not provide him with any training regarding fall protection and/or a fall protection harness, and actually prohibited the use of such harnesses as being both unnecessary and inefficient, and that (2) Escobar had been performing this type of work for approximately four years without incident and believed he was a safe worker and safe from falling.

In its second and third motions, Sur Developers argues in the alternative for summary judgment under Pennsylvania substantive law. Here, Sur Developers contends it is entitled to

summary judgment because (1) as a mere property owner it cannot be held liable for injuries occurring to an employee of an independent contractor or (2) assuming Milton Home proves its allegations that Sur Developers was the general contractor for the installation of the modular home and hired Escobar's employer, Ralph M., as a sub-contractor to install/set the home, which it contests, Sur Developer's would be entitled to statutory employer immunity pursuant to Pennsylvania's Workers' Compensation law. In its responses to these motions, Milton Home argues Sur Developers is not entitled to summary judgment under Pennsylvania law because (1) Sur Developers was not a mere property owner, but also the general contractor as it contends and (2) a property owner who is also the general contractor is not entitled to statutory immunity under our Workers' Compensation law.

II. DISCUSSION

A. Standard of Review.

"Pennsylvania law provides that summary judgment may be granted only in those cases in which the record clearly shows that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law." *Gutteridge v. A.P. Green Servs., Inc.*, 804 A.2d 643, 651 (Pa. Super. Ct. 2002). "In determining whether to grant summary judgment, the trial court must view the record in the light most favorable to the non-moving party and must resolve all doubts as to the existence of a genuine issue of material fact against the moving party." *Id.* "Thus, summary judgment is proper only when the uncontraverted allegations in the pleadings, depositions, answers to interrogatories, admissions of record, and submitted affidavits demonstrate that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law." *Id.* And it is "only when the facts are so clear that reasonable minds cannot differ," that a trial court may properly grant summary judgment. *Id.*

B. Choice of Law.

As a preliminary matter, Milton Home argues Sur Developers agreed by contract to the application of Pennsylvania law. Here, Milton Home cites to language contained within the arbitration provision of a written warranty that provides, "[t]his contract and any dispute arising from it shall be governable by the laws of Pennsylvania." (Pl.'s Resp. re Contributory Negligence Ex. A.) Milton Home argues this provision and Pennsylvania's adoption of Section 187 of the Restatement (Second) of Conflicts dictates Pennsylvania law "sets the negligence standard for this case." (Pl.'s Mem. re Contributory Negligence 8.) For the reasons that follow, this court does not agree.

Section 187 of the Restatement (Second) of Conflict of Laws, which has been cited by Pennsylvania courts, provides in most relevant part: "The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue." Restatement (Second) of Conflict of Laws § 187(1) *and see, e.g.*, *Miller v. Allstate Ins. Co.*, 763 A.2d 401, 403 (Pa. Super. Ct. 2000) (citing Section 187.) While the court agrees that to the extent it is required to construe the written warranty agreement between Sur Developers and Milton Home, it must give effect to the choice of law provision pursuant to Section 187 and apply Pennsylvania law, it does not agree that this choice of law provision dictates Pennsylvania law set the negligence standard for this case and govern whether one tortfeasor has a right to contribution or common law indemnity against another tortfeasor. Rather, in the opinion of this court, the law applicable to those issues is to be determined by Pennsylvania's "combination of the 'government interest' analysis and the 'significant relationship' approach of Section 145 of the Restatement (Second) of Conflicts[,]" which is generally applicable to the underlying tort.

See Troxel v. A.I. duPont Inst., 636 A.2d 1179, 1180 (Pa. Super. Ct. 1994) (discussing the Supreme Court of Pennsylvania's abandonment of the rule of *lex loci delicti*, which applied the law of the place where the tort was committed, and adoption of a more flexible approach in *Griffith v. United Air Lines, Inc.*, 203 A.2d 796 (Pa. 1964)).

Section 173 of the Restatement (Second) of Conflict of Laws, which specifically addresses contribution and indemnity claims, provides "[t]he law selected by application of the rule of § 145 determines whether one tortfeasor as a right to contribution or indemnity against another tortfeasor." Restatement (Second) of Conflict of Laws § 173. The comment to this section makes clear that with the exception of "[t]he existence of a contractual right to indemnity, and the rights created thereby," which are determined by the law selected by application of Section 187, *see id.* (cmt.), "choice of law principles generally applicable to the underlying tort determine whether one tortfeasor has a right of [contribution] or indemnity against another tortfeasor[,]" *see Allianz Inc. Co. v. Otero*, 353 F. Supp. 2d 415, 422 (S.D.N.Y. 2004) (concluding a contractual indemnity claim was governed by New Jersey law due to the presence of an express choice of law provision, while all other issues, including a common law indemnity claim, were governed by New York law).

While Milton Home's complaint against Sur Developers makes a claim for contractual indemnification, from this court's review of the parties' motion papers and exhibits such a claim does not appear viable as there is no express indemnity provision between Sur Developers and Milton Home. As such, this court will focus the remainder of its analysis on Pennsylvania's choice of law provisions that are generally applicable to the underlying tort and that were cited to by the parties.

Usually the first step in a choice of laws analysis in Pennsylvania is to determine whether an actual conflict exists between the laws of the competing states. *McDonald v. Whitewater Challengers, Inc.*, 2015 PA Super 104 *5 (Apr. 29, 2015). If an actual conflict does not exist, no further analysis is necessary, and the substantive laws of Pennsylvania will be applied to the issue. *See id.* If an actual conflict exists, then it must be classified as "true," "false," or "unprovided-for." *Id.*

A "true" conflict exists "'when the governmental interests of ***both*** jurisdictions would be impaired if their laws were not applied.'" *Id.*, *quoting Garcia v. Plaza Oldsmobile, Ltd.*, 421 F.3d 216, 220 (3d Cir. 2005) (emphasis original). If a true conflict exists, then it must be determined "'which state has the greater interest in the application of its law.'" *McDonald*, 2015 PA Super 104 at *5, *quoting Cipolla v. Shaposka*, 267 A.2d 854, 856 (Pa. 1970).

Here, both parties contend, and this court agrees, that a true conflict exists. In Maryland, even when the defendant's misconduct may have been the primary cause of the injury complained of, the common law defense of contributory negligence is designed to protect the defendant from any and all liability when any of the proximate and immediate cause of the plaintiff's injury can be traced to want of ordinary care and caution on the part of the plaintiff. *Coleman v. Soccer Ass'n of Columbia*, 69 A.3d 1149, 1153-54 (Md. 2013). Under such circumstances, it is Maryland's policy that the plaintiff "must bear the consequences of his own recklessness or folly." *Id.*, *quoting Irwin v. Sprigg*, 6 Gill. 200, 205 (Md. 1847). In Pennsylvania, statutory comparative negligence is designed to protect plaintiffs and apportion liability on the basis of fault, not to bar a plaintiff's recovery if it can be shown that the plaintiff "had any degree of fault at all ... ." *Howell v. Clyde*, 620 A.2d 1107, 1109 (Pa. 1993), *quoting Rutter v. Northeastern Beaver County Sch. Dist.*, 437 A.2d 1198, 1210 n. 6 (Pa. 1981). Rather,

under Pennsylvania's comparative negligence statute, even if "the plaintiff may have been guilty of contributory negligence [,]" the plaintiff may recover something so long as the plaintiff was less than 50% at fault for their injury. *See* 42 Pa. C.S. § 7102. The dichotomy between Maryland's common law contributory negligence defense and Pennsylvania's statutory comparative negligence scheme represents a true conflict and, accordingly, it must be determined which state has the greater interest in the application of its law.

"In *Griffith* ... , the Supreme Court [of Pennsylvania] abandoned the rule of *lex loci delicti,* which had applied the law of the place where the tort was committed, and adopted a methodology which is a combination of the 'government interest' analysis and the 'significant relationship' approach of Section 145 of the Restatement (Second) of Conflicts." *Troxel*, 636 A.2d at 1180. Under *Griffith*, when they relate to the "policies and interests underlying the particular issue before the court[,]" *Griffith*, 203 A.2d at 805, the following contacts are "considered vital in determining the state of most significant relationship[,]" *id.* at 802, to the issue at hand:

(1) "the place where the injury occurred,"

(2) "the place where the conduct causing the injury occurred,"

(3) "the domicil[e], 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[,]"

Restatement (Second) of Conflict of Laws § 145(2). *See also Griffith*, 203 A.2d at 802, *citing* Restatement (Second) of Conflict of Laws § 379(2), *now renumbered as* § 145(2), *and* Restatement (Second) of Conflict of Laws § 173 (providing "[t]he law selected by application of the rule of § 145 determines whether one tortfeasor has a right to contribution or indemnity

against another tortfeasor."). This analysis, thus, requires more than a mere counting of contacts. *Cipolla*, 267 A.2d at 856. Rather, the court must weigh a particular state's contacts on a qualitative rather than quantitative scale. *Id.*

First, the court will consider the place where the injury occurred. Here, it is undisputed that the underlying injury occurred in Maryland when Escobar fell from the roof. Second, the court will consider the place where the conduct causing the injury occurred. This is also Maryland as the concentration of alleged negligent acts causing injury to Escobar, and all of those for which Milton Home might obtain contribution or indemnity from Sur Developers, occurred in Maryland. A comment to the Restatement (Second) of Conflict of Laws notes: "The state where conduct and injury occurred will not by reason of these contacts alone be the state that is primarily concerned with the question [of] whether one tortfeasor may obtain contribution [or common law indemnity] against another. The local law of this state will, however, be applied unless some other state has a greater interest in the determination of the particular issue." Restatement (Second) of Conflict of Laws § 173 (cmt.). Thus, it appears to this court that the question going forward is whether Pennsylvania has some greater interest than Maryland in determination of the issues at bar.

Third, the court will consider the domicile, residence, nationality, place of incorporation and place of business of the parties. In this case, Sur Developers is a Maryland corporation that did business in Maryland; Milton Home is a Pennsylvania corporation that did business in Pennsylvania and Maryland; and, to whatever extent it is relevant, Escobar is a Pennsylvania resident that worked for a Pennsylvania company that did business in Pennsylvania and Maryland. As these contacts are fairly evenly mixed between Pennsylvania and Maryland, they

offset and do not move this court toward the conclusion that Pennsylvania has some greater interest than Maryland in determination of the issues at bar.

Fourth, the court will consider the place where the relationship, if any, between the parties is centered. As between Milton Homes and Sur Developers, there is some evidence that the parties' relationship is centered in Pennsylvania. Specifically, while the court did not find it dispositive to the issues at hand, the choice of law and forum selection provision in the written warranty and the forum selection provision in the larger contract are some evidence of the parties' relationship being centered in Pennsylvania. However, in the opinion of this court, these considerations are more than offset by the fact that as it pertains to alleged negligence, the parties' relationship is centered in Maryland. As discussed above, the injury occurred in Maryland and any allegedly negligent conduct causing the injury, particularly on the part of Sur Developers or Escobar, occurred in Maryland. As such, this factor favors application of Maryland law.

In opposition to the application of Maryland law, Milton Home relied heavily on the United States District Court for the Eastern District of Pennsylvania case of *Breskman v. BCB, Inc.*, 708 F. Supp. 655 (E.D. Pa. 1988). In *Breskman*, the plaintiff, a Pennsylvania resident, "stopped at an Interstate 95 rest stop to sleep in his car." *Id.* at 656. While parked in a "for trucks only" area, the plaintiff's car was struck by a tractor-trailer owned by the defendants, a North Carolina corporation and its principals. *Id.* Both parties asserted the other party was negligent, and the plaintiff advocated for the application of Pennsylvania law (comparative negligence), while the defendants advocated for the application of Maryland law (contributory negligence). *Id.* Because the defendants were citizens of North Carolina, the court also, *sua*

sponte, considered the application of North Carolina law (contributory negligence). *Id.* at 656-57.

In analyzing the choice of laws issue, the court first looked at the four contacts specified in Section 145 Restatement (Second) of Conflict of Laws taking into account the qualitative nature of each. *Id.* at 657. If it was merely counting contacts, the court found Maryland law would apply. *Id.* However, given the fortuitous nature of automobile accidents, the court found "little weight should be given to the contacts with the State of Maryland" and the greatest weight should be given to the states in which the parties reside. *Id.* at 658. Then, in deciding whether the laws of Pennsylvania and North Carolina, the court found "Pennsylvania's interest in allowing recovery for [the] plaintiff[] as its citizen ... is roughly equal to that of North Carolina's interest in protecting its citizens from a suit by a plaintiff who was contributorily negligent." *Id.* As such, under a governmental interest analysis used "to resolve this standoff conflict[,]" the court concluded the tie went to Pennsylvania as the home/forum state. *Id.* at 658-59.

Contrary Milton Home's assertions, *Breskman* is distinguishable from the instant case in at least two significant respects. First, unlike the place where the injury occurred in *Breskman*, the site of the accident in this case was not fortuitous. Rather, the parties' interconnected contractual arrangements purposefully brought them all together in Maryland so that a modular home could be set on Sur Developers' property in Maryland, and it was during that activity that Escobar was injured, which provides Maryland with a real connection to the conflict between the parties. Second, unlike the residences of the parties in *Breskman*, one of the parties in this case is a resident of the state where the injury occurred. In this case, Sur Developer is a Maryland corporation that does and was doing business in Maryland on property that it owned in that state. Thus, unlike in *Breskman*, Maryland has a real interest in protecting the rights of one of its

residents or citizens in this case and "it seems only fair to permit a defendant to rely on [its] home state law when [it] is acting within that state." *McDonald*, 2015 PA Super 104 at *7.

In sum, this is not a case where the court needs to rely on a tiebreaker to decide what law should apply between two states that have no connection to the case other than the two parties being respective residents of those states. Rather, this is a case where weighing the qualitative contacts between two states, one state clearly has a greater interest in the application of its law to the issues at bar, and that state is Maryland.

C. Application of Maryland Law.

Having found Maryland law applies, the court will next look at Maryland's contributory negligence and assumption or the risk law to determine whether Escobar was guilty of either as a matter of law so as to preclude Milton Home from having a right to contribution against Sur Developers.

In Maryland, "[t]he defense of assumption of the risk involves a manifestation of consent to relieve the defendant of the obligation of reasonable conduct towards the plaintiff, whereas contributory negligence is the neglect of duty imposed upon all men and women to observe ordinary care for their own safety." *Thomas v. Panco Mgmt. of Maryland, LLC*, 31 A.3d 583, 601-02 (Md. 2011) (citations, quotations, brackets, and emphasis omitted). To establish the defense of contributory negligence, the defendant must prove "the injured party acted, or failed to act, with knowledge and appreciation, either actual or imputed, of the danger of injury which his [or her] conduct involves." *Menish v. Polinger Co.*, 356 A.2d 233, 237 (Md. 1976). "The rule to be applied, in determining whether the facts justify a holding that the plaintiff was guilty of contributory negligence as a matter of law, is that the act (or omission) so relied on must be distinct, prominent and decisive, and one about which reasonable minds would not differ in

declaring it to be negligence." *Id.* at 238 (quotations omitted). Thus, Maryland courts have concluded that in order for a case to "be withdrawn from the jury on the ground of contributory negligence, the evidence must show some prominent and decisive act which directly contributed to the accident and which was of such a character as to leave no room for difference of opinion thereon by reasonable minds." *Id.*

To establish the defense of assumption of the risk, the defendant must prove: "(1) the plaintiff had knowledge of the risk of the danger; (2) the plaintiff appreciated that risk; and (3) the plaintiff voluntarily confronted the risk of danger." *Thomas*, 31 A.3d at 588. However, in terms of knowledge, Maryland courts have concluded knowledge may only be imputed to the plaintiff, as a matter of law, "when there is undisputed evidence of awareness" of the risk of danger. *Id.* at 591. And in terms of voluntariness, Maryland courts have recognized that when the plaintiff can demonstrate his or her job would have been jeopardized had he or she not confronted the risk, the plaintiff may be found to have acted involuntarily. *Crews v. Hollenbach*, 751 A.2d 481, 492-94 (Md. 2000).

In this case, genuine issues of material fact regarding whether Escobar was contributorily negligent and/or assumed the risk of injury prevent Sur Developers from being entitled to summary judgment on these issue. As Milton Home argues, in moving for summary judgment on these issues, Sur Developers "ignores all facts contrary to its position and relies solely on its own expert and two pages of [Escobar's] testimony, which it mischaracterizes." (Pl.'s Mem. re Contributory Negligence 15.)

In terms of contributory negligence, Sur Developers points to its expert's opinion "that a primary contributing factor in Escobar's fall was his decision to violate workplace safety standards by working six feet aloft without fall precautions." (Def.'s Mem. re Contributory

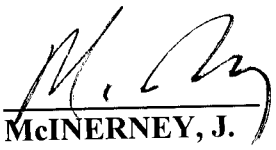
Negligence 10.) Sur Developers argues Escobar's "work upon that roof without fall protection was voluntary and as a matter of law a portion of liability for his injuries must rest with him." (*Id.*) Milton Home, however, has evidence which Sur Developers ignores that Ralph M. "did not provide its employees with either any training regarding fall protection or with a fall protection harness[,]" and in fact "prohibited the use of harnesses[] as being both unnecessary and slowing work." (Pl.'s Mem. re Contributory Negligence 17.) Under such circumstances, the court cannot say Escobar's working upon the roof without fall protection was some distinct, prominent, and decisive act of negligence on his part upon which reasonable minds could not differ.

In terms of assumption of the risk, Sur Developers points to Escobar's testimony "that he knew people in his profession wore fall protection equipment and that falling off of a roof was a possibility" and argues he "voluntarily worked on the roof without fall protection and thereby assumed the risk of his injuries." (Def.'s Mem. re Contributory Negligence 10-11.) Here, as Milton Home argues, Sur Developers ignores the fact that Escobar performed this type of work for four years before his accident without incident and had a subjective understanding that he was a safe worker "and believed that he was not at risk of falling." (Pl.'s Mem. re Contributory Negligence 17.) Moreover, Milton Home has evidence that Escobar's job would have been at risk had he insisted on wearing fall protection. Under such circumstances, the court cannot say as a matter of law that Escobar voluntarily assumed the risk of falling by working on the roof without fall protection.

As such, the court concludes it cannot determine as a matter of law Escobar was contributorily negligent and/or assumed the risk of injury. Therefore, the court will grant Sur Developers' first motion for summary judgment as to choice of laws, but deny it in all other

respects. However, having concluded Maryland law should determine whether Milton Home has a right to contribution or common law indemnity against Sur Developers, the court will also dismiss as moot Sur Developer's second and third motions for summary judgment that cite Pennsylvania law.

BY THE COURT:



McINERNEY, J.