FILED, Clerk of the Appellate Division, August 05, 2024, **A-002835-23**

ROBERT RUSSO and JOYCE RUSSO, his wife, Plaintiffs-Respondents, v. O.A PETERSON CONSTRUCTION COMPANY, and MIKE, as employee representative of O.A PETERSON CONSTRUCTION i/j/s/a, Defendants-Appellants, And O.A PETERSON CONSTRUCTION COMPANY, Defendant/Third-Party Plaintiff-Appellant, v. DYNAMIC PROTECTION SYSTEM Third-Party Defendant-Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-002835-23 Civil Action Sat Below: Hon. James J. Ferrelli, J.S.C. Docket No. BUR-L-002349-21

BRIEF OF DEFENDANT/THIRD-PARTY PLAINTIFF-APPELLANT
O.A PETERSON CONSTRUCTION COMPANY

FILED, Clerk of the Appellate Division, August 05, 2024, **A-002835-23**

KENNEDYS CMK LLP
120 Mountainview Boulevard
P.O. Box 650
Basking Ridge, New Jersey 07920
(908) 848-6300
Anand.Dash@kennedyslaw.com
Attorney Id. 031242006
Attorneys for Defendant/Third-Party Plaintiff-Appellant O.A Peterson Construction Company

Anand Dash
Of Counsel and on the Brief
Dylan M. Greenspan
Benjamin Weisbrot
On the Brief

Date of Submission: August 5, 2024

FILED, Clerk of the Appellate Division, August 05, 2024, **A-002835-23**

TABLE OF CONTENTS

Page

TABLE OF JUDGMENTS, ORDERS AND RULINGS ii

TABLE OF AUTHORITIES ..... iii-iv

PRELIMINARY STATEMENT 1

PROCEDURAL HISTORY 3

CONCISE STATEMENT OF FACTS 7

LEGAL ARGUMENT

POINT I 8

I. The Trial Court Erred In Denying O.A. Peterson's Motion For Reconsideration Because It Incorrectly Found The Indemnity Provision Of The Subcontract To Be Ambiguous (Da045-048; 2T) 8

A. Standard Of Review 8
B. The Trial Court Erroneously Determined That The Subcontract Was Ambiguous 9
C. The Indemnity Provision Of The Subcontract Has Been Found To Be Unambiguous By This Court's Prior Decisions 17

POINT II 19

II. The Trial Court's Erroneous Dismissal Of DPS Deprived The Jury From Being Able To Consider DPS' Comparative Fault For Purposes Of Indemnification (This Point Was Not Raised Below) 19

A. Had The Jury Been Able To Consider DPS' Comparative Fault, There Would Have Been A Finding Of Fault Greater Than One Percent 26

CONCLUSION 29

FILED, Clerk of the Appellate Division, August 05, 2024, **A-002835-23**

TABLE OF JUDGMENTS, ORDERS AND RULINGS

Document *Appendix Page Number*

Order Granting Cross-Motion for Summary Judgment,
filed October 20, 2023 .... Da041

Order Denying Summary Judgment,
filed October 20, 2023 .... Da043

Order Denying Reconsideration,
filed January 5, 2024 .... Da045

Order Granting Motion to Correct Clerical Error,
filed January 5, 2024 .... Da047

Order Entering Judgment in Favor of Plaintiffs,
filed April 15, 2024 .... Da049

Oral Argument Transcript on
O.A. Peterson Motion for Summary Judgment
and DPS Cross-Motion for Summary Judgment
(October 20, 2023).......... Da412

Oral Argument Transcript on
O.A Peterson Motion for Reconsideration and
DPS Motion to Correct Clerical Error
(January 5, 2024) Da433

TABLE OF AUTHORITIES

Page(s)

Cases

Ace Am. Ins. Co. v. Am. Med. Plumbing, Inc.,
458 N.J. Super. 535 (App. Div. 2019) 12
Azurak v. Corp. Prop. Inv'rs,
175 N.J. 110 (2003) 9, 10, 16, 18
Belmont Condo. Ass'n, Inc. v. Geibel,
432 N.J. Super. 52 (App. Div. 2013) 24
Camp, Dresser & McKee, Inc. v. Paul N. Howard Co.,
853 So. 2d 1072 (Fla. Dist. Ct. App. 2003) 15
Capparelli v. Lopatin,
459 N.J. Super. 584 (App. Div. 2019) 8
Englert v. The Home Depot,
389 N.J. Super. 44 (2006) 15, 16, 17, 19
Estate of D'Avila ex rel. D'Avila v. Hugo Neu Schnitzer E.,
442 N.J. Super. 80 (App. Div. 2015) .... *Passim*
Excelsior Ins. Co. v. Selective Ins. Co. of Am.,
696 F. Supp. 3d 15 (D.N.J. 2023) 10
George M. Brewster & Son v. Catalytic Const. Co.,
17 N.J. 20 (1954) 18
Haviland v. Lourdes Med. Ctr. of Burlington Cnty., Inc.,
466 N.J. Super. 126 (App. Div. 2021) 28
Kane v. Hartz Mountain Industries, Inc.,
143 N.J. 141 (1996) 22
Kane v. Hartz Mountain Industries, Inc.,
278 N.J. Super. 129 (App. Div. 1994) 22
Kieffer v. Best Buy,
205 N.J. 213 (2011) 5, 10
Leitao v. Damon G. Douglas Co.,
301 N.J. Super. 187 (App. Div. 1997) 6, 17, 18, 23
Mantilla v. NC Mall Associates,
167 N.J. 262 (2001) 9, 16, 18
MT Builders, L.L.C. v. Fisher Roofing, Inc.,
197 P.3d 758 (Ariz. Ct. App. 2008) 14
Nester v. O'Donnell,
301 N.J. Super. 198 (App. Div. 1997) 5

Powell v. Alemaz, Inc.,
335 N.J. Super 33 (App. Div. 2000) 10
Ramos v. Browning Ferris Indus. of S. Jersey, Inc.,
103 N.J. 177 (1986)... 9
Sayles v. G&G Hotels, Inc.,
429 N.J. Super. 266 (App. Div. 2003) 5
Schor v. FMS Fin. Corp.,
357 N.J. Super. 185 (App. Div. 2002) 10, 17
Spring Creek Holding Co. v, Shinnihon U.S.A.,
399 N.J. Super. 158 (App. Div. 2008) 8
Stiefel v. Bayly, Martin & Fay of Conn., Inc.,
242 N.J. Super 643 (App. Div. 1990) 11
Sw. Nat. Bank v. Simpson & Son, Inc.,
799 P.2d 512 (Kan. Ct. App. 1990) 14
United States v. Seckinger,
397 U.S. 203..*Passim*
White v. Newark Morning Star Ledger,
245 N.J.Super. 606 (Law Div. 1990) 21, 22

Statutes

N.J.S.A. 2A:40A-1 .... 16, 21, 27
N.J.S.A. 34:15-1.. 23

PRELIMINARY STATEMENT

Defendant and Third Party Plaintiff, O.A. Peterson Construction Company ("O.A. Peterson") submits this brief in support of its appeal seeking reversal of the trial court's October 20, 2023 Order denying O.A. Peterson's Motion for Summary Judgment, October 20, 2023 Order granting Dynamic Protection System's ("DPS") Cross-Motion for Summary Judgment, and January 5, 2024 Order denying reconsideration.

This appeal involves the interpretation of a contractual indemnity provision entered into between O.A. Peterson, a general contractor, and DPS, a subcontractor, relating to injuries suffered by plaintiff, Robert Russo ("Plaintiff" or "Russo"), during his employment with DPS. Despite the plain and unambiguous language of the indemnity provision, which is based on a widely used form construction contract, the trial court engaged in a tortured reading of the provision, injected ambiguity where none existed, and incorrectly dismissed DPS from the case. The trial court's ruling contravenes binding authority that holds analogous indemnification provisions to be unambiguous, including a similar indemnification agreement upheld by the United States Supreme Court.

The trial court's erroneous dismissal of DPS from the case and DPS' absence at trial forced another error, namely, the jury being unable to consider

DPS' liability under the framework of the contractual indemnity provision. Thus, the jury's verdict that O.A. Peterson was solely liable for Plaintiff's injuries is not a legal bar to O.A.'s appeal, as DPS will argue, because the erroneous dismissal of DPS rendered it impossible for the jury to consider DPS's negligence for purposes of determining the enforceability of the contractual indemnity provision.

Moreover, in accordance with controlling authority, the New Jersey Workers' Compensation Act does not bar enforcement of the indemnification agreement entered into between O.A. Peterson and DPS for Plaintiff's injuries as long as the accident was in some part caused by DPS. However, without DPS' participation at trial, the jury was deprived of the opportunity to consider whether O.A. Peterson's conduct was the sole cause of the accident ***in relation to DPS' conduct.***

For these reasons, as discussed below, this Court should reverse the trial court's January 5, 2024 Order denying O.A. Peterson's Motion for Reconsideration and granting DPS' Motion for Summary Judgment. Upon reversal, the Court should remand this matter for proceedings consistent with a ruling that the contractual indemnity provision is unambiguous and enforceable against DPS. The remand will allow the jury to properly consider DPS's liability in the framework of the indemnity provision.

PROCEDURAL HISTORY

On November 10, 2021, Russo filed a complaint against O.A. Peterson and its employee, O'Donnell, arising out of the fall down incident that occurred on November 4, 2020. Russo filed a lawsuit in the Superior Court of New Jersey, Law Division, Burlington County, with Docket Number: BUR-L-2349-21 (the "Underlying Lawsuit").

On December 1, 2021, the liability carrier for O.A. Peterson, Selective Insurance Company of America ("Selective") formally tendered the defense of the Underlying Lawsuit to DPS or its insurance carrier, and demanded that DPS hold harmless and indemnify O.A. Peterson and O'Donnell on a primary and non-contributory basis. (Da160-162). On or about December 12, 2021, Morgan Dooley, claims adjuster on behalf of DPS denied Selective's tender demand, claiming that there was no independent liability on or against DPS. (Da163-164).

On or about December 16, 2021, O.A. Peterson filed a third-party complaint against DPS, seeking contribution, indemnification, and insurance coverage from the third-party defendant, DPS, pursuant to paragraph M of the Subcontract, which provides, in relevant part:

> to the fullest extent permitted by law, the subcontractor shall indemnify and hold harmless the contractor (O.A. Peterson)…from and against all claims, damages, losses and expenses including, but not limited to attorney's fees, arising out of or resulting from

> the performance of the Work provided that such claim, damage, loss or expense is attributable to bodily injury…sustained by anyone, including employees of subcontractor (DPS)…caused in whole or in part by negligent acts or omissions of the subcontractor…regardless of whether or not such claim, damage, loss or expense is caused in whole or in part by negligent acts or omissions of the subcontractor (DPS)…regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

(Da150).

On September 8, 2023, O.A. Peterson filed a Motion for Summary Judgment, largely premised on the argument that the Subcontract requires DPS to indemnify O.A Peterson for Russo's claims in the Underlying Lawsuit. On September 26, 2023, DPS filed both an opposition to O.A. Peterson's Motion for Summary Judgment, as well as a Cross Motion for Summary Judgment. DPS argued that the indemnification clause in the Subcontract was ambiguous and should be strictly construed against O.A. Peterson. DPS further argued that O.A. Peterson's employee was solely responsible for Russo's injuries and therefore DPS' indemnification obligation is not triggered. On October 20, 2023, the trial court denied O.A. Peterson's Motion for Summary Judgment and granted DPS' Cross-Motion for Summary Judgment. (Da041-042; Da043-044; Da412-432; 1T)[1]. The trial court, per the Honorable Aimee R. Belgard,

---

[1] Pursuant to R. 2:6-8, the transcript of the oral argument and decision on O.A. Peterson's motion for summary judgment and DPS's Cross-Motion for

found the Subcontract's indemnification clause to be ambiguous, though she acknowledged competing caselaw. (Da43; 1T36:14-24, 37:1-15).

On November 9, 2023, O.A. Peterson moved to reconsider the trial court's denial of its Motion for Summary Judgment, and the trial court's grant of DPS' cross-motion. In its moving papers, O.A. Peterson asserted that the trial court failed "to provide or state on the record what the two competing interpretations of the clause are" citing to Nester v. O'Donnell, 301 N.J. Super. 198, 210 (App. Div. 1997) ("An ambiguity in a contract exists if the terms of the contract are susceptible to at least two reasonable alternative interpretations") (internal quotations omitted).

Further, O.A. Peterson submitted that the Court did not interpret the Subcontract by giving its terms their plain and ordinary meaning, citing to Kieffer v. Best Buy, 205 N.J. 213, 223 (2011). O.A. Peterson also argued that the trial court contravened the holding in Sayles v. G&G Hotels, Inc., 429 N.J. Super. 266 (App. Div. 2003), in which the court held that merely because a contract could have been written better does not make the contract equivocal or ambiguous. Id. at 274. Lastly O.A. Peterson asserted that the language of

---

Summary Judgment is referred to as 1T; the transcript of the oral argument on O.A. Peterson's Motion for Reconsideration and DPS's Motion to Correct a Clerical Error is referred to as 2T; the April 11, 2024 transcript of Hon. James Ferrelli's Jury Charge is referred to as 3T.

the indemnification clause in Englert v. The Home Depot, 389 N.J. Super. 44 (2006) was distinguishable, and that the indemnification clauses in Leitao v. Damon G. Douglas Co., 301 N.J. Super. 187 (App. Div. 1997) and other related cases, which were upheld as unambiguous, were more analogous to the indemnification clause at issue in the present action.

On January 5, 2024, the trial court denied O.A. Peterson's Motion for Reconsideration. (Da045-046; Da047-048; 2T). A jury trial was conducted before the Honorable James J. Ferrelli from April 1, 2024 through April 11, 2024. Notably, as DPS's Cross-Motion for Summary Judgment was granted, the third-party claim by O.A. Peterson against DPS was not submitted to the jury. (Da050-092; 3T). On April 15, 2024, Judge Ferrelli entered judgment against O.A. Peterson in the amount of $909,547.00. (Da049). In light of the various foregoing arguments, O.A. Peterson filed the within appeal seeking reversal of the trial court's January 5, 2024 Order, inter alia, finding the Subcontract to be ambiguous and dismissing DPS from the Underlying Action. This appeal seeks reversal of all three (3) Orders, though for the sake of clarity, the brief will refer to the trial court's January 5, 2024 Order denying reconsideration.

CONCISE STATEMENT OF FACTS

O.A. Peterson is a company licensed in the State of New Jersey and engaged in the business of construction management and general construction. On or about August 14, 2020, O.A. Peterson entered into a Subcontract Agreement (the "Subcontract") with DPS. (Da148-150;1T5:10-14). DPS contractually agreed to provide fire alarm installation work at a job site located at 33 Monroe Street, Bridgewater, New Jersey (the "Property").

On November 4, 2020, Plaintiff Robert Russo was at the Property. Russo alleges that, while in the course and scope of his employment with DPS as a senior fire alarm technician, he was injured after falling into an open floor hatch at the Property. Russo alleges that Mike O'Donnell ("O'Donnell"), a representative of O.A. Peterson, opened a hatch in the floor at the Property to confirm the existence of a crawl space. (Da225-226). Russo further alleges that his supervisor, Ed Prescott ("Prescott"), looked down into the hatch, as Russo's plan was to pull the requisite wires through the opening. Russo and Prescott allegedly informed O'Donnell that they did not need to access the crawl space that day. Subsequently, Russo alleges that he and Prescott then walked away, approximately 30 feet from the hatch. (Da225-226). Russo allegedly took out his flashlight to inspect the ceiling. Following the wires running along the ceiling, Russo walked in the direction of the hatch. Russo

then allegedly encountered the open hatch. Russo's left leg allegedly fell into the hatch, while his right leg fell and struck the floor. (Da225-226). Russo testified at his deposition that the hatch into which he allegedly fell was approximately three (3) feet by four (4) feet. (Da235). The area where the accident occurred allegedly had ample lighting. (Da235).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING O.A. PETERSON'S MOTION FOR RECONSIDERATION BECAUSE IT INCORRECTLY FOUND THE INDEMNITY PROVISION OF THE SUBCONTRACT TO BE AMBIGUOUS. (Da045-048; 2T)

The trial court erred in denying O.A. Peterson's Motion for Reconsideration, dismissing DPS from the case, and finding that the indemnity provision of the Subcontract was ambiguous. This Court should, therefore, reverse the trial court's decision as a matter of law and remand the case to the trial court for consideration of DPS's liability in the overall framework of Russo's negligence claim and O.A. Peterson's conduct.

A. Standard Of Review.

Under New Jersey Law, "[t]he 'interpretation and construction of a contract is a matter of law for the court subject to *de novo* review.'" Capparelli v. Lopatin, 459 N.J. Super. 584, 605 (App. Div. 2019) (quoting Spring Creek

Holding Co. v, Shinnihon U.S.A. Co., 399 N.J. Super. 158, 190 (App. Div. 2008)). This Court "accord[s] no special deference to a trial court's interpretation of an agreement entered into by the parties." Id. Thus, the trial court's ruling in this action that the indemnity provision of the Subcontract was "equivocal relating to the indemnification of the subcontractor" should be afforded no deference. (Da431; 1T37:13-15).

B. The Trial Court Erroneously Determined That The Subcontract Was Ambiguous.

The trial court erroneously determined that the indemnity provision of the Subcontract was ambiguous. As an initial matter, the trial court correctly recognized that an agreement which purports to include indemnification for an indemnitee's own negligence must contain "explicit language" to that effect. Azurak v. Corp. Prop. Inv'rs, 175 N.J. 110, 112 (2003). In Azurak, the New Jersey Supreme Court affirmed its prior ruling that "a contract will not be construed to indemnify the indemnitee against losses resulting from its own negligence unless such an intention is expressed in unequivocal terms." Mantilla v. NC Mall Associates, 167 N.J. 262, 272-73 (2001) (quoting Ramos v. Browning Ferris Indus. of S. Jersey, Inc., 103 N.J. 177, 191 (1986). Based on the Azurak standard, O.A. Peterson contends that the indemnification provision in question, contrary to the trial court's ruling, was not ambiguous

because it "specifically reference[s] the negligence or fault of the indemnitee." Azurak, 175 N.J. at 112-13.

When interpreting a contract,"[its] terms are to be given their 'plain and ordinary meaning,' and courts are not permitted to 'rewrite a contract for the parties better than or different from the one they wrote themselves.'" Excelsior Ins. Co. v. Selective Ins. Co. of Am., 696 F. Supp. 3d 15, 37 (D.N.J. 2023) (quoting Kieffer v. Best Buy, 205 N.J. 213, 223 (2011)). When determining whether a provision in a contract is ambiguous, a court is not to engage in the "perversion of language or the exercise of inventive powers to create ambiguities where they do not exist." Powell v. Alemaz, Inc., 335 N.J. Super 33, 44 (App. Div. 2000).

Under New Jersey law, a contractual provision is deemed ambiguous only when the provision is "susceptible to at least two reasonable alternative interpretations[.]" Schor v. FMS Fin. Corp., 357 N.J. Super. 185, 191 (App. Div. 2002) (internal quotations omitted). However, "[a contract] is not ambiguous merely because two conflicting interpretations of it are suggested by the litigants. Rather, both interpretations must reflect a *reasonable* reading of the contractual language." Powell, 335 N.J. Super. at 44 (emphasis added). Not only should the court conduct a *reasonable* reading of the contract language, "[t]he court should read [contractual] provisions so as to *avoid*

ambiguities, if the plain language of the contract permits. ***The court should not torture the language of the [contract] to create ambiguity.***" Stiefel v. Bayly, Martin & Fay of Conn., Inc., 242 N.J. Super 643, 651 (App. Div. 1990) (emphasis added).

When viewed in this lens, O.A. Peterson contends that the indemnification provision is not ambiguous or susceptible to two reasonable alternative interpretations. Instead, the trial court tortured the language of the Subcontract, engaged in its perversion, and created ambiguity.

The indemnification provision of the Subcontract states:

> To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Contractor and its consultants, agents and employees or any of them from and against all claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage loss or expense is attributable to bodily injury sickness, disease or death sustained by anyone, including employees of Subcontractor or to injury to or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom, caused in whole or in part by negligent acts or omissions of the Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damaged [sic], loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist between Contractor and Subcontractor.

(Da150).

The starting point for interpretation of this provision is the fact that it is derived from § 3.18.1 of the American Institute of Architects: General Conditions of the Contract for Construction, also known as AIA Document A201. This important fact was overlooked by the trial court. AIA Document A201 has been recognized by New Jersey courts as "a widely used form construction contract." Ace Am. Ins. Co. v. Am. Med. Plumbing, Inc., 458 N.J. Super. 535, 537 (App. Div. 2019). AIA Document A201 § 3.18.1 provides:

> To the fullest extent permitted by law, the contract shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees arising out of or resulting from the performance of the Work, provided that such claim, damage, loss, or expense is attributable to bodily injury sickness, disease or death sustained by anyone, including employees of Subcontractor or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omission of the Contractor a Subcontractor, anyone directly or indirectly employed by them, or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss, or expense is caused in party by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in this Section 3.18.

(Da495).

In fact, when referencing AIA A201, the United States Supreme Court has described an earlier version of this same provision as being "[a]n example of an indemnification clause ***that makes specific reference*** to the effect of the

negligence of the indemnitee." United States v. Seckinger, 397 U.S. 203, 213, n. 17, (1970) (emphasis added). The version of the provision referred to by the United States Supreme Court states:

> 4.18.1. The Contractor shall indemnify and hold harmless the Owner and the Architect and their agents and employees from and against all claims, damages, losses and expenses including attorneys' fees arising out of or resulting from the performance of the Work, provided that any such claim, damage, loss or expense (a) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom, and (b) is caused in whole or in part by any negligent act or omission of the Contractor, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder.'

Id.

Because of the striking similarity between the foregoing provision referred to by the U.S. Supreme Court and the provision in the Subcontract, the Supreme Court's interpretation finding the provision to be unambiguous must be followed by this Court to reverse the trial court's erroneous finding of ambiguity.

Moreover, the trial court improvidently took exception with two phrases in the indemnification provision at issue, namely: "caused in whole or in part by negligent acts or omissions of the Subcontractor", and "regardless of whether or not such claim, damage, loss, or expense is caused in part by a

party indemnified hereunder." (Da431; 1T37:5-12). The trial court's finding of ambiguity as to these clauses is contradicted by the same provision referred to by the United States Supreme Court. That provision contains both of the clauses that the trial court in this action erroneously deemed "equivocal." (Da431; 1T37:13-15).

Like the United States Supreme Court in Seckinger, other courts have held that similar indemnification provisions derived from AIA Document A201 are clear and unambiguous. For instance, the Arizona Court of Appeals ruled that the 1987 version of the above-referenced provision created a valid indemnity claim. MT Builders, L.L.C. v. Fisher Roofing, Inc., 197 P.3d 758, 764 (Ariz. Ct. App. 2008). In MT Builders, the Court held "[t]he indemnification provision at issue here obligated Fisher to 'indemnify and hold harmless' MT Builders 'from and against all claims, damages, losses and expenses' under certain specified conditions. ***This wording constitutes an agreement to indemnify for loss."*** Id. at 763 (emphasis added). The Kansas Court of Appeals has also upheld a similar version of this provision. Sw. Nat. Bank v. Simpson & Son, Inc., 799 P.2d 512, 520 (Kan. Ct. App. 1990). That Court was discussing whether a contract incorporated A201 by reference. Id. at 517. Despite assessing the contract in question for ambiguities, nowhere did the Kansas Court of Appeals find equivocal, ambiguous language in the

indemnification provision contained in AIA document A201. Similarly, the 5th District Court of Appeal of Florida reached the same conclusion when it interpreted an indemnification provision like that found in A201. Camp, Dresser & McKee, Inc. v. Paul N. Howard Co., 853 So. 2d 1072, 1077 (Fla. Dist. Ct. App. 2003) ("The indemnity provision at issue in paragraph 6.30 is almost verbatim the indemnification provision contained in the American Institute of Architects (AIA) Standard Document A201 for General Conditions of the Contract for Construction"). There, the District Court of Appeal stated that the language of the provision was "***a paradigm of clarity*** in shifting the risk of a negligent indemnitee's loss to the indemnitor." Id. (Emphasis added).

In contravention of Seckinger and the foregoing authority, the trial court erroneously determined the indemnification provision of the Subcontract was ambiguous. In reaching this conclusion, the trial court relied on an incorrect interpretation of this Court's decision in Englert v. The Home Depot, 389 N.J. Super. 44 (App. Div. 2006). (Da431; 1T36:24-25, 37:1-2; Da454; 2T24:20-25, 25:1-3). In Englert, the Court decided a similar, but not identical, indemnity provision that was also derived from AIA Document 201. The facts in Englert involved Weir Welding Company ("Weir"), a subcontractor, who was brought in by general contractor, C. Raimondo & Sons Construction ("Raimondo"), in

connection with the construction of a new Home Depot Store. The Court in Englert, was tasked with interpreting the following indemnification provision:

> [T]o the fullest extent permitted by law, [Weir] *shall indemnify* and hold harmless [Home Depot] ... and [Raimondo] and all of their agents and employees from and against *all claims,* damages, losses and expenses, including but not limited to attorney's fees, *arising out of or resulting from the performance of [Weir's] Work under this Sub-contract,* provided that any such claim, damage, loss, or expense *is attributable* to *bodily injury,* sickness, disease, or death, or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom, ***to the extent caused*** *in whole or in part by any negligent act or omission of [Weir] or anyone directly or indirectly employed by [Weir] or anyone for whose acts [Weir] may be liable,* ***regardless of*** *whether it is caused in part by a party indemnified hereunder.* Such obligation shall not be construed to negate, or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or person described in this Paragraph.

Englert, 389 N.J. Super. at 47–48 (emphasis in original).

The Englert Court determined that the above language did not have the clarity required by Azurak/Mantilla. However, the Englert Court explained the specific language it deemed noncompliant with Azurak/Mantilla:

> In the absence of the 'to the extent' phrase in [the provision], the 'regardless of' phrase could be interpreted to require Weir to indemnify Raimondo for its own even if Weir was not at fault at all, as long as Raimondo was not the 'sole' cause of damages. *See N.J.S.A.* 2A:40A-1. The 'to the extent phrase in [the provision] is itself subject to differing interpretations.

Id. at 56.

Thus, it was the "to the extent" phrase that the Englert Court determined gave rise to two "reasonable interpretations." See also, Schor, 357 N.J. Super. at 191. Here, the indemnification provision of the Subcontract omits the problematic "to the extent" phrase, as the provision satisfies the Englert Court's concern, namely, compliance with N.J.S.A. § 2A:40A-1, which prohibits indemnification for claims caused by the indemnitees "sole negligence." Englert, 389 N.J. Super. at 56. As the provision in Englert is distinguishable from provision in the Subcontract, the trial court's reliance on Englert was misplaced and constitutes reversible error.

C. The Indemnity Provision Of The Subcontract Has Been Found To Be Unambiguous By This Court's Prior Decisions.

Consistent with the United States Supreme Court's analysis in Seckinger, this Court's published decisions examining indemnification provisions derived from A201 have found them to be unambiguous. For example, in Leitao v. Damon G. Douglas Co., 301 N.J. Super. 187 (App. Div. 1997), this Court examined the following indemnification provision:

> Indemnification Agreement—The subcontractor/vendor shall indemnify and hold harmless [the general contractor] and all of its agents and employees from and against all claims, damages, losses, and expenses, including attorney's fees arising out of or resulting from the performance of the subcontractor/vendor's work under this purchase order, provided that any such claim, damage, loss or expense a) is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than work itself), including the loss of use resulting

> therefrom, and b) is caused in whole or in part by any negligent act or omission of the subcontractor/vendor or anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether it is caused in part by a party indemnified hereunder.

Id. at 191.

The Leitao Court, despite reaching its decision prior to in Azurak and Mantilla, recognized that "[a] contract will not be construed to indemnify the indemnitee against losses resulting from its own negligence unless such an intention is expressed in unequivocal terms." Id. (citing George M. Brewster & Son v. Catalytic Const. Co., 17 N.J. 20, 33 (1954)). The Court determined that provision "[b]y its plain terms… is to be effective where the underlying claim is caused by any negligent act or omission by anyone directly or indirectly employed by the subcontractor, '***regardless of whether*** it is caused in part by a party indemnified.'" Id. at 195 (emphasis added).

Since Leitao, this Court found yet another similar indemnification provision to be "sufficiently plain and unequivocal" under the Azurak standard. See, Estate of D'Avila ex rel. D'Avila v. Hugo Neu Schnitzer E., 442 N.J. Super. 80 (App. Div. 2015). In D'Avila, this Court specifically rejected the argument "that the 'whether or not' phraseology contained in the contract's indemnity provision created a fatal ambiguity." Id. at 115. The "regardless of whether or not…" phrase is one of the two phrases within the provision that

the trial court in this action found ambiguous. (Da431; 1T37:13-15). As such, the trial court's analysis and finding of ambiguity contradicts the holding of this Court in D'Avila, the U.S. Supreme Court in Seckinger, and other jurisdictions discussed above.

Finally, none of the foregoing cases, save for Englert, dealt with indemnity provisions containing the phrase "to the extent." Here, the indemnity provision of the Subcontract omits that language to which the Englert Court took exception. Thus, the trial court's decision is contradicted by the overwhelming weight of authority discussed above. The trial court also erred by incorrectly applying Englert to this matter. Therefore, the indemnification provision of the Subcontract is not ambiguous because, among other reasons discussed, it "makes specific reference to the effect of the negligence of the indemnitee." Seckinger, 397 U.S. at 213, n. 17.

The trial court's decision finding that the Subcontract is ambiguous was in error and should be reversed.

POINT II

THE TRIAL COURT'S ERRONEOUS DISMISSAL OF DPS DEPRIVED THE JURY FROM BEING ABLE TO CONSIDER DPS' COMPARATIVE FAULT FOR PURPOSES OF INDEMNIFICATION. (This Point Was Not Raised Below)

In D'Avila, the Appellate Division established a clear delineation between the prohibited action of apportioning liability to a plaintiff's

employer, and the permissible action of enforcing an employer's express, contractual indemnification agreement. Here, the trial court erred in finding the contractual indemnification clause to be ambiguous, as discussed in D'Avila. Accordingly, DPS inappropriately obtained summary judgment, which, in turn, *de facto* relieved DPS of its contractual obligation of indemnification to O.A. Peterson. As discussed below, because a jury should be afforded the opportunity to enforce DPS' indemnification obligations, this case should be remanded accordingly.

In D'Avila the Appellate Division succinctly noted:

> "[I]n the context of a plaintiff-employee's negligence claims against other tortfeasors relating to workplace injuries, the jury cannot be asked to apportion fault to the plaintiff's own employer, even if that seems like a more equitable manner of presenting the matter to the jury. On the other hand, indemnification of a third party by an employer pursuant to an express contract does not disturb the delicate balance struck by the Legislature in the WCA. Nothing in the WCA precludes an employer from assuming a contractual duty to indemnify a third party through an express agreement." (internal citations omitted)

D'Avila, 442 N.J. Super. at 100.

The D'Avila court ultimately held that it was permissible for the defendant to seek indemnification from the plaintiff's employer, and noted the only legal bar to such indemnification would be if the defendant was found 100% liable for plaintiff's damages, as the New Jersey State Legislature has disallowed indemnification agreements imposing liability where the damages

in question were caused by the indemnitee's sole negligence. N.J.S.A. 2A:40A-1. As discussed in Point II, Subsection A, O.A. Peterson is not solely liable for Plaintiff's alleged injuries. As such, a jury should be afforded the opportunity to assign damages accordingly.

Similar to the holding in D'Avila, there is a long line of New Jersey cases that permits third-party claims for indemnification to proceed against employers of injured parties. In White v. Newark Morning Star Ledger, 245 N.J.Super. 606 (Law Div. 1990), the plaintiff, an employee of Colin Service Systems, Inc. ("Colin"), was injured while working on the premises of defendant Newark Morning Star Ledger ("Ledger"). Id. at 608. In the governing contract, Colin agreed to indemnify Ledger. The plaintiff sued only Ledger, alleging negligence, and Ledger filed a third-party complaint against Colin for defense and indemnification. Id. at 609. Colin moved for summary judgment to dismiss Ledger's third-party complaint and the Law Division judge denied that motion. Id. The Law Division judge in White recognized that if both Ledger and Colin were found to be negligent and to have proximately caused the accident, then "Ledger as the third-party tortfeasor [would] be solely responsible" for the plaintiff's injuries. Id. at 611. Thus, the case required an allocation of fault as between Ledger, the defendant/indemnitee, and Colin, the third-party defendant/indemnitor. The

judge further noted that there was a genuine issue, at least on the facts presented in the summary judgment record, as to "whether the cause of [the] plaintiff's injury was solely caused by Ledger's negligence." Id. at 613. Finally, the judge in White concluded that, in deciding how best to allocate the liability as between Ledger, to the extent that liability results from Ledger's affirmative negligent acts, and Colin[,] "[t]he logical and most efficient means of achieving that result will be by proceeding as this case is presently structured, with both Ledger and Colin as parties. That will enable the same jury to fix the damages due from Ledger to [the plaintiff], while also fixing the amount due to Ledger pursuant to the indemnification provisions of the [contract]." Id. at 611.

In Kane v. Hartz Mountain Industries, Inc., 278 N.J. Super. 129 (App. Div. 1994), the Appellate Division found reversible error in the trial court's conducting of the jury trial and remanded the case with further instructions. The Appellate Division held that the employer-indemnitor would not have been prejudiced by a separate trial on the issue of indemnification and accordingly ruled that, on remand, the trial of the third-party claim should be severed. The Supreme Court of New Jersey granted certification and affirmed the Appellate Division's ruling. Kane v. Hartz Mountain Industries, Inc., 143 N.J. 141 (1996).

In a later tort case, Leitao v. Damon G. Douglas, Company, 301 N.J. Super. 187 (App. Div. 1997), the Appellate Division noted that the Law Division had severed at trial a defendant general contractor's third-party complaint for contractual indemnification against the plaintiff's employer. After the jury found the contractor 51% negligent and the employee 49% negligent, the trial court addressed the indemnification questions. The court ruled that the plaintiff's employer was obligated to fully indemnify the defendant, despite the plaintiff's comparative fault. The court did so because the accident "arose out of" the employer's subcontract and was not caused by the defendant indemnitee's "sole negligence." Id. at 190.

Ultimately, in D'Avila, the Appellate Division noted the quandary of pursuing indemnification against an injured party's employer and the complications that arise in light of the "sole remedy" of the Workers' Compensation Act (N.J.S.A. 34:15-1 et seq.). The D'Avila Court pointedly stated, in an effort to resolve this quandary:

> Taking all of these competing concerns into account, we hold that the sounder practice—in a context such as the present one involving claims even more extensive than those in *Kane* and an unusually lengthy trial—is to try the negligence and contractual indemnification issues simultaneously before the jury. After the evidence has been presented at such a trial, the court should issue carefully-crafted jury instructions, addressing the pivotal factual issues that the jury must decide. The verdict form will likewise need to be carefully designed, so as to only have the jurors address

> the question of the employer's potential fault when it is absolutely necessary to do so.
>
> For example, the jury must be instructed that they should only consider the employer's negligence if they first determine that the conduct of the defendant seeking indemnity is not the sole cause of the accident. Jurors will be presumed to follow such instructions faithfully. See Belmont Condo. Ass'n, Inc. v. Geibel, 432 N.J. Super. 52, 97 (App. Div. 2013). In this way, the unified trial process will not subvert the policies and objectives underpinning the exclusive remedy provision of the WCA. This unitary fact-finding model avoids discordant results and may conserve the resources of the parties and the court.
>
> The jury should be given appropriate instructions about the presence of the employer's counsel in the trial, explaining that he or she is participating solely with respect to certain factual issues that the jury might need to address. The jury should not be given an "ultimate outcome" instruction divulging that the plaintiff cannot recover any damages from the employer, for we suspect such an instruction would likely engender confusion and speculation.
>
> The judge must mold the verdict after it is issued, so that the plaintiff's damages are not reduced by the employer's percentage share of fault, if any. Instead, the non-employer defendants must fully bear any liability owed to the plaintiff. Thus, for example, if the jury finds defendant "A" 60% at fault, another defendant "B" 20% at fault, and the plaintiff's employer, defendant "C," 20% at fault, with no comparative fault accorded to plaintiff, the employer's 20% share must be divided among the other defendants in a molded judgment that assigns a 75% share to defendant "A" and 25% to defendant "B."

D'Avila, 442 N.J. Super. at 113.

Here, in ordering summary judgment in favor of DPS, the trial court ignored the above ruling and procedures prescribed by D'Avila in a factually

and legally analogous matter. On August 14, 2020, O.A. Peterson entered into the Subcontract with DPS whereby DPS was to provide fire alarm installation work at the subject property. The Subcontract contained a clear, unambiguous indemnification provision, whereby DPS assumed the obligation to indemnify O.A. Peterson. The indemnification provision provided, in relevant part: "To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Contractor…from and against all claims, damages, losses and expenses…arising out of or resulting from the performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury…caused in whole or in part by negligent acts or omissions of the Subcontractor… regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder." (Da150).

The binding precedent in D'Avila is applicable to the facts here and necessitates a reversal of the trial court's ruling. At the time of the incident, Plaintiff was an employee of DPS and was acting in the course and scope of his employment with DPS. Pursuant to the indemnification language of the Subcontract, and consistent with D'Avila, O.A. Peterson filed a third-party complaint against DPS seeking contribution and indemnification. The correct procedure, as set forth by D'Avila, would have been to deny DPS' Motion for

Summary Judgment and allow the jury to allocate damages amongst O.A. Peterson, DPS, and Plaintiff, to the extent any of the parties were responsible, at least in part, for his injuries. Subsequent to the jury's verdict, any of DPS' liability would have been borne and shared by the responsible parties. Finally, as per the instructions provided by D'Avila, DPS' contractual indemnification agreement would have been triggered and, to the extent O.A. Peterson was found liable for any of Plaintiff's damages, DPS would be contractually obligated to indemnify O.A. Peterson for O.A. Peterson's share of damages.

Instead, in direct contradiction of this Court's holding in D'Avila, DPS was summarily dismissed from this action due to alleged ambiguity in the indemnification provision. As discussed in Point I, the trial court erred in finding ambiguity in the indemnification clause of the Subcontract. Insofar as caselaw demonstrates that there is no ambiguity in the indemnification language, this case must be remanded in accordance with the prescribed procedures set forth by this Court in D'Avila.

A. Had The Jury Been Able To Consider DPS' Comparative Fault, There Would Have Been A Finding Of Fault Greater Than One Percent.

The trial court should not have dismissed DPS from the case and should have submitted its negligence to the jury for purposes of the indemnification provision in the Subcontract. In order for the indemnification provision of the

Subcontract to be triggered, N.J.S.A. 2A:40A-1 mandates that DPS' share of comparative fault must be one percent or greater. Under N.J.S.A. 2A:40A-1, the indemnification clause may not "[purport] to indemnify or hold harmless the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the ***sole negligence*** of the promise." (emphasis added).

Because DPS was erroneously and prematurely dismissed from the case, the jury was not afforded the opportunity to reach a determination as to DPS' comparative fault of one percent or more. Should this Court reverse the trial court and remand consistent with O.A. Peterson's arguments, O.A. Peterson will contend at trial that there is no question that DPS' employee, Ed Prescott, was negligent on November 4, 2020, thereby contributing to Plaintiff's accident to the extent of ***at least*** one percent fault.

Upon remand, O.A. Peterson will contend that there is no question that Prescott had actual knowledge of the open hatch and that he considered an "open hatch on the floor as being a dangerous condition." (Da275). Prescott testified that he "had asked [Mike O'Donnell] about it and he had brought us to that room, he had opened up the crawl space." (Da264). According to Prescott, after O'Donnell opened up the hatch, he, O'Donnell, and plaintiff "basically had walked out of the room" (Da264). There is no question that

Prescott knew of the unsafe condition, the open hatch, and yet he admitted that "I assumed [Mike O'Donnell] closed the hatch at that point." (Da264). At trial, O.A. Peterson will demonstrate that that Prescott: (1) knew the hatch was left open; (2) knew that an open hatch on the floor was a "dangerous condition"; (3) was plaintiff's supervisor and responsible for "setting up" the work site; and (4) he simply assumed that someone else closed that hatch. Under these facts, O.A. Peterson will show that Prescott was acting within the scope of his employment and his more than one percent (1%) negligence is imputed to his employer, DPS, under the doctrine of *respondeat superior*. Haviland v. Lourdes Med. Ctr. of Burlington Cnty., Inc., 466 N.J. Super. 126, 132 (App. Div. 2021), aff'd, 250 N.J. 368 (2022).

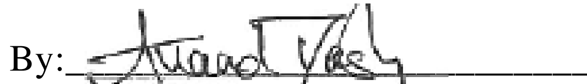
Therefore, had DPS's fault been submitted to a jury, in all likelihood, DPS would have been found to be at least one percent negligent, triggering the indemnity provision of the Subcontract in favor of O.A. Peterson.

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's October 20, 2023 Order granting DPS' Motion for Summary Judgment, the October 20, 2023 Order denying O.A. Peterson's Motion for Summary Judgment, and the January 5, 2024 Order denying O.A. Peterson's Motion for Reconsideration.

Respectfully submitted,

Kennedys CMK LLP

By:
Anand Dash
Dylan M. Greenspan
Benjamin Weisbrot
Attorneys for Defendant-Third Party Plaintiff and Appellate, O.A. Peterson Construction Company

Date of Submission:
August 5, 2024

FILED, Clerk of the Appellate Division, October 04, 2024, **A-002835-23**

<table>
<tr>
<td>
ROBERT RUSSO AND JOYCE RUSSO, HIS WIFE,

PLAINTIFF

vs.

O.A. PETERSON CONSTRUCTION COMPANY AND MIKE AS EMPLOYEE REPRESENTATIVE OF O.A. PETERSON CONSTRUCTION, I/J/S/A,

DEFENDANT / THIRD-PARTY PLAINTIFF

vs.

DYNAMIC PROTECTION SYSTEM

THIRD-PARTY DEFENDANT
</td>
<td>
SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-002835-23

CIVIL ACTION

APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, BURLINGTON COUNTY
DOCKET NO. BUR-L-2349-21

SAT BELOW:

Hon. Aimee R. Belgard, J.S.C.

Hon. James J. Ferrelli, J.S.C.
</td>
</tr>
</table>

DYNAMIC PROTECTION SYSTEM'S BRIEF IN OPPOSITION TO O.A. PETERSON CONSTRUCTION COMPANY'S APPEAL

Quinn M. McCusker – 011352005
Fowler Hirtzel McNulty &
Spaulding, LLP
10000 Midlantic Drive – Suite 402W
Mount Laurel, NJ 08054
Phone: 856-242-2130
qmccusker@fhmslaw.com
Attorneys for Third-Party
Defendant/Respondent, Dynamic
Protection System

Date of Submission: October 4, 2024

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

PROCEDURAL HISTORY 4

COUNTERSTATEMENT OF FACTS 8

LEGAL ARGUMENT 16

POINT I 16

I. THE JURY'S VERDICT EXTINGUISHED ANY CHALLENGE TO THE TRIAL COURT'S HOLDING ON CONTRACTUAL INDEMNIFICATION 16

A. The Jury's Verdict Precludes Peterson from Obtaining Indemnification from DPS for Peterson's Own Negligence . 16

B. Peterson Created an Invited Error By Urging The Trial Court To Dismiss DPS 17

C. New Jersey Law Barred DPS from Participating at Trial 19

D. Peterson Failed To Address The Plain Error Standard and Thus Waived Its Argument Regarding DPS's Trial Participation 24

POINT II 25

II. THE LOWER PROPERLY GRANTED DPS SUMMARY JUDGMENT AS PETERSON DID NOT OPPOSE DPS's MOTION SEEKING OUTRIGHT DISMISSAL 25

POINT III 27

III. PETERSON FAILED TO APPEAL THE ORDER GRANTING PETERSON'S OUTRIGHT DISMISSAL 27

POINT IV 29

IV. THE TRIAL COURT PROPERLY HELD PETERSON'S CONTRACT TO BE IMPERMISSIBLY VAGUE AND AMBIGUOUS 29

A. Standard of Review 29

B. Strictly Construed Against Peterson, the Vague and Ambiguous Contract is Open to More Than One Meaning and Does Not Contain Bright Line Language Sufficient to Overcome the Presumption Against Indemnification........... 31

C. New Jersey Courts' Inconsistent Findings Regarding Substantially Similar Indemnification Clauses Illustrate Ambiguity 38

CONCLUSION 50

TABLE OF AUTHORITIES

Cases **Page(s)**

Arsenis v. Boro. Of Bernardsville, 476 N.J. Super. 195 (App. Div.) certif. denied, 257 N.J. 524 (2024) 25

Atl. N. Airlines v. Schwimmer, 12 N.J. 293 (1953) 31

Azurak v. Corporate Prop. Investors, 175 N.J. 110 (2003) ... 30, 36, 38, 39, 40, 41, 42, 48

Brett v. Great Am. Recreation, Inc., 144 N.J. 479 (1996) 18

Campagna v American Cyanamid, 337 N.J. Super. 530 (App. Div.), certif. den. 168 N.J. 294 (2001) 28

Celanese Ltd. v. Essex Cnty. Improvement Auth., 404 N.J. Super. 514 (App. Div. 2009) 29

Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am., 195 N.J. 231 (2008) 31

Conway v. 287 Corp. Ctr. Assocs., 187 N.J. 259 (2006) 31

Driscoll Constr. Co. v. State, Dep't of Transp., 371 N.J. Super. 304 (App. Div. 2004) 29

Englert v. The Home Depot, 389 N.J. Super. 44 (App. Div. 2006) ... 34, 35, 36, 37, 40, 41, 43, 44, 45

Estate of D'Avila v. Hugo Neu Schnitzer East, 442 N.J. Super. 80 (App. Div. 2015) 21, 22, 41, 42, 43, 44, 45

GE Capital Mortg . Servs., Inc. v . N.J. Title Ins. Co., 333 N.J. Super. 1 (App. Div. 2000) ....

Gallenthin Realty Dev. Inc. v. Borough of Paulsboro, 191 N.J. 344 (2007) 35

Greer v. City of Philadelphia, 568 Pa. 244 (Sup. Ct. Pa 2002) 34

In re Estate of Miller, 90 N.J. 210 (1982) 31

Johnson v. Fankell, 520 U.S. 911 (1997) 35

FILED, Clerk of the Appellate Division, October 04, 2024, **A-002835-23**

Kane v. Hartz Mountain Industries, Inc., 278 N.J. Super. 129 (App. Div.) aff'd 143 N.J. 141 (1996) 19, 20, 21, 22, 23

Kieffer v. Best Buy, 205 N.J. 213 (2011) 29, 30, 31, 36

Leitao v. Damon G. Douglas Co., 301 N.J. Super. 187 (App. Div. 1997) 22, 23, 39, 40, 41

Longi v. Raymond-Commerce Corp., 34 N.J. Super. 593 (App. Div. 1955) 30

M.J. Paquet, Inc. v. N.J. Dep't of Transp., 171 N.J. 378 (2002) 30, 36

Mack-Cali Realty Corp. v. State, 466 N.J. Super. 402 (App. Div. 2021) aff'd o.b. 250 N.J. 550 (2022) 18

Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366 (1995) 29

Mantilla v. NC Mall Assocs., 167 N.J. 262 (2001) 29, 30, 31, 32, 41

Mass. Bay Ins. Co. v. Hall Bldg. Corp., 2018 N.J. Super. Unpub. LEXIS 7858 (Law Div. 2018) 43, 44, 45

Mautz v. J.P. Patti Co., 298 N.J. Super. 13 (App. Div. 1997) 39, 41, 43

Naporano Assocs, V. B&P Builders, 309 N.J. Super. 166 (App. Div. 1998) 28

Pusco v. Newark Bd., of Educ., 349 N.J. Super. 455 (App. Div.) certif. den. 174 N.J. 544 (2002)... 28

Ramos v. Browning Ferris Indus. of S. Jersey, Inc., 103 N.J. 177 (1986) 34

Serico v. Rothberg, 234 N.J. 168 (2018) 29

Serpa v. New Jersey Transit, 401 N.J. Super. 371 (App. Div. 2008) 23, 24

Silveira-Franciso v. Bd of Educ., 224 N.J. 126 (2016) 28

State v. Pontery, 19 N.J. 457 (1955) 18

State v. Walker, 385 N.J. Super. 388 (App. Div. 2006) 24

Synnex Corp. v. ADT Security, 394 N.J. Super. 577 (App. Div. 2007) 28

Terranova v. Skyline Restorations, 2023 N.J. Super. Unpub. LEXIS 1547 (App. Div. September 20, 2023) 44, 45

United States v. Seckinger, 397 U.S. 203 (1970) 34, 35

Vladichak v. Mt. Creek Ski Resort, Inc., 2022 N.J. Super. Unpub. LEXIS 606 (App. Div. April 13, 2022) 46, 47, 48, 49

W.H. Indus. v. Fundicao, 397 N.J. Super. 455 (App. Div. 2008) 28

1266 Apt. Corp. v. New Horizon Deli, 368 N.J. Super. 456 (App. Div. 2004) 28

Rules

R. 2:5-1 ..... 27, 28
R. 2:6-1 6
R. 2:6-2 24
R. 2:6-3 6
R. 2:6-8 6
R. 2:10-2 ..... 18, 24
R. 4:46-2 27

Statutes

N.J.S.A. 2A:40A-1 16

Other Authorities

Pressler & Verniero, Current N.J. Court Rules, (2025) 24, 28

PRELIMINARY STATEMENT

This appeal need not be another banal, de novo review of an indemnification clause. A jury found the purported indemnitee solely liable for the Plaintiff's injuries. This verdict eliminates any need for appellate review. The indemnitee now lacks standing to challenge the trial court's ruling that the indemnification clause was impermissibly vague.

In this construction site personal injury action, the jury found the general contractor, appellant/third-party plaintiff, O.A. Peterson Construction ("Peterson"), 100% at fault for plaintiff, Robert Russo's damages. Prior to trial, the trial court dismissed respondent/third-party defendant, subcontractor, and Mr. Russo's employer, Dynamic Protection System ("DPS") from the case on summary judgment with Peterson's urging and consent.

On appeal, Peterson seeks to overturn the verdict and undo the consented-to dismissal so that it may challenge the trial court's finding that the Peterson-DPS contract lacked language sufficient to require DPS to indemnify Peterson for Peterson's own negligence. However, in doing so, Peterson admits: 1) the jury found Peterson solely liable for plaintiff's injuries and 2) New Jersey law bars indemnitees from obtaining contractual indemnification if they are the sole cause of a plaintiff's injuries. These admissions defeat Peterson's appeal outright, regardless of the contract's language.

Recognizing this fatal flaw, Peterson attempts to salvage appellate review by making an argument it *claims* the trial court failed to address. Specifically, Peterson asserts the trial court erred by depriving the jury the opportunity to assess DPS's negligence. This argument is baffling.

The jury did not assess DPS's negligence because Peterson urged and convinced the trial court to not allow DPS to participate at trial. That Peterson made this argument on the record conclusively shows the trial court addressed the issue. But, to now turn around and cite DPS's absence at trial as reversable error is nothing more than Peterson's attempt to manipulate the judicial process. This invited error bars appellate review.

Even had Peterson not convinced the trial court to disallow Peterson's participation at trial, that result was inevitable. In non-complex personal injury matters involving third-party contractual indemnification claims, long-standing New Jersey law prohibits impleaded employers from participating in their employees' personal injury trials.

Peterson's appeal falls short for several other reasons. Initially, Peterson failed to argue DPS's absence at trial amounts to plain error. As a result, Peterson waived this argument in its entirety. Moreover, Peterson failed to preserve or perfect its appeal regarding the Order granting DPS's outright dismissal. After choosing not to oppose DPS's motion seeking outright

dismissal, Peterson did not include the Order granting this request in either its Notice of Appeal or Civil Case information Statement.

Even if this Court overlooks these significant flaws to reach the indemnification issue, Peterson's appeal remains exceedingly inadequate. As the drafting party and purported indemnitee, Peterson failed to overcome the presumption against indemnification. The clause, strictly construed against Peterson, does not contain bright line, unequivocal language sufficient to require DPS to indemnify Peterson for Peterson's own negligence.

That Appellate Division and Law Division judges reached divergent conclusions in evaluating substantially similar clauses illustrates the ambiguous nature of the oft-used language. Since courts can reach different findings examining essentially the same language, the language must be ambiguous. Contractors and the public at large certainly cannot be bound by such ambiguous terms.

I. PROCEDURAL HISTORY

After sustaining injuries on a jobsite at which Peterson was the general contractor, Plaintiff, Robert Russo, together with his wife, sued Peterson on November 10, 2021. (**Da001-Da008**, Plaintiffs' Complaint). On December 16, 2021, Peterson answered the Russos' Complaint and impleaded Russo's employer, DPS. (**Da017-Da024**, Peterson's Amended Answer and third-party Complaint). Peterson's third-party Complaint sought recovery from DPS under theories of contribution, common law indemnification, and contractual indemnification. (**Da021-Da024**, Peterson's Amended Answer and Third-Party Complaint, Counts 1-3).

Peterson moved for summary judgment on September 8, 2023. (**Da104-Da186**, Peterson's Statement of Material Facts and Exhibits). DPS cross-moved for summary judgment on September 26, 2023. (**Da187-Da328**, DPS's Statement of Material Facts and Exhibits). DPS's cross-motion for summary judgment sought to dismiss Peterson's Third-Party Complaint in its entirety. Peterson opposed DPS's cross motion for summary judgment on the issue of contractual indemnification only. <u>See</u> **Da372-379**, DPS's Motion for Reconsideration.

The trial court denied Peterson's motion for summary judgment on October 20, 2023 (**Da043-044**). That same day, the trial court partially granted

DPS's cross motion for summary judgment on the limited issue of contractual indemnification for Peterson's own negligence. (**Da041-042**). In her Order (which modified the form of order DPS submitted seeking summary judgment in its entirety – See **Da410-Da411**), Judge Belgard held "Dynamic Protection Systems, Inc.'s cross motion for summary judgment is hereby GRANTED as it relates to indemnification for the **subcontractor's** own negligence…" (**Da041**)(emphasis added). This Order did not address the remaining issues and DPS remained an active party to the case. However, this Order contained a clerical error by incorrectly referring to the "subcontractor's own negligence" (i.e., DPS) rather than "general contractor's own negligence" (i.e., Peterson) (Ibid.).

Peterson moved to reconsider on November 9, 2023. (**Da329-370**, Peterson's Statement of Facts and Exhibits). DPS filed its own motion for reconsideration and to correct the clerical error on November 15, 2023. (**Da371-Da411**, DPS's Attorney Certification and Exhibits). In addition to seeking to have the trial court correct the clerical error, DPS asked the trial court to reconsider its decision limiting its ruling solely to the issue of contractual indemnification for Peterson's own negligence. (**Da372**, DPS's Attorney Certification). That is, DPS's motion for reconsideration asked the Court to

dismiss Peterson's third-party Complaint in its entirety. (**Da373-379**, DPS's Attorney Certification).

On December 20, 2023, DPS filed a motion to sever the third-party contractual indemnification claim from the January 22, 2024 personal injury trial between Plaintiff and O.A. Peterson. (**TPDa1**[1]**-TPDa11**[2]).

The Court held oral argument on Peterson's and DPS's motions for reconsideration on January 5, 2024. (**2T**, **Da433-Da470**). The Court granted DPS's motion to correct the clerical error with the consent of Peterson. (**Da459**, **2T50:16-51:3**). Thereafter, the Court addressed DPS's motion for reconsideration and DPS's request to be entirely dismissed from the case. (**Da459-Da465**, **2T51:11-62:21**). Peterson did not oppose DPS's motion for a complete dismissal, either in the initial motion for summary judgment or in the motion for reconsideration. (**Da459**, **2T51:11-52:12**; **Da461**, **2T54:2-8**; **Da462**, **2T 56:22-57:15**). The Court noted Peterson's lack of opposition as a basis for

---

[1] As Peterson utilized the "**Da**" (defendant's appendix) designation for its appendix, pursuant to R. 2:6-8, DPS will utilize "**TPDa**" (third-party defendant's appendix) to identify documents contained in its appendix. Pursuant to R. 2:6-3, DPS will rely upon its appendix for the purposes of this motion and in support of its merits brief.

[2] Pursuant to R. 2:6-1(a)(2), DPS includes this motion in its entirety to establish the issue of DPS's participation at trial was raised and waived by Peterson.

granting DPS's motion and upon granting the motion, Peterson's attorney indicated "That's fine." (**Da462, 2T56:22-57:17; Da465, 2T62:9-21**).

During argument, Peterson argued against allowing DPS to participate at trial noting DPS would not appear on the verdict sheet. (**Da460-Da461**, **2T53:6-54:1**; **Da463**, **2T58:11-16**). Peterson further indicated it would not seek a jury interrogatory to assess liability against DPS, as that would be barred by the worker's compensation act. (**Da459-Da461**, **2T51:18-54:1**). In fact, Peterson suggested allowing DPS to participate at trial would confuse the jury. (**Da461, 2T54:8-13**). The Court ultimately granted DPS's motion for reconsideration and dismissed DPS entirely from the case. (**Da465, 2T62:8-21**).

During that same hearing, the court addressed DPS's motion to sever, which the Court determined to be moot. (**Da461, 2T54:2-8, 2T71:15-16**)

Following oral argument, the Court denied Peterson's motion for reconsideration (**Da045-Da046**) and granted DPS's motion to reconsider and correct a clerical error on January 5, 2024. (**Da047-Da048**). This Order completely dismissed DPS from the case. (**Da047-Da048**). **Peterson did not appeal this Order**. (**Da96-Da101**, Peterson's Notice of Appeal). That same day, the Court denied DPS's motion to sever as moot. (**TPDa12-TPDa13**).

Plaintiffs and Peterson participated in a jury trial between April 2, 2024 and April 11, 2024. On April 11, 2024, the jury returned its verdict finding Peterson 100% liable for Plaintiff's injuries. (**Da093-Da95**).

Peterson filed Notices of Appeal and Civil Case Information Statements that are silent as to Peterson's intent to appeal the trial court's January 5, 2024, Order dismissing DPS from the case outright. (**Da96-Da101**, Peterson's Initial Notice of Appeal; **TPDa14-TPDa18**, Peterson's Amended Notice of Appeal; **TPDa19-TPDa23** Peterson's Initial Case Information Statement; and **TPDa24-TPDa28** Peterson's Amended Case Information Statement).

II. COUNTERSTATEMENT OF FACTS

This personal injury action arises out of an alleged November 4, 2020 fall down accident. On that date, Robert Russo was working at a construction site at 33 Monroe Street, Bridgewater, New Jersey. (**Da001-Da002**, Plaintiffs' Complaint, First Count, ¶2). Russo alleged that, while in the course and scope of his employment with DPS as a senior fire alarm technician, he was injured after falling into an open floor hatch. (**Da001-Da002**, Plaintiffs' Complaint, First Count, ¶2). Russo alleges that, as the general contractor for the job site, Peterson's negligence caused his injuries. (**Da001-Da003**, Plaintiffs'

Complaint, First Count). Russo further alleged that, Peterson employee, "Mike"[3] was responsible to walk Russo through the job site. (**Da003-Da005**, Plaintiffs' Complaint, Second Count). Russo alleged that Mike O'Donnel was negligent in failing to close the floor hatch and by failing to warn Russo of the dangerous condition. (**Da003-Da005**, Plaintiffs' Complaint, Second Count). Plaintiffs' Complaint contained a Third Count seeking to have Mike O'Donnell's actions as a Peterson employee imputed to Peterson. (**Da005-Da006,** Plaintiffs' Complaint, Third Count).

Russo answered form interrogatories in this matter. (**Da126-Da127**, Plaintiffs' Answers to Form A Interrogatories). According to Russo's answers to interrogatories, his accident occurred as follows:

> …[on] November 4, 2020…at approximately 10:00 a.m. Mike, the representative from OA Peterson Construction, opened the hatch in the floor to confirm the existence of a crawl space. Ed Prescott (my supervisor) and I looked down into the hatch as our plan was to pull the wires through the hole. We told Mike we did we did not need to access the crawlspace that day. Ed and I then walked away approximately 30 feet from the hatch and I took out my flashlight to look at the ceiling and follow the wires. Mike remained in the area by the hatch. As I was walking around with Ed looking up to follow the wires on the ceiling, I encountered the open hatch and my left leg went into it and my right leg was stuck on the floor holding most of my body weight which caused me to twist underneath myself.

---

[3] Russo and Peterson later stipulated that "…the alleged acts and/or omissions of Mike O'Donnell (referred to in the original complaint as "Mike") were done within the scope of his employment with O.A. Peterson…" <u>See</u> **Da214**.

> Mike failed to close the hatch and warn me that it was still open as I was approaching. He apologized to me multiple times and said that he forgot to close it..
>
> (**Da126-Da127,** Plaintiffs' Answers to Interrogatories, Form C, #2).

Plaintiffs' At his November 16, 2022 deposition, Russo testified that, at the time of his injury, he was working as a senior alarm installer for DPS. (**Da228-Da259,** Plaintiffs' Deposition Transcript, 9:1-17, 18:1-6). To complete his work of alarm installation, Russo and his supervisor, Ed Prescott walked through the one-story building to ensure it was a safe environment. (**Da228-Da259,** Plaintiffs' Deposition Transcript, 21:20-22:20, 24:1-3, 44:8-14, 48:17-51:16). Russo also attempted to determine whether he would install electrical wiring in the ceiling or in the crawl space below the floor, as the building had no basement. (**Da228-Da259,** Plaintiffs' Deposition Transcript, 24:19-25:10, 48:17-51:16).

Mike O'Donnell showed Mr. Russo and Mr. Prescott the crawl space by opening up a floor hatch that was not visible when closed. (**Da228-Da259,** Plaintiff's' Deposition Transcript, 27:22-25, 29:22-30:15, 38:17-23, 48:17-51:16). Mr. Russo did not open or close the hatch. He assumed that Mr. O'Donnell would have closed the hatch as Mr. O'Donnell opened the hatch and it was his job to close the hatch. (**Da228-Da259,** Plaintiff's Deposition Transcript, 30:10-15, 33:5-7, 33:17-18, 37:8-13, 43:19-22, 48:17-51:16, 117:5-

20). Mr. Russo stepped into the hole because he thought Mr. O'Donnell closed the hatch and it was covered. (**Da228-Da259,** Plaintiff's Deposition Transcript, 37:16-25, 48:17-51:16). Plaintiff assumed that hatch was closed/covered was because, before falling, Russo informed Mr. O'Donnell that he would not need access to the hatch that day. (**Da228-Da259,** Plaintiffs' Deposition Transcript, 40:18-41:4, 45:2-6, 48:17-51:16, 118:11-23).

Peterson employee, Mr. O'Donnell, opened the hatch despite not being asked to do so. Mr. Russo merely asked him if a crawl space existed and, instead of just answering the question, Mr. O'Donnell took the affirmative step of opening the hatch. (**Da228-Da259,** Plaintiffs' Deposition Transcript, 41:5-42:2, 48:17-51:16). After exiting the hatch room, Mr. Russo was following ceiling wiring through the building and eventually ended up in the area of the hatch, and, while examining overhead wires, stepped backwards into the open hatch, as he assumed Mr. O'Donnell had closed the hatch, (**Da228-Da259,** Plaintiff's Deposition Transcript, 48:17-51:16, 53:1-9, 56:18-57:8).

After Mr. Russo fell into the hatch, Mr. O'Donnell apologized and said something to the effect of "I forgot to shut it" or "I should have shut it." (**Da228-Da259,** Plaintiff's Deposition Transcript, 50:21-25). Had Mr. Russo known Mr. O'Donnell failed to close the hatch, he would have been more aware of his surroundings. (**Da228-Da259,** Plaintiffs' Deposition Transcript, 58:14-59:5).

Ed Prescott testified that Mr. Russo was following the ceiling wires with Mr. Prescott into the utility room when Mr. Russo stepped backward and fell into the open hatch. (**Da261-Da275**, Ed Prescott's Deposition Transcript, 8:14-9:7, 46:16-47:2). They did not intend to access the hatch or crawl space that day. (**Da261-Da275**, Ed Prescott's Deposition Transcript, 9:22-10:3). Neither Mr. Russo nor Mr. Prescott opened or shut the hatch. (**Da261-Da275**, Ed Prescott's Deposition Transcript, 10:4-10, 17:10-20). Peterson—the general contractor—opened the hatch without being specifically asked to do so. (**Da261-Da275**, Ed Prescott's Deposition Transcript, 10:4-10, 11:16-19, 25:9-26:7).

When Mr. O'Donnell opened the hatch, there was a light on inside of the crawl space. (**Da261-Da275**, Ed Prescott's Deposition Transcript, 11:1-15, 25:1-4). Mr. Prescott assumed Mr. O'Donnell closed the hatch, as he re-entered the hatch room after showing the Plaintiff and Mr. Prescott the hatch. (**Da261-Da275**, Ed Prescott's Deposition Transcript, 12:5-13, 28:17-24, 51:10-23). While Mr. O'Donnell did not close the hatch, Mr. Prescott testified Mr. O'Donnell shut off the light inside the crawl space, as when the Plaintiff fell into it, it was dark. (**Da261-Da275**, Ed Prescott's Deposition Transcript, 12:5-18). Neither Plaintiff nor Mr. Prescott shut off the light inside the crawl space. (**Da261-Da275**, Ed Prescott's Deposition Transcript, 17:10-20).

At the time Mr. Russo stepped into the hatch, both he and Mr. O'Donnell were looking up to follow the ceiling wires. (**Da261-Da275**, Ed Prescott's Deposition Transcript, 14:16-15:3). At that point, because the light was shut off inside the crawl space, there was no way to notice the hatch was open, which was a dangerous condition. (**Da261-Da275**, Ed Prescott's Deposition Transcript, 15:4-15, 17:21-24). Plaintiff was not walking backwards when he fell, he was stationary examining overhead wires, but stepped backward into the open hatch while looking up. (**Da261-Da275**, Ed Prescott's Deposition Transcript, 8:14-9:7, 14:16-15:3, 31:23-32:3, 38:1-7, 46:24-47:22).

The general contractor followed Mr. Russo and Mr. Prescott the entire time during their work and was present when the Mr. Russo fell. (**Da261-Da275**, Ed Prescott's Deposition Transcript, 36:15-37:12, 47:3-13). Mr. Prescott testified that the general contractor created the dangerous condition by shutting off the light in the crawl space. (**Da261-Da275**, Ed Prescott's Deposition Transcript, 53:9-12). Only Mr. Russo, Mr. Prescott, and Mr. O'Donnell were present on the job site during this time. (**Da261-Da275**, Ed Prescott's Deposition Transcript, 17:6-9, 18:10-13).

Mr. O'Donnell admitted he was Peterson's site superintendent that day and responsible for supervising Mr. Russo and Mr. Prescott. (**Da277-Da303**, Mike O'Donnell's Deposition Transcript, 8:8-11, 9:16-10:7). Mr. O'Donnell

admitted being responsible for general safety conditions as well as for ensuring that the premises were safe for subcontractors. (**Da277-Da303**, Mike O'Donnell's Deposition Transcript, 10:24-11:17). Mr. O'Donnell agreed that, if he **or anybody else** left the hatch open, that would not be a safe thing to do and, if he had seen it was left open, he would have closed it. (**Da277-Da303**, Mike O'Donnell's Deposition Transcript, 35:5-17). Mr. O'Donnell confirmed that, as the person in charge of safety for the project, his policy or rule would be that the hatch should be closed when unattended. (**Da277-Da303**, Mike O'Donnell's Deposition Transcript, 18:14-24).

Mr. O'Donnell could not recall if he did **or did not** open the hatch. (**Da277-Da303**, Mike O'Donnell's Deposition Transcript, 37:10-38:25). Mr. O'Donnell could not remember who opened the hatch. (**Da277-Da303**, Mike O'Donnell's Deposition Transcript, 17:22-25, 20:1-22, 24:3-16, 35:25-36-4, 37:18-23, 38:16-25). Mr. O'Donnell also testified was unaware the hatch was open at the time the Plaintiff stepped into it. (**Da277-Da303**, Mike O'Donnell's Deposition Transcript, 30:6-20, 32:11-19).

Mr. O'Donnell confirmed that Mr. Russo and Mr. Prescott were inspecting overhead wires prior to Plaintiffs' fall. (**Da277-Da303**, Mike O'Donnell's Deposition Transcript, 41:1-6). Mr. O'Donnell confirmed he was with the Plaintiff and Mr. Prescott while they were performing their work. (**Da277-**

Da303, Mike O'Donnell's Deposition Transcript, 43:2-6). Mr. O'Donnell acknowledged the crawl space was lit from within and a light switch in the same room as the hatch. (**Da277-Da303**, Mike O'Donnell's Deposition Transcript, 54:18-55:3).

Before the accident, Peterson drafted a contract containing the following language:

> M. To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Contractor, and its consultants, agents and employees or any of them from and against all claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death sustained by anyone, including employees of Subcontractor or to injury to or destruction of intangible property (other than the Work itself) including loss of use resulting therefrom, **caused in whole or in part by negligent acts or omissions of the Subcontractor**, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, **regardless of whether or not such claim, damaged, loss or expense is caused in part by a party Indemnified hereunder.** Such obligations shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist between Contractor and Subcontractor.
>
> See **Da149-Da150** (emphasis added).

FILED, Clerk of the Appellate Division, October 04, 2024, **A-002835-23**

LEGAL ARGUMENT

POINT I

THE JURY'S VERDICT EXTINGUISHED ANY CHALLENGE TO THE TRIAL COURT'S HOLDING ON CONTRACTUAL INDEMNIFICATION

A. The Jury's Verdict Precludes Peterson from Obtaining Indemnification from DPS for Peterson's Own Negligence

The jury found Peterson 100% at fault for the plaintiff's injuries. (**Da093-Da095**). New Jersey law prohibits contractual indemnification where the indemnitee (i.e., Peterson) is found solely liable, **no matter what the contract says**. Mautz v. J.P. Patti Co., 298 N.J. Super. 13, 20 (App. Div. 1997) citing N.J.S.A. 2A:40A-1; and see Estate of D'Avila v. Hugo Neu Schnitzer East, 442 N.J. Super. 80, 101 (App. Div. 2015), Englert v. The Home Depot, 389 N.J. Super. 44, 49 (App. Div. 2006), Leitao v. Damon G. Douglas Co., 301 N.J. Super. 187, 191-192, 197-198 (App. Div. 1997).

Peterson concedes both points. (See **Db17, Db20-21, Db26-27**). Peterson has absolutely no standing to challenge the trial court's finding that the Peterson-DPS contract was ambiguous. The issue of Peterson's contractual indemnification became moot once the jury returned its verdict.

B. Peterson Created an Invited Error By Urging The Trial Court To Dismiss DPS

DPS cannot fathom how Peterson filed this appeal and certified the issue of DPS's trial participation was never raised below. The record directly contradicts this claim.

On December 20, 2023, DPS filed a motion to sever the third-party contractual indemnification claim from the personal injury trial between Plaintiff and O.A. Peterson. (**TPDa1-TPDa11**). This motion raised the same issues below that Peterson now raises in its appeal regarding DPS's participation at trial. (**Db19-Db28**, **TPDa3-TPDa11**). Peterson did not join or otherwise address this motion.

During the January 5, 2024 hearing on the parties' motions for reconsideration, the court addressed DPS's motion to sever and denied the motion as moot. (**Da461, 2T54:2-8, 2T71:15-16**).

The trial court reached this conclusion becuase Peterson urged the trial court to disallow DPS's participation at trial. Peterson argued against allowing DPS to participate at trial as DPS would not appear on the verdict sheet. (**Da460-Da461**, **2T53:6-54:1**; **Da463**, **2T58:11-16**). Peterson further indicated it would not seek a jury interrogatory to assess liability against DPS, as that is barred by the worker's compensation act. (**Da459-Da461**, **2T51:18-54:1**). In fact,

Peterson even suggested allowing DPS to participate at trial would confuse the jury. (**Da461, 2T54:8-13**).

By convincing the trial court to bar DPS from participating at trial, only to now turn around and cite DPS's absence at trial as reversable error is clearly Peterson's attempt to manipulate the judicial process. Such invited error must preclude appellate review. See Mack-Cali Realty Corp. v. State, 466 N.J. Super. 402, 447 (App. Div. 2021) aff'd o.b. 250 N.J. 550 (2022) (The doctrine of invited error operates to bar a disappointed litigant from arguing on appeal that an adverse decision below was the product of error, when that party urged the lower court to adopt the proposition now alleged to be error); quoting Brett v. Great Am. Recreation, Inc., 144 N.J. 479, 503 (1996); and see R. 2:10-2. A party "cannot beseech and request the trial court to take a certain course of action,…then condemn the very procedure he sought and urged, claiming it to be error and prejudicial." State v. Pontery, 19 N.J. 457, 471 (1955).

Peterson's invited error forms the sole basis for its request to have this court review the contractual indemnification issue, as that issue would not otherwise be appealable once the jury found Peterson solely liable. The invited error doctrine mandates the court deny Peterson's appeal outright.

C. New Jersey Law Barred DPS from Participating at Trial

Peterson correctly asserted below that DPS would not participate in the underlying trial or appear on the verdict sheet. As Plaintiff's employer, New Jersey law barred DPS from participating in the underlying personal injury trial.

Approximately three decades ago, the Appellate Division held, and the Supreme Court affirmed, it was neither necessary nor appropriate to permit an injured plaintiff's employer to participate in the personal injury trial. Kane v. Hartz Mountain Industries, Inc., 278 N.J. Super. 129, 146-147 (App. Div.) aff'd 143 N.J. 141 (1996). Rather, "**the trial of the third-party claim should be severed**." Ibid. (emphasis added).

In Kane, Plaintiff sustained injuries in the course and scope of his employment with Eastern Steel Erectors ("Eastern") when he fell from a 29-foot-high beam. Kane, 278 N.J. Super. at 134. The beam was part of a structural steel frame for a warehouse Eastern was constructing for Hartz-Claiborne Limited Partnership ("Hartz-Claiborne") in North Bergen. Ibid.

Plaintiff filed suit against the following parties, alleging that defendants failed to keep the premises reasonably safe and failed to comply with applicable federal and state safety codes:

i. The General Contractor, Hartz Mountain Industries, Inc. (Hartz Mountain)
ii. Hartz's superintendent, Joseph Romeo
iii. Hartz-Claiborne

iv. Howell Steel, Inc.
v. Nacamuli Associates
vi. Hartz Mountain Development Corporation (Hartz Development)
vii. Liz Claiborne, Inc.
viii. Kenneth Carl Bonte
ix. Keith A. Michaels.

Kane, 278 N.J. Super. at 134

Hartz-Claiborne retained Howell to furnish all labor, materials, and equipment necessary to complete structural steel work. Id. at 135. Their contract specified that Howell was responsible for full compliance with safety standards. Ibid.

Howell only operated a steel fabrication facility, so it hired Eastern to construct the structural steel. Ibid. Their contract had a "safety" subsection whereby Eastern agreed to be solely responsible for complying with OSHA[4] and all other applicable safety regulations. Ibid.

Eastern agreed to indemnify and hold harmless Howell and the "owner" of the project from any losses or claims arising out of Eastern's work on the project. Ibid. Howell joined Eastern as a third-party defendant, alleging that Eastern's negligence had caused the injury to plaintiff (Eastern's employee) and that Eastern had contractually agreed to indemnify Howell for any personal

---

[4] The subject contract herein also mentions OSHA standards. See **Da150**, ¶O. As revealed by practically every transcript from each day of trial, the trial involved significant arguments and testimony regarding OSHA and the parties called experts to address OSHA standards and OSHA's impact on the case.

injuries arising out of Eastern's performance of its subcontract with Howell. Kane, 278 N.J. Super. at 135.

On the first day of trial, the judge determined that Eastern would be allowed to participate in the trial and an eight-day trial followed. Id. at 136. At the close of Plaintiff's case, Plaintiff dismissed its complaint as to Romeo and Hartz Development. Ibid. On September 24, 1992, the jury returned a verdict of no cause for action as to Nacamuli and the remaining Hartz defendants. Ibid.

Plaintiff's motion for a new trial was denied and Plaintiff appealed. Ibid. The Appellate Division held that the third-party contractual indemnification claim should have been severed, and it was error to have the employer (Eastern) participate at trial. Id. at 146-147. The Court determined that Howell would not be held liable without a similar finding of fault against Eastern. Id. at 147.

The Supreme Court affirmed Kane in a published opinion "substantially for the reasons expressed" and did not offer any additional analysis on an employer's participation at trial. Kane v. Hartz Mt. Indus., 143 N.J. 141, 142 (1996).

Thereafter, the Appellate Division exhaustively analyzed Kane in Estate of D'Avila v. Hugo Neu Schnitzer East, 442 N.J. Super. 80 (App. Div. 2015). D'Avila was an enormous case involving numerous parties and claims, including negligence against the general contractor, subcontractors that were not

plaintiff's employer, and various medical providers, as well as coverage claims involving several insurance companies and brokers. The trial took nearly 40 days. D'Avila, 442 N.J. Super. at 86-87. The D'Avila Court recognized the Supreme Court's affirmation of Kane leaves Kane as controlling law. Id. at 104, 106.

While the Court in D'Avila allowed the contractual indemnification issue to proceed alongside the personal injury claim, the Court specifically acknowledged that the D'Avila case was substantially distinguishable from Kane, as Kane was a straightforward, **eight-day trial** whereas D'Avila was a complex, **forty-day trial**. Id. at 107. And, while the D'Avila case modified Kane to allow employer participation in large, complex cases, involving numerous parties, complex issues, and multiple witnesses, the D'Avila Court specifically indicated that it did not overturn or modify Kane in less-complex cases. Instead, the D'Avila Court urged the Supreme Court to address whether Kane "should be followed in less complex settings." D'Avila, 442 N.J. Super. at 109-114 (App. Div. 2015). The Court ultimately determined employers should participate at trial, but only "in a context such as the present one involving claims even more extensive than those in Kane and an unusually lengthy trial." Id. at 111.

One final case to consider is Leitao v. Damon G. Douglas, Company, wherein the Appellate Division noted the trial court had severed a defendant

general contractor's third-party complaint for contractual indemnification against the plaintiff's employer. Leitao v. Damon G. Douglas, Company, 301 N.J. Super. 187, 190 (App. Div.), certif. denied, 151 N.J. 466 (1997).

Kane's holding, affirmed by the New Jersey Supreme Court, remains authoritative and barred DPS's participation at trial. Like Kane, this was a short[5] negligence trial involving very few issues or witnesses. Compared to the scope of D'Avila (40 days, numerous parties and issues), the distinction becomes clear.

Kane barred DPS's participation at trial. Given Peterson did not implead any additional third-party defendants (i.e., non-employer subcontractors, the property owner, etc.), to ensure it preserved its right to seek indemnification, it became incumbent upon Peterson to convince the jury that Peterson was not solely responsible for Plaintiff's injuries. All Peterson had to do was persuade the jury that the Plaintiff was at least 1% responsible for causing the accident. Peterson failed to do so and the jury found Peterson solely negligent.[6] The jury's verdict extinguished Peterson's appeal.

---

[5] Trial in this case was one day shorter than the trial in Kane.

[6] Despite overwhelming evidence showing Peterson created the dangerous condition and exclusively caused the Plaintiff's injuries, Peterson chose to place its fate in the hands of the jury. **Peterson certainly had another viable option.** Peterson could have settled Mr. Russo's claim, pursued this appeal, and, if successful on appeal, sought indemnification from DPS. See Serpa v. New Jersey Transit, 401 N.J. Super. 371, 379-380 (App. Div. 2008). In Serpa, New Jersey Transit ("NJT") sought indemnification for a settlement it reached with

D. Peterson Failed To Address The Plain Error Standard and Thus Waived Its Argument Regarding DPS's Trial Participation

In the event this Court determines that the issue of DPS's trial participation was not raised below, to prevail on this unpreserved argument, Peterson would need to show the trial court's decision amounted to plain error. Pressler & Verniero, Current N.J. Court Rules, cmt. 3 on R. 2:6-2 (2025)(An issue not raised below may be considered if it meets the plain error standard), and see State v. Walker, 385 N.J. Super. 388, 410 (App. Div. 2006); R. 2:10-2. Despite conceding that it raise dan unpreserved argument, Peterson never cites

---

an employee of the indemnitor/contractor, Dan-Za General Contractors, Inc. Serpa, 401 N.J. Super. at 374. Plaintiff sued NJT only due to the worker's compensation bar and NJT named Dan-Za as a third-party defendant. Ibid. Before trial, Plaintiff and NJT settled the case, and counsel for Dan-Za agreed the $1.5M settlement was reasonable. Ibid. The matter then went to trial for an allocation of fault between NJT and Dan-Za only. Ibid. The jury found NJT 15% at fault and Dan-Za 85% at fault, so Dan-Za was responsible for its percentage of negligence, or $1.275M of the settlement. Ibid.

The Court determined a party may be indemnified for settlement payments it makes provided that the following three criteria are met: (a) the indemnitee's claims are based on a valid, pre-existing indemnitor/indemnitee relationship; (b) the indemnitee faced potential liability for the claims underlying the settlement; and (c) the settlement amount was reasonable. Id. at 379. The Court determined that all three criteria were met. Id. at 380.

Settlement is not a determination of fault; it is a fault-free agreement. At the same time, it triggers an indemnification cause of action to accrue. On the other hand, the verdict was a determination that Peterson was solely at fault. Had Peterson settled, the jury never would have returned its verdict finding Peterson solely negligent and extinguished Peterson's right to contractual indemnification. Peterson must abide the consequences of its decision.

the plain error standard or otherwise attempts to explain how the trial court's finding amounts to plain error.

On the issue of DPS's participation at trial, Peterson's failure to address or analyze the plain error standard in its merits brief waives review. Arsenis v. Boro. Of Bernardsville, 476 N.J. Super. 195, 204 n.3 (App. Div.), certif. denied, 257 N.J. 524 (2024) ("[A]n issue not briefed is deemed waived.").

POINT II

THE LOWER PROPERLY GRANTED DPS SUMMARY JUDGMENT AS PETERSON DID NOT OPPOSE DPS's MOTION SEEKING OUTRIGHT DISMISSAL

DPS's cross-motion for summary judgment sought to dismiss Peterson's Third-Party Complaint in its entirety. However, Peterson only opposed DPS's cross motion for summary judgment on the issue of contractual indemnification. See **Da372-379**, DPS's Motion for Reconsideration.

Significantly, the trial court only partially granted DPS's cross motion for summary judgment, limiting its decision to the issue of contractual indemnification. (**Da041-042**). In her Order (which modified the form of order DPS submitted seeking summary judgment in its entirety – See **Da410-Da411**), Judge Belgard held "Dynamic Protection Systems, Inc.'s cross motion for summary judgment is hereby GRANTED as it relates to indemnification for the subcontractor's own negligence…" (**Da041**). This Order did not address the

remaining issues, **including whether DPS would participate at trial**. Therefore, DPS remained an active party to the case.

DPS filed a motion for reconsideration seeking to have the trial court reconsider its decision limiting its ruling solely to the issue of contractual indemnification for Peterson's own negligence. (**Da371-Da411**, DPS's Attorney Certification and Exhibits). That is, DPS's motion for reconsideration asked the trial court to dismiss Peterson's third-party Complaint in its entirety. (**Da373-379**, DPS's Attorney Certification).

The Court held oral argument on DPS's motion for reconsideration on January 5, 2024. (**2T**, **Da433-Da470**). The Court addressed DPS's motion for reconsideration and DPS's request to be entirely dismissed from the case. (**Da459-Da465**, **2T51:11-62:21**). Peterson did not oppose DPS's motion for a complete dismissal, either in the initial motion for summary judgment or in the motion for reconsideration. (**Da459**, **2T51:11-52:12**; **Da461**, **2T54:2-8**; **Da462**, **2T 56:22-57:15**). The Court noted Peterson's lack of opposition as a basis for granting DPS's motion and upon granting the motion, Peterson's attorney indicated "That's fine." (**Da462, 2T56:22-57:17; Da465, 2T62:9-21**). The Court ultimately granted DPS's motion for reconsideration and dismissed DPS entirely from the case. (**Da465, 2T62:8-21**).

By failing to oppose both DPS's underlying and reconsideration motions for summary judgment, Peterson admitted all facts contained therein and Peterson waived this argument on appeal. See R. 4:46-2(b).

POINT III

PETERSON FAILED TO APPEAL THE ORDER GRANTING PETERSON'S OUTRIGHT DISMISSAL

The Court entered its order granting DPS's motion to reconsider on January 5, 2024. (**Da047-Da048**). This Order completely dismissed DPS from the case. (**Da047-Da048**). Specifically, the Order indicates, in part:

> …IT IS FURTHER ORDERED that Third-Party Defendant Dynamic Protection System's Motion to Reconsider this Court's October 20, 2023 Order is hereby GRANTED, and
>
> IT IS FURTHER ORDERED that Dynamic Protection System is hereby DISMISSED from this case…
>
> **(Da048)**

Peterson did not appeal this Order. This failure is fatal to Peterson's appeal. See R. 2:5-1(f)(2)(ii) (requiring appellants in civil cases to designate "the judgment, decision, action, or rule, or part thereof, appealed from").

One of the obvious purposes of the notice of appeal is to put the court and opposing parties on reasonable notice of the issues and lower court rulings on

appeal. Pressler & Verniero, Current N.J. Court Rules, cmt. 5.1 on R. 2:5-1(f)(1) (2025). Courts have concluded that only the judgments, orders, or parts thereof designated in the notice of appeal are subject to the appellate process and review. Campagna v American Cyanamid, 337 N.J. Super. 530, 550 (App. Div.), certif. den. 168 N.J. 294 (2001): Pusco v. Newark Bd., of Educ., 349 N.J. Super. 455, 461-462 (App. Div.) certif. den. 174 N.J. 544 (2002); 1266 Apt. Corp. v. New Horizon Deli, 368 N.J. Super. 456, 459 (App. Div. 2004); Naporano Assocs, V. B&P Builders, 309 N.J. Super. 166, 178 (App. Div. 1998); W.H. Indus. v. Fundicao, 397 N.J. Super. 455, 458-459 (App. Div. 2008). However, failure to identify an issue in a notice of appeal may be remedied where the issue or order is identified in the case information statement. See Synnex Corp. v. ADT Security, 394 N.J. Super. 577, 588 (App. Div. 2007); Silveira-Franciso v. Bd of Educ., 224 N.J. 126, 140-141 (2016).

Here, Peterson focused solely on the Orders denying its motions for summary judgment and reconsideration. Peterson's Notices of Appeal and Civil Case Information Statements do not indicate any intention to appeal the trial court's January 5, 2024, Order dismissing DPS from the case outright. (**Da96-Da101**, Peterson's Initial Notice of Appeal; **TPDa14-TPDa18**, Peterson's Amended Notice of Appeal; **TPDa19-TPDa23** Peterson's Initial Case

Information Statement; and **TPDa24-TPDa28** Peterson's Amended Case Information Statement).

As Peterson failed to appeal DPS's Order of dismissal, Peterson's appeal fails on its face.

POINT IV

THE TRIAL COURT PROPERLY HELD PETERSON'S CONTRACT TO BE IMPERMISSIBLY VAGUE AND AMBIGUOUS

A. Standard of Review

The interpretation or construction of a contract is a legal question, reviewed de novo by this court. Driscoll Constr. Co. v. State, Dep't of Transp., 371 N.J. Super. 304, 313 (App. Div. 2004); see also Celanese Ltd. v. Essex Cnty. Improvement Auth., 404 N.J. Super. 514, 528 (App. Div. 2009) (holding that "unless the meaning is both unclear and dependent on conflicting testimony[,]" the court interprets the terms of a contract as a matter of law). In our review, the "trial court's interpretation of the law and legal consequences that flow from" it are "not entitled to any special deference." Serico v. Rothberg, 234 N.J. 168, 178 (2018), Kieffer v. Best Buy, 205 N.J. 213, 222 (2011), Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Specific to this appeal, contractual indemnification for one's own negligence must be clearly and unequivocally manifested in the contract's language. See Mantilla v. NC Mall Assocs., 167 N.J. 262, 272-273 (2001);

Ramos v. Browning Ferris Indus. of S. Jersey, Inc., 103 N.J. 177, 191-192 (1986). This requirement is mandated by the Supreme Court, in that there must be "bright line" language referencing the indemnitee's own negligence. Azurak v. Corporate Prop. Investors, 175 N.J. 110, 112-113 (2003). In fact, there is a presumption against indemnifying an indemnitee for its own negligence that can be rebutted only by plain language clearly expressing contrary intent. Mantilla, 167 N.J. at 269.

Generally, courts give contractual provisions "their plain and ordinary meaning." Kieffer v. Best Buy, 205 N.J. 213, 223 (2011) quoting M.J. Paquet, Inc. v. N.J. Dep't of Transp., 171 N.J. 378, 396 (2002). In that regard, the courts' role in construing a contractual indemnity provision is the same as in construing any other part of a contract—it is to determine the intent of the parties. Kieffer, 205 N.J. at 223. "**However, indemnity provisions differ** from provisions in a typical contract in one important aspect: if the meaning of an indemnity provision is ambiguous, the provision is '**strictly construed against the indemnitee**.'" Kieffer, 205 N.J. at 223-224 quoting Mantilla, 167 N.J. at 272 (emphasis added)(internal citation omitted). In determining the meaning of an indemnity provision, the clause "is…and not extended to things other than those therein expressed." Longi v. Raymond-Commerce Corp., 34 N.J. Super. 593, 603 (App. Div. 1955) (citation omitted). An ambiguity exists where "the terms

of the contract are susceptible to at least two reasonable alternative interpretations." Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am., 195 N.J. 231, 238 (2008) (citation omitted).

Finally and significantly, the court's role in interpreting a contract's meaning is to consider the agreement's terms "in the context of the circumstances under which it was written," "accord to the language a rational meaning in keeping with the expressed general purpose[,]" and apply the agreement accordingly. Conway v. 287 Corp. Ctr. Assocs., 187 N.J. 259, 269 (2006) quoting Atl. N. Airlines v. Schwimmer, 12 N.J. 293, 301-302 (1953). However, where an ambiguity appears in a written agreement, the writing is to be **strictly construed against the drafting party**. In re Estate of Miller, 90 N.J. 210, 221 (1982)(citation omitted).

B. Strictly Construed Against Peterson, the Vague and Ambiguous Contract is Open to More Than One Meaning and Does Not Contain Bright Line Language Sufficient to Overcome the Presumption Against Indemnification

Peterson and DPS do not come before this Court on equal footing. As both the drafting party and the purported indemnitee, to prevail on appeal, Peterson must meet a substantial burden.

Specifically, any ambiguity in the indemnification clause must be strictly construed against Peterson as both the indemnitee **and** as the drafting party. See Kieffer v. Best Buy, 205 N.J. 213, 223-224 (2011) quoting Mantilla v. NC Mall

Assocs., 167 N.J. 262, 272 (2001) (internal citation omitted). Moreover, there is a presumption against indemnifying an indemnitee for its own negligence. Mantilla, 167 N.J. at 269.

DPS urges this Court to complete its review of the subject clause with these factors in mind. To prevail and overcome the presumption against indemnification therefore, Peterson must show its indemnification clause is clear, concise, unequivocal, and incapable of having more than one meaning or interpretation. Here, the indemnification provision – strictly construed against Peterson – is impermissibly vague and does not contain the required bright line or unequivocal language.

The contract Peterson drafted contains the following provision:

> M. To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Contractor, and its consultants, agents and employees or any of them from and against all claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death sustained by anyone, including employees of Subcontractor or to injury to or destruction of intangible property (other than the Work itself) including loss of use resulting therefrom, [sic] **caused in whole or in part by negligent acts or omissions of the Subcontractor**, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, **regardless of whether or not such claim, damaged [sic], loss or expense is caused in part by a party indemnified hereunder**…
>
> See **Da149-Da150** (emphasis added).

Initially, the contract does not contain any "bright line" or "unequivocal terms" indicating the duty to indemnify extends to the indemnitee's own negligence. In fact, the contract is silent regarding Peterson's negligence. The indemnification clause does not include the terms "Peterson's negligence," "general contractor's negligence," or even "indemnitee's negligence." While those specific terms are not absolutely required, the clause did nothing to signify, illustrate, or notify DPS that it would be responsible to indemnify Peterson for Peterson's own negligence.

Rather than unequivocally stating the clause included indemnification for Peterson's own negligence, the clause merely indicates DPS will indemnify Peterson "**regardless of whether or not such claim, damaged [sic], loss or expense <u>is</u> <u>caused</u> in part**[7] **by a party indemnified hereunder**." <u>See</u> **Da149-Da150** (emphasis added). Putting aside one of many typos ("damaged" should be "damage"), this clause is in no way unequivocal and was never intended to satisfy the bright line requirement for Peterson to be indemnified for its own negligence.

---

[7] The jury found solely negligent. Again, this is fatal to Peterson's appeal.

Rather, this clause serves an entirely different purpose. This clause exists to satisfy the common law requirement[8] that indemnitees be free from fault. See Englert v. The Home Depot, 389 N.J. Super. 44, 56 (App. Div. 2006)(the "regardless of" language can be read simply to eliminate that common law condition from the parties' indemnification agreement). This clause simply means that Peterson's contributory negligence will not prohibit it from being indemnified.

On the other hand, this clause does not satisfy the bright line language requirement, as it does not distinguish between allowing indemnification for the negligence of others and allowing indemnification for the indemnitee's own negligence. Englert, 389 N.J. Super. at 56. Simply put, this clause will not: 1) void indemnity that *does* exist or 2) create indemnity that *does not* exist.[9]

Peterson misstates Englert's ultimate conclusion. (**Pb16-Pb17**).[10] Englert did not find it was only the "to the extent" language that was impermissibly

[8] Ramos v. Browning Ferris Indus. of S. Jersey, Inc., 103 N.J. 177, 190 (1986) (1980)(citation omitted)(Ordinarily, a claim for indemnification requires the claimant to be free of fault.)

[9] Pennsylvania courts agree, holding the "regardless of whether or not" language merely clarifies that any contributory negligence by an indemnitee will not bar their indemnification for damages due to an indemnitor's negligence. Greer v. City of Philadelphia, 568 Pa. 244, 250 (Sup. Ct. Pa 2002).

[10] Peterson's reliance on the Supreme Court of the United States case of United States v. Seckinger is misplaced. In Seckinger, the Court was not interpreting

vague. Rather, Englert found both the "to the extent" and the "regardless of" phrases to be independently vague and ambiguous. Englert, 389 N.J. Super. at 56. Specifically, the Court wrote "[n]either the 'regardless of' phrase nor the 'to the extent' phrase answers the question whether such indemnification would include [an indemnitee's] own share of fault." Ibid. The Englert decision remains intact and persuasive.

Further examination uncovers additional problems with this language. Without referencing Petersons own negligence, the word "caused" is open to numerous meanings. After all, the word "cause" certainly does not mean "negligence." Merriam-Webster defines "cause" to mean, inter alia, "something that brings about an effect or a result."

New Jersey law. It was applying federal common law, thus it's incorrect to say that the Appellate Division "must" follow United States v. Seckinger, 397 U.S. 203 (1970). At most, that decision is persuasive authority only. After all, neither the U.S. Supreme Court "nor any other federal tribunal has any authority to place a construction on a state statute different than the one rendered by the highest court of the state." Johnson v. Fankell, 520 U.S. 911, 916 (1997). The New Jersey Judiciary is the final arbiter of the State Constitution. See Gallenthin Realty Dev. Inc. v. Borough of Paulsboro, 191 N.J. 344, 358 (2007).

Moreover, the AIA contract was not part of the record below, as that contract was never submitted to nor considered by the trial court. Peterson attempts to – yet again – prevail utilizing an argument that it did not make below relying on documents that were not considered below. The fact was not "overlooked" by the trial court, it was never raised by Peterson. DPS submits the Court must ignore this portion of Peterson's brief.

In the context a construction site, it is an enormous leap to conclude the word "caused" exclusively means "negligence" and has no other possible meaning. There is no support for such a finding anywhere in the contract, especially if words are given "their plain and ordinary meaning." Kieffer v. Best Buy, 205 N.J. 213, 223 (2011) quoting M.J. Paquet, Inc. v. N.J. Dep't of Transp., 171 N.J. 378, 396 (2002). Grossly negligent or even intentional conduct would also fall under the plain and ordinary meaning of "caused." Without specifically referencing the indemnitee's / general contractor's / Peterson's own negligence, the clause is impermissibly vague.

The more concise wording is simple: "…regardless of whether or not such claim, damage, loss or expense is caused in part by **the negligence of** a party indemnified hereunder." Inserting "the negligence of" solves both problems by clearly referencing the indemnitee's own negligence and clarifying that "caused" exclusively applies to "negligence." Without this phrase, however, the clause is not Azurak compliant.

As both Azurak and Englert:

> … it would have placed no undue burden on the parties to have drafted a clear, unambiguous indemnification provision. The parties could have spelled out their intention as to which party would bear liability under various circumstance, in particular, whether [the indemnitor] would bear [the indemnitee's] entire liability, irrespective of whether [indemnitee's]

> obligation to a third party arose in part from its own negligence.
>
> Englert at 57 (internal citations omitted).

Next, the indemnification "clause" consists of a single, enormous, run-on sentence. This fact alone opens the clause to ambiguity and potentially more than one meaning. For example, as written, the clause could mean that DPS is only obligated to indemnify Peterson if DPS caused the alleged injury **or** it could mean DPS is obligated to indemnify Peterson regardless of whether DPS caused the injury.

Specifically, the phrase "…provided that such claim…is attributable to bodily injury, sickness, disease or death sustained by anyone, including employees of Subcontractor or to injury to or destruction of intangible property (other than the Work itself) including loss of use resulting therefrom, caused in whole or in part by negligent acts or omissions of the Subcontractor" is clearly missing the word "and" or "is" between "therefrom," and "caused."

There is a significant difference between:

- "…provided that such claim, damage, loss or expense is attributable to bodily injury,…caused in whole or in part by negligent acts or omissions of the Subcontractor…"

  and

- "…provided that such claim, damage, loss or expense is attributable to bodily injury,…**AND** caused in whole or in part by negligent acts or omissions of the Subcontractor…"

> **or**
>
> "…provided that such claim, damage, loss or expense is attributable to bodily injury,…**IS** caused in whole or in part by negligent acts or omissions of the Subcontractor…"

Without the "and" or "is", the "claim" only specifically applies to "bodily injury, sickness, disease or death sustained by anyone…" The run-on nature of the sentence and multiple comas cannot conclusively establish whether the "claim" must also be "caused in whole or in part by the negligent acts or omissions of the Subcontractor." This phrase is impermissibly vague and ambiguous and fails to include language sufficient for Peterson to meet its heightened burden.

Construed strictly against Peterson, the indemnification clause Peterson drafted does not meet the Azurak standard. Peterson's claim for contractual indemnification fails as a matter of law.

C. New Jersey Courts' Inconsistent Findings Regarding Substantially Similar Indemnification Clauses Illustrate Ambiguity

New Jersey courts have reached inconsistent findings pertaining to substantially similar clauses containing terms such as "caused in whole or in part by negligent acts or omissions of the indemnitor" and "regardless of whether or not caused by the indemnitee" or similar language. These inconsistent findings perfectly illustrate the ambiguous and vague nature of

Peterson's contract. Our own Appellate Court judges cannot agree what this provision means.

Prior to the Appellate Division's 2002 decision in Azurak, the Court analyzed contract language nearly identical to the subject clause and reached contrary conclusions. In February of 1997, in Mautz v. J.P. Patti Co., the Appellate Division interpreted a slightly modified combination of the "caused in whole or in part" and "regardless of" phrases as the clause also indicated the indemnitor was only responsible to indemnify the indemnitee "**to the extent**" caused by the indemnitor's own negligence. Mautz v. J.P. Patti Co., 298 N.J. Super. 13, 21 (App. Div.) certif. denied, 151 N.J. 472 (1997). The Court held the clause **did not require** indemnification for the indemnitee's own negligence, rather, **indemnification only existed "to the extent" the claim was caused by the indemnitor's negligence.** Mautz, 298 N.J. Super. at 21.

Later that year in May, the Appellate Division reviewed a clause nearly identical to Peterson's in Leitao v. Damon G. Douglas Co. and found that clause **required** the subcontractor to indemnify the general contractor for the general contractor's own negligence, even though the subcontractor was not negligent; the only other negligent party was the plaintiff. Leitao v. Damon G. Douglas Co., 301 N.J. Super. 187, 197-198 (App. Div.), certif. denied, 151 N.J. 466 (1997). **However**, unlike this case, the clause in Leitao was significantly more

concise, specifically pertaining to outlining how the injuries must be caused by the Subcontractor's negligence. Specifically, our contract indicates:

- …provided that such claim…is attributable to bodily injury, sickness, disease or death sustained by anyone, including employees of Subcontractor or to injury to or destruction of intangible property (other than the Work itself) including loss of use resulting therefrom, caused in whole or in part by negligent acts or omissions of the Subcontractor.

On the other hand, the clause in Leitao court found indemnification where the clause indicated:

- …provided that any such claim, damage, loss or expense a) is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than work itself), including the loss of use resulting therefrom, and b) is caused in whole or in part by any negligent act or omission of the subcontractor…

  Leitao, 301 N.J. Super. at 191.

As outlined above, our contract is clearly missing the word "and" or "is" between "therefrom," and "caused." The Leitao contract does not suffer from this ambiguity and is therefore, significantly less ambiguous. Leitao illustrates the imprecise nature of Peterson's contract.

Post Azurak, in 2006 the Appellate Division examined a similar provision to Mautz that imposed a duty to indemnify for claims or losses "to the extent caused" by the indemnitor's acts or omissions described "regardless of whether it is caused in part by a party indemnified hereunder." Englert v. The Home

Depot, 389 N.J. Super. 44, 56 (App. Div. 2006)(emphasis added). After considering Mantilla, Leitao, and Azurak amongst others, the Appellate Division concluded, contrary to Mautz, that the subject provision was not unequivocal and **did not require** indemnification for the indemnitee's own negligence. Englert, 389 N.J. Super. at 56.

Relevant to the Peterson contract, the Court determined that, while the "regardless of" language does not preclude Peterson's indemnification, the phrase is ambiguous and does not distinguish between allowing indemnification for the negligence of others and allowing indemnification for the indemnitee's own negligence. Ibid. **This phrase simply eliminates the common law requirement for indemnitees to be free from fault.** Ibid.

The Court ultimately held that "[n]either the 'regardless of' phrase nor the 'to the extent' phrase answers the question whether such indemnification would include [the indemnitee's] own share of fault and do not satisfy the required 'unequivocal' expression of intention to obligate [an indemnitor] to fully indemnify [the indemnitee] for damages resulting from its own negligence." Englert, 389 N.J. Super. at 56.

Next, the Appellate Division reached a slightly different conclusion in Estate of D'Avila v. Hugo Neu Schnitzer E., 442 N.J. Super. 80 (App. Div. 2015). D'Avila also involved a work site accident and a similar indemnification

clause. There, the Plaintiff worked for a subcontractor, S&B. Defendant, Hugo Neu, hired S&B to install a foundation and structural supports for a large machine being installed at its facility. D'Avila, 442 N.J. Super. at 87-88. While on site, an unsecured metal ladder fell on to the Plaintiff causing paralysis. Id. at 85. Plaintiff ultimately died due to his injuries and subsequent negligent medical treatment. Ibid. Testimony revealed that the ladder most likely belonged to S&B. Id. at 88-89.

In finding that the clause required indemnification even for Hugo Neu's own negligence, the D'Avila Court focused on the "arising out of" and "regardless of" phrases. Initially, the indemnification clauses in every case outlined above contain these two phrases. Only Leitao – decided prior to Azurak – even considered the "arising out of" language. However, Leitao did not find that this phrase addressed anything approaching the required "bright line" language pertaining to an indemnitee's own negligence. The reason for this is simple. The phrase "arising out of" performance of the work does not address the indemnitee's own negligence.

D'Avila relied solely on the phrase "regardless of" to satisfy the bright line requirement. In doing so, the D'Avila court entirely ignored the Englert Court's determination that the "regardless of" language is ambiguous and fails to answer the question whether such indemnification would include and

indemnitee's own negligence. Englert, 389 N.J. Super. at 56. Clearly, the D'Avila Court reached a finding at odds with prior decisions and only served to further muddy the waters on whether indemnification clauses such as Peterson's are clear and unambiguous and meet the "bright line" requirement.

An unpublished[11] 2018 Middlesex County case cites D'Avila and further illustrates DPS's argument. Mass. Bay Ins. Co. v. Hall Bldg. Corp., 2018 N.J. Super. Unpub. LEXIS 7858 (Law Div. 2018) (See **TPDa29-TBDa47)**. The facts of Mass. Bay are substantially like our case.[12] However, the indemnification clause included the substantially different language. Id. at *5-*6.

Unlike D'Avila and our case, the Mass. Bay indemnification clause included the phrase "to the extent caused" making the clause identical to that found in Mautz and Englert. Ibid. However, citing D'Avila, the Mass. Bay Court reached a finding directly at odds with Englert, finding this specific clause **did**

[11] DPS does not cite the following unpublished opinions as somehow legally binding or authoritative. Rather, DPS cites these cases as additional examples of our courts reaching divergent conclusions when addressing substantially similar indemnification clauses.

[12] The case arose from a December 16, 2011 construction site accident where the injured plaintiff, David Morra, stepped into an unguarded hole while working as an employee for Conex Construction Corporation ("Conex"). Mass. Bay Ins. Co., 2018 N.J. Super. Unpub. LEXIS at *4. Hall Building Corporation & Consolidated Construction ("HBC"), was the general contractor and hired Conex. Id. at *4-5. HBC joined Conex as a third-party defendant and therein asserted claims seeking, common law contribution and indemnification as well as contractual indemnification therefrom. Id. at *5.

meet the bright line standard. Mass. Bay, 2018 N.J. Super. Unpub. LEXIS at *47-*48. In doing so, Mass. Bay ignored the fact that Englert included the phrase "to the extent caused" whereas D'Avila did not. The Mass. Bay Court failed to address the differing clauses or justifications for the findings found in Englert and D'Avila. The Mass. Bay Court conflated the two clauses and ignored the impact these divergent opinions would or should have on its own decision. Instead of addressing this significant issue, the Court merely included a footnote indicating D'Avila was the newer case. Id. at *48 fn. 11.

The Mass. Bay case perfectly illustrates the ambiguous nature of the subject clause. Where even courts and judges fail to reach similar findings regarding substantially similar indemnification clauses, it defies common sense to hold these clauses out as clear, concise, and unambiguous for the general public. The Appellate Division handed down another unpublished decision last year that hammers this point home.

In Terranova v. Skyline Restorations, a general contractor, Skyline Restoration, Inc. retained One Team Restoration, Inc. to work on a project wherein an employee of another subcontractor sustained injuries because of falling scaffolding. Terranova v. Skyline Restorations, 2023 N.J. Super. Unpub. LEXIS 1547, *1 (App. Div. September 20, 2023) (See **TPDa48-TBDa57**). Plaintiff sued both Skyline and One Team. Terranova, 2023 N.J. Super. Unpub.

LEXIS at *2. Skyline sought, inter alia, contractual indemnification from One Team. Ibid.

The Skyline – One Team contained the following indemnification:

> § 4.6.1 To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect, Architect's consultants, and agents, servants, assigns, officers, directors, members, shareholders, and employees of any of them from and against claims, damages, losses and expenses, including but not limited to reasonable attorney's fees (of Contractor's choosing), **arising out of** or resulting from performance of the Subcontractor's Work under this Subcontract, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), **but only to the extent caused** by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, **regardless of whether or no**t such claim, damage, loss or expense is caused in part by a party indemnified hereunder.
>
> Terranova, 2023 N.J. Super. Unpub. LEXIS at *11-12.

Significantly, the Terranova Court did not cite D'Avila (nor Englert) and reached a seemingly inconsistent conclusion to Mass. Bay by placing significant weight on the phrase "but only to the extent caused." Terranova, 2023 N.J. Super. Unpub. LEXIS at *17-18. The court determined that Skyline was not entitled to indemnification because Skyline failed to establish One Team's negligence. Id. at *18-19.

As a final example, in 2022, the Appellate Division handed down its decision in Vladichak v. Mt. Creek Ski Resort, Inc., 2022 N.J. Super. Unpub. LEXIS 606 (App. Div. April 13, 2022) (See **TPDa58-TBDa64)**. Judge Weaver's and the Appellate Division's findings in Vladichak (at pages 22-25 and *8-*11, respectively) are substantially similar to DPS's arguments above. Additionally, the subject clauses in Vladichak do not contain the phrase " to the extent."

In Vladichak, Plaintiff sustained personal injuries after being struck by another skier while at a resort owned and operated by Mountain Creek. Vladichak, 2022 N.J. Super. Unpub. LEXIS at *1-*2. Plaintiff filed a Complaint against Mountain Creek and the other skier (Lavin) alleging:

> Mountain Creek was independently negligent for failing to provide appropriate warnings to skiers, failing to appropriately designate the difficulty of ski trails, failing to provide skiers with appropriate information about trail conditions, failing to timely remove obvious manmade hazards, and/or otherwise failing to establish adequate procedures to provide a safe skiing environment.
>
> Lavin was negligent for breaching his duty to others to ski in a reasonably safe manner by skiing in a reckless manner and/or intentionally colliding into plaintiff and causing her injuries.
>
> Vladichak, 2022 N.J. Super. Unpub. LEXIS at *2

Mountain Creek filed an answer and crossclaims seeking defense and indemnification from Lavin based on executed Rental and Release Agreements.

Vladichak, 2022 N.J. Super. Unpub. LEXIS at *2-*3. Plaintiff settled with Lavin, then Mountain Creek filed a motion seeking reimbursement from Lavin for defending Plaintiff's allegations and indemnification from Lavin. Id. at *3. Lavin filed a cross-motion for summary judgment that led to the order on appeal. Ibid.

Prior to the incident, Lavin signed an Equipment Rental Agreement and a Lift Ticket Release Agreement in which he agreed to defend and indemnify Mountain Creek from any claims related to his own conduct and use of the property's equipment facilities. Id. at *7-*8.

The Equipment Rental Agreement states, in part:

> To the fullest extent permitted by law, I also agree to DEFEND, INDEMNIFY AND HOLD HARMLESS Mountain Creek from any and all claims, suits, costs and expenses including attorneys' fees for personal injury, death or property damage against it by me or third parties arising or allegedly arising out of or resulting from my conduct while utilizing Mountain Creek's facilities or the use of this equipment whether or not MOUNTAIN CREEK'S NEGLIGENCE contributed thereto in whole or in part.

The Lift Ticket Release Agreement states, in part:

> INDEMNIFICATION. To the fullest extent permitted by law, I agree to DEFEND, INDEMNIFY AND HOLD HARMLESS Mountain Creek from any and all claims, suits, costs and expenses including attorneys' fees asserted against Mountain Creek by me or third parties arising or allegedly arising out of or resulting from my conduct while utilizing Mountain Creek's facilities

> WHETHER OR NOT MOUNTAIN CREEK'S NEGLIGENCE contributed thereto in whole or in part.
>
> Vladichak, 2022 N.J. Super. Unpub. LEXIS at *8.

The Appellate Division agreed with the motion judge that these indemnity provisions are ambiguous as to claims of Mountain Creek's independent negligence. Ibid. The Appellate Division specifically held:

> Although the provisions reference Mountain Creek's negligence in bold and capitalized letters, **the language "arising out of or resulting from my conduct . . . whether or not MOUNTAIN CREEK'S NEGLIGENCE contributed thereto in whole or in part" is insufficient to meet the Azurak standard.** One could reasonably interpret the provisions to require indemnification and defense of Mountain Creek for any claims of negligence against it caused by Lavin's conduct even when Mountain Creek is partially at fault or to require Lavin to indemnify and defend Mountain Creek for separate claims of its own negligence.
>
> Id. at *8-*9 (internal citation omitted)(emphasis added)

The Court ultimately concluded:

> An indemnitor may expect to indemnify and defend an indemnitee for claims caused by its negligent conduct when the indemnitee may also be at fault but may not expect to be solely responsible to indemnify and defend the indemnitee when the indemnitee has committed separate acts of negligence. That is the case here, as plaintiff's complaint alleged Mountain Creek was separately negligent for failing to provide adequate instructions to skiers and a safe ski environment. A better— and likely enforceable— provision would explicitly state that the indemnitor indemnifies Mountain Creek for claims arising out of indemnitor's

> conduct and for claims of Mountain Creek's independent negligence.
>
> The provisions at issue do not meet the bright line rule requiring "unequivocal terms" that the duty to indemnify extends to the indemnitee's own negligence. Thus, the provisions are ambiguous and must be strictly construed against Mountain Creek…
>
> Vladichak, 2022 N.J. Super. Unpub. LEXIS at *10-11.

The above cases clearly show a lack of consistency amongst New Jersey courts in interpreting indemnification clauses. If the courts can reach inconsistent interpretations of the same, or substantially similar clauses, this Court must not hold DPS to a seemingly higher standard and expect that DPS would have understood the meaning of Peterson's clause to include indemnification for Peterson's own negligence. This is especially true when the actual standard requires contractors to draft indemnification clauses in a clear and unambiguous manner and, in cases such as this one where Peterson drafted the contract, a failure to do so will be strictly construed against Peterson.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that the trial court properly granted DPS's motion for summary judgment.

Dated: October 4, 2024

Quinn M. McCusker – 011352005
Fowler Hirtzel McNulty & Spaulding
10000 Midlantic Drive – Suite 402W
Mount Laurel, NJ 08054
Attorneys for Third-Party Defendant/Respondent, Dynamic Protection System

ROBERT RUSSO and JOYCE RUSSO, his wife, Plaintiffs-Respondents, v. O.A PETERSON CONSTRUCTION COMPANY, and MIKE, as employee representative of O.A PETERSON CONSTRUCTION i/j/s/a, Defendants-Appellants, And O.A PETERSON CONSTRUCTION COMPANY, Defendant/Third-Party Plaintiff-Appellant, v. DYNAMIC PROTECTION SYSTEM Third-Party Defendant-Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-002835-23 Civil Action Sat Below: Hon. James J. Ferrelli, J.S.C. Docket No. BUR-L-002349-21

REPLY BRIEF OF DEFENDANT/THIRD-PARTY PLAINTIFF-APPELLANT O.A PETERSON CONSTRUCTION COMPANY

FILED, Clerk of the Appellate Division, December 11, 2024, **A-002835-23**

KENNEDYS CMK LLP
120 Mountainview Boulevard
P.O. Box 650
Basking Ridge, New Jersey 07920
(908) 848-6300
Anand.Dash@kennedyslaw.com
Attorney Id. 031242006
Attorneys for Defendant/Third-Party Plaintiff-Appellant O.A Peterson Construction Company

Anand Dash
Of Counsel and on the Brief
Dylan M. Greenspan
Benjamin Weisbrot
On the Brief

Date of Submission: December 11, 2024

TABLE OF CONTENTS

Page

TABLE OF JUDGMENTS, ORDERS AND RULINGS..ii

TABLE OF CITATIONS iii

PROCEDURAL HISTORY 1

STATEMENT OF FACTS……………………………………………………1

LEGAL ARGUMENT...1

I. The Jury's Finding That O.A. Peterson was 100% Liable Does not Foreclose Reversal Of The Trial Court's Erroneous Decision Finding That The Contractual Indemnity Provision Was Ambiguous..1

A. The Doctrine Of Invited Error Is Inapplicable To This Appeal......................5
B. The D'Avila Case Is Controlling In This Appeal 6
C. The Plain Error Standard Is Inapplicable To This Appeal.............................9

II. The Trial Court's Error In Ruling That The Indemnification Clause Is Ambiguous Is A Predicate And Threshold Error Requiring Reversal And Remand..9

III. O.A. Peterson Appealed From Both January 5, 2024 Orders......................10

IV. The Subcontract Is Not Ambiguous...11

A. The Subcontract Makes Specific Reference To The Effect Of the Negligence Of The Indemnitee..11
B. Englert v. The Home Depot Is Distinguishable The Doctrine Of Invited Error Is Inapplicable To This Appeal 14

CONCLUSION...15

FILED, Clerk of the Appellate Division, December 11, 2024, **A-002835-23**

TABLE OF JUDGMENTS, ORDERS AND RULINGS

(See Table of Judgments, Orders and Rulings Appealed in O.A. Peterson Construction Company's Brief of August 5, 2024, incorporated here by reference.)

TABLE OF CITATIONS

Page(s)

Cases

Ace Am. Ins. Co. v. Am. Med. Plumbing, Inc.,
458 N.J. Super. 535 (App. Div. 2019)....................3
Azurak v. Corp. Prop. Inv'rs,
175 N.J. 110 (2003)....................12
Camp, Dresser & McKee, Inc. v. Paul N. Howard Co.,
853 So. 2d 1072 (Fla. Dist. Ct. App. 2003) 3
Englert v. The Home Depot,
389 N.J. Super. 44 (App. Div. 2006)....................14
Estate of D'Avila ex rel. D'Avila v. Hugo Neu Schnitzer E.,
442 N.J. Super. 80 (App. Div. 2015).................... 4, 6, 15
Kane v. Hartz Mountain Industries, Inc.,
278 N.J. Super. 129 (App. Div. 1994).................... 6, 7, 8
Kieffer v. Best Buy,
205 N.J. 213 (2011)....................11, 12
Leitao v. Damon G. Douglas Co.,
301 N.J. Super. 187 (App. Div. 1997).................... 13, 15
Mantilla v. Nc Mall Assocs.,
167 N.J. 262 (2001)....................13
Sayles v. G&G Hotels, Inc.,
429 N.J. Super. 266 (App. Div. 2013)....................13
State v. Corsaro,
107 N.J. 339 (1987)....................5
State v. Gore,
205 N.J. 363 (2011)....................9, 11
State v. Jenkins,
178 N.J. 347 (2004)....................5
State v. Singh,
245 N.J. 1 (2021)....................9
United States v. Seckinger,
397 U.S. 203.................... 3, 12, 13

Statutes

N.J.S.A. 2A:40A–1 14

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Appellant/Third-Party Plaintiff, O.A. Peterson Construction Company ("O.A. Peterson") refers to and incorporates the Procedural History and Statement of Facts in its opening brief of August 5, 2024.[1]

LEGAL ARGUMENT

POINT I

THE JURY'S FINDING THAT O.A. PETERSON WAS 100% LIABLE DOES NOT FORECLOSE REVERSAL OF THE TRIAL COURT'S ERRONEOUS DECISION FINDING THAT THE CONTRACTUAL INDEMNITY PROVISION WAS AMIBIGUOUS.

Perhaps indicative of the immateriality and shortcomings of DPS' arguments in opposition to O.A. Peterson's appeal, is DPS's **verbatim** assertion of the arguments that failed in its motion for summary disposition. Throughout this opposition brief, DPS asserts the same ineffective argument that was previously rejected - the jury's finding that O.A. Peterson is 100% at fault for the plaintiff's injuries somehow precludes contractual indemnification. Despite

---

[1] O.A. Peterson briefly disputes a certain statement within the Procedural History section of Dynamic Protection System's ("DPS") brief of October 14, 2024: DPS states that O.A. Peterson "argued against allowing DPS to participate at trial." (TPDb7) That is a mischaracterization of O.A Peterson's position. (See, Da460; 2T53:12-25, 2T54:1). Rather, O.A. Peterson was acknowledging an effect of the trial court's conclusion that the indemnification provision between O.A. Peterson and DPS was ambiguous.

already having been addressed, O.A. Peterson will take this opportunity to demonstrate that, not only is DPS' argument without merit, but it highlights DPS' confusion of the basis of O.A. Peterson's appeal.

As O.A. Peterson pointed out on numerous occasions throughout its Appellate Brief and responses to DPS' Motion for Summary Disposition, the basis of O.A. Peterson's appeal is the Law Division's erroneous ruling that the indemnification clause entered into by and between O.A. Peterson and DPS was ambiguous. Unfortunately, the Law Division's ruling on ambiguity created a domino effect, one that essentially forced DPS' dismissal from this case, leaving O.A. Peterson as the sole party to which liability could have been apportioned by the jury.

The plaintiff in the underlying lawsuit was injured while in the course and scope of his employment with DPS, a subcontractor of O.A. Peterson, and in that situation, the New Jersey Workers' Compensation Act (the "WCA") serves as <u>the sole remedy for an injured party against his or her employer</u>. Absent an indemnity agreement, the sole party to whom the underlying plaintiff could directly apportion liability for his injuries was O.A. Peterson.

Separate from, yet related to the issue of directly apportioning liability to a tortfeasor, is the issue of contractual indemnification. In accordance with the industry standard, and pursuant to the Subcontract, DPS agreed to indemnify

O.A. Peterson. The indemnification clause copied language found in the American Institute of Architects' ("AIA") Document A201. Courts around this country, including the United States Supreme Court, have routinely upheld identical or analogous language as unambiguous. Nonetheless, despite identical indemnification language being upheld by the Supreme Court of the United States (See, United States v. Seckinger, 397 U.S. 203, 213, n. 17 (1970)), despite the source of the language being referred to by this court as "a widely used form of construction contract," (See, Ace Am. Ins. Co. v. Am. Med. Plumbing, Inc., 458 N.J. Super. 535, 537 (App. Div. 2019)), and despite the language being referred to as "a paradigm of clarity" by another state's appellate court (See, Camp, Dresser & McKee, Inc. v. Paul N. Howard Co., 853 So. 2d 1072, 1077 (Fla. Dist. Ct. App. 2003)), the Law Division found the clause to be ambiguous. Notably, the Law Division failed to articulate how the clause was ambiguous (i.e. by failing to articulate another reasonable interpretation of the clause) and denied O.A. Peterson its contractual right to pursue indemnification.

Absent contractual indemnification, there were no avenues by which DPS could be apportioned or assigned liability, pursuant to the WCA. Thus, it was impossible for any other entity, other than O.A. Peterson, to have been apportioned liability in connection with the plaintiff's injuries. Now, because of the Law Division's error, DPS argues that, because the full liability was

apportioned to O.A. Peterson, contractual indemnification would not be available, even if the clause were found to be unambiguous. However, this faulty logic relies on the Law Division's error being upheld by this Court. By virtue of the Law Division's erroneous ruling, O.A. Peterson was deprived of its right for a jury to assign any amount of liability to DPS, and, in turn, trigger the indemnification clause. This court has previously ruled that the proper procedure where a plaintiff's employer has entered into a contractual indemnification agreement with a third-party, is to allow the employer to participate at trial, allow the jury to ascribe any amount of liability to the employer, and then, subsequent to the jury's findings, re-apportion the employer's liability amongst the remaining tortfeasors. See, Estate of D'Avila ex rel. D'Avila v. Hugo Neu Schnitzer E., 442 N.J. Super. 80 (App. Div. 2015). Such a procedure preserves the WCA's sole remedy provisions, while also ensuring that parties remain free to apportion liability via contractual indemnification clauses, a right enshrined in New Jersey public policy.

Finally, it is critical to note, though it goes without saying, that O.A. Peterson did not, as DPS argues, "concede" that its appeal is moot. In fact, quite the opposite is true. Mr. Jahnsen, O.A. Peterson's trial counsel, argued that given the Law Division's ruling on ambiguity, DPS "has no standing in [the] case any longer," however, Mr. Jahnsen specifically reserved the right to resuscitate DPS'

standing in this case "in the event that a court determines that the [Law Division's] ruling here was a bit narrow." (Da463). This appeal is the very occurrence that O.A. Peterson foresaw after the Law Division incorrectly ruled on the issue of ambiguity in the contractual indemnification provision. Thus, DPS' argument is without merit, premature, unsupported by the record in this matter, and unsupported by New Jersey case law.

A. The Doctrine Of Invited Error Is Inapplicable To This Appeal.

Contrary to DPS' regurgitation of the same argument that failed in its motion for summary disposition, the Doctrine of Invited Error clearly does not apply to the facts of the instant matter. The New Jersey Supreme Court has explained the doctrine of "invited error" as "errors which were induced, encouraged, or acquiesced in or consented to by defense counsel." State v. Corsaro, 107 N.J. 339, 345 (1987). In State v. Jenkins, the Supreme Court of New Jersey held that the doctrine of "invited error" is implicated only "[W]hen a defendant in some way has led the court into error…Some measure of reliance by the court is necessary for the invited-error doctrine to come into play." State v. Jenkins, 178 N.J. 347, 359 (2004). Here, just as this Court found in DPS' Motion for Summary Disposition, there is no evidence that demonstrates that the Law Division's ruling on ambiguity was induced, encouraged, acquiesced in, or consented to by O.A. Peterson, and, moreover, DPS failed to assert a single argument in favor of the notion that the Law Division relied upon O.A.

Peterson's non-existent arguments in favor of finding ambiguity in the indemnification clause when it ultimately ruled as such. In fact, the opposite is true. O.A. Peterson filed a third party complaint against DPS on December 16, 2021, a Motion for Summary Judgment against DPS on September 8, 2023, a Motion for Reconsideration on November 9, 2023, and this very appeal each of which were premised on the argument that the indemnification clause was unambiguous. To argue that O.A. Peterson somehow invited the Law Division's error is absurd.

B. The D'Avila Case Is Controlling In This Appeal.

DPS's next argument demonstrates yet another clear misunderstanding of New Jersey law. DPS expends three pages analyzing the facts of a case that is over thirty years old (Kane v. Hartz Mountain Industries, Inc., 278 N.J. Super. 129, 146-147 (App. Div. 1994) (while it conspicuously expends a maximum of two-three paragraphs in support of its own arguments). The holding in D'Avila is factually, legally, and temporally far more relevant to the facts in the instant matter. Nonetheless, in DPS's misguided attempt at distinguishing this Court's holding in D'Avila from the matter at bar, DPS stresses the argument that the holding in Kane, not the holding in D'Avila, should apply to the instant matter.

DPS misunderstands the holding in Kane, and the facts that gave rise to its holding. In Kane, the plaintiff was injured when he lost his balance and fell on a rocky ground, causing him to suffer catastrophic injuries. At trial, the judge charged

the jury that the general contractor ("Hartz") and the subcontractor at issue ("Howell") were ultimately responsible for any violations of industry-wide standards. Thus, **the sole question that the jury was presented** was whether there were violations of industry-wide or regulatory safety standards. The Kane court ultimately held that Eastern, the plaintiff's employer, would:

> not be prejudiced by a separate trial on the indemnification issue. The trial of the third-party claim should be severed, as unquestionably any liability of Howell is not so independent of the failure of Eastern to abide by safety standards as to bring about the result that Howell might be held liable without a similar finding of fault on the part of Eastern.
>
> [Kane, 278 N.J. Super at 146].

Contrary to the facts in Kane, DPS's potential liability is inextricably intertwined with the issue of O.A. Peterson's liability, because any amount of liability ascribed to DPS would offset the liability apportioned to O.A. Peterson. Thus, DPS's potential liability is intertwined with O.A. Peterson's liability. The Kane court presided over an entirely distinct factual scenario, one in which the court already established that two of the defendants were responsible for industry wide violations, and asked the jury only to consider whether those defendants' actions violated those standards. The indemnification claim against the employer was therefore properly severed, as its results had no bearing on the ultimate liability of the other defendants. Here, the issue is far more complex in that the assignment of liability to DPS does have a

material impact on O.A. Peterson's ultimate liability, and thus, the Kane procedures are inapplicable towards the resolution of this dispute.

Finally, even assuming¸ *arguendo*, that DPS is correct that the holding in Kane is applicable to the instant matter, the analysis in Kane nonetheless bolsters O.A. Peterson's position. In ruling on the employer's participation at trial, the Kane court held:

> Nothing in the Act precludes an employer from assuming a contractual duty to indemnify a third party through an express agreement. Employers, who have agreed to indemnify a party sued by a plaintiff-employee, may be joined as third-party defendants in the employee's suit against the indemnitee.
>
> [Kane, 278 N.J. Super at 145].

In this matter, DPS's negligence was placed at issue during the trial of plaintiff's suit. In fact, DPS was brought in by O.A. Peterson as a third-party defendant specifically to enforce DPS' indemnification obligations. Thus, pursuant to the holding in Kane, which reaffirms long-held New Jersey Supreme Court jurisprudence, the Workers' Compensation Act does not preclude an employer from assuming a contractual duty to indemnify a third party. Here, that is precisely what O.A. Peterson seeks, and nothing in Kane precludes such an action. Thus, the subheading of this argument "New Jersey Law Barred DPS from Participating at Trial" is a grossly inaccurate depiction of New Jersey law.

C. <u>The Plain Error Standard Is Inapplicable To This Appeal.</u>

The "Plain Error Standard" does not apply to this appeal, thus rendering DPS's argument irrelevant. The "Plain Error Standard" of Rule 2:10-2 applies when a party does not object to an alleged trial error or otherwise properly preserve the issue for appeal. <u>State v. Singh</u>, 245 N.J. 1, 13 (2021); <u>State v. Gore</u>, 205 N.J. 363, 383 (2011). Here, this issue is irrelevant, as O.A. Peterson repeatedly raised the issue of the contractual indemnification clause's lack of ambiguity in the Law Division. O.A. Peterson filed a third party complaint against DPS on December 16, 2021, a Motion for Summary Judgment against DPS on September 8, 2023, and a Motion for Reconsideration on November 9, 2023 all premised on the argument that the indemnification clause was unambiguous. Finally, O.A. Peterson specifically reserved the right to resuscitate DPS' standing in this case "in the event that a court determines that the [Law Division's] ruling" on ambiguity was found to be "a bit narrow." (Da463). Thus, DPS' argument as to the applicability of the Plain Error Standard is moot.

<u>POINT II</u>

THE TRIAL COURT'S ERROR IN RULING THAT THE INDEMNIFICATION CLAUSE IS AMBIGUOUS IS A PREDICATE AND THRESHOLD ERROR REQUIRING REVERSAL AND REMAND

Point II of DPS' brief in opposition once again demonstrates a lack of understanding as to the basis of O.A. Peterson's appeal and relevant New Jersey Law.

As discussed extensively above, there are only two avenues by which DPS may be forced to pay damages in connection with the underlying plaintiff's injuries. First would be directly from DPS to the underlying plaintiff, however, such a lawsuit is expressly barred by the WCA. The second, and only remaining viable manner by which DPS may be forced to pay for the injuries sustained by the underlying plaintiff is via the contractual indemnification clause entered into by and between O.A. Peterson and DPS. When the Law Division found the indemnification clause to be ambiguous, and thus unenforceable, DPS's participation at trial was moot. At this point in time, O.A. Peterson asks this Court to render a decision that the indemnification language was unambiguous, and allow O.A. Peterson to obtain the contractual indemnification that it contracted with DPS for. O.A. Peterson certainly did not waive any arguments on appeal, rather, it preserved those arguments on the record, and seeks a ruling in kind at this juncture.

POINT III

O.A. PETERSON APPEALED FROM BOTH JANUARY 5, 2024 ORDERS

DPS argues that O.A. Peterson failed to appeal from the trial court's January 5, 2024 Order granting its motion for reconsideration. (TPDb27). DPS relies a number of cases to support its position that O.A. Peterson did not appeal from the that Order (TPDb28). However, all but one case cited by DPS relies on this Court's decision in Sikes v. Township of Rockaway, N.J. Super. 463 (App.

Div. 1994). The issue in Sikes, was that the appeal was not properly before the court because Appellant failed to include a trial transcript central to its argument, and as a result, the court did not have a chance to complete a full review. Id. at 466. Here, unlike Sikes, this Court has every material before it needed to render a decision on this appeal.

The January 5, 2024 Order that DPS argues was not appealed from was made part of O.A. Peterson's Appeal. (Da047-Da048). O.A. Peterson has maintained that the trial Court's denial of its motion for summary judgment and its subsequent motion for reconsideration is the error from which all other issues in this appeal stem from. (See, Db20). Moreover, both trial court Orders granting DPS's motion to reconsider, and denying O.A. Peterson's were entered on the same day, and were argued on the same day. (Da045-Da048; Da433-Da470; 2T).

Per this Court's decision in Sikes, the Court has all of the relevant materials necessary to decide every issue on Appeal. Any argument otherwise is an attempt to have O.A. Peterson's Appeal dismissed on a technicality.

POINT IV

THE SUBCONTRACT IS NOT AMBIGUOUS

A. The Subcontract Makes Specific Reference To The Effect Of The Negligence Of The Indemnitee

Respondent urges this Court that indemnity provisions are to be "strictly construed against the indemnitee." Kieffer v. Best Buy, 205 N.J. 213, 223

(2011). However, as DPS points out, it is only strictly construed against the indemnitee, "[i]f the meaning of an indemnity provision is ambiguous." Ibid. Therein lies the crux of this appeal. The trial court erroneously read ambiguity into an otherwise straightforward provision. A provision that is widely used by the construction industry throughout the country, one which the United States Supreme Court touted as "an example of an indemnification clause that ***makes specific reference to the effect of the negligence of the indemnitee.***" Seckinger, 397 U.S. at 212 n.17 (1970)(emphasis added). "Mak[ing] specific reference to the effect of the negligence of the indemnitee" is *exactly* what our the Azurak Court meant by "bright line language." Azurak v. Corp. Prop. Inv'rs, 175 N.J. 110, 112-13 (2003)("Finally, in order to allay even the slightest doubt on the issue of what is required to bring a negligent indemnitee within an indemnification agreement, ***we reiterate that the agreement must specifically reference the negligence or fault of the indemnitee***")(emphasis added). To hold that the nearly identical language from the instant Contract is ambiguous, would be in direct contravention of the United States Supreme Court, and the New Jersey Supreme Court

Specifically, DPS takes issue with the phrase "is caused." (TPDb33). The earlier version of AIA Document A201 that the United States Supreme Court reviewed in Seckinger also contained the unambiguous phrase "is caused."

Therefore, it is inarguable that the inclusion of "is caused" means the provision "was never intended to satisfy the bright line requirement." (TPDb33). O.A. Peterson was mimicking a model that is widely used in the construction industry, and, crucially, a model that "makes specific reference to the effect of the negligence of the indemnitee" just as Azurak and Mantilla v. Nc Mall Assocs., 167 N.J. 262 (2001) require. See, Seckinger 397 U.S. at 212 n.17.

This Court, in its decision in Leitao v. Damon G. Douglas Co., also found an extremely similar indemnification provision (Db17-18) to be unequivocal. 301 N.J. Super. 187, 191 (App. Div. 1997). DPS admits this provision is "nearly identical" to the provision at issue. (TBDb39). Notably, the provision in Leitao also contained the "is caused" language. Ibid. DPS attempts to distinguish the Leitao case by arguing the clause in that case was more concise, but this Court has held: even when a contract is to be strictly construed against an indemnitee, it is not required that the Court search for an ambiguity in every complex provision. Sayles v. G&G Hotels, Inc., 429 N.J. Super. 266, 274 (App. Div. 2013).

Here, the language of the indemnity provision at issue plainly satisfies the Azurak standard, as it is unambiguous in accordance with this Court's precedent, and the precedent set by the United States Supreme Court.

B. Englert v. The Home Depot Is Distinguishable

DPS argues that O.A. Peterson misstates this Court's conclusion in Englert v. The Home Depot, 389 N.J. Super. 44 (App. Div. 2006). (TPDb34). Unlike DPS's assertions, it is clear that this Court, in Englert, took issue with the phrase "to the extent", which was present in the indemnification before this Court in Englert, but not here. The Englert Court explained the problem with "to the extent" phrase as follows:

> ***In the absence of the "to the extent" phrase in Article 11, the "regardless of" phrase could be interpreted to require Weir to indemnify Raimondo for its own negligence even if Weir was not at fault at all, as long as Raimondo was not the "sole" cause of damages.*** See N.J.S.A. 2A:40A–1. ***The "to the extent" phrase in Article 11 is itself subject to differing interpretations.*** "To the extent" can be read to mean "if"; that is, Weir is required to indemnify Raimondo only "if" Weir is also found negligent. Under that reading, "to the extent" is not inconsistent with complete indemnification of Raimondo, even for its own negligence, as long as Weir is also negligent "to [some] extent." But the phrase also can be read to require Weir to indemnify Raimondo only "to the extent" of Weir's (or its sub-contractors') share of fault. Neither the "regardless of" phrase nor the "to the extent" phrase answers the question whether such indemnification would include Raimondo's own share of fault.
>
> [Id. at 56](emphasis added).

Clearly, the "to the extent" phrase is the portion of the provision that is "subject to differing interpretations", and "[i]n the absence" of "to the extent", the "regardless of" phrase could be interpreted as an attempt to comply with N.J.S.A. 2A:40A-1. In other words, "to the extent" is problematic with or without

"regardless of." That reading of Englert is consistent with this State's published caselaw on the subject. See, Leitao, 301 N.J. Super. at 191; Estate of D'Avila, 442 N.J. Super. at 114.

Plainly, the subcontract complied with Englert, Azurak, and the other New Jersey caselaw on the subject. The trial court's finding of ambiguity is completely opposed to said caselaw, and as such should be reversed.

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's October 20, 2023 Orders granting DPS' Motion for Summary Judgment and denying O.A. Peterson's Motion for Summary Judgment, and the January 5, 2024 Order denying O.A. Peterson's Motion for Reconsideration.

Respectfully submitted,

Kennedys CMK LLP

By:

Anand Dash
Dylan M. Greenspan
Benjamin Weisbrot
Attorneys for Defendant-Third Party Plaintiff and Appellant, O.A. Peterson Construction Company

December 11, 2024