Superior Court of New Jersey

Appellate Division

Docket No. A-002753-23T4

DONALD J. HOILAND and MANDY HOILAND, his wife, *Plaintiffs-Respondents,* vs. AJD CONSTRUCTION CO., INC., *Defendant-Appellant,* and GRAND LHN III, U.R., LLC, GRAND LHN II URBAN RENEWAL, LLC, GRAND LHN I URBAN RENEWAL, LLC, GRAND LHN URBAN RENEWAL 1, LLC, GRAND LHN, III, LLC, IRONSTATE DEVELOPMENT COMPANY, IRONSTATE DEVELOPMENT COMPANY, LLC, P. ESPOSITO CONSTRUCTION, LLC, *(For Continuation of Caption See Inside Cover)*	CIVIL ACTION ON APPEAL FROM THE ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY Docket No. HUD-L-002754-19 Sat Below: HON. ANTHONY V. D'ELIA, J.S.C.

BRIEF FOR DEFENDANT-APPELLANT

On the Brief:
SOFYA UVAYDOV, ESQ.
Attorney ID# 094842013
SEAN HARRITON, ESQ.
Attorney ID# 261682018

KAHANA FELD LLP
Attorneys for Defendant-Appellant
800 Third Avenue, 16th Floor
New York, New York 10022
(917) 590-1280
suvaydov@kahanafeld.com
sharriton@kahanafeld.com

Date Submitted: December 11, 2024

CP COUNSEL PRESS (800) 4-APPEAL • (333253)

ESPOSITO CONSTRUCTION, LLC, ESPOSITO INDUSTRIES, LLC, ESPOSITO GROUP, LLC, AMERICAN SAFETY PARTNERS, LLC, MEN OF STEEL ENTERPRISES, LLC, MEN OF STEEL REBAR FABRICATORS, LLC, EMPIRE STATE REBAR INSTALL, LLC, JOHN DOES 1-20 and ABC CORPS/BUSINESS ENTITIES 1-20,	:
Defendants-Respondents.	:

TABLE OF CONTENTS

Page

TABLE OF JUDGMENTS

Page

TABLE OF TRANSCRIPTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

PRELIMINARY STATEMENT

Defendant-Appellant AJD Construction Co. Inc. ("AJD" or "defendant") submits this brief in support of its appeal from the Combined Order For Judgment Upon Compensatory Damages Jury Verdict And Offer of Judgment of the Superior Court of New Jersey, Law Division, Hudson County (D'Elia, J.), entered April 5, 2024 ("April 2024 Judgment") which (1) entered judgment in favor of plaintiffs and against AJD in the amount of $5,157,247.59; (2) ordered AJD to reimburse plaintiffs' counsel $94,344.73 in costs and $1,723,947 in fees pursuant to Rule 4:58-2 (Consequences of Non-Acceptance of Claimant's Offer); and (3) entered judgment in the combined total amount of $6,975,539.32.

While this is a case of first impression for the Court, the factual circumstances are simple. Plaintiff Donald Hoiland, a Men of Steel Enterprises, LLC ("MOS") employee, was injured at a construction site owned by Grand LHN, III, LLC ("Grand"). Prior thereto, AJD contracted with MOS to install rebar which agreement required MOS to indemnify AJD for "any and all" costs and fees (a) when a claim arises out of the performance of an MOS's employee's work (b) so long as the claim was not caused by AJD or Grand's sole negligence.

After commencing suit, plaintiffs filed an offer of judgment proposing to settle with AJD for $2,750,000. MOS became aware of the offer (a) after having received repeated communications from AJD that it was seeking indemnity for

"any and all" costs and fees; and (b) shortly after the court denied its motion for dismissal of AJD's contractual indemnification claim in an order indicating that MOS had to indemnify AJD if a jury found plaintiff partially at fault given that his accident occurred in furtherance of MOS's work. MOS failed to offer any input to AJD or act with respect to plaintiffs' offer and a jury later found AJD 80% liable and plaintiff 20% at fault thereby triggering the indemnity clause.

Thereafter, the court held a hearing on AJD's motion for fees and costs and MOS's opposition and cross-motion to correct judgment and recognized that the salient issue – whether a party contractually obligated to indemnify another must pay for costs and fees related to the indemnitee's failure to accept an offer of judgment – had not been addressed by New Jersey courts and would need clarification on appeal. Unfortunately, the court erroneously found that MOS did not have to indemnify AJD for offer of judgment costs and fees because they were not contemplated by the parties and "specifically addressed" in the contract and any ambiguity must be construed against AJD as drafter of the contract.

The court erred for three main reasons. First, the contract states that MOS must indemnify AJD for "any and all" costs and fees. Indeed, the broad "any and all" term necessarily encompasses costs and fees awarded pursuant to the offer of judgment rule among other types. However, the court disregarded longstanding jurisprudence related to contractual interpretation and exempted

offer of judgment costs and fees from MOS's indemnity obligations despite no indication that the parties intended to exclude any subset of costs and fees.

Second, the court's decision results in an unfair outcome. In Willner, infra, the New Jersey Supreme Court ruled that courts should balance plaintiffs' and defendants' competing interests relating to offers of judgment and ensure a just outcome. Burdening AJD, an indemnitee, with offer of judgment costs and fees is manifestly unfair here because, *inter alia*, (a) MOS was aware from the outset that AJD was seeking indemnification for "any and all" costs and fees and knew about the offer of judgment and consequences of non-acceptance; and (b) MOS was involved in all aspects of litigation and even frustrated settlement efforts.

Finally, neither the contract nor the offer of judgment rule suggests that AJD's rejection of plaintiffs' offer limits full recovery of costs and fees. In Tierra Holdings, Ltd., infra, the Florida court assessed a similar issue and found it improper to read an "implicit cut-off" into its state's offer of judgment statute thereby denying a party's entitlement to the broad contractual indemnification for which it bargained for. A similar conclusion is plainly warranted here.

Respectfully, this Court should reverse the April 2024 Judgment insofar as it denied AJD's motion for contractual indemnification against MOS for costs and fees awarded to plaintiffs pursuant to the offer of judgment rule and, thus, award AJD contractual indemnification against MOS for such costs and fees.

PROCEDURAL HISTORY[1]

A. Instant Action

Plaintiffs Donald Hoiland and his wife, Mandy Hoiland, filed a summons and amended complaint in April 2020, asserting causes of action sounding in negligence and loss of consortium against AJD, MOS,[2] Grand,[3] the Esposito defendants, Ironstate Development Company, Ironstate Development Company, LLC (collectively, "Ironstate"), American Safety Partners, LLC, Empire State Rebar Install, LLC ("Empire"), John Does 1-20 and ABC Corps/Business Entities 1-20 (Da36-44).

As relevant here, in April 2020, (a) AJD submitted an answer to plaintiffs' amended complaint asserting cross-claims against MOS and the other defendants sounding in contractual indemnification, common law indemnification, contribution, breach of contract for failure to procure

[1] Defendant notes that "1T" refers to the October 22, 2021 Motion Transcript; "2T" refers to the September 5, 2023 Trial Transcript; "3T" refers to the September 26, 2023 Trial Transcript; "4T" refers to the December 4, 2023 Motion Transcript; "5T" refers to the March 22, 2024 Motion Transcript; and "6T" refers to the June 3, 2024 Motion Transcript.

[2] Defendants Men of Steel Enterprises, LLC and Men of Steel Rebar Fabricators, LLC are collectively referred to herein as "MOS."

[3] Defendants Grand LHN III, U.R., LLC, Grand LHN II Urban Renewal, LLC, Grand LHN I Urban Renewal, LLC, Grand LHN Urban Renewal 1, LLC, Grand LHN, III, LLC are collectively referred to herein as "Grand."

insurance, breach of express warranty and breach of implied warranty; and (b) MOS filed an answer to plaintiffs' amended complaint alleging cross-claims against AJD and the other defendants sounding in contribution, common law indemnification and contractual indemnification (Da45-54; 79-87). In May 2020, plaintiffs signed a settlement agreement and release dismissing their direct claims against MOS with prejudice (Da859-60). Thereafter, the motion court entered an Order in June 2020 dismissing plaintiffs' claims against Men of Steel Enterprises, LLC and in September 2020 dismissing plaintiffs' claims against Men of Steel Fabricators, LLC (Da860).

B. MOS's Summary Judgment Motion And Resulting Order

In September 2021, MOS filed a motion for summary judgment wherein it sought, *inter alia*, dismissal of AJD's contractual indemnification claim against it (Da94-519). Following briefing on the motion and an October 22, 2021 virtual hearing (see 1T), the Superior Court (Espinales-Maloney, J.), by Order and Memorandum of Decision dated November 5, 2021, denied MOS's motion for summary dismissal of AJD's contractual indemnification claim (hereinafter, "the November 2021 Decision") (Da855-868). Specifically, the court initially held that it "is persuaded by AJD's argument that a substantial nexus exists: Plaintiff testified that the accident occurred while he was walking on the access

road, performing his job. Therefore, the duty to indemnify was triggered" (Da866). The court then correctly determined (Da867):

> …AJD asserts that Men of Steel agreed by contract to indemnify AJD for any claim 'as long as the fact finder does not find that Plaintiff's claim 'was caused by Contractor's [] sole negligence.' However, if the plaintiff is found to be comparatively at fault, then AJD would only be found to be partially, not 'solely' liable, triggering the indemnification clause.'…The Court agrees. There are facts in the record that could lead a jury to find the plaintiff comparatively negligent for his accident, thus triggering the indemnification clause. The Court has a duty to enforce contracts as they are written. Issues regarding liability are issues of material fact, and the standard for summary judgment motions requires the court to look at the facts in the light most favorable to the non-moving party. As such, summary judgment on the issue is precluded.

C. Plaintiffs' Offer Of Judgment To AJD

In December 2021, plaintiffs submitted an offer of judgment to AJD by filing same on the trial court docket – thereby providing notice to MOS and all parties – wherein it proposed to settle their claims against AJD for $2,750,000 (Da869). The offer of judgment noted that the offer shall be deemed withdrawn after 90 days of its service and stated that if it is not accepted and the verdict is an amount "which is 120% or more of the rejected offer, plaintiffs shall be allowed, in addition to costs of suit, eight (8%) percent interest on the amount of any money recover from the date of the offer or the date of completion of discovery whichever is later, also a reasonable attorney's fee…" (Da870).

D. MOS's Motion To Reconsider And Resulting Order

Later that month, MOS filed a motion to reconsider the November 2021 Decision. Following motion practice, the Superior Court (Espinales-Maloney, J.), by Order dated January 7, 2022 (issued prior to the time that plaintiffs' December 2, 2021 offer of judgment expired) denied MOS's motion for reconsideration stating, in pertinent part (Da891):

> Defendant essentially restates its prior arguments and alleges that the Court's analysis was overly broad in its November 5, 2021 Memorandum of Law. However, Defendant fails to show that the Court incorrectly applied the law, that there was a change in circumstances, or that there was a misappreciation of what was previously argued. Mere dissatisfaction or disagreement with this Court's decision does not merit reconsideration…

E. The Trial, Jury Verdict, AJD's Motion For Summary Judgment And Resulting Order

Trial commenced on September 5, 2023 and ended on September 26, 2023 during which time the jury found that AJD was 80% liable and plaintiff was 20% at fault for the occurrence and rendered a compensatory judgment award in the amount of $4,785,185 (Da1; 892-93).

Thereafter, in October 2023, AJD submitted a motion for summary judgment or, alternatively, for reconsideration of the court's denial of AJD's trial motion for entry of default and default judgment (Da894-979). Following a virtual hearing and, by Orders dated December 4, 2023, the Superior Court (Vanek, J.), (a) granted AJD's application as to contractual indemnification

finding that MOS must contractually indemnify AJD "for the entirety of the jury verdict less the amount attributable to plaintiff's negligence, as well as interest and attorneys fees and costs attributable to the defense of [AJD];" and (b) denied MOS's cross-motion for summary dismissal of AJD's contractual indemnification claim (Da1254-57; 4T).

F. AJD's Motion For Fees And Costs, MOS's Cross-Motion To Correct Judgment And The March 22, 2024 Virtual Hearing

In December 2023, AJD filed a motion for fees and costs and, in January 2024, MOS submitted an opposition and cross-motion to correct judgment. (Da1261-1301; 1304-17). That same month, AJD submitted a reply (Da1318-38).

On March 22, 2024, the motion court held a virtual hearing on both applications (5T). During the hearing, MOS's counsel asserted that it should not have to pay costs and fees related to the consequences of AJD's rejection of plaintiffs' offer of judgment because "AJD never came to us and said, hey, this is an offer of judgment, we're going to come after you by way of the contractual notification to pay those fees by way of the…failure to accept the offer of judgment" (5T24 22-25; 5T25 1-2). MOS's counsel confirmed that it never offered its opinion as to how to handle the offer of judgment and that AJD never asked for it (5T25 22-25). MOS admitted that it received notice of plaintiffs' offer of judgment "by way of e-Courts" and was aware of it as soon as "it was

uploaded" (5T23 13-19; 5T25 8-17). MOS's counsel's statements prompted the court to find for the record that MOS knew about the offer of judgment and "[k]new what would happen if it wasn't accepted" (5T39 8-22).

AJD's counsel then advised the court that it "contacted [MOS] seven times" during the course of litigation regarding the fact that AJD would "seek complete indemnification of attorneys fees and costs under the indemnification clause;" and pointed out that had MOS "not breached their contract in picking up [AJD's] defense" or otherwise had been "actively involved at all in AJD's defense," MOS would have been in a position to make the determination to accept or reject the offer of judgment (5T26 9-13; 5T30 17-19; 5T45 2-11). Additionally, AJD's counsel noted that MOS's counsel was well-aware of Judge Espinales-Maloney's ruling in the November 2021 Decision – issued before plaintiffs e-filed the offer of judgment – that the subject indemnification clause would be triggered "if there was one percent finding of comparative negligence against the plaintiff" (5T51 22-25; 5T52 1-4).

Subsequently, plaintiffs' counsel advised the court that MOS was keenly aware of what was going on with the proceedings, noting that MOS's counsel was monitoring the trial "if not every day, almost every [day]" (5T32 14-22). Plaintiffs' counsel further contended that MOS frustrated settlement negotiations and mediation talks, stating that (a) "[m]any of the mediation dates

that we projected never took place" because MOS or MOS's counsel "would not agree to it;" (b) "[i]t's surprising…to say that AJD was 100 percent running the settlement train here because every time a judge or mediator would be frustrated with the stonewalling with respect to settlement from the defense I always heard that its [MOS] that's driving this" and explained (c) "I feel compelled as an officer of the court to give [plaintiffs'] perspective as to the facts and what was really going on…with respect to the settlement posture" (5T32 14-25; 5T33 1-25; 5T34 1-2).

MOS's counsel responded by stating that he did not know whether MOS frustrated settlement and mediation efforts because another attorney from his office was involved in the suit at the time but noted that if plaintiffs' counsel states that MOS had counsel present at trial every day, then he "accept[s]" plaintiffs' counsel's "representation 100 percent" (5T35 5-9). AJD's counsel later added that (a) MOS was on notice of the offer of judgment "with regard to settlement and things like that;" (b) MOS's attorney "was involved in every conversation we had with regard to mediation and where we were going;" (3) AJD tried to settle the case and even "spent a whole day with plaintiff on the phone" but "nothing happened simply because Men of Steel's carrier would not step in and even participate let alone…indemnify AJD;" and (4) MOS would not participate in settlement negotiations even at trial (5T44 18-25; 5T45 13-25).

Thereafter, the court stated for the record: "we now know Men of Steel knew about the offer of judgment, didn't do anything within the 90 days, didn't contact [AJD's counsel], didn't tell [AJD] you better take it, didn't say we're not going to reimburse you if – if you get wacked for sanctions under this. Did nothing, ignored it and left it up to [AJD] to decide" (5T43 23-25; 5T44 1-6). The court further held that MOS (a) seemingly acted "'cute' and saw the offer of judgment and just let it slide and did nothing within 90 days of December 2021" (5T44 9-17); and (b) "made no attempt in 90 days after the offer of judgment [was] served by the plaintiff properly…to pick up the phone and call AJD and say, we'll -- we've been monitoring the case, I – we know you're coming after us for indemnification, we don't want to be on the hook for offer of judgment or -- or we'll chip in some money so -- so we can get rid of this and avoid the offer of judgment" (5T48 1-9).

MOS's counsel later stated that it was incorrect to say that MOS "stonewalled settlement" because MOS tendered it's $1 million policy at trial which prompted the court to note that MOS's tender was made "[w]ell after the offer of judgement" (5T52 14-25; 5T53 1-2).

Significantly, the court acknowledged that "there is no case law" related to the "unique question" as to whether a party contractually obligated to indemnify another is also responsible for costs related to the indemnitee's failure

to accept an offer of judgment (5T49 12-13). The court ultimately ruled (5T53 1-25; 5T54 1-25; 5T56 1-25; 5T57 1-6):

> I'm going to decide it because I think maybe -- maybe the Appellate Division could clarify it.
>
> There's no question that the plaintiff is entitled to -- to re -- to recover the sanctions due to the non-acceptance of the plaintiff's offer of judgment that was served on December 2, 2021 from the defendant, AJD. The question is whether AJD can be indemnified for those sanctions as well as the attorneys fees and costs in defending the lawsuit under the contractual agreement that they had with Men of Steel. I find that they cannot pursue contractual indemnification cause the offer of judgment issued clearly could not have been contemplated by the parties when they entered into that contract and is not specifically addressed in the contract.
>
> I believe that contract was also drafted by AJD. So if there's any ambiguity on that question I'm construing it against AJD as drafters of the contract. They can't get contractual indemnification. The -- the defend -- the -- AJD's arguing they should be indemnified to further the purpose of the -- of the fee shifting, cost and fee shifting, sanctions under the offer of judgment rule. The offer of judgment expressly states that when the offer of judgment is not accepted and you meet certain requirements to 120 percent rule, et cetera, then all reasonable litigation expenses incurred following non acceptance, pre-judgment interest 8 percent in the amount of recovered, et cetera shall be allowable and reasonable attorneys fees are compelled by the non acceptance. It deals with parties suffering the consequences of non-acceptance of an offer. The rule does not address indemnification in any way whatsoever. I am denying the request that Men of Steel re -- have to indemnify AJD for any of the fees, costs and sanctions that are attributable to the AJD's refusal to accept the offer of judgment. I'm making that finding just so that the appellate court could be clear about the record with these certain things that seem to be factually true. The offer of judgment was known to Men of Steel when it was uploaded at first in December of '21. There was no communication between AJD and Men of Steel regarding, specifically regarding, the offer of judgment certainly

> within the 90 days required by the rule. The decision to reject the offer of judgment was made by [AJD] without input from Men of Steel. Now, whether Men of Steel sat on the sidelines and didn't volunteer any input is one thing. I accept that fact.
>
> I also find as a fact that AJD never solicited or requested input from Men of Steel as to whether the offer of judgment should or should not be accepted.
>
> So with those -- and -- and I'll also find for the record that throughout the course of all the settlements Men of Steel might have been a problem, a wrench in the operations.
>
> And I'll also find for the purposes of this motion record that Men of Steel participated in all 14 days of the trial…
>
> ***
>
> So the financial consequences under the court rule for rejecting an offer of judgment falls on a party. There's nothing that addresses indemnification under those facts. I'm going to deny – I guess I'm going to grant the motion, cross-motion, by Men of Steel…
>
> ***
>
> I'm doing a separate order today that AJD is not entitled to be indemnified for any of the fees, costs or -- or sanctions attributable the consequences of the failure to accept plaintiff's offer of judgment. We'll do that order, and then when we come…we'll do the attorneys fees. And then once you do that then that, Ms. Tutelo, that'll open you up so you can go up to the Appellate Division. Maybe we can get a case on this, cause it is -- it is a -- it is a -- it is a -- a unique issue that I don't see any prior cases address -- addressing that.

Thereafter, on March 25, 2024, the court issued Orders (1) granting MOS's motion to correct judgment and (2) denying AJD's motion seeking contractual indemnification for fees, costs or sanctions attributable to the

consequences of the failure to accept plaintiffs' offer of judgment (Da1339-42). Subsequently, on April 5, 2024, the court entered judgment in favor of plaintiffs and against AJD in the total amount of $6,975,539.32 comprised of (a) $5,175,247.59 representing the compensatory damages verdict plus pre-judgment and post-judgment interest plus (b) $1,818,291.70 representing costs and fees resulting from AJD's rejection of plaintiffs' offer of judgment (Da1-3).

Following subsequent motion practice, on June 25, 2024, the court entered a final judgment in favor of AJD and against MOS in the amount of $5,691,072 comprised of $5,157,247.59 on the molded verdict and $533,824.57 for attorney's fees and costs (Da1345-50).

STATEMENT OF FACTS

A. The Parties And Plaintiff's Accident

This action arises out of a November 2, 2017 incident in which plaintiff Donald Hoiland suffered injuries while performing construction work at the premises located at 235 Grand Street, Jersey City, NJ (Da13, 36-43, 97-98, 855-59, 530). Specifically, plaintiff claims that he stepped on a "fist-sized" rock in an access roadway on the premises causing his left foot to roll off the rock and him to fall to the ground (Da13, 36-43, 97-98, 855-59). The incident occurred

when plaintiff was walking with delivery driver, Dorson Hess,[4] to determine where to stage a rebar delivery for offloading in furtherance of MOS's rebar work onsite (Da207-08, 865-66). Mr. Hess completed an incident report in which he stated that he "witnessed [plaintiff] step on a fist size rock and roll off of it with his heel. As he rolled off [the] rock" he experienced "a severe jolt to his body" and "fell straight down to his face" (Da176, 358-61).

The subject project began in July 2017 and involved the construction of a 10-story multi-unit rental structure and a 45-story multi-unit rental structure on the property (Da530). At the time of the incident, Grand was the developer and owner of the premises (Da530). Grand retained AJD to serve as general contractor for the construction project and AJD, in turn, hired, plaintiff's employer, MOS, to install steel rebar for the project (Da97-98, 116-17, 172, 855-59) pursuant to an agreement entered into between them in August 2017 (Da116-167). Esposito Construction, LLC[5] was the excavation contractor on the project which built the access road where plaintiff fell and was "responsible for digging out the foundation areas" and "maintaining the roadways" (Da230, 233, 858).

[4] According to plaintiff's testimony, Mr. Hess was an "independent driver" who was delivering rebar for "Harris Rebar or Barker Steel" (Da216, 242).

[5] Defendants P. Esposito Construction, LLC, Esposito Construction, LLC, Esposito Industries, LLC, Esposito Group, LLC are collectively referred to herein as "the Esposito defendants."

B. The Contract Between AJD And MOS

Importantly, AJD and MOS's contract contained a provision requiring MOS to indemnify AJD for "any and all" claims, costs, expenses and attorney's fees "aris[ing] from, relate[d] to or otherwise connected with or incidental to" MOS's steel rebar installation work (Da 153-864-66). The indemnity provision specifically states (Da153, 858-59) (emphasis added):

> To the fullest extent permitted by law, [MOS] shall indemnify, defend and hold harmless [AJD], [Grand], any other person or entity required to be indemnified by [AJD] under the Prime Contract, and the officers, directors, employees, agents, insurers, successors and assigns of each, from and against *any and all* actual, threatened or alleged claims, citations, fines, forfeitures, penalties, liens, causes of actions, suits, demands, damages, liabilities, losses, *costs and expenses, including, but not limited to, attorney's fees* (the 'Claim') that: (i) arise from [MOS's] breach of a term of the Contract Documents, (ii) are caused or alleged to have been caused by [MOS], a Sub-subcontractor or any other person for whose acts or omissions [MOS] or Sub-subcontractor may be responsible (including, but not limited to, violations of [Grand's] and [AJD's] health and safety requirements); (iii) arise from, relate to or otherwise are connected with or incidental to the Work, whether or not caused or alleged to be caused in part by [Grand] or [AJD]; or (iv) arise from actual or alleged contamination, pollution, or public or private nuisance, arising directly or indirectly out of this Agreement or any acts or omissions of [MOS], its subcontractors…Nothing herein shall require [MOS] to indemnify [AJD] or [Grand] for claims caused by [AJD's] or [Grand's] sole negligence…

Significantly, as block quoted above, MOS's duty to indemnify AJD for "any and all" costs and fees would be triggered (a) when a claim arises out of the performance of an MOS's employee's work pursuant to the contract (b) so

long as the claim was not "caused by [AJD's] or [Grand's] sole negligence" (Da153).

ARGUMENT

POINT I

THE SUBJECT INDEMNIFICATION PROVISION REQUIRING MOS TO INDEMNIFY AJD FOR ANY AND ALL COSTS AND ATTORNEY'S FEES AXIOMATICALLY INCLUDES THOSE AWARDED PURSUANT TO NEW JERSEY'S OFFER OF JUDGMENT RULE (Da1)

As a threshold matter, the motion court erred in denying AJD's motion on the basis that the contract does "not specifically address[]" whether MOS is obligated to indemnify AJD for costs and fees associated with rejecting an offer of judgment and any ambiguity in that regard must be construed against AJD, the drafters of the agreement (5T54 4-12). To be sure, AJD and MOS's agreement does not include the term, "offer of judgment." However, the indemnification provision is broadly worded and expressly obligates MOS to indemnify AJD for "*any and all*…losses, costs and expenses, including…attorney's fees" (DA153) (emphasis added). It stands to reason that the expansive "any and all" costs and fees contemplated would include those awarded to plaintiffs pursuant to the offer of judgment rule among other types of fees and costs. The motion court's contrary finding exempting offer of judgment costs and fees from the inclusive "any and all" costs and fees simply

defies logic and commonsense and, moreover, contravenes longstanding judicial precedent related to contractual interpretation.

Moreover, nothing in New Jersey's offer of judgment rule, N.J. R. 4:58-2, was intended to nullify or limit AJD's broad contractual indemnification rights as against MOS. See Point II, infra.

Axiomatically, "[i]ndemnity contracts are interpreted in accordance with the rules governing the construction of contracts generally." Ramos v. Browning Ferris Industries, Inc., 103 N.J. 177, 191 (N.J. 1985). "In New Jersey, contract indemnity clauses should be interpreted like all contracts, looking at both the language of the contract and the intent of the parties." Cozzi v. Owens Corning Fiber Glass Corp., 164 A.2d 69, 71 (App. Div. 1960). "The terms used in the contract are given their plain and ordinary meaning, and '[i]f an indemnity provision is unambiguous, then the words presumably will reflect the parties' expectations." Boyle v. Huff, 257 N.J. 468, 478 (N.J. 2024). Conversely, "[i]f the meaning of an indemnity provision is ambiguous, the provision is 'strictly construed against the indemnitee.'" Kieffer v. Best Buy, 205 N.J. 213, 223 (N.J. 2011).

Importantly, however, "New Jersey law *does not require specificity in indemnity clauses nor does it require strict construction of those clauses*." Mobile Dredging & Pumping Co. v. City of Gloucester, 2005 U.S. Dist. LEXIS

16601, at *9 (D.N.J. Aug. 4, 2005) (emphasis added) citing First Jersey Nat. Bank v. Dome Petroleum Ltd., 723 F.2d 335, 339-340 (3d Cir. 1983); see also Borough of Edgewater v. Waterside Constr., LLC, 2021 U.S. Dist. LEXIS 155830 (D.N.J. Aug. 18, 2021). "Indeed, parties to an indemnity contract *may use broad language and need not list exactly which harms they intend to cover*." Mobile Dredging & Pumping Co., 2005 U.S. Dist. LEXIS 16601, at *9 (emphasis added); see also First Jersey Nat. Bank, 723 F.2d at 340 ("under New Jersey law a broadly worded indemnification clause need not also recite the specific sorts of loss within its coverage"). "Because parties now commonly shift their contractual risk of loss to insurance companies, strict construction of indemnity provisions is anachronistic." Stier v. Shop Rite of Manalapan, 201 N.J. Super. 142, 155 (App. Div. 1985).

Moreover, "[i]t is a bedrock principle of contract interpretation that the phrase 'any and all' allows for no exception," and is an "all-inclusive provision." Giaccone v. Canopius U.S. Ins. Co., 133 F.Supp.3d 668, 675 (D. N.J. 2015); see also News America Marketing In-Store Services, LLC v. Floorgraphics, Inc., 576 Fed. Appx. 111, 114 (3d Cir. 2014) ("Any and all" language is "broad and unqualified"); Isetts v. Borough of Roseland, 364 N.J. Super. 247, 256 (App. Div. 2003) ("the phrase 'any and all' allows for no exception…but only with regard to those types of things thereafter mentioned"). Indeed, "[t]he word 'any'

clearly may and should be interpreted as meaning 'all or every.'" Atlantic Cas. Ins. Co. v. Interstate Ins. Co., 28 N.J. Super. 81, 91 (App. Div. 1953); see also Isetts, 364 N.J. at 255-56.

As reflected above, New Jersey law confirms that the motion court erred in finding that MOS does not have to indemnify AJD for offer of judgment costs and fees merely because such costs and fees are not "specifically addressed" in the contract. Indeed, AJD and MOS were not obligated to "list exactly" all costs and fees MOS would be required to pay AJD in the event that the indemnification provision was triggered. Mobile Dredging & Pumping Co., 2005 U.S. Dist. LEXIS 16601, at *9. Rather, it was entirely appropriate under the circumstances to employ broad indemnity language requiring MOS to indemnity AJD for "any and all" costs and fees – a term that necessarily encompasses those awarded pursuant to the offer of judgment rule. Of course, if the parties intended otherwise, they would have explicitly stated so or, at the very least, not used the extremely broad term, "any and all," when referring to costs and fees. See Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 118 (N.J. 2014) ("If the language of a contract 'is plain and capable of legal construction, the language alone must determine the agreement's force and effect'") (citations omitted); see also Nesby v. Fluermond, 461 N.J. Super. 432, 439 (App. Div. 2019) ("the phrase 'any and all' allows for no exception") quoting Isetts, 364

N.J. Super. at 256; Schor v. FMS Financial Corp., 357 N.J. Super. 185, 192 (App. Div. 2002) ("The court has no right 'to rewrite the contract merely because one might conclude that it might well have been functionally desirable to draft it differently'") (citations omitted).

All told, the plain contractual language clearly evinces the parties' intent to require MOS to indemnify AJD for "any and all" types of costs and fees in the event the indemnification clause is triggered. As the unambiguous provision in no way carves out an exception for any subset of costs and fees, let alone those awarded pursuant to the offer of judgment rule, the motion court's decision must be reversed. Should this Court agree with the foregoing, it need not reach the balance of this brief. See Matter of County of Atlantic, 230 N.J. 237, 254 (N.J. 2017) ("[i]t is well-settled that courts enforce contracts based on the intent of the parties, the express terms of the contract, surrounding circumstances and the underlying purpose of the contract"); Barila v. Board of Educ. of Cliffside Park, 241 N.J. 595, 616 (N.J. 2020) ("[t]he plain language of the contract is the cornerstone of the interpretive inquiry"); Serico v. Rothberg, 234 N.J. 168 (N.J. 2018) ("A reviewing court must consider contractual language in the context of the circumstances at the time of drafting and…apply a rational meaning in keeping with the expressed general purpose"); Quinn v. Quinn, 225 N.J. 34, 45 (N.J. 2016) ("[W]hen the intent of the parties is plain and the language is clear

and unambiguous, a court must enforce the agreement as written, unless doing so would lead to an absurd result").

POINT II

THE COURT'S DECISION RESULTS IN AN UNFAIR OUTCOME THAT CONTRAVENES THE PURPOSE OF THE OFFER OF JUDGMENT RULE (Da1)

A. Applicable Law: New Jersey's Offer Of Judgment Rule (Da1)

New Jersey's offer of judgment rule provides that "if the offer of a claimant is not accepted and the claimant obtains a money judgment, in an amount that is 120% of the offer or more, excluding allowable prejudgment interest and counsel fees, the claimant shall be allowed" in addition to costs of suit: "(1) all reasonable litigation expenses incurred following non-acceptance; (2) prejudgment interest of eight percent on the amount of any money recovery from the date of the offer or the date of completion of discovery, whichever is later, but only to the extent that such prejudgment interest exceeds the interest prescribed by R. 4:42-11(b), which also shall be allowable; and (3) a reasonable attorney's fee for such subsequent services as are compelled by the non-acceptance." N.J. R. 4:58-2.

"The offer-of-judgment rule is designed particularly as a mechanism to encourage, promote, and stimulate early out-of-court settlement of…claims that in justice and reason ought to be settled without trial." Gonzalez v. Safe & Sound

Sec. Corp., 185 N.J. 100, 125 (N.J. 2005). "'That goal is achieved through the imposition of financial consequences (the award of fees and costs) where a settlement offer turns out to be more favorable than the ultimate judgment.'" Puglia v. Phillips, 473 N.J. Super. 402, 411 (App. Div. 2022) quoting Best v. C&M Door Controls, Inc., 200 N.J. 348, 356 (N.J. 2009). "Whereas most states simply modeled their offer of judgment rule on Federal Rule 68, New Jersey took a different approach. From its inception, New Jersey's rule was more ambitious in scope" because (1) it "allows both the plaintiff and the defendant to issue pre-trial settlement offers; the federal rule only allows a defendant to make a pre-trial offer;" and (2) "the cost-shifting sanctions attached to the New Jersey rule are much more significant than those attached to the federal rule" given that "[a] party awarded costs under the New Jersey rule will be awarded both court costs and attorneys fees, while the party may only collect court costs under the federal rule." Reid v. Finch, 425 N.J. Super. 196 (N.J. Super. 2011).

B. The New Jersey Supreme Court Has Ruled That Courts Must Balance The Competing Interests Of Plaintiffs And Defendants As It Relates To Offer Of Judgments And Ensure A Just Outcome (Da1)

The motion court was correct in finding that New Jersey courts have not addressed the "unique question" as to whether a party contractually obligated to indemnify another is required to pay offer of judgment fees and costs (5T49 12-13). Indeed, this is a case of first impression. Defendant submits that, under such

a scenario, the motion court should have found for AJD on the basis that any finding that offer of judgment fees and costs are excluded from MOS's indemnification obligations leads to an unfair outcome. This was the approach taken by the New Jersey Supreme Court in Willner v. Vertical Reality, Inc., 235 N.J. 65 (N.J. 2018) when it decided an unresolved issue related to the offer of judgment rule. Defendant submits that the Willner Court's reasoning should be followed here.

In Willner, the plaintiff was injured while climbing a rock wall owned by his employer and, thereafter, brought suit against the camp and the manufacturers of the wall and parts contained in the wall, defendant Vertical Reality, Inc. ("Vertical Reality") and defendant ASCO Numatics ("Numatics"), respectively. Id. at 69. Prior to trial, plaintiff made a single offer of judgment to the defendants in the amount of $125,000 which neither defendant accepted. Id. After the case was tried to its conclusion, the jury rendered a $358,000 verdict apportioning 30% percent of liability to Numatics and 70% to Vertical Reality and the trial judge granted plaintiff's "motion for attorney fees and costs pursuant to the offer of judgment rule." Id. Numatics appealed and the Appellate Division affirmed the trial court's award of attorney's fees and costs on the basis that the "jury's verdict was sufficiently greater than [plaintiff's] offer to trigger sanctions pursuant to Rule 4:58." Id. at 70.

However, the New Jersey Supreme Court reversed. The Supreme Court noted that (a) "[t]he rule leaves unclear the circumstances triggering the imposition of sanctions on an individual defendant when a single plaintiff makes a global offer to multiple defendants, there is no acceptance of the offer, and no counteroffer is made in response." Id. at 82-83. The court recognized that "mandating that individual defendants contemplate global offers from a single plaintiff…is problematic" as "[s]uch a requirement would force defendants who are likely less liable than their co-defendants to consider settling for an amount greater than their individual liabilities, simply to avoid significant sanctions." Id. at 82-83. Importantly, the court then concluded (id. at 84) (emphasis added):

> This case illustrates the problem. The jury awarded [plaintiff] a total of $358,000 and found Numatics thirty percent responsible for those damages. Numatics' molded share of liability was therefore $107,400. [Plaintiff's] offer of judgment was for $125,000, presented to all defendants. Under [plaintiff's] view, because the total verdict was greater than 120% of his offer, Numatics is liable for sanctions. This interpretation would dictate that the only way Numatics could have escaped an award of sanctions would have been to accept [plaintiff's] global offer -- for an amount greater than the amount that Numatics was ultimately determined to be at fault. *We find such an outcome to be unfair. Our offer of judgment rule must balance the competing interests of plaintiffs and defendants.*

The court ultimately held that "[i]t would be unfair to impose sanctions in a case where the only means for a party to avoid sanctions would be to pay an amount greater than the jury's verdict against that party, without advance notice

of that consequence" and, thus, "it would be improper to shift fees and costs" under the instant circumstances. Id. at 70, 85.

C. The Motion Court's Decision Here Undoubtedly Results In An Unfair Outcome (Da1)

Defendant respectfully submits that this Court should balance the competing interests of the parties here and, in so doing, reverse the motion court's decision. See Willner, 235 N.J. at 84. Requiring AJD, an indemnified party, to pay offer of judgment costs and fees not only flies in the face of the express language of the indemnity agreement obligating the indemnitee to pay "any and all" costs and fees and, frankly, commonsense, but is fundamentally unfair under the instant facts. Indeed, MOS (a) had notice from the outset of litigation that it was obligated to indemnify AJD for "any and all" costs and fees in the event its indemnity obligations were triggered; (b) had timely notice of and was served with plaintiffs' offer of judgment to AJD but failed to offer any input to AJD prior to the offer expiring; (c) was denied summary dismissal of AJD's contractual indemnification claim in a decision issued eleven (11) days prior to plaintiffs' service of the offer of judgment where the motion court indicated that the duty to indemnify would be triggered if a jury found plaintiff even 1% at fault; (d) was later denied reconsideration of said order in a decision issued prior to the expiration of plaintiffs' offer of judgment; (e) was involved in all aspects of litigation proceedings and monitored the eventual 14-day jury

trial; and (f) was not just involved in settlement and mediation but frustrated the parties' efforts to resolve the matter prior to trial.

As set forth more fully below, the Court should consider the foregoing factors and overall context of the factual circumstances at bar and, in so doing, find in the interests of fairness that it "would be improper to shift fees and costs" pursuant to the offer of judgment rule to AJD. Willner, 235 N.J. at 85.

1. MOS Was On Notice Of The Offer Of Judgment And Its Duty To Indemnify AJD "Any And All" Costs And Fees If The Jury Found Plaintiff Partially At Fault For His Accident (Da1)

First, MOS indisputably had notice from the onset of litigation through the conclusion of trial that AJD was seeking indemnification for "any and all" costs and fees pursuant to the subject indemnification agreement. In November 2019, shortly after plaintiffs commenced the suit and prior to their submission of an amended complaint, AJD tendered the matter to MOS via letter wherein it specifically requested defense and indemnification from MOS and/or MOS's insurance carrier (Da1320-21). The following month, AJD tendered the matter to MOS's insurance carrier (Da1309-10).

Although AJD received a response from MOS's insurer stating that it was denying AJD's tender, AJD had not received a response from MOS and, therefore, AJD forwarded a second letter to MOS's counsel in February 2020 (Da1322). Therein, AJD reiterated that it was seeking defense and

indemnification pursuant to the express terms of their contract regardless of whether it was provided by MOS directly or its insurance carrier (Da1322). Shortly thereafter, AJD received another response from MOS's carrier denying AJD's tender (Da1323-24).

AJD never received a response from MOS directly with regard to its tender. However, MOS's knowledge of AJD's position became apparent when, in September 2021, MOS filed a motion for summary dismissal of AJD's contractual indemnification claim against it. The next month, while MOS's motion was pending, AJD sent another follow up letter to MOS on the tender issue and, once again, AJD received no response (DA1316-17).

Thereafter, in November 2021, the court aptly denied MOS's motion and, in so doing, specifically (a) determined that "the duty to indemnify was triggered" given that plaintiff's accident occurred while "he was walking on the access road, performing his job;" and (b) credited AJD's argument that "if plaintiff is found to be comparatively at fault" at trial "then AJD would only be found partially, not 'solely' liable" thereby "triggering the indemnification clause'" (Da866-67). Shortly after the court's decision – a mere eleven (11) days later – plaintiffs electronically filed offers of judgment to AJD, Grand and the Esposito Defendants. Indeed, the offers of judgment were filed on the docket and thus served upon all parties including MOS.

Against this backdrop, the fact that AJD did not send yet another letter to MOS with the e-filed offer of judgment advising MOS that it would specifically seek costs and fees potentially awarded to plaintiffs pursuant to the offer of judgment rule is immaterial. The foregoing procedural history firmly establishes that MOS was on notice of the offer of judgment and the fact that AJD would endeavor to enforce the indemnification provision in the contract including the requirement that MOS pay AJD "any and all" costs and fees in the event the indemnification provision was triggered. It borders on frivolous to suggest that AJD would not consider offer of judgment costs and fees to be encompassed by the term "any and all" when the contract does not specifically exempt such costs and fees.

All told, it cannot reasonably be disputed that MOS was the party that should have taken affirmative steps to effectuate settlement between AJD and plaintiffs prior to trial or, at a minimum, offer input to AJD once it had notice of the offer of judgment. Doubtless MOS would agree that it would not have made a modicum of sense for AJD, as an indemnitee who would recover payment from its indemnitor in the event plaintiff was found 1% at fault for the happening of his accident to settle with plaintiffs on its own accord. The most rational explanation for MOS's failure to offer any input to AJD is that it did not want AJD to accept plaintiffs' offer. Perhaps MOS believed and was betting that a

jury would not award a money judgment that was 120% or more of the $2.75 million offer or would not find plaintiff partially at fault thereby triggering MOS's duty to indemnify.

In any event, AJD should not be punished and MOS's irresponsible gamesmanship in sitting "on the sidelines" and leaving "it up to [AJD] to decide" should not be rewarded (5T44 3-4; 5T55 16-17). Basic logic holds that AJD could not have reasonably anticipated that "the only means" for avoiding the prospect of paying offer of judgment costs and fees would have been to accept plaintiffs' offer of judgment and pay plaintiffs $2.75 million thereby likely forcing it to commence a separate, subsequent suit against MOS to recoup such payment. See Willner, 235 N.J. at 70.

2. MOS's Trial Counsel Was Involved In All Aspects Of The Litigation Prior To The Imposition Of Offer Of Judgment Costs And Fees And Even Frustrated The Parties' Efforts To Effectuate Settlement (Da1)

Of course, the fact that MOS did not volunteer any input or otherwise contact AJD when it became aware of the offer of judgment and the prospect of paying costs and fees related to the offer of judgment rule is unsurprising. As the motion court recognized at the March 2024 hearing, "Men of Steel might have been a problem, a wrench in the operations" throughout "the course of all the settlements" (5T55 22-25). Indeed, during the hearing, (1) plaintiff's counsel advised the court that (a) "[m]any of the mediation dates that [plaintiffs and

AJD] projected never took place" because MOS "would not agree to [them]" and (b) "every time a judge or mediator would be frustrated with the stonewalling with respect to settlement from the defense I always heard that its [MOS] that's driving this" (5T32 14-25; 5T33 1-25); and (2) AJD's counsel noted that (a) MOS was on notice of the offer of judgment "with regard to settlement and things like that" but would not participate in settlement negotiations even at trial and (b) MOS's counsel "was involved in every conversation we had with regard to mediation and where we were going" (5T44 18-25; 5T45 13-25).

MOS's counsel did not dispute plaintiffs' and AJD's counsel's representations but stated that he did not know whether they were accurate as another attorney from his firm was involved in settlement and mediation discussions and argued that MOS did not "stonewall settlement" because it offered its $1 million policy during the trial (5T52 14-25; 5T53 1-2).

Indeed, it is undisputed that MOS was involved in all aspects of litigation, had notice of the offer of judgment and potential consequences that would result if it was not accepted and aware of its duty to indemnity AJD for "any and all" costs and fees if a jury found that plaintiff was comparatively negligent. Yet, the evidence suggests that MOS did not merely fail to assist in effectuating settlement but, instead, was "a wrench" in the parties' genuine efforts to resolve

the matter (5T55 22-25). In view of these facts, it is simply a miscarriage of justice to "shift fees and costs" stemming from the offer of judgment rule to AJD. Willner, 235 N.J. at 85.

3. Unlike MOS, AJD Acted Prudently And Rationally When Faced With Plaintiffs' Offer Of Judgment And Throughout The Course Of Litigation (Da1)

Furthermore, MOS's conduct with respect to the offer of judgment and settlement in general is particularly perplexing on these facts. At risk of stating the obvious, MOS should have known that it was *highly likely* that a jury verdict would trigger its duty to indemnify AJD for "any and all" costs and fees because (a) as the motion court properly determined in its summary judgment order, the evidentiary proof confirms that plaintiff's accident arises out of the performance of MOS's rebar work pursuant to AJD and MOS's contract and (b) the record demonstrates that a jury would almost certainly find plaintiff at least 1% negligent for the accident. In other words, MOS took an enormous gamble in not working with AJD to accept plaintiffs' offer of judgment or otherwise assisting with settlement and mediation efforts prior to verdict.

First, the testimonial evidence firmly establishes that plaintiff's accident arose out of the performance of MOS's rebar work thereby triggering the subject indemnity clause. Indeed, plaintiff specifically admitted at his deposition that the incident occurred during the course of his work for MOS when he was

walking with rebar delivery driver, Mr. Hess, on the access road to determine where to stage a rebar delivery for offloading (Da207-08, 865-66). Plaintiff and other workers routinely utilized the access road to perform work and plaintiff specifically conceded that he had traversed the access road "quite a bit" going "back and forth, across it, all over the place" on the date of the accident, noting that in the two hours preceding his fall, he was "making…rounds checking on everyone, making sure that they had enough manpower, enough equipment, seeing if they needed anything" (Da215, 247, 366). Further, MOS and Empire's general manager, Jeffrey Jacuk,[6] confirmed at his deposition that (a) plaintiff's job duties included accepting rebar deliveries and directing rebar delivery drivers where to position their truck at the premises and (b) rebar delivery drivers routinely checked in with plaintiff upon arriving at the premises (Da181-83).

Moreover, a review of the record leads to the inexorable conclusion that plaintiff was partially at fault for his fall. First, plaintiff testified that (a) he had observed rocks including ones of similar size in the access road and throughout the premises while working at the jobsite prior to his fall; (b) he had prior experience working on five (5) to ten (10) jobsites that also had rocky surfaces

[6] Mr. Jacuk testified that MOS and Empire were sister companies and that MOS was the rebar fabrication company while Empire was tasked with rebar installation (Da182-83).

during which time he had to make an effort to avoid stepping on rocks; and (c) in order to safely walk and work on the jobsite, he had to be careful to avoid stepping on rocks and to look where he was going (Da242-43, 245, 254, 540).

Second, Mr. Jacuk further averred that (a) part of his responsibility was to make sure his "workers are safe on all of my jobs sites and all operations;" (b) if he felt the walking surfaces were unsafe he would have talked to someone at the jobsite; (c) he had walked on the access road prior to the incident more than a dozen times and never made any notes regarding any hazards or found anything "alarming" with respect to the condition of the access road; (d) neither plaintiff nor other employees complained to him about the walking areas on the job site prior to the incident; and (e) he could not recall plaintiff ever telling him that he complained to AJD about the condition of the access road (Da182, 187-89).

Third, Matthew Esposito, owner of Esposito Construction, LLC, Esposito Industries, LLC, and Esposito Group, LLC testified that he did not believe that the presence of "fist-sized rocks" at the premises was a safety issue and did not pose "a danger to trained construction workers" and that plaintiff "might have had a walking problem" (Da463, 477, 493). Mr. Esposito further averred that were "probably rocks everywhere" at the premises because it "was a construction site" and noted that rocks were actually put down in the ground "for stabilization of the soil" (Da455).

Additionally, Mr. Esposito contended that (a) the area of the accident where plaintiff fell looked "pretty normal and [was] actually a pretty clean looking area;" (b) the subject jobsite "look[ed] like every other jobsite" and the roadway appeared to be a "very stable" roadway; (c) it is entirely common for there to be rock and debris in an area of a jobsite that has not yet been paved; and (d) there was not a lot of water in the area where plaintiff's accident occurred (Da456-57, 474-75).

Finally, AJD's engineering expert, Keith A. Bergman, P.E., opined in a January 2021 expert report, *inter alia*, that (1) the actions and/or inactions of plaintiff caused the incident to occur given that (a) the ground condition encountered by plaintiff should have been expected and anticipated as the area was under construction; (b) regular inspections of the construction site were performed and no observations of a defective surface were noted; (c) construction workers are responsible for taking precaution for their own safety when traversing a construction site; (d) plaintiff knew, or should have known, of the condition of the access road within the boundaries of the active construction site, prior to the incident occurring; (d) had plaintiff been reasonably attentive and proceeded with caution for his own safety while traversing the incident area, this incident would have been avoided; and (e) the

incident was caused by plaintiff failing to exercise reasonable care for his own safety (Da581-82).

Clearly, the record is replete with evidence that plaintiff's fall occurred during the performance of his work for MOS and that he was comparatively negligent for the happening of his accident. MOS should have appreciated these facts long before trial and worked with AJD to resolve the matter with plaintiffs so that its indemnification obligations would not be triggered once the jury rendered its verdict. Needless to say, the operative facts indicate that MOS, as the indemnitor, should bear the burden of the consequences of failing to offer any input to AJD prior to the expiration of plaintiffs' offer of judgment.

D. The Court's Decision Undermines The Intention And Purpose Of New Jersey's Offer Of Judgment Rule (Da1)

Furthermore, the motion court's decision undermines the very purpose of the offer of judgment rule. Indeed, "[t]he fundamental purpose of the rule is to induce settlement by discouraging the rejection of reasonable offers of compromise." Henebema v. South Jersey Transp. Authority, 430 N.J. Super. 485, 515 (App. Div. 2013); Negron v. Melchiorre, Inc., 389 N.J. Super. 70, 94 (App. Div. 2006) ("It is well settled that inducement to the early settlement of cases is the fundamental purpose of the Offer of Judgment Rule"). As the New Jersey Supreme Court has held, the offer of judgment rule "serves the unique and particular purpose of imposing financial consequences on parties who

unwisely reject an offer of settlement and insist on trial." Wiese v. Dedhia, 188 N.J. 587, 593 (N.J. 2006) (emphasis added).

To require a likely indemnitee to accept an offer of compromise or risk bearing the sanctions would financially run counter to promoting reasonable offers of compromise. Rather, an indemnitee even when faced with a grossly inflated offer of compromise would be motivated to accept and pass along 100% of the inflated offer than risk even paying $1 of its own money in potential sanctions from refusing such an offer. While plaintiffs in this matter obtained a higher verdict, to the extent that this Court is ruling on an issue of first impression in the state, it would create unfair policy for indemnitors in a wave of other cases.

POINT III

COURTS OF OTHER JURISDICTIONS HAVE FOUND THAT A SUCCESSFUL OFFER OF JUDGMENT DOES NOT SERVE TO CUT OFF A PARTY'S CONTRACTUAL RIGHT TO FEES AND COSTS (Da1)

Finally, defendant respectfully submits that this Court should look to decisions from out-of-state courts including Tierra Holdings, Ltd. v. Mercantile Bank, 78 So.3d 558 (Fla 1st DCA 2011) and, in so doing, similarly reach the commonsense conclusion that the rejection of a successful offer of judgment in no way affects an indemnitee's entitlement to "any and all" costs and fees.

Florida's seminal offer of judgment case, Tierra, is instructive. In Tierra, plaintiff "raised an issue of first impression" on its appeal of a trial court order which (a) awarded plaintiff costs and fees incurred after the date that it served an offer of judgment in its breach of contract claim against defendant but (b) awarded defendant "all of its costs and fees incurred through trial in connection with its breach of contract claim" against plaintiff "pursuant to a prevailing party attorney's fees provision in the contract." Id. at 559-61. Specifically, the contract "provided that the 'prevailing party' in any litigation in connection with the contract would be entitled to all costs and expenses including attorney's fees." Id. at 560. Plaintiff conceded that defendant "was the prevailing party under the contract but argued that its proposal for settlement cut off [defendant's] entitlement to fees under the contract which were incurred after the date of the proposal." Id.

The appellate court noted that (a) the parties' contract "contains a broad attorney's fees provision;" (b) "nothing in the language of the contract limited a prevailing party's entitlement to an award of fees based upon the opposing party's offer to settle" and (c) "nothing in the language of [Florida's offer of judgment statute] authorizes the modification of a contractual right to attorney's fees." Id. at 563. Significantly, the court then held that "[r]eading an implicit cut-off into the offer of judgment statute…*would deny [defendant] complete*

reimbursement for its litigation expenses and, thus, the contractual indemnification for which the parties bargained." Id. (emphasis added). In affirming the trial court's order, the court credited defendant's argument that "the express language" of Florida's offer of judgment rule does not suggest that "a successful offer of judgment" operates to "cut[] off defendant's contractual right to fees and costs." See Defendant's Answer Brief, 2010 WL 11184925, at *3 (Fla 1st DCA 2011).

Indeed, the facts and circumstances presented in Tierra are akin to those at bar. Here, (a) AJD and MOS's contact contains a "broad" indemnity provision entitling AJD reimbursement for "any and all" costs and fees; (b) "nothing in the language of the contract" limits AJD's "entitlement to an award of fees based upon [an] opposing party's offer to settle;" and (c) "nothing in the language of [New Jersey's offer of judgment statute] authorizes the modification of a contractual right to attorney's fees." Id.; see also N.J. R. 4:58-2. Accordingly, this Court should adopt the appellate court's reasoning in Tierra and find that exempting offer of judgment fees from MOS's indemnification obligations not only contravenes the broad language of the parties' contract but impermissibly reads "an implicit cut-off into [New Jersey's] offer of judgment statute" which does not exist thereby denying AJD "the contractual indemnification for which the parties bargained." Id. See also East Coast Metal Structures, Corp. v

Lemartec Corp., 2022 WL 22874647 *7 (Fla. Cir. Ct. June 8, 2022) (holding that "a proposal for settlement cannot be used to defeat an attorneys' fee award granted under a prevailing party contract provision").

CONCLUSION

For all of the foregoing reasons, the Court should reverse the April 2024 Judgment to the extent that it denied AJD's motion for contractual indemnification against MOS for the costs and attorneys' fees awarded to the plaintiffs pursuant to the offer of judgment rule, and thus, award AJD contractual indemnification against MOS for such costs and attorneys' fees.

Dated: December 11, 2024
New York, New York

Kahana Feld, LLP

Sean Harriton

Of Counsel
Sofya Uvaydov
Sean Harriton

800 Third Avenue, 16th Floor
New York, New York 10022
(917) 590-1280
sharriton@kahanafeld.com

DONALD J. HOILAND and MANDY HOILAND, his wife Plaintiffs-Respondents, vs. AJD CONSTRUCTION CO., INC., Defendant-Appellant and GRAND LHN III, U.R., LLC; GRAND LHN II URBAN RENEWAL, LLC; GRAND LHN I URBAN RENEWAL, LLC; GRAND LHN RENEWAL 1, LLC; GRAND LHN, III, LLC; LLC; IRONSTATE DEVELOPMENT COMPANY; IRONSTATE DEVELOPMENT COMPANY, LLC; P. ESPOSITO CONSTRUCTION, LLC; ESPOSITO CONSTRUCTION, LLC; ESOSITO INDUSTRIES, LLC; ESPOSITO GROUP, LLC; AMERICAN SAFETY PARTNERS, LLC; EMPIRE STATE REBAR INSTALL, LLC; Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-002753-23 CIVIL ACTION ON APPEAL FROM A FINAL ORDER OF THE LAW DIVISION DATED April 5, 2024 DOCKET NO: HUD-L-2754-19 SAT BELOW: ANTHONY V. D'ELIA, J.S.C.

APPELLATE BRIEF ON BEHALF OF DEFENDANTS-RESPONDENTS MEN OF STEEL ENTERPRISES, LLC AND MEN OF STEEL REBAR FABRICATORS, LLC

Patrick B. Minter, Esq.
Of Counsel
Atty ID: 031661994
David M. Blackwell, Esq.
Atty ID: 042541994
Thomas J. Coffey, Esq.
Atty ID: 031402003
On the Brief

DONNELLY MINTER & KELLY, LLC
163 Madison Avenue, Suite 320
Morristown, New Jersey 07960
(973) 200-6400
Attorneys for Defendants-Respondents,
Men of Steel Enterprises, LLC and
Men of Steel Rebar Fabricators, LLC
pminter@dmklawgroup.com
dblackwell@dmklawgroup.com
tcoffey@dmklawgroup.com

TABLE OF CONTENTS

Page

TABLE OF CONTENTS (CONT'D.)

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES (CONT'D.)

Page

Other Authorities

Rules

PRELIMINARY STATEMENT

This appeal arises out of the trial court's determination that AJD Construction Co., Inc ("AJD") cannot contractually pass through to Men of Steel Enterprises LLC and Men of Steel Rebar Fabricators, LLC (collectively "Men of Steel") AJD's obligations to pay to Plaintiff Donald Hoiland ("Plaintiff") his attorneys' fees and costs under the Offer of Judgment Court Rule as a result of AJD's own decision not to accept an offer of judgment that Plaintiff made to AJD. The trial court properly found that the indemnification provision within the contract between AJD and Men of Steel did not require Men of Steel to indemnify AJD for these amounts and, further, found that the transfer of this specific risk was certainly not something contemplated by the parties at the time they entered into the contract. In its appeal, AJD fails to provide a single reason (or a single legal basis) for this Court to disturb the trial court's well-reasoned and ultimately correct Order and, as a result, the Order should be affirmed and AJD should remain responsible for the consequences of its own actions.

Moreover, even if the amounts incurred by AJD were a risk specifically addressed in the indemnification provision and specifically contemplated by the parties – which they absolutely were not – the indemnification provision does not entitle AJD to indemnification for damages due to AJD's own negligence, which

was the basis of the jury's award against AJD, and thus, the basis of the amounts awarded against AJD as a result of its failure to accept Plaintiff's offer of judgment.

The underlying matter arose out of a fall down incident that occurred while Plaintiff was working for Men of Steel at a construction site located in Jersey City, New Jersey. The subject incident occurred while Plaintiff was walking on an access road at the construction site. He stepped on a rock which caused him to fall to the ground.

During the course of the litigation, Plaintiff made defendant-specific offers of judgment to AJD and two other defendants. AJD took no action in response to the offer of judgment. On September 22, 2023, a jury returned a verdict finding AJD negligent and a proximate cause of Plaintiff's injuries. The jury also determined that Plaintiff was comparatively negligent.

The amount of the jury's verdict also triggered the consequences of AJD's non-acceptance of an offer of judgment under R. 4:58-2. During post-trial motion practice, the trial court correctly determined that these consequences were not subject to the indemnification provision contained in the contract between AJD and Men of Steel and were the sole responsibility of AJD. Accordingly, the order determining that AJD is responsible for the consequences of its non-acceptance of Plaintiff's offer of judgment should be affirmed.

PROCEDURAL HISTORY

On or about April 28, 2020, Plaintiff filed an Amended Complaint in the Superior Court of New Jersey, Hudson County (Da36). On April 29, 2020, AJD filed an Answer to the Amended Complaint, which included a claim for contractual indemnification against Men of Steel (Da45). On April 29, 2020, Men of Steel filed an Answer to the Amended Complaint, which included a denial of all cross-claims (Da79).

On June 19, 2020, the Court entered an Order dismissing Plaintiff's claims against Men of Steel Enterprises, LLC based on the workers' compensation bar given Men of Steel's status as Plaintiff's employer (Da997-998). On September 14, 2020, the Court entered an Order dismissing Plaintiff's claims against Men of Steel Rebar Fabricators, LLC for the same reason (Da519). As such, as of September 2020, there were no direct claims from Plaintiff, or his wife, against the Men of Steel Defendants.

On December 2, 2021, Plaintiff served defendant-specific offers of judgment upon AJD and two other defendants (Da869; MDa1, MDa3). AJD took no action in response to the offer of judgment that it received, and as a result, the offer of judgment as to AJD expired under Court Rule 4:58-1(b) ("If the offer is not accepted on or prior to the 10th day before the actual trial date or within 90 days of its service, whichever period expires first, it shall be deemed withdrawn and evidence thereof

shall not be admissible except in a proceeding after the trial to fix costs, interest, and attorney's fee").

On September 5, 2023, Plaintiff's personal injury claims against AJD went to trial. On September 22, 2023, the jury returned a verdict finding AJD's negligence to be the proximate cause of Plaintiff's injuries (Da892-893). The Plaintiff was also found to be comparatively negligent (Da892-893). The amount of the jury's verdict also triggered the consequences of AJD's non-acceptance of an offer of judgment under R. 4:58-2.

On October 16, 2023, AJD filed a motion for summary judgment seeking contractual indemnification from Men of Steel (Da894). On November 7, 2023, Men of Steel filed a cross-motion for summary judgment on the issue of contractual indemnification (Da1085). On October 30, 2023, Plaintiff filed a motion seeking costs and fees as a result of AJD's non-acceptance of the offer of judgment pursuant to R. 4:58-2 (Da980). On December 4, 2023, oral argument occurred before the Hon. Christine M. Vanek on the pending motions and the Court issued Orders that day granting AJD's motion and denying Men of Steel's cross-motion (Da1254-1257). The Court also granted Plaintiff's motion awarding costs and fees based on AJD's failure to accept the offer of judgment served on AJD (Da1258).

On December 26, 2023, AJD filed a motion for fees and costs (Da1261-1303). On January 11, 2024, Men of Steel filed an opposition to the motion and filed a

cross-motion, which argued, in part, that AJD, not Men of Steel, was responsible for the consequences of AJD's non-acceptance of the offer of judgment (Da1304-1317).

Oral argument for these motions occurred on March 22, 2024.

On April 5, 2024, the Court issued a Combined Order for Judgment upon Compensatory Damages, Jury Verdict and Offer of Judgment, which order included the trial court's determination that AJD, and not Men of Steel, was responsible for the payment of plaintiff's attorney's fees and costs pursuant to the offer of judgment (Da1339-1340).

On May 24, 2024, AJD filed an Amended Notice of Appeal on issues related to the consequences of its non-acceptance of the offer of judgment (Da18). Two other appeals are also pending in this matter. Plaintiff has filed a notice of appeal related to the grants of summary judgment to the excavation contractor and the owner of the property, which is docketed as A-3553-23. Men of Steel has also filed an appeal as to issues related to the contractual indemnification provision contained in its contract with AJD, which is docketed as A-3782-23. In that appeal, Men of Steel argues that the indemnification provision does not require Men of Steel to indemnify AJD for the jury's award against it, principally, because the provision does not entitle AJD to indemnification for AJD's own negligence.

COUNTERSTATEMENT OF FACTS

Plaintiff alleged he sustained injuries after he fell on an access roadway on a construction project located at 235 Grand Street, Jersey City, New Jersey (Da36). AJD was the general contractor for the project (Da115-167). Men of Steel was hired to install reinforcing steel (rebar) for the project (Da115-167; Da172).

Plaintiff was the only employee of Men of Steel on site at the time of the incident (Da267). According to the incident report, Plaintiff was walking, stepped on a rock, tweaked his back and fell to the ground (Da358-361). Dorson Hess, who witnessed the incident, stated that he was walking with the Plaintiff and "witnessed him step on a fist size rock and roll off of it with his heel. As he rolled off the rock a severe jolt to his body took place. After the jolt he fell straight down to his face" (Da361).

Plaintiff testified consistent with the incident report that he was walking on the access roadway on the jobsite when he stepped on a rock and fell to the ground (Da216).

Daniel Graham served as an assistant superintendent on the project for AJD (Da366). Keith Healy served as the project manager for AJD (Da386).

On July 19, 2017, AJD and Esposito Construction LLC ("Esposito") entered into an agreement related to excavation services on the project (Da1096-1149). Esposito built the access road and was responsible for the maintenance at the

direction of AJD (Da369, 416, 467). Men of Steel was not hired to in any way repair the access road (Da174). The access road was constructed prior to Men of Steel being on the job site (Da267). Men of Steel was not involved in the construction or delineation of the access road (Da267). Men of Steel was not involved in the maintenance of the access road (Da267).

There is no evidence that Men of Steel was responsible for the design, creation, maintenance, or repair of the access road (Da174). There is no evidence that Men of Steel was responsible for the subject rock being located on the access road at the time of the incident.

On December 4, 2019, AJD tendered to Men of Steel's carrier (Da1308). Men of Steel's carrier denied the tender on February 20, 2020 (Da1311). More than a year and a half after the denial of tender, AJD responded on October 20, 2021 seeking defense (Da1315).

On December 2, 2021, Plaintiff served defendant-specific offers of judgment upon AJD and two other defendants (Da 869; MDa1, MDa3). After AJD failed to accept the offer of judgment as to it within 90 days after it was served, the offer was deemed withdrawn under Court Rule 4:58-1(b).

On September 5, 2023, the Plaintiff's personal injury claims against AJD went to trial. On September 22, 2023, the jury returned a verdict finding AJD's negligence to be the proximate cause of Plaintiff's injuries (Da892-893). The Plaintiff was also

found to be comparatively negligent (Da892-893). As a result, the verdict was reduced by the amount of Plaintiff's comparative negligence, and the portion of the verdict for which AJD is responsible is based solely on its own negligence.

Pertinent to this appeal, AJD and Men of Steel entered into an agreement with respect to the work that was to be performed at the job site by Men of Steel (Da118-167). The agreement contains an indemnification clause, which states as follows:

Section 10. INDEMNIFICATION.

> (a) To the fullest extent permitted by law, Subcontractor [e.g., Men of Steel] shall "indemnify, defend and hold harmless Contractor [e.g., AJD], Owner, any other person or entity required to be indemnified by Contractor under the Prime Contract, and the officers, directors, employees; agents, insurers, successors and assigns of each, from and against any and all actual, threatened or alleged claims, citations, fines, forfeitures, penalties, liens, causes of actions, suits, demands, damages, liabilities, losses, costs and expenses, including, but not limited to, attorney's fees (the "Claim") that: (i) arise from Subcontractor's breach of a term of the Contract Documents, (ii) are caused or alleged to have been caused by Subcontractor, a Sub-subcontractor or any person for whose acts or omissions Subcontractor or Sub-subcontractor may be responsible (including, but not limited to, violations of Owner's and Contractor's health and safety requirements); (iii) arise from, relate to or otherwise are connected with or incidental to the Work, whether or not caused or alleged to be caused in part by Owner or Contractor; or (iv) arise from actual or alleged contamination, pollution, or public or private nuisance, arising directly or indirectly out of this Agreement or any acts or omissions of Subcontractor, its subcontractors, including but not limited to, handling, transportation, treatment, storage or disposal of Hazardous Materials, substances, samples or residue or out of Subcontractor's failure to comply with any warranty contained in this Agreement; (v) arising from, related to, or are otherwise connected to any product or material installed by or incorporated in any way in the Work of the Subcontractor. Nothing herein shall require Subcontractor to indemnify Contractor or Owner for claims

> caused by Contractor's or Owner's sole negligence. In· addition to the insurance requirements prescribed in Section 9 of this Agreement. subcontractor shall obtain, maintain and pay, from the beginning until the completion of the Work, policies of insurance satisfactory to contractor covering the liabilities mentioned above. This indemnity shall survive completion or termination of the Agreement for whatever reason.
>
> (b) Contractor, in its sole discretion, reserves the right to retain its own counsel to defend it, Owner or other indemnified parties, against a Claim covered by Section 10 (a) at Subcontractor's cost and expense. Contractor's reservation of such election to defend with counsel of its own choice shall. not limit Subcontractor's obligations under Section 10(a).
>
> (c) In Claims against any person or entity indemnified under Section 10(a) by an employee of Subcontractor or a Subcontractor, the indemnification obligation under Section 10(a) shall not be limited by a limitation on the amount or type of damages, compensation or other benefits payable by or for the Subcontractor or the Sub-subcontractor under worker's compensation, disability benefit or other employee benefit acts.
>
> (d) For the purpose of this Agreement, "Hazardous Materials" are defined as any substance or material regulated or governed by any permit, or any substance, emission or material now or hereafter deemed by any governing authority to be a "regulated substance," "hazardous material," "hazardous waste," "hazardous constituent," "hazardous substance," "toxic substance," "radioactive substance," "pesticide," or any similar classification, including by reason of deleterious properties, irritability, corrosivity, reactivity, carcinogenicity or reproductive toxicity.

(Da153-154).

Based on this indemnification provision, on October 16, 2023, AJD filed a motion for summary judgment seeking contractual indemnification from Men of Steel for the amount of the verdict assessed against it based on AJD's own negligence (Da894). On November 7, 2023, Men of Steel filed a cross-motion on the issue of

contractual indemnification (Da1085). Concurrently, on October 30, 2023, Plaintiff filed a motion seeking costs and fees as a result of AJD's failure to accept Plaintiff's offer of judgment pursuant to R. 4:58-2 (Da980). On December 4, 2023, oral argument occurred before the Hon. Christine M. Vanek on the pending motions and the Court issued Orders that day granting AJD's motion and denying Men of Steel's cross-motion (Da1254-1257). The Court also granted Plaintiff's motion awarding costs and fees based on AJD's failure to accept the offer of judgment served on AJD (Da1258).

On December 26, 2023, AJD filed a motion for fees and costs (Da1261-1303). On January 11, 2024, Men of Steel filed an opposition to the motion and filed a cross-motion, which argued, in part, that AJD, not Men of Steel, was responsible for the consequences of AJD's non-acceptance of the offer of judgment (Da1304-38).

On March 22, 2024, following oral argument on the motions, the trial court determined that AJD was responsible for the consequences of its non-acceptance of the offer of judgement (T5; Da 1339-1340). An order reflecting this decision was entered on April 5, 2024 (Da1). It is from this order that AJD now appeals.

LEGAL ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THAT THE INDEMNIFICATION PROVISION DOES NOT CONTEMPLATE AN OFFER OF JUDGMENT.

A. The plain language of the contract does not include indemnification for the consequences of an offer of judgment.

Nothing in the indemnification provision of the contract between AJD and Men of Steel mentions the consequences of the non-acceptance of an offer of judgment. Specifically, the contract's indemnification provision, which is set forth in full above, states in relevant part as follows as follows:

> (a) To the fullest extent permitted by law, Subcontractor shall "indemnify, defend and hold harmless Contractor, Owner, any other person or entity required to be indemnified by Contractor under the Prime Contract, and the officers, directors, employees; agents, insurers, successors and assigns of each, from and against any and all actual, threatened or alleged claims, citations, fines, forfeitures, penalties, liens, causes of actions, suits, demands, damages, liabilities, losses, costs and expenses, including, but not limited to, attorney's fees (the "Claim") that: (i) arise from Subcontractor's breach of a term of the Contract Documents, (ii) are caused or alleged to have been caused by Subcontractor, a Sub• subcontractor or any person for whose acts or omissions· Subcontractor or Sub-subcontractor may be responsible (including, but not limited to, violations of Owner's and Contractor's health and safety requirements); (iii) arise from, relate to or otherwise are connected with or incidental to the Work, whether or not caused or alleged to be caused in part by Owner or Contractor; or (iv) arise from actual or alleged contamination, pollution, or public or private nuisance, arising directly or indirectly out of this Agreement or any acts or omissions of Subcontractor, its subcontractors, including but not limited to, handling, transportation, treatment, storage or disposal of Hazardous Materials, substances, samples or residue or out of Subcontractor's failure to comply with any warranty contained in this Agreement; (v) arising from, related to, or are otherwise connected to any product or material installed by or incorporated in any way in the Work of

> the Subcontractor. Nothing herein shall require Subcontractor to indemnify Contractor or Owner for claims caused by Contractor's or Owner's sole negligence. In· addition to the insurance requirements prescribed in Section 9 of this Agreement. subcontractor shall obtain, maintain and pay, from the beginning until the completion of the Work, policies of insurance satisfactory to contractor covering the liabilities mentioned above. This indemnity shall survive completion or termination of the Agreement for whatever reason.

(Da153-154).

Noticeably absent from this lengthy provision – drafted by AJD – is any requirement, whatsoever, that AJD be indemnified by Men of Steel for AJD's own decision to not accept the offer of judgment that Plaintiff served on AJD. This is no surprise, however, since such a requirement was not, and could not have been, contemplated by the parties when they entered into this contract. Said another way, there is nothing in the contract to indicate that either party expected or intended that if AJD, while controlling its own defense, without input from, let alone control by, Men of Steel, decided not to accept an offer of judgment made to AJD, then Men of Steel would be responsible for the consequences of AJD's own actions. When the terms of a contract are clear, "it is the function of a court to enforce it as written and not to make a better contract for either of the parties." Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1960). "Absent ambiguity, the intention of the parties is to be ascertained by the language of the contract." CSFB 2001-CP-4 Princeton Park Corporate Center, LLC v. SB Rental I, LLC, 410 N.J. Super. 114, 119 (App. Div.

2009) "If the language is plain and capable of legal construction, the language alone must determine the agreement's force and effect." Ibid.

Further, allowing AJD to "read" into the indemnification provision that it developed the requirement that Men of Steel indemnify AJD for AJD's own decisions (over which Men of Steel had no control or even involvement) would lead to incredibly perverse and unintended consequences. Perhaps the most obvious example would be that, under AJD's reading of the provision, Men of Steel would be required to indemnify AJD for sanctions imposed upon AJD's attorneys for discovery violations or other misconduct during the handling of Plaintiff's lawsuit. While Men of Steel would assume AJD would not contend that the indemnification provision would require Men of Steel to indemnify it for such sanctions, it is unclear how or where AJD would "draw a line" between the consequences of AJD's own actions for which AJD is and is not entitled to indemnity from Men of Steel under the indemnity provision.

Further, AJD has not even alleged, and it certainly has not identified record evidence that establishes, that it intended to accept the offer of judgment or that it would have done so (or allowed Men of Steel to do so on its behalf) had Men of Steel agreed to indemnify AJD for the offer of judgment. Nor did AJD ever even request that Men of Steel accept the offer of judgment on its behalf. Of course, if AJD had wished to accept the offer of judgment, it would have done so, and then

pursued Men of Steel for the full amount of the offer – just as it decided to take the claims against it to trial and then pursue Men of Steel for indemnity for the jury award against it. Instead, AJD allowed the offer to expire, knowing full well the potential consequences, and it now impermissibly seeks to compel Men of Steel to indemnify it under the parties' contract for AJD's own decision in that regard, despite that obligation being utterly absent from the indemnity provision.

While the indemnity provision mentions attorney's fees, there is nothing in the contract language indicating that Men of Steel would be responsible to indemnify AJD for the attorneys' fees of an entirely different party that AJD is ordered to pay because of AJD's own refusal to accept an offer of judgment by that party. Instead, the only reasonable interpretation of the phrase "attorney's fees" in the provision is that the phrase refers to AJD's attorneys' fees. To be sure, AJD has relied on that very same phrase to pursue Men of Steel for indemnity for its own attorneys' fees. It cannot be allowed to completely contort the phrase to include other parties' attorneys' fees awarded against AJD, because of AJD's failure to settle with that other party. This is precisely the interpretation given to the provision by the trial court:

> the offer of judgment is not contractual indemnification. That's not in the contract. ***It's the attorneys fees and costs to defend the lawsuit.*** It was clearly not contemplated. I'm not even going to do a hearing. It's clearly not contemplated by the parties on contracts like that that we would also pay for any sanctions that are under the offer

> of judgment rules. So contractual indemnification argument is out.

(T5, 43:5-14.) Further, the trial court held that AJD cannot pursue contractual indemnification because the offer of judgment "could not have been contemplated by the parties when they entered into the contract and is not specifically addressed in the contract." (T5, 54:4-8).

Both of these conclusions by the trial court are amply supported by the language of the indemnification provision and the record evidence, neither of which shows that AJD and Men of Steel contemplated the indemnity provision would entitle AJD to recover from Men of Steel the costs and fees awarded against AJD based on AJD's failure to accept Plaintiff's offer of judgment.

B. Should the Court find the indemnification language is ambiguous, it must be construed against its drafter – AJD.

"Indemnity contracts are interpreted in accordance with the rules governing the construction of contracts generally". Mautz v. J.P. Patti Co., 298 N.J. Super. 13, 19 (App. Div. 1997) (quoting Cozzi v. Owens Coming Fiber Glass Corp., 63 N.J. Super. 117, 121 (App. Div. 1960)). "An ambiguity in a contract exists if the terms of the contract are susceptible to at least two reasonable alternative interpretations". Schor v. FMS Financial Corp., 357 N.J. Super. 185, 191 (App. Div. 2002). Where a contractual term is ambiguous, "the writing is to be strictly construed against the party preparing it." Orange Township v. Empire Mortgage Serv., Inc., 341 N.J.

Super. 216, 227 (App. Div. 2001). Moreover, if the meaning of an indemnity provision is ambiguous, the provision is "strictly construed against the indemnitee", here AJD. Mantilla v. NC Mall Assocs., 16 N.J. 262, 272 (2001) (quoting Ramos v. Browning Ferris Industries, 103 N.J. 177, 191 (1986)).

While AJD has not presented any reasonable basis supporting the position that the parties intended there to be fee shifting in accordance with the offer of judgment rule, to the extent that the Court now determines that a second interpretation exists, the Court must, as the trial court acknowledged, construe any ambiguity against the drafter of the contract – AJD. (T5, 54:9-12). As the trial court stated "So if there's any ambiguity on that question I'm construing it against AJD as the drafters of the contract. They can't get contractual indemnification." (T5, 54:9-12).

II. THE TRIAL COURT CORRECTLY DETERMINED THAT THE CONSEQUENCES OF AJD'S FAILURE TO ACCEPT AN OFFER OF JUDGMENT SHOULD NOT BE SUBJECT TO THE INDEMNIFICATION PROVISION.

A. AJD Alone Determined Not to Accept the Offer of Judgment and Cannot Now Transfer the Consequences of that Decision to Men of Steel.

Patterned after Fed.R.Civ.P. 68, New Jersey Court Rule 4:58, the offer of judgment rule, was intended as a procedural mechanism to facilitate the settlement of cases. Wiese v.Dedhia, 188 N.J. 587, 593 (2006). The rule is "designed particularly as a mechanism to encourage, promote, and stimulate early out-of-court

settlement of negligence and unliquidated damages claims that in justice and reason ought to be settled without trial." Crudup v. Marrero, 57 N.J. 353, 361 (1971). To achieve this goal, the rule imposes financial consequences on a party who rejects a settlement offer that turns out to be more favorable than the ultimate judgment. See Schettino v. Roizman Dev., Inc., 158 N.J. 476, 482 (1999).

Rule 4:58-1 provides that :

> (a) Except in a matrimonial action or an action adjudicated in the Special Civil Part, any party may, at any time more than 20 days before the actual trial date, serve on any adverse party, without prejudice, and file with the court, an offer to take a monetary judgment in the offeror's favor, or as the case may be, to allow judgment to be taken against the offeror, for a sum stated therein (including costs). The offer shall not be effective unless, at the time the offer is extended, the relief sought by the parties in the case is exclusively monetary in nature. Any offer made under this rule shall not be withdrawn except as provided herein.
>
> (b) If at any time on or prior to the 10th day before the actual trial date the offer is accepted, the offeree shall serve on the offeror and file a notice of acceptance with the court. The making of a further offer shall constitute a withdrawal of all previous offers made by that party. An offer shall not, however, be deemed withdrawn upon the making of a counter-offer by an adverse party but shall remain open until accepted or withdrawn as is herein provided. If the offer is not accepted on or prior to the 10th day before the actual trial date or within 90 days of its service, whichever period first expires, it shall be deemed withdrawn and evidence thereof shall not be admissible except in a proceeding after the trial to fix costs, interest, and attorney's fee. The fact that an offer is not accepted does not preclude a further offer within the time herein prescribed in the same or another amount or as specified therein.
>
> (c) Except as otherwise provided under this Rule, prior to the service or filing of a notice of acceptance, an offeror may withdraw an offer by serving on the offeree and filing a notice of withdrawal with the court.

> An offer voluntarily withdrawn by the offeror shall not be subject to this Rule.

The offer of judgment rule "serves the unique and particular purpose of imposing financial consequences on parties who unwisely reject an offer of settlement and insist on trial." Wiese, supra, 188 N.J. at 593. "Inducement to settlement has remained the fundamental purpose of the rule as it has evolved." Pressler & Verniero, Current N.J. COURT RULES, Comment R. 4:58 (GANN); see also Best v. C&M Door Controls, Inc., 200 N.J. 348, 356 (2009) ("The fundamental purpose of the rule is to induce settlement by discouraging the rejection of reasonable offers of compromise.") "That goal is achieved through the imposition of financial consequences (the award of fees and costs) where a settlement offer turns out to be more favorable than the ultimate judgment." Firefreeze Worldwide, Inc. v. Brennan & Assocs., 347 N.J. Super. 435, 441 (App. Div. 2002).

While the parties agree that there is no case law addressing how the consequences of a rejection of an offer of judgment are handled when contractual indemnification is in play, the enumerated purposes of the rule indicate that it is meant to apply to the party that rejected the offer. The rule was intended to penalize "a party who rejects a settlement offer that turns out to be more favorable than the ultimate judgment." Gonzalez v. Safe & Sound Sec. Corp., 185 N.J. 100, 125, (2005) (quoting Schettino v. Roizman Dev., 158 N.J. 476, 482 (1999)). Based on these intents and purposes, courts have found that it would "thwart the rule to allow a party

who has rejected a settlement to escape mandatory payment for any portion of the costs incurred as a result of his decision." Wiese, 188 N.J. at 593.

In this matter, Plaintiff served an offer of judgment on AJD in the amount of $2,750,000 on December 2, 2021 (Da869). The Offer of Judgment was directed to AJD and AJD – alone – was the only party that could have responded to the Plaintiff's offer of judgment. AJD did not. At no time during the ninety days that followed service of the offer of judgment on AJD did AJD request Men of Steel's opinion or input regarding the offer of judgment that it received (5T, 25:22-26:2). Nor is there any evidence that AJD told Men of Steel (or itself believed) that AJD would accept the offer, if Men of Steel agreed to pay for it.

Throughout the entire case, AJD controlled the defense of the matter (5T, 30:11-16). As such, the trial court correctly determined that AJD should not be able to nonchalantly transfer to Men of Steel the consequences of its failure to do anything with respect to the offer of judgment. Indeed, Men of Steel should not be forced to bear the burden of fee-shifting when it had no ability or opportunity to act in response to the offer of judgment. Pursuant to the offer of judgment Rule and above-referenced case law, it is only appropriate that the financial consequences of the failure to respond to the offer of judgment must fall on the party that was served with and that failed to acknowledge the offer of judgment. The Rule provides no

mechanism by which a party in Men of Steel's position can respond or be bound by an offer of judgment.

AJD's reliance on Willner v. Vertical Reality, Inc. is misplaced, 235 N.J. 65 (2018). In Willner, The Court addressed the issue of when a single plaintiff makes a global offer to multiple defendants. Id. at 82-83. That is not the case here as Plaintiff made specific offers of judgment to each of the three defendants against whom he had claims at that time. The Willner Court acknowledged that it needed "to balance the competing interests of plaintiffs and defendants, " an issue that is not relevant to this matter. Id. at 84. Nonetheless, the Court did state throughout its opinion that the consequences of the non-acceptance of an offer of judgment apply to a party who rejects a settlement offer. Id. at 81-82. The issue of indemnification is not addressed at all. However, the Court did make clear that "[i]f the sanction of fee shifting is to be awarded, there must be advance notice of the consequences." Id. at 85. As in Willner, without advance notice of the consequences, it would be improper to shift fees and costs. Id.

B. AJD Never Advised Men of Steel of the Offer of Judgment.

As mentioned above, Plaintiff served the offer of judgment on AJD on December 2, 2021 (Da 869). AJD took no action in response to the Offer of Judgment (5T, 55:11-14). Not only did AJD not respond to the Offer of Judgment, AJD made no effort to notify Men of Steel of the Offer of Judgment, its apparent

decision to take no action in response to it, or its intent to seek to recover the consequences of its non-acceptance of the Offer from Men of Steel via contractual indemnification (5T, 55:11-14). AJD never requested Men of Steel's opinion or input regarding the offer of judgment that AJD received (5T, 25:22-26:2). AJD never solicited nor requested input from MOS regarding whether the offer of judgment should be accepted or not (5T, 55:19-21). The decision to take no action regarding the offer of judgment was made by AJD without input from Men of Steel (5T, 54:14-16).

AJD's purported history related to the offer of judgment is full of errors. On December 4, 2019, AJD tendered its defense to Men of Steel's insurance carrier (Da1308). The carrier, on behalf of its insureds, denied the tender on February 20, 2020 (Da1311). More than a year and a half after Men of Steel's carrier denied the tender, AJD responded on October 20, 2021 seeking defense (Da1315). Again, in neither correspondence on AJD's behalf is there any indication that AJD believes the consequences of non-acceptance of an offer of judgment are included in the contractual terms. As it was more than a month before the Offer was made, it would not be expected that AJD would have raised this issue. However, following receipt of the Offer of Judgment, AJD continued to take no action and did not re-new its tender based upon this new information.

Regarding Men of Steel's initial motion for summary judgment, AJD states that the Court's decision advised Men of Steel that the indemnification clause would be triggered (AJDdb9[1]). However, nothing in the order resolved the issue of indemnification in general, and certainly not the issue of the offer of judgment specifically. The decision merely states that "there are facts in the records that could lead a jury to find the plaintiff comparatively negligent, thus triggering the indemnification clause" (Da855-868). It is also undisputed that AJD never affirmatively moved before the court on the issue of indemnification prior to the jury rendering its verdict. Rather, AJD seeks to bind Men of Steel to their unspoken thoughts and intentions that were not conveyed to Men of Steel or the Court.

AJD's counsel, who was not involved during the trial of the case, relies on misrepresentations and inaccuracies in hopes of distracting the Court. AJD's brief represents that AJD notified Men of Steel on seven (7) occasions of its intent to seek indemnification related to the offer of judgment (AJDdb9). This is not correct. Indeed, AJD is citing to the four (4) communications regarding the tender, discussed above – all of which occurred prior to the offer of judgment and contain no reference to offers of judgment (Da1320, 1322, 1323, 1315). Next, AJD refers to the November 5, 2021 Order, also addressed above, as a communication to Men of Steel regarding this issue, which it is clearly not (Da855-868). And, again, no reference

[1] AJDdb refers to AJD's Appellate Brief.

is made to the offer of judgment. Lastly, AJD references a comment made by its counsel during oral argument over two months after the trial completed. Surely, if there had been correspondence between AJD and Men of Steel regarding the offer of judgment, such correspondence would have been presented to the trial court or this Court, but the record is absent of such correspondence because none exist. Further, AJD omits that its counsel had to concede at oral argument that the communications did not reference the offer of judgment: "There's nothing that says offer of judgment." (5T 29:3-6). Further, AJD misstated to the trial court that Judge Vanek had resolved the issues relating to the offer of judgment, only to retract that statement when confronted by the judge at oral argument. (5T, 39:25-40:3; 40:22-42:6).

AJD has presented nothing from the record demonstrating that it did anything upon receipt of the offer of judgment other than sit quietly. There is no evidence that AJD contacted Men of Steel, its insurance carrier, its counsel, or anyone on its behalf during the 90-day pendency of the offer of judgment.[2]

[2] Somewhat shockingly, AJD argues that Men of Steel was a "wrench" in settlement negotiations and, for this reason, should be responsible for payment of Plaintiff's fees. The one and only thing AJD relies on in support of this statement is Plaintiff's counsel's off the cuff comment at oral argument that "every time we talked settlement with either Judge Vanek or the mediator and then this kind of like, yeah, there's no money it was always blamed on Men of Steel" (5T, 33:3-6). First, there is nothing in the record supporting this statement (because there is nothing). Second, Plaintiff's counsel's representation does not rely upon any communications directly with Men of Steel, but just what he allegedly heard from others. Third, the

There is no procedure under Rule, or case law, requiring a party in Men of Steel's position to affirmatively respond to an offer of judgment directed to another party. By failing to respond to the Offer of Judgment and simultaneously failing to place Men of Steel on notice that it intended to transfer the risk to Men of Steel of AJD's refusal to acknowledge the Offer of Judgment, AJD unilaterally removed any ability of Men of Steel to engage in any conduct to protect itself. For this reason, as well, AJD should not be able to pursue Men of Steel for the additional attorneys' fees and interest incurred as a consequence of its failure to acknowledge the Offer of Judgment.

C. AJD's claim that it acted "prudently and rationally" is not supported by the record.

AJD argues that Men of Steel should have worked with AJD to accept the offer of judgment (AJDdb32). As mentioned above, AJD offers nothing to support any contention that it took any action upon receipt of the offer of judgment. For AJD to now argue that it acted prudently and rationally upon receipt of the offer of judgment is meritless. AJD stuck its head in the sand and failed to do anything

---

information relied on by Plaintiff's counsel *apparently came from AJD*. That AJD points out and relies on incorrect, unsubstantiated statements *it itself allegedly made* and then relies on those incorrect unsubstantiated statements in support of its arguments on appeal should not be countenanced. Finally, to the extent this issue relates to settlement communications, reliance on them is wholly improper under N.J. R. Evid. 408.

related to the offer of judgment until after the jury reached its verdict and Men of Steel presented the issue to the trial court.

The issue of whether the trial court's indemnification decision was correct is currently before the Appellate Division and not relevant to the subject matter of this appeal. (See Appellate Docket #A-003782-23). Yet, AJD argues that issue here by maintaining that Men of Steel "should have known it was highly likely that a jury verdict would trigger its duty to indemnify AJD for 'any and all' costs and fees." (AJDdb32). Without relitigating that appeal here, nothing related to that issue affects whether the consequences of AJD's non-acceptance of an offer of judgment are covered by the indemnification provision. Whatever the facts of the subject incident might be, none of them excuse AJD's failure to take any action upon receiving an offer of judgment.

D. AJD's reliance on Florida case law is neither informative nor helpful to the Court.

Seeing as there is no New Jersey case law supportive of AJD's position, AJD seeks to rely upon Florida case law that is factually distinguishable and fails to address the issues of the present matter (AJDdb39, citing Tierra Holdings, Ltd v. Mercantile Bank, 78 So.3d 558 (Fla 1st DCA 2011)). In Tierra Holdings, a Florida appellate court considered issues related to Florida's offer of judgment statute. The facts of that matter involved an analysis of what attorney's fees were to be considered when analyzing a contract that provided that attorney's fees were to be paid to the

prevailing attorney in litigation between the two parties to the contract and any impact the offer of judgment statute had on the contract. Id. at 560-561.

Here, AJD is not seeking to recover under a contractual provision entitling a prevailing party to recover its attorneys' fees. Rather, AJD seeks to expand the New Jersey offer of judgment rule to apply to indemnification provisions. The interplay between a contractual fee shifting agreement and a statutory fee shifting provision and the apportionment of attorneys' fees is inapplicable to this matter. The Tierra Holdings court was not asked to address indemnification, and its holdings offer no guidance to this Court beyond the holding that fee shifting statutes "must be strictly construed because [they] are in derogation of the common law rule that each party pay its own fees." Id. at 563. Given that neither R. 4:58-2 nor any case law addresses indemnification of the consequences of non-acceptance of an offer of judgment, the trial court was correct in not expanding the Rule.

III. THE CONTRACTUAL INDEMNITY PROVISION DOES NOT ENTITLE AJD TO INDEMNIFICATION FOR ITS OWN NEGLIGENCE, WHICH IS THE BASIS FOR THE JURY AWARD AND OFFER OF JUDGMENT CONSEQUENCES.

The jury allocated fault between AJD and Plaintiff for Plaintiff's damages, and AJD is responsible for satisfying only the percentage of the judgment that corresponds with the percentage of fault allocated to AJD based on AJD's own negligence. For there to be a determination that a party must indemnify another party for its own negligence, the contract must specifically, clearly and

unambiguously state as such – this is an unassailable and long-standing "bedrock" principle of New Jersey jurisprudence. In the present matter, the muddled and ambiguous language of the indemnification provision in the parties' contract does not – as it must under binding New Jersey case law – clearly and unequivocally state that Men of Steel must indemnify AJD for AJD's own negligence (Da78-130). Instead, at best, the Subcontract's indemnification provision is ambiguous on that issue, and as such, the provision must be strictly construed against AJD as the drafter and the party seeking indemnification for its own negligence.

"Indemnity contracts are interpreted in accordance with the rules governing the construction of contracts generally". Mautz v. J.P. Patti Co., 298 N.J. Super. 13, 19 (App. Div. 1997) (quoting Cozzi v. Owens Coming Fiber Glass Corp., 63 N.J. Super. 117, 121 (App. Div. 1960)). "An ambiguity in a contract exists if the terms of the contract are susceptible to at least two reasonable alternative interpretations". Schor v. FMS Financial Corp., 357 N.J. Super. 185, 191 (App. Div. 2002). Where, as here, a contractual term is ambiguous, "the writing is to be strictly construed against the party preparing it." Orange Township v. Empire Mortgage Serv., Inc., 341 N.J. Super. 216, 227 (App. Div. 2001). Moreover, if the meaning of an indemnity provision is ambiguous, the provision is "strictly construed against the indemnitee", here AJD. Mantilla v. NC Mall Assocs., 16 N.J. 262, 272 (2001) (quoting Ramos v.

Browning Ferris Industries, 103 N.J. 177, 191 (1986)); Boyle v. Huff, 257 N.J. 468, 478 (2024).

Here, the applicable indemnification language in the contract prepared by AJD states in relevant part as follows:

> (a) To the fullest extent permitted by law, [Men of Steel] shall indemnify, defend and hold harmless [AJD], Owner, any other person or entity required to be indemnified by [AJD] under the Prime Contract, and the officers, directors, employees, agents, insurers, successors and assigns of each, from and against any and all actual, threatened or alleged claims, citations, fines, forfeitures, penalties, liens, causes of action, suits, demands, damages, liabilities, losses, costs and expenses, including, but not limited to, attorney's fees (the "Claim") that: (i) arise from [Men of Steel's] breach of a term of the Contract Documents, (ii) are caused or alleged to have been caused by [Men of Steel], a sub-subcontractor or any person for whose acts or omissions [Men of Steel] or Sub-subcontractor may be responsible (including, but not limited to, violations of Owner's and [AJD's] health and safety requirements); (iii) arise from, relate to or otherwise are connected with or incidental to the Work, whether or not caused or alleged to be caused in part by Owner or [AJD]; or (iv) arise from actual or alleged contamination, pollution, or public or private nuisance, arising directly or indirectly out of this Agreement or any acts or omissions of [Men of Steel], its subcontractors, including but not limited to, handling, transportation, treatment, storage or disposal of Hazardous Materials, substances, samples or residue or out of [Men of Steel's] failure to comply with any warranty contained in this Agreement; (v) arising from, related to, or are otherwise connected to any product or material installed by or incorporated in any way in the

> Work of [Men of Steel]. Nothing herein shall require [Men of Steel] to indemnify [AJD] or Owner for claims caused by [AJD's] or Owner's sole negligence. In addition to the insurance requirements prescribed in Section 9 of this Agreement, [Men of Steel] shall obtain, maintain and pay, from the beginning until the completion of the Work, policies of insurance satisfactory to [AJD] covering the liabilities mentioned above. This indemnity shall survive completion of termination of the Agreement for whatever reason.

(Da153-154).

Noticeably absent is any express and unequivocal language within the indemnification provision stating that AJD is entitled to indemnification for its own negligence, which New Jersey law absolutely requires for AJD to be entitled to indemnification from Men of Steel of AJD's own negligence. It is simply not within the provision, and thus, not within the clearly expressed contemplation of the parties. It is AJD's own negligence that served as the basis for the jury award that triggered the offer of judgment consequences. Therefore, the contractual indemnification provision in the party's contract does not apply to the offer of judgment consequences.

CONCLUSION

Based on the foregoing, it is respectfully submitted that the trial court correctly decided that AJD was solely responsible for the consequences of its non-acceptance of the offer of judgment and its order reflecting this should be affirmed.

DONNELLY MINTER & KELLY, LLC
Attorneys for Respondents,
Men of Steel Enterprises, LLC and Men of Steel Rebar Fabricators, LLC

By: /s/ *Thomas J. Coffey*
THOMAS J. COFFEY

Dated: February 10, 2025

Superior Court of New Jersey

Appellate Division

Docket No. A-002753-23T4

DONALD J. HOILAND and MANDY HOILAND, his wife, *Plaintiffs-Respondents,* vs. AJD CONSTRUCTION CO., INC., *Defendant-Appellant,* and GRAND LHN III, U.R., LLC, GRAND LHN II URBAN RENEWAL, LLC, GRAND LHN I URBAN RENEWAL, LLC, GRAND LHN URBAN RENEWAL 1, LLC, GRAND LHN, III, LLC, IRONSTATE DEVELOPMENT COMPANY, IRONSTATE DEVELOPMENT COMPANY, LLC, P. ESPOSITO CONSTRUCTION, LLC, *(For Continuation of Caption See Inside Cover)*	CIVIL ACTION ON APPEAL FROM THE ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY Docket No. HUD-L-002754-19 Sat Below: HON. ANTHONY V. D'ELIA, J.S.C.

REPLY BRIEF FOR DEFENDANT-APPELLANT

On the Brief:
SOFYA UVAYDOV, ESQ.
Attorney ID# 094842013
SEAN HARRITON, ESQ.
Attorney ID# 261682018

KAHANA FELD LLP
Attorneys for Defendant-Appellant
800 Third Avenue, 16th Floor
New York, New York 10022
(917) 590-1280
suvaydov@kahanafeld.com
sharriton@kahanafeld.com

Date Submitted: March 26, 2025

CP COUNSEL PRESS (800) 4-APPEAL • (376554)

ESPOSITO CONSTRUCTION, LLC, ESPOSITO INDUSTRIES, LLC, ESPOSITO GROUP, LLC, AMERICAN SAFETY PARTNERS, LLC, MEN OF STEEL ENTERPRISES, LLC, MEN OF STEEL REBAR FABRICATORS, LLC, EMPIRE STATE REBAR INSTALL, LLC, JOHN DOES 1-20 and ABC CORPS/BUSINESS ENTITIES 1-20,	:
Defendants-Respondents.	:

TABLE OF CONTENTS

Page

TABLE OF JUDGMENTS

Page

TABLE OF TRANSCRIPTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

PRELIMINARY STATEMENT

Defendant-Appellant AJD Construction Co. Inc. ("AJD") submits this brief in further support of its appeal from the Combined Order For Judgment Upon Compensatory Damages Jury Verdict And Offer of Judgment of the Superior Court of New Jersey, Law Division, Hudson County (D'Elia, J.), entered April 5, 2024 ("April 2024 Judgment") which (1) entered judgment in favor of plaintiffs and against AJD in the amount of $5,157,247.59; (2) ordered AJD to reimburse counsel $94,344.73 in costs and $1,723,947 in fees pursuant to Rule 4:58-2; and (3) entered judgment in the total amount of $6,975,539.32.

Defendants-respondents Men of Steel Enterprises, LLC and Men of Steel Rebar Fabricators ("MOS") fail to rebut AJD's position that MOS must indemnify AJD for costs and fees awarded pursuant to the offer of judgment rule. First and, contrary to MOS's claims, the fact that the contract does not reference offer of judgment costs and fees is immaterial. AJD has presented ample authority confirming that the language requiring MOS to indemnify AJD "any and all" costs and fees necessarily includes offer of judgment costs and fees. MOS's failure to address the broad "any and all" term is fatal to its claims.

Nor has MOS refuted AJD's assertions that exempting offer of judgment costs and fees from MOS's obligations results in an unfair outcome. Requiring AJD to pay such costs and fees here is particularly egregious because MOS (a)

was aware of plaintiffs' offer and knew AJD was seeking indemnification for "any and all" costs and fees but did not act and (b) was involved in all aspects of litigation and even frustrated settlement efforts. Indeed, it made no sense for AJD, which would recover payment from MOS in the likely event plaintiff was found partially at fault for his accident, to settle without any input from MOS.

Further, MOS fails to meaningfully engage AJD's argument that exempting offer of judgment costs and fees from MOS's indemnity obligations impermissibly reads an implicit cut-off into New Jersey's offer of judgment statute *which does not exist* thereby denying AJD the contractual indemnification for which the parties bargained. Finally, MOS erroneously contends that AJD is not entitled to indemnification for its own negligence such that it can be awarded offer of judgment costs and fees. Indeed, a review of the plain indemnity language and applicable New Jersey jurisprudence confirms that the court correctly concluded that MOS must indemnify AJD if AJD is not found solely negligent. Given that the jury found AJD partially at fault, MOS's duty to indemnify AJD for "any and all" costs and fees was clearly triggered.

All told, this Court should reverse the April 2024 Judgment insofar as it denied AJD's motion for contractual indemnification against MOS for costs and fees awarded to plaintiffs pursuant to the offer of judgment rule and, thus, award AJD contractual indemnification against MOS for such costs and fees.

PROCEDURAL HISTORY

AJD incorporates its opening brief's Procedural History section (AJD's Brf, 4-14).

STATEMENT OF FACTS

AJD incorporates its opening brief's Statement of Facts section (AJD's Brf, 14-17).

REPLY POINT I

THE INDEMNIFICATION PROVISION CONTEMPLATES OFFER OF JUDGMENT COSTS AND FEES GIVEN THAT IT REQUIRES MOS TO INDEMNIFY AJD "ANY AND ALL" COSTS AND FEES (Da1)

Simply put, MOS fails to engage AJD's argument that the language requiring MOS to indemnify AJD for "any and all" costs and fees axiomatically includes offer of judgment costs and fees. Instead of addressing the expansive "any and all" phrase and AJD's arguments, MOS hangs its hat on the misguided notion that it is not required to cover offer of judgment costs and fees because the contract does not mention them. However, MOS's arguments contravene applicable authority related to contractual interpretation and must be rejected.

In this novel case, AJD submits that this Court should look to reams of longstanding precedent supporting its position. Contrary to MOS's claims, the fact that the contract does not reference the offer of judgment rule is immaterial because "New Jersey law does not require specificity in indemnity clauses

nor…require[s] strict construction of those clauses" but allows parties to "use broad language" instead of "list[ing] exactly which harms they intend to cover." Mobile Dredging & Pumping Co. v. City of Gloucester, 2005 U.S. Dist. LEXIS 16601, at *9 (D.N.J. 2005); see Stier v. Shop Rite of Manalapan, 201 N.J. Super. 142 (App. Div. 1985). In other words, AJD and MOS were not required to mention any subset of costs and fees for MOS to be on the hook for same.

Moreover, MOS overlooks the significance of the "any and all" term in the contract, which language is "broad and unqualified." News Am. Marketing In-Store Servs., LLC v. Floorgraphics, Inc., 576 Fed. Appx. 111, 114 (3d Cir. 2014). This phrase is an "all-inclusive provision" which "allows for no exception" (Giaccone v. Canopius U.S. Ins. Co., 133 F.Supp.3d 668, 675 (D.N.J. 2015)) except "with regard to those types of things thereafter mentioned." Isetts v. Borough of Roseland, 364 N.J. Super. 247, 256 (App. Div. 2003).

Indeed, MOS is not exempt from covering offer of judgment costs and fees merely because the contract does not address them. If the parties intended to exclude them, they should have stated so or omitted the "any and all" term which "allows for no exception." Giaccone, supra. Given this phrase evinces the parties' intent to hold MOS responsible for all costs and fees, this Court should reject MOS's argument that the contract is ambiguous such that it should be construed against AJD, the drafters of the agreement. See Nesby v. Fluermond,

461 N.J. Super. 432, 439 (App. Div. 2019). All told, MOS's decision to avoid discussion of the "any and all" term – a focal point of AJD's appeal – should tell this Court all it needs to know about the veracity of MOS's arguments.

Further, this Court should not credit MOS's claims that AJD's interpretation would require MOS "to indemnify AJD for sanctions" imposed "for discovery violations or other misconduct" and "it is unclear" where "AJD would 'draw a line' between the consequences of AJD's own actions for which AJD is and is not entitled" to indemnity (MOS's Brf, at 13). MOS's claims might make a modicum of sense if courts did not "bar indemnification of a party for court sanctions" based on misconduct. Int'l Fid. Ins. Co. v. Apodaca, 2015 U.S. Dist. LEXIS 174614, at *28, 32 (D.N.J. Sept. 9, 2015) (contracts calling "for one party to indemnify another for judicial sanctions" are unenforceable). MOS's attempt to conflate costs and fees stemming from an indemnitee's rejection of an offer of judgment with sanctions imposed for misconduct is unavailing. See Goel v. Heller, 667 F. Supp. 144, 153 (D.N.J. 1987) (allowing defendants to avoid sanctions through indemnification "would abrogate…public policy"); Blair v. Anik Liquors, 210 N.J. Super. 636, 643 (N.J. Super. Ct. 1986).

Notably, New Jersey has compared offers of judgment to prejudgment interest, which has been accepted as serving a compensatory rather than punitive role. McMahon v. N.J. Mfrs. Ins. Co., 364 N.J. Super. 188, 192 (App. Div. 2003)

("[Rule 4:58-3's] purpose is similar to the reason given for awarding prejudgment interest pursuant to R. 4:42-11(b), namely to encourage defendants to settle worthy cases"). As such, while a defendant may have acted without bad faith or misconduct, it is still subject to costs under Rule 4:58. Id. at 194.

REPLY POINT II

THE COURT'S DECISION RESULTS IN AN UNFAIR OUTCOME AND UNDERMINES THE OFFER OF JUDGMENT RULE'S PURPOSE (Da1)

A. MOS Did Not Act Despite Knowing Of Plaintiffs' Offer And Its Duty To Indemnify AJD For "Any And All" Costs And Fees (Da1)

MOS's narrative that it should not pay offer of judgment costs and fees because AJD solely made the decision to reject plaintiffs' offer of judgment and did not notify MOS of plaintiffs' offer is disingenuous and misleading. As a threshold matter, MOS continues its pattern of ignoring key information by failing to note that it knew of the offer from the moment it was electronically filed. The fact that it was directed to AJD is irrelevant – MOS could have taken steps to effectuate a resolution or offered input to its indemnitee as to whether it should accept or reject settlement. Needless to say this is not a case where, as MOS contends, it "had no ability or opportunity to act in response to the offer of judgment" (MOS's Brf, 19). MOS's counsel was thoroughly involved in all aspects of litigation and was on notice of the offer and the fact that AJD would

endeavor to enforce the indemnification provision including the requirement that MOS pay AJD "any and all" costs and fees.

AJD's intention to recover "any and all" costs and fees is evidenced by repeated communications to MOS and/or its insurer, namely, AJD's (1) November 2019 letter requesting indemnification from MOS and/or MOS's carrier (Da1320-21); (2) December 2019 letter directed to MOS's carrier requesting same (Da1309-10); (3) February 2020 letter to MOS's counsel reiterating that it was seeking indemnification pursuant to the contract (Da1322); and (4) October 2021 letter to MOS's counsel seeking indemnification furnished during the pendency of MOS's motion for summary dismissal of AJD's contractual indemnification claim (Da1316-17). Indeed, the next month, the motion court properly denied MOS's motion and, just eleven (11) days later, plaintiffs electronically filed their offer of judgment (Da855-70).

Against this backdrop, it is rich for MOS to fault AJD for "not re-new[ing] its tender" after receiving plaintiffs' offer (MOS's Brf, at 21).[1] Clearly, MOS

[1] MOS also faults AJD for not "resolv[ing] the issue of indemnification" by "affirmatively mov[ing] before the court on the issue…prior to…verdict" (MOS' Brf, at 22). MOS fails to admit that it chose not to participate in the trial, defaulted and let trial proceed only with apportionment between its employee, the plaintiff, and AJD (2T6 11-25; 2T7 1-6). Moreover, MOS neglects to mention that AJD's counsel did make an oral application prior to verdict for "a judgment" against MOS "for the indemnification and defense claim against them which they failed to defend" (3T80 7-25; 3T81 1-15). The court declined to

was on notice of the offer and the fact that AJD would seek indemnification for "any and all" costs and fees.[2] Basic logic holds that AJD would consider offer of judgment costs and fees to be encompassed by the broad "any and all" term.

On these facts, it would be unjust to reward MOS for – as the court aptly characterized as – sitting "on the sidelines" and leaving "it up to [AJD] to decide" whether to accept the offer (5T44 3-4; 5T55 16-17). This is especially true here given that there was no reason for AJD to settle with plaintiffs on its own accord. After all, a cursory review of the record would lead any rational litigant to conclude that a jury would find plaintiff at least 1% negligent for his accident such that MOS's duty to indemnify AJD would be triggered.

B. <u>MOS Even Frustrated The Parties' Efforts To Settle The Case (Da1)</u>

While MOS expresses indignation at AJD's point that MOS frustrated settlement, MOS has offered nothing to dispute this. MOS claims that "[t]he one and only thing AJD relies on in support of [its] statement" that MOS "was a 'wrench' in settlement" is plaintiff's counsel's remark during the March 2024 hearing that "'every time we talked settlement with either Judge Vanek or the

---

decide the issue and determined that AJD could make such application in writing thereby providing MOS an opportunity to file a response (3T91 12-22).

[2] Curiously, MOS claims that the foregoing procedural history is "full of errors" but does not explain how AJD's recitation is inaccurate (MOS's Brf, 21).

mediator and then this kind of like, yeah there's no money it was blamed on [MOS]" (MOS's Brf, 23-24, n.2). MOS berates AJD for "rel[ying] on incorrect, unsubstantiated statements" that plaintiff's counsel made which statements "*apparently came from AJD*" (MOS's Brf, 23-24, n.2) (emphasis in original).

Preliminary, MOS neglects to admit that it was the court that stated MOS "might have been a problem, a wrench in the operations" throughout "the course of all the settlements" (5T55 22-25). Further, AJD did not rely on plaintiff's counsel's aforementioned statement exclusively but also cited to other accurate representations in which counsel stated that (a) many "mediation dates…projected never took place" because MOS "would not agree to it" (5T33 3-14); (b) "[i]t's surprising…to say that AJD was 100 percent running the settlement train here because every time a judge or mediator would be frustrated with the stonewalling with respect to settlement from the defense I always heard that its [MOS] that's driving this" (5T33 15-20); and (c) "I can represent to the Court" that MOS's counsel was monitoring the trial "if not every day, almost every [day]" (5T32 14-22). While plaintiff's counsel noted it "technically…doesn't matter" to his client who pays offer of judgment costs and fees, he noted, "I feel compelled as an officer of the court to give [my] perspective as to the facts and what was really going on…with respect to the settlement posture" and "correct the record" (5T32 7-25; 5T33 1-25; 5T34 1-2).

AJD also cited its own statements, namely, that (a) MOS was on notice of the offer of judgment "with regard to settlement" (5T44 18-22) (b) MOS's attorney "was involved in every conversation" regarding "mediation and where we were going" (5T44 23-25); (c) AJD tried to settle and even "spent a whole day with plaintiff on the phone" but "nothing happened" because MOS's carrier would not participate "let alone…indemnify AJD" (5T45 12-19) and (4) MOS "would not participate in settlement negotiations" even "at trial" (5T45 20-24).

AJD will not belabor this point. MOS's conduct provides another basis for this Court to find it improper to shift fees and costs stemming from the offer of judgment rule to AJD. See Willner v. Vertical Reality, Inc., 235 N.J. 65 (2018).

C. MOS's Attempts To Distinguish *Willner* and *Tierra* Fall Flat (Da1)

MOS's efforts to distinguish Willner and Tierra Holdings, Ltd v. Mercantile Bank, 78 So.3d 558 (Fla 1st DCA 2011) miss the mark. In Willner, the issue was whether a defendant found 30% at fault should pay offer of judgment costs and fees after rejecting a global settlement offer. The court held it would be (a) "unfair to impose sanctions" where "the only means" to "avoid [them]" would be "to pay an amount greater" than the verdict "against that party, without advance notice of that consequence" and (b) "[the] offer of judgment rule must balance" the parties' "competing interests." 235 N.J. at 70, 84.

While MOS focuses meaninglessly on factual differences between Willner and here, MOS does not dispute that the court's holding stands firmly for the notion that courts must balance the parties' competing interests related to offers of judgment and ensure a just outcome. Here, it would be unfair to burden AJD with offer of judgment costs and fees because MOS (a) was aware that AJD was seeking indemnity for "any and all" costs and fees and knew about plaintiffs' offer; and (b) was involved in all aspects of litigation and frustrated settlement.

MOS's attempt to distinguish Tierra fares even worse. In short, the Tierra plaintiff appealed the court's order (a) awarding plaintiff costs and fees incurred after it served an offer of judgment but (b) awarding defendant "all of its costs and fees incurred through trial in connection with its breach of contract claim" against plaintiff "pursuant to a prevailing party attorney's fees provision in the contract." 78 So.3d at 559-61. Plaintiff conceded that defendant "was the prevailing party" but argued that its proposal for settlement cut off [its] entitlement to fees under the contract which were incurred after the date of the proposal." Id. at 559. The Tierra court (a) found that "[r]eading an implicit cut-off" into Florida's "offer of judgment statute…*would deny [defendant] complete reimbursement for its litigation expenses and, thus, the contractual indemnification for which the parties bargained*. Id. at 563 (emphasis added). The court credited defendant's argument that "the express language" of Florida's

offer of judgment rule does not suggest that "a successful offer of judgment" operates to "cut[] off defendant's contractual right to fees and costs." Defendant's Brief, 2010 WL 11184925, at *3 (Fla 1st DCA 2011).

While MOS points out factual differences, there can be no dispute the Tierra court found it improper to read an "implicit cut-off" into its state's offer of judgment statute thereby denying a party's entitlement to the broad indemnification for which it bargained. A similar conclusion is warranted here.

D. MOS Does Not Dispute That The Court's Decision Undermines The Intention And Purpose Of The Offer Of Judgment Rule (Da1)

MOS points out that the offer of judgment rule applies to the party that rejects the offer but concedes that no case law addresses "how the consequences of a rejection of an offer of judgment are handled when contractual indemnification is in play" (MOS's Brf, at 18). AJD submits that requiring it to cover offer of judgment costs and fees would undermine the rule's "purpose of imposing financial consequences on parties who unwisely reject an offer of settlement and insist on trial." Wiese v. Dedhia, 188 N.J. 587, 593 (2006).

Requiring indemnitees to pay offer of judgment costs and fees under these circumstances would surely create a perverse scenario in which indemnitees (a) accept severely inflated offers to prevent the prospect of paying their own money in potential sanctions following a verdict and then (b) seek to recover this extravagant sum from their indemnitors. Doubtless MOS would agree that this

predictable state of fairs would be unfair for both indemnitors and indemnitees alike and would undermine the offer of judgment rule's purpose by compelling indemnitees to accept *unreasonable* settlement offers. See Best v. C&M Door Controls, Inc., 200 N.J. 348, 356 (N.J. 2009) ("The fundamental purpose of the rule is to induce settlement by discouraging the rejection of reasonable offers").

REPLY POINT III

THE CONTRACT REQUIRES MOS TO INDEMNIFY AJD FOR ITS OWN NEGLIGENCE IF AJD IS NOT FOUND SOLELY AT FAULT (Da1)

Finally, MOS erroneously claims that the indemnity clause does not entitle AJD to indemnification for its own negligence and, as such, MOS is not required to pay offer of judgment costs and fees imposed as a result of the jury award. The indemnity provision states, in part (Da153, 858-59) (emphasis added):

> To the fullest extent permitted by law, [MOS] shall indemnify, defend and hold harmless [AJD]…from and against *any and all* actual, threatened or alleged claims…causes of actions…*costs and expenses, including, but not limited to, attorney's fees* (the 'Claim') that: (i) arise from [MOS's] breach of the Contract…(ii) are caused or alleged to have been caused by [MOS]…(iii) arise from, relate to or otherwise are connected with or incidental to the Work, whether or not caused or alleged to be caused in part by [Grand] or [AJD]; or (iv) arise from…contamination…arising directly or indirectly out of this Agreement or any acts or omissions of [MOS], its subcontractors…Nothing herein shall require [MOS] to indemnify [AJD]…for claims caused by [AJD's]…sole negligence…

MOS's position that the clause does not require it to indemnify AJD for its own negligence – an issue which is not the subject matter of AJD's appeal

but is at the heart of MOS's appeal[3] – was aptly rejected by two judges below.[4] AJD incorporates its respondent's brief in Docket No.: A-003782-23 herein.

Indeed, the court found that the language requiring MOS to indemnify AJD for claims "whether or not caused…in part by [AJD]" and exempting such obligation if AJD is "solely negligent" provides that MOS must indemnity AJD for its own partial negligence. Given the jury found AJD partially at fault, MOS's duty to indemnify AJD for its own negligence was triggered. The court's conclusion is squarely in line with applicable jurisprudence. See Leitao v. Damon G. Douglas Co., 301 N.J. Super. 187, 192 (App. Div. 1997) ("it is not against public policy for the indemnitor to promise to hold harmless the indemnitee for the indemnitee's own negligence" if "the indemnitee is not solely at fault"); Pepe v. Township of Plainsboro, 337 N.J. Super. 209, 216 (App. Div. 2001); Mautz v. J.P. Patti Co., 298 N.J. Super. 13, 19-20 (App. Div. 1997); Secallus v. Muscarelle, 245 N.J. Super. 535, 537 (App. Div. 1991) ("a promise to indemnify for sole negligence is unenforceable" but "a promise to indemnify

[3] MOS commenced a separate appeal of the motion court's orders granting AJD indemnification from MOS for its own negligence (Docket No.: A-003782-23).

[4] The court's findings that AJD is entitled to indemnification is reflected in (a) Judge Espinales-Maloney's decisions denying MOS's motions for summary judgment and for reconsideration and (b) Judge Vanek's orders denying MOS's cross-motion for summary dismissal of AJD's contractual indemnification claim and granting AJD entitlement to same (Da855-868; 891; 1254-57; 4T).

for 99% negligence may be enforced"); see Acker v. Ray Angelini, Inc., 259 F. Supp. 3d 305 (E.D.P.A. 2016) (indemnification clauses are enforceable" if damages were "not caused by the indemnitee's 'sole negligence'").

MOS's last ditch effort to manufacture ambiguity where none exists fails. A review of the contractual language and case law confirms the court correctly found that MOS must indemnify AJD if AJD is not found solely negligent. Given that the jury found AJD partially at fault, MOS's duty to indemnify AJD for "any and all" costs and fees including offer of judgment costs and fees was triggered.

CONCLUSION

For the foregoing reasons, the Court should reverse the April 2024 Judgment to the extent it denied AJD's motion for contractual indemnification against MOS for costs and fees awarded to plaintiffs pursuant to the offer of judgment rule and, thus, award AJD contractual indemnification against MOS for such costs and fees.

Dated: March 26, 2025
New York, New York

Kahana Feld, LLP

Sean Harriton

Of Counsel
Sofya Uvaydov
Sena Harriton

800 Third Avenue, 16th Floor
New York, New York 10022
(917) 590-1280
sharriton@kahanafeld.com