PAUL SOBOTOR,

Plaintiff,

v.

MT. ARLINGTON HOLDINGS, LLC,

Defendant/Appellant,

and

DOUBLE O LANDSCAPE DESIGN, LLC,

Defendant/Respondent,

and

ABC CORPORATION, a fictitious name; and/or DEF SNOW REMOVAL COMPANY, a fictitious name; and JOHN DOES 1-10, said names being fictitious,

Defendants.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO: A-003590-23T4

Civil Action

ON APPEAL FROM THE ORDERS ENTERED IN THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MORRIS COUNTY, DOCKET NO. MRS-L-2173-21, COMPELLING DEFENSE AND INDEMNITY, DATED JUNE 10, 2024, AND ENTERING FINAL DISPOSITION, DATED JUNE 12, 2024

Sat Below:

The Honorable Noah Franzblau, J.S.C.

AMENDED BRIEF ON APPEAL OF DEFENDANT/ APPELLANT, MT. ARLINGTON HOLDINGS, LLC

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PRELIMINARY STATEMENT

This appeal concerns the enforceability of a contract that contained two conflicting indemnity provisions. Plaintiff, Paul Sobotor, sued defendant/ appellant, Mt. Arlington Holdings, LLC ("Mt. Arlington"), and defendant/ respondent, Double O Landscape Design LLC ("Double O Landscape"), for bodily injuries that he sustained in a slip-and-fall accident on Mt. Arlington's premises. He alleged that defendants failed to remove snow and ice properly, which caused him to fall. Mt. Arlington contracted with Double O Landscape to provide snow-removal services for those premises. The trial court granted summary judgment to Double O Landscape, ruling that its snow-removal contract required Mt. Arlington to indemnify Double O Landscape for the latter's own negligence. Mt. Arlington then settled plaintiff's claims but preserved its right to appeal the grant of summary judgment. The grant of summary judgment was reversible error, because the contract did not expressly require Mt. Arlington to indemnify Double O Landscape for its own negligence.

Specifically, the contract, which Double O Landscape drafted, contained two indemnity provisions. The provision entitled "Indemnity" contained mutual indemnity obligations. It required Double O Landscape to indemnify Mt. Arlington for losses that occurred while Double O Landscape was on Mt. Arlington's premises. It also required Mt. Arlington to indemnify Double O

Landscape for acts or omissions of Mt. Arlington and its agents other than Double O Landscape. However, that provision did not require indemnification for either party's own negligence. The other indemnity provision required Mt. Arlington to indemnify Double O Landscape for losses arising out of the use of Mt. Arlington's property, "whether or not" that loss arose out of the negligence of Double O Landscape, Mt. Arlington, or others, without specifically requiring indemnity for Double O Landscaping's own negligence.

Double O Landscape's contract did not contain the bright-line specificity that both the Supreme Court and the Appellate Division require to enforce indemnification for a party's own negligence. Further, the inclusion of two inconsistent indemnity provisions rendered the contract ambiguous and thus unenforceable regarding indemnification for a party's own negligence. The trial court therefore erred in ordering Mt. Arlington to indemnify Double O Landscape for its own negligence in performing snow-removal services. Accordingly, this Court should reverse the judgment below and rule that Mt. Arlington's indemnity obligation does not extend to Double O Landscape's own negligence.

PROCEDURAL HISTORY

Plaintiff filed an action for personal injuries against Mt. Arlington and Double O Landscape. Da8-Da14. Double O Landscape filed an answer with a

crossclaim for indemnification. Da15-Da26. By leave granted, Da27, Mt. Arlington filed an answer denying all crossclaims. Da28-Da33.

Less than thirty days before the original trial date, Double O Landscape filed a motion to compel Mt. Arlington to defend and indemnify it. Da34-Da35. Mt. Arlington opposed that motion, Da80-81, and the Law Division denied the motion because it was an untimely motion for summary judgment. Da1-Da2.

Double O Landscape moved for reconsideration of that ruling. Da104-Da105. The Law Division denied that motion because the interests of justice did not require reconsideration of the prior Order and because Double O Landscape provided no explanation of why it failed to move to compel indemnification in a timely manner. Da3-Da4.

The case then proceeded to trial. Da115 & 1T4:17-:18. On the first day of trial, with the consent of all parties, the Honorable Noah Franzblau, J.S.C., heard argument on the merits of Double O Landscape's indemnity motion. 1T4:22-6:9. Judge Franzblau then entered an Order vacating the prior Orders denying Double O Landscape's motion for defense and indemnification, granting Double O Landscapes' motion to compel Mt. Arlington to defend and indemnify it for its own negligence, and compelling Mt. Arlington to reimburse Double O Landscape's attorneys' fees and costs. Da5-6; 1T18:16-23:18.

On the third day of trial, plaintiff settled with Mt. Arlington. 3T4:17-5:2. However, Mt. Arlington specifically reserved its right to appeal the order compelling it to indemnify Double O Landscape. 3T5:9-:21. The trial court then entered an Order of disposition dismissing the matter because of that settlement. Da7. Plaintiff and Mt. Arlington later filed a stipulation of dismissal with prejudice of plaintiff's claims. Da117. The stipulation specifically preserved for appeal defendants' cross-claims against each other. Ibid.

This office filed a Substitution of Attorney on behalf of Mt. Arlington Holdings. Da119. Mt. Arlington timely filed a Notice of Appeal of the Order compelling it to defend and indemnify Double O Landscape. Da120-Da132.

STATEMENT OF FACTS

I. Plaintiff's allegations.

Plaintiff alleged that he was injured in a slip-and-fall accident that occurred on February 16, 2021, in the parking lot of an apartment complex that Mt. Arlington managed. Da8-9, ¶¶ 1-6; Da37, ¶ 1; Da80, ¶ 1. He sued Mt. Arlington, claiming that its negligence in failing to remove snow and ice caused his fall. Da8-10, Count One, ¶¶ 1-7. He also sued Double O Landscape, claiming that it breached its duty to perform snow and ice removal services properly. Da10-11, Count Two, ¶¶ 1-5.

According to the motion papers, plaintiff alleged that he fell in a parking lot at Mt. Arlington's apartment complex because of snow and ice on those premises. Da37, ¶ 1; Da80, ¶ 1. Plaintiff's accident occurred at about 4:30 a.m. Da81, ¶ 1. Double O Landscape had performed plowing and salting at the premises until about 10:00 p.m. on the night before plaintiff's accident. D891, ¶¶ 1-2. In his deposition, plaintiff testified that it was raining at the time of his accident and that he saw no evidence of salt in the area at issue. Da81, ¶¶ 4-5.

II. Double O Landscape's snow-removal contract with Mt. Arlington.

Double O Landscape and Mt. Arlington entered into a contract requiring Double O Landscape to perform snow and ice removal services for the apartment complex at issue. Da43-46. That contract identified Double O Landscape as the "Contractor" and Mr. Arlington as the "Customer." Da40, ¶ 3. The contract was a proposal that Double O Landscape prepared on its letterhead. Da40.

Paragraph 4 of the snow-removal contract was captioned "Indemnity." Da45, ¶ 4. Paragraph 4 stated:

> Indemnity: To the fullest extent permitted by law, Contractor shall be responsible for claims to bodily injury and property damage due to Contractor's negligent snow plowing work that may arise at Customer's premises while Contractor is physically on premises. To the fullest extent permitted by law, Customer shall defend, indemnify and hold harmless Contractor, its owners, agents, consultants, employees and subcontractors from all claims for bodily injury and

> property damage that may arise from Customer's premises including an[y] acts or omissions by Customer or Customer's subcontractors whether employed directly or indirectly for ice which forms from day time melting from snow and ice which is removed from, brought in by or in between vehicles.
>
> [Da45, ¶ 4.]

Paragraph 2 of the snow-removal contract stated:

> The Customer understands that plowing or ice control of a particular location may not clear the area to "bare pavement" and that slippery conditions may continue to prevail even after plowing or ice control have occurred. The Customer understands that vehicles are constantly entering and leaving the property and that these vehicles frequently drop snow and water onto the areas where they park creating slippery conditions and that Double O Landscape Design LLC is not responsible for cleaning between or under these vehicle or other stationary objects (including curbs, walks, or structures) where the clearance is less than 4 feet or monitoring these areas on a 24 hour basis and therefore will not be responsible for any injuries that occur as a result of these conditions. The Customer understands that the Contractor assumes no liability for this natural occurring condition. Double O Landscape Design LLC and the Client acknowledge that it is impossible to "clear" or "remove" all snow and ice from any time, even after services are properly completed. The Customer is aware that weather conditions may change rapidly and without notice, and that Contractor assumes no liability for such changes in conditions. During operations and after completion of operations Customer agrees to indemnify and save harmless the Contractor and its employees against any and all claims by the Customer, it's [sic] employees or third parties, their heirs, executors, administrators, successors, surrogates or assignees, arising on account of death or injuries to

> persons or damage to property, arising out of use of, or traveling at or onto the property, whether or not such claim [for] damage, injury or death results from negligence of Customer, Contractor or others. Customer shall defend all suits and claims arising from or incidental to the work under the agreement, without expense or annoyance to the Contractor or its employees.
>
> [Da44-45, ¶ 2.]

III. The Trial Court's grant of summary judgment to Double O Landscape and the settlement of plaintiff's claims.

The trial court decided Double O Landscape's motion for summary judgment on the first day of trial with the consent of all counsel. 1T4:22-7:22. Double O Landscape sought summary judgment on the issue of contractual indemnification. 1T7:23-8:3, 8:24-10:7. Although Double O Landscape conceded that its contract "doesn't specifically contain the bright line language of Azurak [v. Corporate Property Investors, 175 N.J. 110 (2003)]," it contended that its contract satisfied the requirement of Azurak and entitled it to indemnification for its own negligence. 1T10:8-12:13. Mt. Arlington contended that the contract's two indemnification clauses failed to specifically require indemnification for Double O Landscape's own negligence. 1T12:15-15:8.

The trial court found that the two indemnification provisions were consistent with one another and that they expressly required Mt. Arlington to indemnify Double O Landscaping for its own negligence. 1T19:22-22:6. The

trial court granted summary judgment to Double O Landscape, ruling that the indemnity language was clear and unambiguous. 1T23:10-:18.

Double O Landscape then reported to the trial judge that it had settled with plaintiff before the trial court heard argument on contractual indemnity. 1T24:11-:15; 1T27:23-34:19, 3T9:21-10:20. The trial court then held the pretrial conference, 1T25:25-44:7; heard in limine motions, 1T44:10-66:24; conducted jury selection, and gave the preliminary jury charge, 1T67:8-85:72, T4:2-42:16. Plaintiff and Mt. Arlington gave opening statements, 2T43:6-72:3, and plaintiff then presented his first fact witness, Omar Ocampo. 2T73:1-81:8. Mr. Ocampo is the owner of Double O Landscape. Da46. When plaintiff attempted to elicit opinion testimony from Mr. Ocampo, the trial court excused the jury for the day so that it could hear argument on whether plaintiff was improperly attempting to elicit an expert opinion through Mr. Ocampo. 2T79:20-105:12. The trial court reserved its decision overnight. 2T105:13-:25.

Mt. Arlington thereafter settled with plaintiff, and at the outset of the third day of trial, the parties placed that settlement on the record. 3T4:17-5:8; 14:16-16:18. That settlement specifically preserved Mt. Arlington's right to appeal the trial court's judgment requiring Mt. Arlington to indemnify Double O Landscape. 3T5:9-7:15. That settlement made the trial moot. 3T15:9-13. The

trial court therefore excused the jury, 3T15:14-16:18, and dismissed the case. Da7.

LEGAL ARGUMENT

The Double O Landscape contract was not Azurak compliant because it failed to state, clearly and explicitly, that it required Mt. Arlington to indemnify Double O Landscape for Double O's own negligence. The contract was also ambiguous because it contained two indemnity provisions with different obligations. The trial court erred in harmonizing the conflicting indemnity obligations in favor of Double O Landscape, the indemnitee and the drafter of the contract. Because the contract was not Azurak compliant, this Court should reverse the judgment below and rule that Mt. Arlington has no obligation to indemnify Double O Landscape for its own negligence.

I. The standard of appellate review of a grant of summary judgment is de novo (not raised below).

Because Mt. Arlington appeals from a grant of summary judgment, the Court's standard of review is de novo. Boyle v. Huff, 257 N.J. 468, 477 (2024). This Court gives no deference to the trial court's analysis of the contract provisions at issue. Ibid.

II. In Azurak, the Supreme Court established a "bright line rule" that contracts requiring indemnification for a party's own negligence must do so clearly and explicitly (raised below at 1T4:22-23:18).

Generally speaking, courts construe contracts as a whole and apply the language of the contract as written to enforce the parties' intent. Boyle, 257 N.J. at 478. Courts will not rewrite a contract to favor one party over the other but will instead apply unambiguous language as written. Ibid.

However, when the language of an indemnity clause is ambiguous, courts construe the indemnity provision strictly against the indemnitee. Ibid. The Supreme Court established a "'bright line rule'" that a contract purporting to require indemnification for the indemnitee's own negligence must do so with "'explicit language,'" and "must specifically reference the negligence or fault of the indemnitee." Azurak, 175 N.J. at 112-13 (quoting Azurak v. Corporate Prop. Investors, 347 N.J. Super. 516, 523 (2002)). If an indemnity provision is ambiguous, it is unenforceable with regard to indemnity for the indemnitee's own negligence. Boyle, 257 N.J. at 478. Courts presume that a party drafting the indemnity clause can do so with the specificity required to provide indemnity for its own negligence. Kieffer v. Best Buy, 205 N.J. 213, 225 (2009).

A. Courts construe indemnification agreements narrowly and interpret ambiguous clauses strictly against the indemnitee (raised below at 1T19:10-23:18).

Courts strictly construe ambiguous indemnity clauses against the indemnitee for two reasons. Boyle, 257 N.J. at 478. The first is that a negligent party is normally responsible for its own share of fault. Id. at 478-79. The second is that the American Rule requires each party to be responsible for its own attorneys' fees. Id. at 479. Contracts that shift a tortfeasor's responsibility for its own fault to another party are in derogation of those rules. Id. at 478-79. Therefore, "'shifting liability to an indemnitor must be accomplished only through express and unequivocal language.'" Id. at 479 (quoting Kieffer, 205 N.J. at 224). The Supreme Court has consistently refused to enforce contracts that do not unambiguously require indemnification for the indemnitee's own negligence.

For example, in Ramos v. Browning Feris Industries, Inc., 103 N.J. 177 (1986), the Supreme Court ruled that a contract that required the customer to indemnify the contractor for claims of injury "resulting from or arising in any manner out of [the] Customer's use, operation, or possession of the equipment furnished" by the contractor was unenforceable with regard to indemnification for the contractor's own negligence. Id. at 181-82. In that case, a waste-removal contractor sought indemnification from its customer for injuries sustained by the

plaintiff, who was an employee of the customer. Id. at 181. The contractor contracted with the customer to provide a compactor to dispose of solid waste. Id. at 181. The customer's workers would empty steel drums of solid waste into the compactor. Id. at 182. The contractor would remove, empty, and return the compactor to the customer's premises. Ibid. The plaintiff was injured in the course of his employment as he was pushing a cart to move a drum to the compactor to empty it. Ibid. The accident happened when the cart hit a snow-covered hole, which caused the drum to fall off of the cart and onto the claimant's leg. Ibid. The hole was created by the contractor's trucks as they removed and returned the compactor. Ibid.

The plaintiff sued the contractor, which in turn sued the customer for indemnification. Ibid. The contract between the contractor and the customer stated that the customer "accepts responsibility" for the contractor's equipment "except when it is physically being handled by employees" of the contractor. Ibid. The contract further required the customer to indemnify the contractor for claims of injury "resulting from or arising in any manner out of [the employer's] use, operation, or possess of the equipment furnished under this Agreement." Ibid. The Law Division ruled that the clause did not entitle the contractor to indemnity for the plaintiff's loss. Ibid. The Appellate Division reversed, ruling

that the customer agreed to indemnify the contractor for all losses except when the contractor's employees were physically handling the equipment. Ibid.

The Supreme Court reversed. Id. at 181. It ruled that if an indemnification clause is ambiguous, "the clause should be strictly construed against the indemnitee." Id. at 191. Thus "a contract will not be construed to indemnify the indemnitee against losses resulting from its own negligence unless such an intent is expressed in unequivocal terms." Ibid. The Court ruled that the contract was ambiguous about whether the customer would indemnify the contractor for the contractor's own negligence at times other than when the contractor's personnel were physically handling the equipment. Id. at 193. Because of that ambiguity, the contractor was not entitled to indemnification for the plaintiff's claims. Ibid.

In Mantilla v. NC Mall Associates, 167 N.J. 262 (1999), the Supreme Court reaffirmed its holding in Ramos that a contract that does not express an obligation to indemnify an indemnitee for the indemnitee's own negligence in "unequivocal terms" is unenforceable. Id. at 272-273. In that case, a plaintiff sued a mall owner and a janitorial service for injuries that he sustained in a slip-and-fall accident. Id. at 264. The plaintiff slipped on water that had accumulated on the floor because of a leaky roof. Ibid. The mall owner sued the janitorial service of contractual indemnification. Id. at 265. The trial court

awarded contractual indemnity to the mall owner, and the Appellate Division affirmed. Ibid.

The contract between the mall owner and the janitorial service contained three indemnification clauses. Id. at 266-67. The first required the janitorial service to indemnify the mall owner for losses that the mall owner might sustain "as the result of a failure of materials and workmanship to be as warranted." Id. at 266. The second required the janitorial service to indemnify the mall owner for claims of bodily injury "occurring in and about the Shopping Center as a result of the work performed and materials and equipment installed or furnished by" the janitorial service. Ibid. The third indemnity clause required the janitorial service to indemnify the mall owner for losses "caused by or arising from the negligence" of the janitorial service." Id. at 267.

The Supreme Court ruled that the contract limited the janitorial service's indemnification of the mall owner to only that portion of the loss caused by the janitorial service's fault, and not for the entire loss. Id. at 269-20. In reaching that result, the Supreme Court noted the presumption against indemnification for one's own negligence, id. at 269, and the requirement that a contract express the intent to indemnify an indemnitee for its own negligence "in unequivocal terms." Id. at 272. The Court ruled that the contract at issue did "not express in unequivocal terms an intention to indemnify the indemnitee [the mall owner]

against losses arising from its own negligence." Id. at 273. Instead, the language of the contract limited indemnification to only those losses resulting from the janitorial service's negligence. Ibid. Because the jury found that the mall owner was partially at fault for the plaintiff's accident, it could not recover costs of defense or indemnification for the janitorial service. Id. 273, 275.

In Kieffer, 205 N.J. 213, the Supreme Court again considered whether an indemnity contract required indemnification for the indemnitee's costs of defense. Id. at 216-17. That case involved a slip-and-fall accident on Best Buy's premises. Id. at 216. The plaintiff sued Best Buy; Best Buy's cleaning contractor, AIC; and AIC's cleaning subcontractor, All Cleaning. Ibid. AIC's subcontract with All Cleaning required All Cleaning to defend and indemnify AIC and Best Buy for any act of negligence arising out of All Cleaning's performance of its services. Id. at 219. The trial court dismissed the plaintiff's claims on summary judgment, ruling that plaintiff's expert report was a net opinion and that the plaintiff therefore failed to offer proof that the defendants were negligent. Id. at 219-20. However, the trial court ordered All Cleaning to reimburse Best Buy and All Cleaning for their defense costs. Id. at 220. The Appellate Division affirmed the trial court's judgment. Id. at 221-22.

The Supreme Court reversed, ruling that the language of the indemnity provision did not require All Cleaning to indemnify AIC and Best Buy for the

costs of defending claims that were dismissed for lack of evidence. It further ruled that All Cleaning's duty to indemnify AIC and Best Buy "depended on a judicial finding of some 'negligence, omission, or conduct' on its part based on evidence in the record or an admission by All Cleaning." Id. at 225. In light of the dismissal of the plaintiff's claims for lack of admissible expert testimony, the record was "devoid of any judicial finding that All Cleaning's conduct somehow caused the accident." Ibid. The Supreme Court ruled that it must interpret the language of the indemnity contract against the drafter, ibid., and that in the absence of a finding that All Cleaning was at fault for the plaintiff's accident, the judgment ordering All Cleaning to reimburse Best Buy and AIC for defense costs was error. Id. at 226.

The Appellate Division has also ruled that an indemnity clause that required indemnification "regardless of whether" the indemnitee was at fault for the loss was ambiguous and unenforceable. Englert v. The Home Depot, 389 N.J. Super. 44, 48 (App Div. 2006). In Englert, the indemnity clause required a subcontractor to indemnify the general contractor and the property owner for losses to the extent caused by the subcontractor, "regardless of whether it [the loss] is caused in part by a party to be indemnified hereunder. Ibid. The Englert court ruled that the indemnity clause was ambiguous. Ibid. Specifically, the phrase "regardless of whether" the loss was caused in part by a party to be

indemnified "did not distinguish between allowing indemnification for the negligence of others and allowing indemnification for [the indemnitee's] own negligence." Id. at 56. Thus, the clause "can be read simply to eliminate the common law condition" that a party seeking indemnification be free of fault. Ibid.; see also Mantilla, 167 N.J. at 272 (stating that common law principle that indemnitee may not recover for its own fault is "a 'default rule' that parties to a contract may choose to override by expressing such an intention in unequivocal terms"). Because an indemnity clause must be construed against both the indemnitee and the drafter, the Appellate Division ruled that the general contractor could not be indemnified for its own negligence. Englert, 389 N.J. Super. at 57-58.

In Mautz v. J.P. Patti Co., 298 N.J. Super. 13 (App. Div. 1997), the Appellate Division also rejected a claim for indemnification for the indemnitee's own negligence in the absence of an unequivocal intent to require such indemnity. In that case, the subcontractor agreed to indemnify the general contractor for all claims and damages arising out of or resulting from the subcontractor's performance of its work, "to the extent caused in whole or in part by any negligence act or omission of the Subcontractor or anyone for whose acts he may be liable, regardless of whether it is caused in part by a party indemnified hereunder." Id. at 18.

The Appellate Division ruled that the contract was clear and unambiguous. Id. at 21. However, it also ruled that the indemnity clause required the subcontractor to indemnify the general contractor only to the extent of the subcontractor's own negligence. Ibid. The indemnity clause did not require the subcontractor to indemnify the general contractor for the general contractor's own negligence. Ibid. Instead, the contract made clear that indemnification for the subcontractor's negligence is available even if the general contractor or other indemnitee was also at fault. Ibid.

In contrast, Sayles v. G & G Hotels, Inc., 429 N.J. Super. 266 (App. Div. 2013), provides an example of an indemnity clause that clearly and unequivocally provides for indemnification of the indemnitee's own negligence. In that case, G & G Hotels contracted to operate a Howard Johnson Hotel. Id. at 268. Two people fell through a window in the hotel that G & G Hotels operated, resulting in the death of one and serious injuries to the other. Ibid. G & G Hotels contracted to defend and indemnify Howard Johnson International Inc. to the fullest extent permitted by law for all losses and expenses relating to the operation of the hotel, "including when the active or passive negligence of [Howard Johnson] is alleged or proven." Id. at 270. Because the indemnity agreement expressly included losses caused by Howard Johnson's active or passive negligence, the court ruled that the indemnity agreement was

enforceable for indemnifying Howard Johnson for its own negligence. Id. at 273. In so ruling, the Sayles court distinguished cases such as Azurak and Ramos because the indemnity clauses in those cases did not state "whether indemnification would be required when the indemnitee was alleged or shown to be negligent." Id. at 272. As shown below, Double O Landscape's contract did not clearly and equivocally require Mt. Arlington to indemnify Double O Landscape for its own negligence. Se Point III, infra.

B. Multiple conflicting indemnity provisions can make an indemnity contract ambiguous (raised below at 1T15:16-17:25).

Both the Supreme Court and the Appellate Division ruled that a contract that contains multiple indemnity provisions can be ambiguous and therefore unenforceable with regard to indemnification for one's own negligence. Mantilla, 167 N.J. 262, Englert, 389 N.J. Super. 44; Meder v. Resorts Int'l Hotel, Inc., 240 N.J. Super. 470 (App. Div. 1989). If multiple indemnity clauses are inconsistent, the contract does not satisfy the requirement of a clear and unequivocal intent to require indemnification for the indemnitee's own negligence. Englert, 389 N.J. Super. at 48.

As discussed, in Mantilla, a mall owner sued a janitorial service, seeking contractual indemnification for losses sustained by a plaintiff who fell on a wet floor. Id. at 264-65. The contract between the mall owner and the janitorial

service contained three paragraphs governing indemnification. Id. at 266. The first indemnity provision required the janitorial service to indemnify the mall owner for any loss that the mall owner might incur "as the result of a failure of material and workmanship to be as warranted." Ibid. The second indemnity provision required the janitorial service to indemnify and save the mall owner harmless for all claims and liability "occurring in and about the Shopping Center as a result of the work performed and material and equipment installed or furnished by" the janitorial service. Ibid. The third indemnity provision required the janitorial service to indemnify the mall owner for all claims and liability "caused by or arising from the negligence of" the janitorial service. Id. at 267.

The Supreme Court reiterated that a contract will not be construed to require indemnity for the indemnitee's own negligence unless the contract specifies that intent unequivocally. Id. at 273-74. On the contrary, courts construe any ambiguity in such a clause strictly against the indemnitee. Id. at 273. The Supreme Court ruled that the indemnity clauses in the contract required indemnity only to the extent that the janitorial service was found to be at fault. Id. at 269-70. Because the multiple indemnity clauses did not unambiguously require the janitorial service to indemnify the mall owner for the

mall owner's own liability, the Supreme Court reversed the judgment in favor of the mall owner. Id. at 273-74, 275.

In Englert, the Appellate Division considered a subcontract that contained two indemnity clauses. 389 N.J. at 47-48. Holding that two conflicting indemnity clauses did not meet the Azurak standard of unequivocally expressing an intent to indemnify a tortfeasor for its own negligence, the Englert Court reversed the judgment awarding indemnity to the tortfeasor. Id. at 57-58.

In that case, Home Depot contracted with C. Raimondo & Sons Construction ("Raimondo") to serve as Home Depot's general contractor on a contraction project. Id. at 47. Raimondo subcontracted with Weir Welding Company ("Weir") to provide structural steel fabrication. Ibid. Weir sub-subcontracted that work to the plaintiff's employer. Id. at 48-49. The plaintiff was injured in a fall in the course of welding structural steel. Id. at 49. Raimondo sought contractual indemnification from Weir for the plaintiff's claims. Ibid.

The subcontract between Raimondo and Weir, which Raimondo drafted, contained two separate indemnity provisions. Id. at 47-48. The first indemnity provision required Weir to indemnify the Home Depot and Raimondo for all claims and losses "arising out of or resulting from the performance of" Weir's work, "to the extent caused in whole or in part by any negligent act or omission

of" Weir, its employees, or agents, "regardless of whether it is caused in part by a party to be indemnified hereunder." Id. at 48. The second indemnity clause required Weir to indemnify Raimondo against all claims "arising out of injury or death" of any person, "caused in whole or in part by the acts or omission of" Weir, its employees, or agents, "while engaged in the performance of the Work or any activity associated therewith or relative thereto." Ibid.

After a liability trial, the jury found Weir twenty-five percent liable, Raimondo fifteen percent liable, and the plaintiff's employer sixty percent liable. Id. at 50. The trial court entered an Order directing Weir to indemnify Raimondo for the entire settlement. Ibid.

The Appellate Division reversed that Order. Id. at 58. It determined that the first indemnity provision was ambiguous and that the first and second indemnity provisions were inconsistent. Id. at 48. The contract therefore failed to express "the required clear and unequivocal intention for Raimondo to be indemnified for its own negligence." Ibid.

Turning to the first indemnity provision, the court ruled that the "regardless of" language did "not distinguish between allowing indemnification for the negligence of others and allowing indemnification for Raimondo's own negligence." Id. at 56. The "regardless of" phrase could be read to eliminate the common-law requirement that an indemnitee be free from fault. Ibid. The

Englert Court also ruled that the phrase "to the extent of" was ambiguous because it could require indemnity if Weir and Raimondo were both negligent or to require indemnity for only the fault of Weir and its subcontractor. Ibid. The first provision therefore was unenforceable because it did not unequivocally express an intent that Weir would indemnify Raimondo for Raimondo's own negligence. Ibid.

Next, the Englert Court ruled that the inclusion of "two very different indemnification provisions in the same contract" created an additional ambiguity. Id. at 57. In light of those differences, the contract, taken as a whole, did not meet the Azurak standard of expressing an intent for Weir to indemnify Raimondo for Raimondo's own negligence. Ibid. Because an ambiguous indemnity contract is construed against the indemnitee, the Appellate Division reversed the order compelling Weir to indemnify Raimondo for Raimondo's negligence. Id. at 57-58.

Finally, in Meder, the Appellate Division again ruled that a contract with conflicting indemnity provisions is unenforceable in respect of the indemnitee's own negligence. Meder, 240 N.J. Super. at 478-80. In that case, defendant Resorts International Hotel, Inc. ("Resorts") contracted with Claremont Interior Contractors, Inc. ("Claremont") to supply building material for a construction project. Id. at 472. The plaintiff's decedent died in a fall while working on that

construction project. Ibid. All defendants but Resorts settled with the plaintiff, and the trial court dismissed the plaintiff's claim against Resorts at the close of her proofs. Id. at 493. The Appellate Division reversed, ruling that the plaintiff's proofs were sufficient to allow a jury to find that Resorts' failure to ensure compliance with safety regulations was a proximate cause of the decedent's death. Id.at 477.

Resorts filed a third-party claim against Claremont seeking contractual indemnification. Ibid. Resorts based its indemnification claim on the three indemnity provisions in its contract with Claremont. Ibid. The first indemnity clause required Claremont to indemnify Resorts for losses arising out of the performance of the contract work "occasioned wholly or in part by any act or omission of" Claremont or its employees or agents. Id. at 478. Claremont also contracted to defend Resorts in any suit provided, that Resorts was not found liable to Claremont in such a suit. Ibid.,

The second provision required Claremont to indemnify Resorts for all losses and claims that may arise out of Claremont's performance of its work and that are caused by any act or omission of Claremont or its employees or agents. Ibid. The third provision required Claremont to assume "the entire responsibility and liability for" all losses and claims "sustained or alleged to have been sustained in connection with or to have arisen out of or resulting

directly or indirectly from the performance of the work by" Claremont, its employees, or agents. Ibid.

The Meder Court ruled that the contract did not unequivocally express an intent to indemnify Resorts for its own negligence. Id. at 480. The court stated that "If anything, the three indemnity provisions together suggest the contrary intent; that reading is supported by the principle that ambiguities in an indemnification agreement are to be strictly construed against the indemnitee." Ibid. Finally, to the extent that a single provision might require indemnification for Resorts' own negligence, that intent failed when the three provisions were read in conjunction. Id. at 479. The Appellate Division therefore remanded the matter for entry of an order dismissing Resorts' claim for indemnification for its own negligence. Id. at 480.

III. The indemnity provisions in the Double O Landscape contract are unenforceable with regard to Double O Landscape's own negligence because they are not Azurak compliant (raised below at 1T4:22-23:18).

As shown below, the Double O Landscape contract is not Azurak compliant. It contains two conflicting indemnity provisions. One indemnity provision does not require either party to indemnify the other for their own respective negligence. The second indemnity provision does not explicitly state that Mt. Arlington will indemnify for Double O Landscape its own negligence. The trial court further erred by using one indemnity provision to interpret

another when those two provisions conflicted. This Court should therefore reverse the judgment below.

A. Paragraph 4 of the Contract, entitled "Indemnity," requires each party to indemnify the other only to the extent of their respective fault (raised below at 1T4:22-23:18).

Paragraph 4 of the Double O Landscape contract, entitled "Indemnity," simply did not require Mt. Arlington to indemnify Double O Landscape for its own negligence. Da45, ¶ 4. Instead, it was a mutual indemnity obligation that required each party to indemnify the other for their respective negligence. Ibid. The trial court therefore erred in concluding that the contract expressly granted Double O Landscape indemnification for its own negligence, 1T19-22-22:6, and that the contract was clear and unambiguous on that issue. 1T23:10-18.

Specifically, Paragraph 4 required Double O Landscape, "to the fullest extent permitted by law," to indemnify Mt. Arlington for claims of bodily injury and property damage "due to [Double O Landscape's] negligent snow plowing work that may arise at [Mt. Arlington's] premises while [Double O Landscape] is physically present on premises." Da45, ¶ 4. It required Mt. Arlington, "to the fullest extent permitted by law," to defend and indemnify Double O Landscape for claims of bodily injury and property damages that may arise from Mt. Arlington's premises, including acts or omissions of Mt. Arlington and its agents other than Double O Landscape, "for ice which forms from day time

melting from snow and ice which is removed from, brought in by or in between vehicles." Ibid.

Under Paragraph 4, both Mt. Arlington and Double O Landscape were obligated to indemnify each other for losses caused by their respective negligence. Ibid. Paragraph 4 simply did not require either party to be indemnified for its own negligence. Ibid. Paragraph 4 did not specify, with "explicit language," that Mt. Arlington will indemnify Double O Landscape for its own negligence. Azurak, 175 N.J. at 112-13. The trial court therefore erred in ruling that a clause that required Mt. Arlington to indemnify Double O Landscape for claims arising from Mt. Arlington's premises explicitly and unequivocally required Mt. Arlington to indemnify Double O Landscape for the latter's own negligence. 1T21:5-:21. Accordingly, this Court should reverse the grant of summary judgment to Double O Landscape requiring Mt. Arlington to indemnify Double O Landscape for the latter's own negligence based on Paragraph 4. Boyle, 257 N.J. at 478; Mantilla, 167 N.J. at 272-73.

B. Paragraph 2 of the Contract makes no provision for Mt. Arlington to indemnify Double O Landscape for Double O Landscape's own negligence (raised below at 1T4:22-23:18).

Paragraph 2 of the Double O Landscape Contract obligated Mt. Arlington to indemnify Double O Landscape for losses arising out of the use of Mt. Arlington's property during or after Double O Landscape's operations, "whether

or not such claim [for] damage, injury or death results from negligence of Customer, Contractor or others." Da44-45, ¶ 2. That clause is analogous to the indemnity clause that the Appellate Division considered in Englert, 389 N.J. Super. 44, and Mautz, 298 N.J. Super. 13, and is unenforceable in respect of Double O Landscape's own negligence. Englert, 389 N.J. at 56-58.

The phrase "whether or not" the claim or loss results from Double O Landscape's negligence in Paragraph 2, Da45, ¶ 2, renders it ambiguous and this unenforceable for indemnification for Double O Landscape's own negligence. It does not distinguish between indemnification for Double O Landscape's own negligence and the negligence of Mt. Arlington or other entities. Englert, 389 N.J. at 56. It "can be read simply to eliminate" the common-law requirement that Double O Landscape be free from fault to recover indemnification. Ibid. Thus, courts read the phrase "whether or not caused by" the fault of the party to be indemnified to mean that indemnity is available even if the indemnitee is at fault, but only to the extent that the loss was caused by entities other than the indemnitee. Mautz, 298 N.J. Super. at 21.

Two cases hold that the term "regardless of whether" the loss is caused by the indemnitee required indemnification for the indemnitee's own negligence. The first is Leitao v. Damon G. Douglas Co., 301 N.J. Super. 187 (App. Div. 1997). In Leitao, the general contractor contracted with the plaintiff's employer

to perform electrical work on a construction project. Id. at 190. The plaintiff tripped over wire mesh that a mason used to pour concrete floors. Ibid. The injured worker sued the site owner and the general contractor, and the jury determined that the general contractor was 51% liable and the plaintiff was 49% liable. Ibid. The indemnity provision required the employer to indemnify the general contractor for losses arising out of the employer's work, "regardless of whether it is caused in part by a party to be indemnified hereunder." Id. at 191. The court focused on whether the accident arose out of the employer's work. Id. at 194.95. The Leitao court also rejected the regiment that the general contractor was being indemnified for its sole negligence in violation of N.J.S.A. 2A:40A-1, because the employer was not solely negligent. Id. at 105-198.

However, the Englert Court criticized reliance on Leitao for determining whether the phrase "regardless of whether" the indemnitee was negligent required indemnification for the indemnitee's own negligence. Englert, 389 N.J. Super. at 55-56. As the Englert Court ruled that phrase "does not distinguish between allowing indemnification for the negligence of others and allowing indemnification for [the indemnitee's] own negligence." Id. at 56. This Court should likewise reject reliance on Leitao to determine whether Double O Landscape is entitled to indemnification for its own negligence. Id. at 56-58.

The other case ruling that the phrase "whether or not" the negligence of the indemnitee caused the loss allows indemnification for one's own negligence is Estate of D'Avila v. Hugo Neu Schnitzer East, 442 N.J. Super. 80 (App. Div. 2015). Although the Hugo Neu Court recognized that a contract requiring indemnification for the indemnitee's own negligence must be "plain and unequivocal," id. at 114, its analysis focused on whether the phrase "arising out of" permitted indemnification. Id.at 115. In ruling that the phrase "whether or not" the indemnitee contributed to the loss in whole or in part was not fatal to indemnification, the court considered only N.J.S.A. 2A:40A-1's prohibition against indemnification for one's sole negligence. Id. at 115. The Hugo Neu opinion did not discuss Englert or any of the cases ruling that phrases such as "whether or not" the indemnitee is at fault are ambiguous and therefore unenforceable. Ibid. Hugo Neu cannot be reconciled with Englert. See Englert, 398 N.J. Super. at 55-58 (rejecting reliance on Leitao and ruling the phrase "regardless of" indemnitor's fault is ambiguous and therefore unenforceable to require indemnity for indemnitor's own fault).

The trial court thus erred in relying in Hugo Neu to rule that Double O Landscape's contract unambiguously required Mt. Arlington to indemnify Double O Landscape for Double O's own negligence. Compare 1T22:7-23:9 with Englert, 389 N.J. at 56-58. As the Appellate Division ruled, drafting an

indemnity clause that explicitly stated that Mt. Arlington was to indemnify Double O Landscape for Double O Landscape's liability, even if that liability arose in part from Double O Landscape's own negligence, "would have placed no undue burden" on Double O Landscape. Englert, 389 N.J. at 57. This Court should therefore reverse the judgment below on indemnification for Double O Landscape's own fault. Ibid.

C. The inclusion of two contradictory indemnification clauses in the Contract renders the indemnity provisions ambiguous (raised below at 1T15:16-17:25).

Finally, the fact that Double O Landscape's contract contains two conflicting indemnity provisions renders the contract ambiguous and unenforceable with regard to indemnification for Double O Landscape's own fault. Mantilla, 167 N.J. 262; Englert, 389 N.J. Super. at 48, 57; Meder, 240 N.J. Super. at 380. As discussed on Point II.B, supra, a contract that contains inconsistent indemnity clauses does not express the clear and unequivocal intent needed to permit indemnification for the indemnitee's own negligence. Englert, 389 N.J. Super. at 48. The trial court therefore erred in attempting to harmonize those disparate clauses, 1T20:16-21:23, instead of applying case law that governs multiple conflicting indemnity provisions. E.g., Englert, 389 N.J. Super. at 57.

Specifically, Paragraph 4 required Double O Landscape to indemnify Mt. Arlington for losses caused by its negligent snow removal while Double O was physically on the premises, and it required Mt. Arlington to indemnify Double O Landscape for losses arising from its premises, including the negligence of Mt. Arlington or its agents, for ice caused by snow melting and refreezing. Da45, ¶ 4. Paragraph 4 did not require either party to be indemnified for its own negligence. Ibid. Paragraph 2 required Mt. Arlington to indemnify Double O Landscape for claims of injury arising out of the use of the property, whether or not such loss is caused by the negligence of Mt. Arlington, Double O Landscape, or others. Da44-45, ¶ 2. Simply put, those paragraphs have different indemnity requirements. Da44-45, ¶ 2 & ¶ 4.

In using paragraph 2 to re-write paragraph 4 into a clause that required Mt. Arlington to indemnify Double O Landscape for Double O's own negligence, 1T19:22-22:6, the trial court erred. Mantilla, 167 N.J. 262 (holding that inconsistent indemnity provisions renders contract ambiguous); Englert, 389 N.J. Super. at 48, 57 (same). Courts construe contracts as written and do not re-write them to favor one party over another. Boyle, 257 N.J. at 478. Moreover, because courts construe indemnity clauses strictly, they construe any ambiguity against the indemnitee, such as Double O Landscape. Ibid.

Further, the fact that Paragraph 4 and Paragraph 2 conflict shows that the indemnity provisions, even taken as a whole as the trial court did, are not Azurak compliant. Englert, 389 N.J. Super. at 48, 57. If a court must seek to interpret one clause by reference to a separate clause, the contract does satisfy the bright-line rule of Azurak that a contract seeking to require indemnification for the indemnitee's own negligence must do so by using explicit language to "specifically reference the negligence or fault of the indemnitee." Azurak, 175 N.J. at 112-13.

Only one case, Hugo Neu, 442 N.J. Super. 80, ruled that a contract containing multiple indemnity provisions can be Azurak compliant. Id. at 114. In that case, a subcontract contained three indemnity provisions. Ibid. However, that subcontract "specified that all three of these indemnity triggers apply 'whether or not any acts, errors, omission[s] or negligence of any of the [i]ndemnitees [i.e., Hugo Neu] contributed thereto in whole or in part[.]'" Ibid. (alterations in original). Thus, the three indemnity provisions were subject to the same clause governing indemnification for the indemnitee's own negligence. Ibid. Here, in contrast, nothing in the Double O Landscape contract harmonizes the disparate indemnity provisions set out in Paragraph 4 and Paragraph 2, see Da43-46, rendering Hugo Neu inapplicable. See Hugo Neu, 442 N.J. Super. at 114.

Courts thus do not harmonize conflicting indemnity provisions. Mantilla, 167 N.J. 262; Englert, 389 N.J. Super. at 48, 57; Meder, 240 N.J. Super. at 380. The trial court therefore erred in seeking to harmonize Paragraph 2 and Paragraph 4 by ruling that the wording of Paragraph 2 shows that Paragraph 4 required indemnity for Double O Landscape's own negligence, 1T19:22-22:6, when in fact Paragraph 4 contained no provision for either party to be indemnified for its own negligence. Da45, ¶ 4. Ignoring the inconsistencies in the indemnity obligations between Paragraph 4 and Paragraph 2 was therefore reversible error. Boyle, 257 N.J. at 478; Mantilla, 167 N.J. 262; Englert, 389 N.J. Super. at 48, 57; Meder, 240 N.J. Super. at 380.

CONCLUSION

As shown above, the trial court erred in ruling that Double O Landscape's contract clearly and unequivocally required Mt. Arlington to indemnify Double O for its own negligence in connection with plaintiff's claims. The Court should therefore reverse the grant of summary judgment in favor of Double O Landscape and enter judgment in favor of Mt. Arlington.

Respectfully submitted,

KINNEY LISOVICZ, REILLY & WOLFF, PC

By: */s/ Kevin E. Wolff*
Kevin E. Wolff, Esq. (023881981)

Dated: December 6, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

PAUL SOBOTOR Plaintiff vs. MT. ARLINGTON HOLDINGS, LLC and/or ABC CORPORATION, a fictitious name: DOUBLE O LANDSCAPE DESIGN, LLC, and/or DEF SNOW REMOVAL COMPANY, a fictitious name; and JOHN DOES 1-10, said names being fictitious Defendants	Docket No. A-003590-23T4 ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MORRIS COUNTY CIVIL ACTION SAT BELOW: HON. NOAH FRANZBLAU, J.S.C.

AMENDED BRIEF ON BEHALF OF RESPONDENT DOUBLE O LANDSCAPE DESIGN, LLC

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PRELIMINARY STATEMENT

This negligence lawsuit arises from plaintiff's allegation that on February 16, 2021, he was injured due to a snow and ice condition on the premises of an apartment complex, known as Shore Hills Apartments, owned by defendant/appellant Mt. Arlington Holdings, LLC. On February 16, 2021, a snow removal contract for the winter season 2020-2021 was in effect between defendant/respondent snow removal contractor Double O Landscape Design, LLC (hereinafter "Double O Landscape") and defendant/appellant customer Mt. Arlington Holdings, LLC d/b/a Shore Hills Apartments (hereinafter "Mt. Arlington Holdings"). On June 10, 2024, The Honorable Noah Franzblau, J.S.C., granted Double O Landscape's motion for summary judgment thereby compelling Mt. Arlington Holdings to defend and indemnify Double O Landscape. The court below accurately interpreted the language of the contract and did not commit reversible error in its ruling that the defense and indemnification language clearly obligated Mt. Arlington Holdings to defend and indemnify Double O Landscape for its own negligence.

The contract does not contain any conflicting indemnity provisions. Mt. Arlington Holdings agreed to the two (2) indemnity provisions which complement the other in favor of Double O Landscape. In paragraph two (2) Mt. Arlington Holdings agreed to

indemnify and save harmless Double O Landscape whether or not the claim arose from the negligence of Double O Landscape, Mt. Arlington Holdings or any other party. Mt. Arlington Holdings also agreed to the terms of paragraph four (4) of the contract. The terms inuring to the benefit of Mt. Arlington Holdings are moot as the facts of this case do not support their being owed indemnification. The applicable and pertinent language of the paragraphs obligated Mt. Arlington Holdings to defend and indemnify Double O Landscape, to the fullest extent permitted by law, from all claims of negligence that may arise from any act or omission of Double O Landscape.

Mt. Arlington Holdings agreed to the terms of the contract which, under the facts of this case, obligate them to defend and indemnify Double O Landscape. The argument that the terms of the contract are inconsistent are without merit. The contract, read holistically, realizes a consistent theme, to wit, the intentions of the parties are abundantly clear. Therefore, the court below having addressed the clear language of the contract and the agreed upon intentions of the parties, appropriately ruled that Mt. Arlington Holdings defend and indemnity Double O Landscape and, accordingly, did not commit reversible error. Accordingly, this Honorable Court should affirm the Honorable Noah Franzblau, J.S.C.'s ruling that Mt. Arlington Holdings defend and indemnify Double O Landscape.

PROCEDURAL HISTORY

Defendant Double O Landscape accepts the procedural history as set forth by Defendant/Appellant Mt. Arlington Holdings, with the following comments:

1) Defendant Double O Landscape specifically asserted in its answer filed on November 8, 2021, a crossclaim for contractual indemnification and demanded for Mt. Arlington Holdings to hold harmless Double O Landscape against any and all judgment or settlement in favor of plaintiff. **Da15.** Defendant Double O Landscape also asserted a crossclaim for breach of contract for failure to procure insurance coverage, **Da 19,** and seeking:

> (a) A determination and declaration that said co-defendant(s) was/were obligated at the time of plaintiff's accident to provide the appropriate insurance coverage and is obligated to provide a defense in the pending lawsuit to the answering defendant(s);
>
> (b) If the answering defendant(s) is found liable in whole or in part of the within lawsuit brought on behalf of Plaintiff must indemnify and hold harmless the answering Defendant(s) as against any judgment and/or settlement as against the answering defendant(s) in favor of plaintiff;
>
> (c) Declaring said co-defendant(s) liable for costs incurred; and

(d) Declaring said co-defendant(s) liable for any and all legal fees incurred in connection with the defense of the answering Defendant(s).

2) A tender demand for defense and indemnification was sent to Defendant Mt. Arlington Holdings by Hartford Insurance representative on or about July 8, 2021. **Da48.** Carrier for Mt. Arlington Holdings (AmTrust North America) denied the tender as premature. **Da52.** A request for defense and indemnification was again made thereafter on May 31, 2023. **Ra1.** A third request was made via e-mail between carriers for Mt. Arlington Holding and Double O Landscape on April 9, 2024. **Da55.**

3) At mediation on April 9, 2024, it was again verbally specifically expressed that Double O Landscape was seeking defense and indemnify from Mt. Arlington Holdings pursuant to the terms and conditions contained in the snow removal contract. Mt. Arlington Holdings did not respond to the request for defense and indemnification. As such, mediation failed to resolve the matter. The motion to compel defense and indemnification was immediately filed on April 10, 2024, after Mt. Arlington failed to resolve all claims asserted by the plaintiff and Double O Landscape. **Da34.** The motion to compel defense and indemnification and motion for reconsideration, filed May 1, 2024, were procedurally denied. **Da1.**

4) With the consent of all parties, The Honorable Noah Franzblau, J.S.C., pursuant to R. 4:42-2, reconsidered the May 1, 2024, prior ruling, and concluded that in the interests of justice the motion warranted reconsideration on the merits. **1T 18:18-14 to 1T 19:1-6.**

RESPONSE TO APPELLANT'S "STATEMENT OF FACTS"

I. Plaintiff's allegations.

Respondent, Double O Landscape, will rely on Appellant's Statement of Facts Paragraph I. "Plaintiff's Allegations" as though fully set forth herein.

II. Double O Landscape's snow-removal contract with Mt. Arlington Holdings.

In appellants Statement of Facts II, appellant incorrectly set out paragraph 4 and paragraph 2 in chronological order.[1]

Appellants inaccurately described the contract as a proposal. Rather, page one (1) identified the services to be performed and related pricing. **Da 43.** Separately, pages two (2) through four (4) articulate the terms of the "snow removal contract 2020-2021. **Da44.**

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[1] In appellant's Statement of Facts II, appellant incorrectly set out paragraph 4 and paragraph 2 in non-chronological order. Respondent's Statement of Facts setting forth paragraphs 2 and 4 in chronological order is consistent with the court below. **1T 19:22-25 and 20:1-25 and 21:1-4.**

At his deposition, Victor Forzani testified that he was the property manager of Shore Hills Apartments from April 2020 until July 25, 2022. **Ra14, lines 12-19**. Sharon is the regional property manager. Sharon is the only one that can sign contracts on behalf of Mt. Arlington Holdings/Short Hills. **Ra20, lines 20-24** Even if the terms of the contract are not changing from one year to the next, the contract must be reviewed and approved through the owner. **Ra18 lines 5-14 to Ra19 lines 16-25.** Here, the renewal contract was signed by Sharon who oversees the contracts with the owner of the property and then Mr. Forzani is given final approval to submit the proposal to Double O Landscape. **Ra18 lines 22-14 to Ra19 line 1.** Mr. Forzani's testimony showed that Mt. Arlington Holdings had the contract reviewed at least twice, including by its owner. Mt. Arlington Holdings had a clear understanding of the implications of the contract language. The clear and unequivocal language should be enforced, especially when sophisticated parties are involved. Azurak v. Corp. Prop. Inv., 175 N.J. 110 (2003)

III. The Trial Court's grant of summary judgment to Double O Landscape and the settlement of plaintiff's claims.

Double O Landscape settled the claims against them with the plaintiff on May 30, 2024. Double O Landscape did not dismiss their crossclaims for defense and indemnification against Mt. Arlington Holdings. As such, Double O Landscape appeared for trial on June

10, 2024, to monitor the trial and assist with producing witnesses. The parties initially met with Honorable Noah Franzblau, J.S.C., in chambers at which point Double O Landscape informed that plaintiff settled with defendant/respondent, however, their crossclaims against Mt. Arlington Holdings remained viable. Further, Double O Landscape informed the court below that it intended to file a post-trial motion seeking defense and indemnification from Mt. Arlington Holdings. Plaintiff and Mt. Arlington Holdings then consented to the court below deciding Double O Landscape's motion compelling defense and indemnification. **1T 5:20-25 and 6:1-9.**

Appellant has now placed artificial emphasis on one line from a lengthy oral argument, in which a concession was allegedly made by Double O Landscape that the contract was not Azurak compliant. In doing so, Mt. Arlington Holdings intentionally disregards Double O Landscape's complete accurate position at oral argument that the indemnity provisions were Azurak compliant in favor of Double O Landscape. However, based on the totality of the argument contained within the transcript it is clear that Double O Landscape maintained throughout that it was entitled to indemnification. Double O Landscape argued, only, that the provisions simply did not utilize the word "own" but expressed unequivocally that it was entitled to indemnification for its negligence, if any, pursuant to Azurak. **1T 11:21-25 and 12:1-13.** Double O Landscape contended

that the two indemnification paragraphs when read together show the intent of the parties, which was to have Mt. Arlington defend Double O Landscape. **1T 15:16-25 to 16:1-24.** The court below granted the motion. **1T 21:24-25 to 23:1-9.**

LEGAL ARGUMENT

The snow removal contract in effect between Double O Landscape and Mt. Arlington Holdings contained indemnification language which the court below ruled to be Azurak compliant. The assertion by defendant/appellant that the contract is ambiguous because it contains two indemnity provisions is meritless. The court below interpreted and enforced the terms of the valid snow removal contract and, as a matter of law, appropriately ruled the indemnity provisions to be Azurak compliant. Having reviewed the language of the contract, the court below ruled it was the intent of the parties for Mt. Arlington Holdings to defend and indemnify Double O Landscape, for its negligence based on the facts of this case. There is no basis for this Honorable Court to reverse the ruling of the Honorable Noah Franzblau, J.S.C., as the court below did not commit reversible error.

I. The standard of appellate review of a grant of summary judgment is de novo (not raised below).

Respondent, Double O Landscape, will rely on Appellant's Legal Argument Paragraph I. as though fully set forth herein.

II. In Azurak, the Supreme Court established a "bright line rule" for indemnification clauses. The language in the agreement must specifically reference the negligence or fault of the indemnitee.

Respondent, Double O Landscape, will rely on appellant's Legal Argument paragraph II. as though fully set forth herein.

A. New Jersey courts will enforce indemnification clauses which explicitly reference negligence of the indemnitee. (Raised below at 1T 10:3-17)

It is respectfully submitted that the cases submitted by appellant in Point A. of its brief and the recitation of the facts and decisions of the court in those respective cases speak for themselves.

However, Double O Landscape rejects appellant's statement on page 19 that "As shown below, Double O Landscape's contract did not clearly and equivocally require Mt. Arlington Holdings to indemnify Double O Landscape for its own negligence." To the contrary, the provisions contained in the subject contract specifically reference the negligence or fault of Double O Landscape.

B. Indemnity provisions are enforceable when there is a clear understanding of the parties' intentions, and the language is unequivocal. (Raised below at 1T 15:16-25 to 16:1-11)

In the Estate of D'Avila v. Hugo Neu Schnitzer East, 442 N.J. Super 80 (App. Div. 2015), Jack D'Avila worked for Simpson & Brown, a subcontractor in a facility owned by Hugo Neu Corporation. Hugo Neu is a metal recycling company and Simpson & Brown was hired to install a concrete base to hold the motor of a 700-foot "mega shredder." Hugo Neu hired Femco Machine Company to assemble and install the shredder. On May 18, 2005, a ladder which was leaning against the motor base fell and struck Mr. D'Avila in the head. It was believed that the ladder belonged to Simpson & Brown. Mr. D'Avila ultimately succumbed to his injuries. It was believed that the ladder belonged to Simpson & Brown.

Hugo Neu had a subcontract with Simpson & Brown containing indemnity language which stated in pertinent part:

> "[t]o the fullest extent permitted by law," S&B shall indemnify Hugo Neu "against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of [S&B's work under the contract], including, without limitation, any such claim, damage, loss or expense attributable to bodily injury, . . . *caused by the acts or omissions* of [S&B], . . . or anyone for whose acts they may be liable,

> regardless of whether or not such claim, damage, loss or expense is caused in part by [Hugo Neu]." Id. at 116-117

The Appellate Division held that this language clearly expressed that S&B must indemnify Hugo Neu against all claims "arising out of or resulting from performance of" S&B's work. The obligation applies, "regardless of whether or not such claim, damage, loss or expense is caused in part by [Hugo Neu]." The contract expressly identifies one subset of such claims for which S&B must indemnify Hugo Neu "without limitation," that is, claims for bodily injury caused by S&B's negligence, or the negligence of any party for which S&B is responsible. Id. at 116.

> Hence, under the clear and unambiguous terms of the indemnification clause, S&B must indemnify Hugo Neu for decedent's damages caused by Hugo Neu or S&B. As we have already noted with respect to Femco's similar provision, the phrase "arising out of" does not require a finding of proximate cause between a plaintiff's injury and S&B's work. Rather, it is sufficient that there is proof of a substantial nexus between the injury and S&B's work. Estate of D'Avila, supra, at 116, citing Vitty v. D.C.P. Corp., 268 N.J. Super 447, 452-453 (App. Div. 1993).

III. The indemnity provisions in the contract are enforceable with regard to Double O Landscape's own negligence because they are Azurak compliant. (Raised below at 1T 15:16-25 to 16:1-11)

There exist precedented guidelines with regard to the interpretation of contract terms by a court in New Jersey. "Contracts should be read "as a whole in a fair and common sense

manner.'" Manahawkin Convalescent v. O'Neill, 217 N.J. 99,118 (2014). In Borough of Princeton v. Bd of Chosen Freeholders of Mercer, 333 N.J. Super. 310 (App. Div. 2000) the Appellate Division applied the well established guidelines in reviewing disputed contract terms. The court held that when interpreting a contract it should seek "to ascertain the 'intention of the parties to the contract as revealed by the language used, taken as an entirety…the situation of the parties, the attendant circumstances, and the object the parties were striving to attain." Id. at 325. In determining the intention of the parties to the contract, "the document.. must be read as a whole, without artificial emphasis on one section, with a consequent disregard for other. Literalism must give way to context." Id. At 325.

The New Jersey Supreme Court in Pacifico v. Pacifico, 190 N.J. 258, 920 A.2d 73 (2007) held that when a contract exists between "sophisticated businesspeople" it made no difference "who drafted" the contract. Id. at 258, 267-268.

Under New Jersey law, a contract is binding when there is a "meeting of the minds". The parties must agree to the essential terms of the contract with an intent to be bound by the terms. Weichert Co. Realtors v. Ryan, 128 N.J. 427 (1992). The contract terms must be sufficiently clear so that what each party should or should not do may be determined with certainty. Id. at 435.

Thus, if an indemnification provision is clear and unambiguous, it can provide for absolute indemnification of a party, regardless of fault. Rommell v. U.S. Steel Corp., 66 N.J. Super 30, 42 (App. Div. 1984).

Sub judice, Mt. Arlington Holdings and Double O Landscape agreed to the unequivocal essential indemnity terms of the contract. The court below appropriately ruled that the two paragraphs, when read together, unequivocally established that the indemnity language was Azurak compliant and enforceable. Defendant/Appellant has not proffered any compelling argument that the court below committed reversible error. As such, this Honorable Court should affirm the ruling of the court below.

A. Paragraph 4 of the contract unequivocally requires Mt. Arlington Holdings to indemnify Double O Landscape for its own negligence. (raised below at 1T 11:22-25 and 12:1-8)

The paragraphs of the contract were not presented by Defendant/Appellant in chronological order so as to obfuscate the issue at hand.[2] However, commencing with the terms of paragraph four (4) of the contract, Mt. Arlington Holdings is

[2] In appellant's Statement of Facts II, appellant incorrectly set out paragraph 4 and paragraph 2 in non-chronological order. Respondent's Statement of Facts setting forth paragraphs 2 and 4 in chronological order is consistent with the court below. 1T 19:22-25 and 20:1-25 and 21:1-4

unequivocally required to indemnify Double O Landscape for its own negligence.

Paragraph 4 of the binding contract between Double O Landscape and Mt. Arlington Holdings stated:

> To the fullest extent permitted by law, Contactor shall be responsible for claims to bodily injury and property damage due to Contractor's negligent snow plowing work that may arise at Customer's premises while Contractor is physically on premises. To the fullest extent permitted by law, Customer shall defend, indemnify and hold harmless Contractor, its owners, agents , consultants, employees, and subcontractors from all claims for bodily injury and property damage that may arise from Customer's premises *including and* ***acts or omissions*** *by Customer or Customer's subcontractors whether employed directly or indirectly* [emphasis added] for ice which forms from day time melting from snow and ice which is removed from, brought in by or in between vehicles. **Da45.**

Contrary to appellant's assertion, paragraph four does not contain a mutual indemnity obligation that required each party to indemnify the other for their respective negligence. The clause specifically articulates the responsibilities of each party without reciprocal indemnification. The first sentence of paragraph four (4) clearly articulates that Double O Landscape would be responsible for any claims that arise from negligent snow plowing while on Mt. Arlington Holding's premises. *Sub judice*, the provision did not apply because the accident occurred when Double O Landscape was *not on site*. The sentence did not contain any mutual reciprocity with regard to indemnification.

The next sentence of paragraph four (4) stated to the fullest extent permitted by law, Mt. Arlington Holdings (Customer) shall defend, indemnify and hold harmless Double O Landscape, its owners, agents , consultants, employees, and subcontractors from all claims for bodily injury and property damage that may arise from Customer's premises *including and "any"* [emphasis provided] *acts or omissions by Customer or Customer's subcontractors whether employed directly or indirectly* for ice which forms from day time melting from snow and ice which is removed from, brought in by or in between vehicles. Notably, this sentence did not contain any mutual reciprocity with regard to indemnification.

Appellant's argument that there was mutual reciprocal indemnity language in paragraph 4 is devoid of merit. This paragraph clearly articulated the nature of the claims subject to indemnification, i.e., bodily injury and the scope of matters from which those claims arise, i.e., Double O Landscapes' work. It states with specificity Mt. Arlington Holdings duty to defend. Finally, the clause stated that Mt. Arlington Holdings will defend and indemnify Double O Landscape for bodily injury claims, *including and* [sic] *(any)* ***acts or omissions*** *by Customer or Customer's subcontractor whether employed directly or indirectly for ice….* [Emphasis added]. The sentence specifically references

acts or omissions of Mt. Arlington Holding's contractor, Double O Landscape. The indemnification language contained in paragraph four (4) is enforceable as it unequivocally addresses and considered *any act or omission* of Double O Landscape.

Accordingly, the court below did not commit reversible error having considered the intent of the parties to the extent that Mt. Arlington Holdings agreed to indemnify Double O Landscape for its own negligence. Therefore, it is respectfully requested that this Honorable Court affirm the ruling of the court below.

B. Paragraph two (2) of the Contract unequivocally articulated that Mt. Arlington Holdings should indemnify Double O Landscape for its own negligence. (raised below at 1T 9:16-25 and 10:1-7)

Paragraph two (2) of the contract relative to indemnification provided in pertinent part:

> "During operations and after completion of operations Customer agrees to indemnify and save harmless the Contractor and its employees against any and all claims by the Customer, it's employees or third parties, their heirs, executors, administrators, successors, surrogates or assignees, arising on account of death or injuries to persons or damage to property, arising out of use of, or traveling at or onto the property, **whether or not such claim damage, injury or death results from negligence of Customer, Contractor or others.** Customer shall defend all suits and claims arising from or incidental to the work under the agreement, without expense or annoyance to the Contractor or its employees." [Emphasis added] **Da44-Da45.**

The terms of paragraph two (2) clearly articulated the nature of the claims subject to indemnification, i.e., bodily injury and the scope of matters from which those claims arose, i.e., Double O Landscape's work. It stated with specificity Mt. Arlington Holding's duty to defend. There was clear unequivocal Azurak compliant language which expressly stated that Mt. Arlington Holdings will defend and indemnify Double O Landscape whether the claim results from "negligence of Customer, Contractor or others". **Da44.** The language is explicit and "specifically referenced the negligence or fault of the indemnitee". Azurak, 175 N.J. at 112-113 (quoting Azurak v Corporate Prop. Investors, 347 N.J. Super. 516, 523(2002)) Thus, there was no room for interpretation and the "bright line rule" required by the Supreme Court in Azurak clearly has been met. The contract at issue expressed in unequivocal terms an intention for Mt. Arlington Holdings to defend and indemnify Double O Landscape against losses arising from its own negligence.

Defendant/appellant placed a veil over the significance of the holding in Leitao v. Damon G. Douglas Co., 301 N.J. Super. 187 (App. Div. 1997), and its application to this case. Regardless of appellant's assertion that the Englert Court criticized reliance on Leitao for determining the enforceability of an indemnification

clause, Leitao remains authoritative. There is a substantial body of New Jersey case law in which courts have interpreted similar indemnity clauses providing indemnity for losses "regardless of" or "arising out of" or "arising from" the contractual engagement. See Torres v. Tamburri Assocs., Inc., 2010 N.J. Super. Unpub. LEXIS 2901 (App. Div. December 3, 2010), **Ra53;** Dorsey v. Cobblestone Village Equities, LLC, 2009 N.J. Super. Unpub. LEXIS 584 (App. Div. March 25, 2009), **Ra68**; Di Filippi v. Target Corp.,2008 N.J. Super. Unpub. LEXIS 1549 (App. Div. January 16, 2008), **Ra73**; Leitao v. Damon G. Douglas Co., 301 N.J. Super 187 (App. Div. 1997); Vitty v. D.C.P. Corp., 268 N.J. Super 447 (App. Div. 1993). In those cases, New Jersey courts analyze whether there was a "substantial nexus between the claim and the subject matter of the subcontractor's work duties."

In Leitao, the indemnification clause provided in pertinent part:

> "The subcontractor/vendor shall indemnify and hold harmless Damon G. Douglas Company and all of its agents and employees from and against all claims, damages, losses, and expenses, including attorney's fees, arising out of or resulting from the performance of the subcontractor/vendor's work under this purchase order, regardless of whether they are caused in part by the contractor". Leitao, supra, at 191.

In Leitao, this Honorable Court applied the standards set forth in Vitty in holding an indemnification clause in a contract

between a contractor and its subcontractor to be enforceable. Notably, Leitao applied precedent established in Vitty to uphold the enforceability of indemnification language in the realm of negligence. In Vitty, the Court held that an indemnification clause may be enforceable even when the contractor is partially negligent, as long as the subcontractor's negligence contributed to the accident. The court acknowledged, "when the meaning of the clause is ambiguous, it should be strictly construed against the indemnitee." Ramos v. Browning Ferris Indus., 103 N.J. at 191, 510 A.2d at 1152. We are nonetheless obliged to construe the clause in a manner consonant with its essential purpose and with the objects the parties were striving to achieve. *Stier v. Shop Rite, 201* N.J. Super. *142, 151, 492 A.2d 1055 (App.Div.1985); see also George M. Brewster & Son, Inc. v. Catalytic Constr. Co., 17* N.J. 20, 32, 109 A.2d 805 (1954). Further,

> …within this analytical framework, we reject the contention that the phrase "arising out of" requires that the injury or property damage sustained must be the direct and proximate result of the performance of towing services in order for the indemnification clause to be triggered. Specifically, the license does not require that the claim of the injured party be directly and proximately caused by the operation of a tow truck in transit. Instead, the words "arising out of" should be construed in accordance with their common and ordinary meaning as referring to a claim "growing out of" or having its "origin in" the subject matter of the towing agreement. Vitty, supra, 452-453.

See Westchester Fire Ins. Co. v. Continental Ins. Cos., 126 N.J. Super. 29, 38, 312 A.2d 664 (App.Div.1973), aff'd, 65 N.J. 152, 319 A.2d 732 (1974); Minkov v. Reliance Ins. Co., 54 N.J.Super. 509, 516, 149 A.2d 260 (App.Div.1959). So interpreted, there need be shown only a substantial nexus between the property damage or injury alleged in the claim and the activities encompassed in the towing contract. Vitty, supra, at 453.

Applying these principles, we agree with the Law Division that the indemnification and defense clause applied to the Vitty claim. In reaching this conclusion, we acknowledge that Vitty's death resulted from a freak accident that perhaps could not have been envisioned by the parties. However, clearly an automobile accident involving a tow truck was a reasonably foreseeable event within the contemplation of the parties when they entered the towing agreement. Vitty, supra, at 453.

The Supreme Court held in Azurak that for an indemnification clause to be enforceable in indemnifying an indemnitee's own negligence, it must be clear and explicit. Azurak at 112.

In Leitao, this Honorable Court applied the Azurak standard which required the intent to indemnify for one's own negligence must be unequivocally stated in the contract. It was held in Leitao, that the Azurak standard was met, as the contract clearly required the subcontractor to indemnify the contractor for claims

caused in whole or in part by the subcontractor's negligence. Leitao at 195.

The indemnification clause in Leitao and the indemnification clauses in the contract, *sub judice*, were both clear and explicit. Like Leitao, the language of paragraphs two (2) and four (4) specified that Mt. Arlington Holdings is responsible for indemnifying Double O Landscape for claims arising out of Double O Landscape's work, which included claims resulting from Double O Landscape's negligence. The language contained in paragraph two (2) and paragraph (4) was exhaustive and left no opportunity for ambiguity.

Defendant/appellant's application of the holding in Englert v. The Home Depot, 192 N.J. 70 (2007) was improper. The indemnity clause in Englert is distinguishable from the indemnity language contained in paragraph two (2) of the matter at hand. Appellant inappropriately relied on cited Supreme Court and Appellate Division decisions, wherein indemnity clauses were held to be unenforceable, to persuade this Honorable Court to construe the indemnity language in the subject contract against Double O Landscape.

In Englert, the Appellate Division held that the indemnity clause was ambiguous because it did not clearly state whether the subcontractor would indemnify the contractor for its own

negligence. Englert at 58. *Sub judice*, the snow removal contract between defendant/appellant and defendant/respondent contained agreed upon defense and indemnification terms which were Azurak compliant. The contract contained two (2) paragraphs which clearly and cohesively articulate that Mt. Arlington Holdings would defend and indemnify Double O Landscape for its own negligence. The paragraphs contained indemnification language establishing a clear and convincing overlapping intent of the parties. Thus, the clear and the respective terms of the contract contained "sufficiently plain unequivocal" language. Englert at 53.

In Estate of D'Avila v. Hugo Neu Schnitzer East, 442 N.J. Super. 80, 115 (App. Div. 2015), the court held: "We reject Femco's argument that the "whether or not" phraseology contained in the contract's indemnity provision created a fatal ambiguity that limits its obligation to indemnify Hugo Neu for its own negligence. Nor do we agree with Femco that the indemnity language here is internally inconsistent. The only limitation that applies stems from the statute, N.J.S.A. 2A:40A-1, precluding an enforceable duty to indemnify a party that is solely negligent, not applicable here." D'Avila at 115.

Contrary to defendant/appellant's incredulous assertions, the Estate of D'Avila v. Hugo Neu, supra, case can definitively

be reconciled with Englert v. The Home Depot, 192 N.J. 70 (2007). In New Jersey, the interpretation of indemnification language must be determined on a case-by-case basis. In Mantilla v. NC Mall Associates, 167 N.J. 262 (2001), the Supreme Court opined that the objective in construing a contractual indemnity provision was to determine the intent of the parties involved. Mantilla at 269. In Englert, the court held that the indemnification clause was ambiguous because it did not unequivocally provide for indemnification for the contractor's own negligence. Englert at 57. In the Estate of D'Avila, the indemnification provision was found to be "sufficiently plain and unequivocal" to require indemnification for the general contractor's own negligence. D'Avila at 114. Contrary to appellant's assertions, the D'Avila court properly applied the Englert standard and correctly concluded that the indemnification provision was valid and enforceable. Rather, D'Avila analyzed the indemnity language presented to it and appropriately applied the standards set forth by the Supreme Court in Azurak. D'Avila at 114-115.

Likewise, the court below conducted the same analysis set forth in D'Avila. The Honorable Noah Franzblau, J.S.C., analyzed the language contained in paragraph two (2) and paragraph four (4). The court below analyzed the intent of the parties and

correctly applied the indemnification enforceability standards set forth in Azurak and its progeny. The Honorable Noah Franzblau, J.S.C., did not commit reversible error in reading the contract as a whole; deciphering the intentions of the parties; and appropriately applying the holding in D'Avila. The court below appropriately and thoroughly analyzed the indemnity provisions of the contract and the intentions of the parties, which the court found to be clear and unequivocal. As such, the ruling of the court below which obligated Mt. Arlington Holdings to indemnify Double O Landscape should be affirmed.

C. The cohesive indemnification language of the contract clearly establishes the intent of the parties, thereby rendering the indemnification provisions enforceable. (raised below at 1T 21:24-25 and 22:1-6)

In what appears to be a desperate attempt by appellant to ask This Honorable Court to overturn the Honorable Noah Franzblau, J.S.C.'s order, the appellant boldly asserts that the court "re-wrote" the contract at issue. It is clear that the court below followed the letter of the law and appropriately evaluated the clauses at issue to reach its conclusion. To suggest that the Honorable Noah Franzblau, J.S.C., was in any way biased or acted inappropriately is disconcerting.

Mt. Arlington Holdings had the ability to choose from any snow removal contractor in New Jersey for the 2020-2021 winter season. They are a multi-tenanted commercial complex with two sophisticated individuals who reviewed and approved the contract for each winter season. Mt. Arlington Holdings explicitly agreed to assume the burden of indemnifying Double O Landscape regarding the circumstances surrounding Mr. Sobotor's claim. When the contract was signed before the start of the 2020-2021 winter season, Mt. Arlington Holdings had no objection to any of the language in the contract.

The indemnification language in the contract was accepted and endorsed by Mt. Arlington Holdings. The indemnification obligations by the parties are triggered by certain facts and circumstances. Mt. Arlington Holdings was entitled to indemnification for its own negligence when Double O Landscape was on site, even if it was negligent in the supervision and operation of the premises. Mt. Arlington Holdings had the opportunity to be indemnified, however, based on the facts of this case, they were not eligible to be indemnified. As for Double O Landscape, it was entitled to indemnification when an accident occurred when Double O Landscape was not on the premises, even if it was partly negligent for work performed prior to the accident. Therefore, both parties had an opportunity to seek indemnification, when and

if, the facts triggered the indemnification provisions. The contract, *sub judice*, was fair, equitable, unequivocal and unambiguous.

Defendant/respondent submits that defendant/appellant intentionally cited certain phrases of the contract to confuse the issue at hand. Defendant/appellant's iteration of inapplicable case law throughout its brief is yet another attempt to dissuade this Honorable Court from affirming Judge Franzblau's ruling. It is clear from the transcript of the motion that the court below recognized the standards that must be applied, as a matter of law, when considering the enforceability of indemnification provisions.

The Honorable Noah Franzblau, J.S.C., at the outset of the court's ruling, acknowledged that "indemnification provisions will be construed in accordance with general rules of construction of contracts and no indemnification for a party's own negligence will be found absent an unequivocal expression of an intention to so indemnify." Quoting Azurak v. Corporate Property Investors, 347 N.J. Super. 516, 521 (App. Div. 2002), which was affirmed at 175 N.J. 110 (2003), and quoting Ramos v. Browning-Ferris Industries, 103 N.J. 177, 191 (1986). See also Mantilla v. N.C. Mall Associates, 167 N.J. 262, 273 (2001).

Next, the court below cited indemnification language in paragraph 2, which provided in pertinent part: "During operations

and after completion of operations, customer," being Mount Arlington, "agrees to indemnify and save harmless the contractor," that being Double O, "and save its employees against any and all claims by the customer," Mount Arlington, "its employees and third parties arising on account of death or injuries to persons or damage to property, whether or not such claim, damage, injury or death results from the negligence of the customer," being Mount Arlington, "the contractor," Double O, "or others." "Customer," Mount Arlington, "shall defend all lawsuits and claims arising from or incidental to the work of the agreement, without expense or annoyance to the contractor," being Double O, "or its employees." **Da44-Da45.**

"Therefore, the Court notes that paragraph 4 of the snow removal contract applies, which pertains specifically to indemnification. And that provides in pertinent part, "to the fullest extent permitted by law, the customer shall defend, indemnify, and hold harmless the contractor, its owners, agents, consultants, employees, and subcontractors from all claims for bodily injury and property damage that may arise from customer's premises, including any acts or omissions by customer or customer's subcontractor, whether employed directly or indirectly for ice which forms from daytime melting from snow and ice which is removed from, eroded by, or in between vehicles." **1T 20:16-25 and 21:1-4.**

Notably, the court further analyzed the language at the top of paragraph 4, which provides in pertinent part, "to the fullest extent permitted by law, the customer shall defend, indemnify, and hold harmless," and it goes on from there, "for damages arising from the customer's premises, including any acts or omissions by customer or customer subcontractor, whether employed directly or indirectly." **Da45.** The Honorable Franzblau, J.S.C., found that paragraph four (4) is consistent with the verbiage in paragraph two (2). **1T 21:5-21.**

The court below then properly reviewed the document as a whole and ruled that the language of paragraph four (4) is consistent with paragraph two (2). The Honorable Noah Franzblau, J.S.C., then applied the requirements of Azurak to the language of the contract and, considering the intention of the parties, found it to be clear and unambiguous. "In this regard, the snowplow contract within paragraph 2 and otherwise expressly provides that Mount Arlington shall defend and indemnify Double O from any and all claims by third parties, whether or not the claims result from the negligence of Double O." **1T 22:2-6.**

The Honorable Noah Franzblau, J.S.C., provided further support for the enforceability of the indemnification language in the contract. The court compared the language of the contract, *sub judice*, to the indemnification language in the contract which was

the subject of Estate of D'Avila v. Hugo Neu, 442 N.J. Super. 80 (App. Div. 2015). The court below found that the language contained in the contract "to be sufficiently similar to the language discussed in Estate of D'Avila. In D'Avila, a subcontractor agreed to indemnify the general contractor "to the fullest extent permitted by law," and further quoting, "against claims, damages, losses, and expenses arising out of or resulting from the performance of the subcontractor's work, including without limitation any such claim, damage, loss, or expense attributable to the bodily injury caused by acts or omissions of the subcontractor or anyone else whose acts that may be liable regardless of whether or not such claims, damage, loss, or expenses caused in part by the general contractor." Id. at 115-116. **1T 22:12-24.**

The court in the Estate of D'Avila found the indemnification clause was "sufficiently plain and unequivocal" to require the subcontractor to indemnify the general contractor for damages, including those caused by the general contractor's own negligence. **1T 22:25 and 23:1-4.**

The court below held that the language of the subject contract was similar to the language and indemnity within the Estate of D'Avila. "In the interest of justice and consistent with Azurak, grants Double O's motion for defense and indemnification by Mount

Arlington" based on what it perceives to be the clear and unambiguous language within section four of the indemnity, which is supplemented by paragraph 2, to reflect the parties' intentions." **1T 23:5-17.**

As the Appellate Division ruled in Estate of D'Avila, the indemnification paragraphs of the contract, *sub judice*, are enforceable. The contract contained proof of a "substantial nexus" between the injury and the activity contemplated by the contract. In paragraph 2 of the agreement, Mt. Arlington agreed to defend and indemnify Double O Landscape whether or not the injury arose from the negligence of Mt. Arlington, Double O Landscape, or others. The language was clear and unambiguous and, therefore, appropriately deemed to be enforceable by the court below.

Likewise, despite defendant/appellant's argument that the language was not harmonious, paragraphs 2 and 4, when read separately and together, are in tune with the intent of the parties. Appellant simply seeks to have a second bite at the apple as it relates to their adverse ruling. Appellant failed to recognize that the enforceability of indemnification language must be reviewed on a case-by-case basis. The Honorable Noah Franzblau, J.S.C., ruled, as a matter of law, that indemnification language in the contract was enforceable following careful consideration of the applicable law and analysis of the appropriate language and

intention of the parties. This Honorable Court should, therefore, affirm the judgment below in favor of Double O Landscape.

CONCLUSION

As articulated above, the Honorable Noah Franzblau, J.S.C., did not commit reversible error in ruling that the indemnification provisions in the contract between Double O Landscape and Mt. Arlington Holdings is valid and enforceable. The court below properly applied the appropriate legal principles and diligently analyzed the contract's indemnity language. Appellant's request for relief should be denied in its entirety, together with any other, further or different relief as this Court deems just and proper. This Honorable Court should affirm the granting of summary judgment by the court below in favor of Double O Landscape and enter judgment accordingly.

Respectfully submitted,

LAW OFFICES OF LINDA S. BAUMANN

By: /s/ Deirdre M. Dennis
DEIRDRE M. DENNIS (ID 006141988)

Dated: February 7, 2025

PAUL SOBOTOR,

Plaintiff,

v.

MT. ARLINGTON HOLDINGS, LLC,

Defendant/Appellant,

and

DOUBLE O LANDSCAPE DESIGN, LLC,

Defendant/Respondent,

and

ABC CORPORATION, a fictitious name; and/or DEF SNOW REMOVAL COMPANY, a fictitious name; and JOHN DOES 1-10, said names being fictitious,

Defendants.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO: A-003590-23T4

Civil Action

ON APPEAL FROM THE ORDERS ENTERED IN THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MORRIS COUNTY, DOCKET NO. MRS-L-2173-21, COMPELLING DEFENSE AND INDEMNITY, DATED JUNE 10, 2024, AND ENTERING FINAL DISPOSITION, DATED JUNE 12, 2024

Sat Below:

The Honorable Noah Franzblau, J.S.C.

REPLY BRIEF ON APPEAL OF DEFENDANT/ APPELLANT, MT. ARLINGTON HOLDINGS, LLC

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PRELIMINARY STATEMENT

The crux of this appeal is the enforceability of a contract that contains two indemnity clauses with different indemnity obligations. Defendant/respondent, Double O Landscape Design, LLC ("Double O Landscape") drafted the contract at issue and seeks indemnification for its own fault from defendant/appellant, Mt. Arlington Holdings, LLC ("Mt. Arlington"). Neither of the two indemnity clauses in Double O Landscape's contract specifically required Mt. Arlington to indemnify Double O Landscape for the latter's own negligence. One clause did not specifically reference the fault of the party to be indemnified and the other limited the indemnity obligation to the indemnitor's own fault. As a result, the contract failed to comply with the requirement that an indemnification provision must state unequivocally that a party shall provide indemnification for the indemnitee's own fault. The trial court therefore erred in ruling that the indemnity clauses, read together, were enforceable and required Mt. Arlington to indemnify Double O Landscape for the latter's own negligence. Double O Landscape's opposition brief does not provide a justification for the trial court's error. The Court should therefore reverse the judgment below.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Mt. Arlington relies on the procedural history and statement of facts contained in its moving brief.

LEGAL ARGUMENT

The trial court erred in ruling that the two indemnity clauses in the Double O Landscape contract were enforceable with regard to indemnity for Double O Landscape's own negligence. The first provision, Paragraph 2, required indemnification even if Double O Landscape was at fault, but did not explicitly require Mt. Arlington to indemnify Double O Landscape for that latter's own negligence. The other provision, Paragraph 4, did not require either party to indemnify the at-fault party for the at-fault party's own negligence. The trial court erred in ruling that those conflicting indemnity provisions could somehow be combined to comply with the Supreme Court's requirement in Azurak v. Corporate Property Investors, 175 N.J. 110 (2003), that a contract requiring indemnification for one's own negligence be explicit and unequivocal. The Double O Landscape contract was not Azurak compliant and Double O Landscape's argument that the parties intended to require Mt. Arlington to indemnify Double O Landscape for the latter's own negligence lacks any support in the record. This Court should therefore reverse the judgment below.

I. Multiple conflicting indemnity clauses create ambiguity that renders the contract ambiguous regarding indemnification for the indemnitee's own negligence.

Because the Double O Landscape contract contains two indemnity provisions with two different indemnity obligations, Da44-45, ¶ 2, ¶ 4, Double

O Landscape's argument that it is entitled to indemnification for its own negligence is fatally flawed. See Mantilla v. NC Mall Assocs., 167 N.J. 262, 273-75 (2001) (holding that multiple conflicting indemnity clauses are ambiguous); Englert v. The Home Depot, 389 N.J. Super. 44, 48, 57-58 (App. Div. 2006) (same). Double O Landscape concedes that its indemnity clauses must comply with Azurak, 175 N.J. 110. Under Azurak, a contract that seeks to require indemnification for the indemnitee's own negligence "must specifically reference the fault of the indemnitee." Id. at 112-13. If the contract fails to contain "'clear and explicit language addressing indemnification for the [indemnitee's] own negligence,'" the contract is unenforceable in that respect. Id. at 112 (quoting Azurak v. Corporate Property Investors, 347 N.J. Super. 516, 523 (App. Div. 2002)). The Supreme Court held that the requirement of such "'explicit language'" is a "'bright line rule.'" Ibid. Accordingly, where a contract includes more than one indemnity clause, and the clauses contain conflicting obligations regarding indemnity for the indemnitee's own negligence, the contract is not Azurak compliant. Mantilla, 167 N.J. at 266-68, 269-70; Englert, 389 N.J. Super. at 56-58; Meder v. Resorts Int'l Hotel, Inc., 240 N.J. Super. 470, 480 (App. Div. 1989).

Of the four published cases adjudicating indemnity disputes involving contracts that contain more than one indemnity clause, three held that the

inclusion of multiple indemnity clauses that contained different indemnity obligations rendered the contract unenforceable with regard to indemnity for a tortfeasor's own negligence. Mantilla, 167 N.J. at 269-73; Englert, 389 N.J. Super. at 57-58; Meder, 240 N.J. Super. 470. In Mantilla, the Supreme Court ruled that the three indemnity clauses at issue in the mall owner's contract did not require, in unequivocal terms, the janitorial service to indemnify the mall owner for a slip-and-fall injury for which the mall owner and the janitorial service were both liable. 167 N.J. at 269-73. In Englert, the contractor at issue contained two indemnity clauses with different indemnity obligations. 389 N.J. Super. at 47-48. The inconsistency between the provisions created an ambiguity that rendered the contract unenforceable. Id. at 57-58. The Meder court likewise ruled that the two indemnity provisions in the contract at issue rendered the landowners' indemnity claim against a contractor unenforceable with regard to the landowner's own negligence. 240 N.J. Super. at 480. The Appellate Division also rejected the approach that the Law Division used in this case, stating that even if one of the provisions could be interpreted to require indemnity for the landowner's own negligence, that interpretation failed when the three clauses were read together. Id. at 479. Under Meder, the trial court erred in relying on Paragraph 2 to find that the intent of Paragraph 4 was to

require Mt. Arlington to indemnify Double O Landscape for the latter's own negligence. 1T19:22-22:6.

The case on which Double O Landscape relies to argue that its contract required indemnification for its own negligence is Estate of D'Avila v. Hugo Neu Schnitzer East, 442 N.J. Super. 80 (App. Div. 2015). Hugo Neu does not apply because the three separate indemnity provisions in the contract at issue in that case were all subject to the same clause governing the fault of the indemnitee. Ibid. Specifically, the contract in Hugo Neu "specified that all three of these indemnity triggers apply, 'whether or not any acts errors, omission[s] or negligence of any of the [i]indemnitees [i.e., Hugo Neu] contributed thereto in whole or in part[.]'" Ibid. (alterations in original). Thus, the issue in this appeal – that the indemnity provisions in Double O Landscape's contract are inconsistent – was not present in Hugo Neu. Hugo Neu therefore provides no support for Double O Landscape's argument that its indemnity clauses explicitly and unequivocally require Mt. Arlington to indemnify Double O Landscape for the latter's own negligence. Mantilla, 167 N.J. at 269-73; Englert, 389 N.J. Super. at 57-58; Meder, 240 N.J. Super. 470.

Here, Double O Landscape's contract contained two conflicting indemnity provisions. Da44-45, ¶ 2 & Da45, ¶ 4. Paragraph 2 required Mt. Arlington to indemnify Double O Landscape for claims of bodily injury or property damage

"arising out of use of, or traveling at or onto the property, whether or not such claim [for] damage, injury or death results from negligence of Customer [Mt. Arlington], Contractor [Double O Landscape] or others." Da45, ¶ 2.

In contrast, Paragraph 4, entitled "Indemnification," required Double O Landscape to "be responsible," "to the fullest extent permitted by law," for

> all claims for bodily injury and property damage that may arise from Customer's premises including an[y] acts or omissions by Customer or Customer's subcontractors whether employed directly or indirectly for ice which forms from day time melting from snow and ice which is removed from, brought in by or in between vehicles.
>
> [Da45, ¶ 4.]

Paragraph 4 did not require either party to indemnify the other for the indemnitee's own negligence. Ibid. Paragraph 4 specifically limits Mt. Arlington's indemnity obligations to bodily injury and property damage that may arise from Mt. Arlington's premises, including acts or omissions of Mt. Arlington or its "subcontractors." Ibid. Contrary to Double O Landscape's argument, Opp. br. 16-17, the term "subcontractor" does not include Double O Landscape. The contract refers to Double O Landscape as the "Contractor." See Da44-46. Further, Paragraph 2 did not contain that language requiring indemnity "to the fullest extent permitted by law." See Da45, ¶ 2.

Paragraph 2 and Paragraph 4 thus contained different indemnity obligations, and the trial court's ruling that those provisions were consistent with each other, 1T19:22-22:6, was unsupported by the record. See Da44-45, ¶ 2 & ¶ 4; 1T12:15-15:8 (conceding that Double O Landscape contract "doesn't specifically contain that bright line language of Azurak"). That ruling was reversible error because the Supreme Court and this Court have held that multiple conflicting indemnity provisions that fail to express, in unequivocal terms, an intent to indemnify the indemnitee for its own negligence renders that portion of the contract unenforceable. Mantilla, 167 N.J. at 266-68, 269-70; Englert, 389 N.J. Super. at 48, 57-58. Further, the trial court's ruling was an impermissible re-writing of the indemnity provisions in favor of Double O Landscape, the party that drafted the contract and the party that sought indemnity for its own negligence, mandating reversal. Boyle v. Huff, 257 N.J. 468, 478 (2024). If Double O Landscape wanted to contract for indemnification for its own negligence, it could have done so with the specificity that Azurak requires. Kieffer v. Best Buy, 205 N.J. 213, 225 (2009).

II. The phrase "whether or not indemnitee is negligent" in the Double O Landscape contract is not Azurak compliant without a specific reference to indemnification for Double O Landscape's own negligence.

Double O Landscape argues that its contract requires indemnity for its own negligence because Paragraph 2 contained the phrase "whether or not the

indemnitee is negligent." Da45, ¶ 2. Paragraph 4, entitled "Indemnity," did not contain that phrase, Da45, ¶ 4, adding to the fatal inconsistency between Paragraph 2 and Paragraph 4. Englert, 389 N.J. Super. at 48, 57-58. Further, the phrase "whether or not the indemnitee is negligent" does not satisfy the "bright line" rule of Azurak that a contract requiring indemnity be specific and unequivocal. Id. at 55-56; Mautz v. J.P. Patti Co., 298 N.J. Super. 13 (App. Div. 1997). The trial court therefore erred in ruling that Double O Landscape was entitled to indemnification for its own negligence, because courts interpret the language of an indemnity clause against the drafter. Kieffer, 205 N.J. at 225.

Englert held that phrases such as "whether or not the indemnitee is negligent" can be read to eliminate the common-law condition that an indemnitee be free from fault instead of requiring indemnification for the indemnitee's own negligence. Englert, 389 N.J. Super. at 56. The common-law principle that a party may not obtain indemnification for its own negligence is "a 'default rule'" that parties may overcome by clearly expressing such an intent in unequivocal terms. Mantilla, 167 N.J. at 272. Because courts construe indemnification clauses narrowly and against the drafter, phrases such as "whether or not the indemnitee is negligent" or "regardless of whether the indemnitee is negligent," without more, are not Azurak compliant. Englert, 389 N.J. Super. at 57-58.

If the indemnitee clause explicitly requires indemnitee for the indemnitor's own negligence, courts will enforce that clause. For example, in Sayles v. G & G Hotels, Inc., 429 N.J. Super. 266 (App. Div. 266), G & G Hotels, a hotel owner, contracted with Howard Johnson International to use the Howard Johnson name for the hotel at issue. Id. at 268. The contract required G & G Hotels to indemnify Howard Johnson for any claim arising out of the operation of the hotel, "including when the active or passive negligence of [Howard Johnson] is proven." Id. at 270. The Sayles court ruled that the indemnity clause was Azurak compliant because it "expressly" included indemnity for Howard Johnson's own negligence. Id. at 273.

Here, Paragraph 2 of the Double O Landscape contract states only that Mt. Arlington will indemnify Double O Landscape for claims of bodily injury or property damage arising out of the use of Mt. Arlington's property, "whether or not such claim [for] damage, injury or death results from the negligence of Customer [Mt. Arlington], Contractor [Double O Landscape] or others." Da45, ¶ 2. It does not expressly state that Mt. Arlington will provide such indemnity even when Double O Landscape has been found to be at fault. Ibid. Paragraph 4 does not require indemnification for either party's own negligence. Da45, ¶4. The indemnity clause is therefore not Azurak compliant and is unenforceable

with regard to Double O Landscape's own negligence. Englert, 389 N.J. Super. at 48, 57-58; Sayles, 429 N.J. Super. at 273.

Double O Landscape relies on Leitao v. Damon G. Douglas Co., 301 N.J. Super. 187 (App. Div. 1997), and unreported cases to argue that a contract that requires indemnification "regardless of whether" the indemnitee is at fault is enforceable. However, Leitao was decided five years before Azurak, and this Court ruled that under Azurak, the phrase "regardless of whether" the indemnitee is at fault is unenforceable with regard to indemnification for the indemnitee's own negligence. Englert, 389 N.J. Super. at 56-67. The Court should therefore reject Double O Landscape's reliance on Leitao to decide whether a contract that contains more than one indemnity provision and that does not explicitly require indemnification for Double O Landscape's own negligence is Azurak compliant. Ibid.

III. The trial court erred in re-writing the Double O Landscape contract in favor of indemnification for Double O Landscape's own negligence.

Finally, the trial court erred in ruling that the Double O Landscape contract is Azurak compliant when Paragraphs 2 and 4 are read together to overcome the fact that Paragraph 4, which is entitled "Indemnification," does not require either party to provide indemnification for the indemnitee's own negligence. Da45, ¶ 4. As noted, courts apply contracts as written and will not

interpret them to favor one party over another. Boyle, 257 N.J. at 478. In addition, courts construe indemnity clauses strictly. Kieffer, 205 N.J. at 225. Therefore, "an ambiguous contractual indemnification provision must be construed against the indemnitee." Englert, 389 N.J. Super. at 57. The trial court thus erred in relying on Paragraph 2 to rule that Paragraph 4 required indemnification for Double O Landscape's own negligence. 1T19:22-22:6.

In support of its indemnity claim, Double O Landscape argues that Paragraph 4 "specifically references acts or omissions of Mt. Arlington's contractor, Double O Landscape." Opp. Br. 16-17 (emphasis added). However, the indemnity clause in Paragraph 4 actually requires Mt. Arlington to indemnify Double O Landscape only for the acts or omissions of Mt. Arlington or its "subcontractors," not for the acts or omissions of the "Contractor." Da45, ¶ 4. The contract uses only the term "Contractor," with a capital "C," to refer to Double O Landscape. The term "subcontractor" appears only in Paragraph 4 and is used separately from the term "Contractor." Ibid. Double O Landscape is not one of Mt. Arlington's "subcontractors." Ibid.

Double O Landscape's argument that Paragraph 4 required Mt. Arlington to indemnify it for Double O Landscape's own negligence thus depends on a re-writing of the terms of the contract that it drafted. Cf. Opp. Br. 14-15 with Da45, ¶ 4. Double O Landscape thus asks the Court to re-write the indemnity clause

in its favor, which is impermissible. Boyle, 257 N.J. at 478; Englert, 389 N.J. Super. at 57. The Court should therefore reject Double O Landscape's attempt to expend the scope of indemnity that it drafted in its favor. Kieffer, 205 N.J. at 225. Likewise, the trial court's ruling that Paragraph 4 was "broad and consistent with the other verbiage of paragraph two, indicating that the indemnification would apply even against the contractor's own negligence," 1T21:5-:9, failed to distinguish between the terms 'subcontractor," for which Mr. Arlington owed indemnity, and "Contractor," for which Mt. Arlington did not. See Da45, ¶ 4. The Court should therefore reject the trial court's ruling and Double O's argument in favor of it. Boyle, 257 N.J. at 478.

Last, Double O Landscape argues that Mt. Arlington adopted Double O Landscape's interpretation of the contract regarding indemnity for the latter's own negligence, and that Mt. Arlington was a sophisticated business that could have retained a different snow-removal contractor if it objected to Double O Landscape's interpretation of the contract. However, nothing in the statement of material facts in support of either Double O Landscape's motion for summary judgment, Da36-39, or its motion for reconsideration, Da107-108, supports its argument that "Mt. Arlington Holdings explicitly agreed to assume the burden of indemnifying Double O Landscape regarding the circumstances surrounding Mr. Sobotor's claim." Opp. Br. 26. The whole purpose of Azurak is to require

specificity in indemnity contracts so that the indemnitor expressly understands that it will indemnify the other party for the latter's own negligence and so that Courts do not have to infer such an obligation from the contract. Englert, 389 N.J. Super. at 57-58. Drafting "a clear, unambiguous indemnification provision" that explicitly required indemnification for Double O Landscape's own negligence "would have placed no undue burden" on it. Id. at 57.

CONCLUSION

For the foregoing reasons, as well as those contained in Mt. Arlington's moving brief, the judgment below that the Double O Landscape clearly and unequivocally required indemnification for Double O Landscape's own negligence was in error. The Court should therefore reverse the grant of summary judgment in favor of Double O Landscape and enter judgment in favor of Mt. Arlington.

Respectfully submitted,

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