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IN THE SUPREME COURT OF THE STATE OF DELAWARE

UNION PACIFIC CORPORATION, Appellant/Cross-Appellee, v. CLEAN HARBORS, INC., Appellee/Cross-Appellant.	No. 35, 2018 Case Below: Superior Court of the State of Delaware, C.A. No. N15C-07-081 MMJ CCLD

CROSS-APPELLANT'S REPLY BRIEF ON CROSS-APPEAL

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SUMMARY OF ARGUMENT ON CROSS-APPEAL[1]

Controlling authority from this Court mandates that Clean Harbors is entitled to recover the fees it was forced to incur to obtain the benefits of its indemnification rights. UPC's discussion of general rules of indemnification and the American Rule of each party paying its own attorney's fees are irrelevant in light of this controlling authority. UPC's efforts to distinguish the controlling authorities fail because the arguments UPC presents have already been rejected by this Court and the indemnification clause here has the required breadth. Finally, the fact that Clean Harbors was awarded a substantial amount of its claim instead of the entirety does not undermine its entitlement to fees and costs incurred to enforce the indemnification.

[1] Capitalized terms not defined herein shall have the meanings ascribed to them in previous briefs, including Clean Harbors' Answering Brief on Appeal and Opening Brief on Cross-Appeal (Trans. ID # 62053547), which is cited herein as "*CH Ans. Br*. []." Citations to Appellant UPC's Reply Brief on Appeal and Answering Brief on Cross-Appeal (Trans. ID # 62159940), shall appear as "*UPC Reply Br.* []." Citations herein to exhibits refer to the exhibits previously appended to Clean Harbors' Answering Brief on Appeal and Opening Brief on Cross-Appeal and "BR" citations herein refer to the appendix filed in conjunction with this Reply Brief on Cross-Appeal.

CLEAN HARBORS' REPLY ARGUMENTS ON CROSS-APPEAL

I. CONTROLLING AUTHORITY MANDATES AN AWARD OF FEES AND COSTS.[2]

Contrary to UPC's disingenuous assertion, there is controlling authority mandating an award of fees in the present case (*see UPC Reply Br.* p. 20). UPC turns a blind eye to precedent in place for nearly a quarter century. Since 1994 it has been the law in Delaware that a party forced to litigate in order to enjoy the benefits of a contractual indemnification promising to hold the indemnitee harmless, is entitled to have its fees and costs reimbursed by the indemnitor. *Pike Creek Chiropractic Ctr. v. Robinson*, 637 A. 2d 418, 422 (Del. 1994) [hereinafter *Pike Creek*]. This Court said in *Delle Donne & Assoc., LLP v. Millar Elevator Serv. Co.*, 840 A.2d 1244, 1256 (Del. 2004) [hereinafter *Delle Donne*]:

[2] While the purpose of this cross-appeal reply brief is to address UPC's opposition to the cross-appeal, it is important to note the UPC argues in its reply brief on appeal that issues of fact precluded entry of summary judgment on the third party issue (*UPC Reply Br.* pp. 2–3)—an argument not raised below. Clean Harbors, in opposing summary judgment, requested the trial court affirmatively rule that the claims in issue were third party claims. (BR.2). In its reply brief concerning the motion for summary judgment before the trial court, UPC asserted there was no issue of fact and the matter was appropriate for summary judgment. (BR.4–5). UPC also did not assert in oral argument that there were issues of fact. (BR.6–37). Delaware Supreme Court Rule 8 precludes UPC raising the issue now. Furthermore, UPC's one sentence reference to issues of fact in its opening brief on appeal does not permit a fact based argument in its reply. *See Rogers v. Christina Sch. Dist.*, 73 A.3d 1, 8 (Del. 2013) (discussing the presentation of arguments in accordance with Delaware Supreme Court Rule 14).

> Our case law recognizes that where, as here, a party… is contractually entitled to be held harmless, that party is entitled to its costs and attorneys' fees incurred to enforce the contractual indemnity provision. Any other outcome would not result in [the indemnitee] being held harmless.

Pike Creek and *Delle Donne* are controlling authority for this case and under those precedents, the right to receive an award of fees and costs is a judicially engrafted additional award, necessary to give full effect and meaning to the phrase "hold harmless." *Pike Creek*, 637 A.2d at 422; *Delle Donne*, 840 A.2d at 1256.[3]

[3] Because the right to fees to enforce indemnification is the product of judicial interpretation that the award of fees is necessary to give effect to the hold harmless language, the 20-year limitation cannot apply to the award of fees. Giving effect to that limitation would allow an indemnitor to avoid the holdings of *Pike* and *Della Donne* by feigning an interest in settling until a sunset had elapsed. *Chamison v. Healthtrust, Inc.*, 735 A.2d 912, n.57 (Del. Ch. 1999) ("To hold otherwise, in my opinion, will create perverse economic incentives for indemnitors, and potentially vitiate the value of indemnification agreements to indemnitees."). Indeed, Clean Harbors submits that happened here.

II. UPC'S EFFORTS TO DISTINGUISH THE PRESENT CASE FROM *PIKE CREEK* AND *DELLE DONNE* FAIL.

UPC attempts to escape the clear mandate of the *Pike Creek-Delle Donne* line of cases by arguing: (1) there is no express provision in the SPA providing for an award of fees to enforce the indemnification; (2) the award of fees under the indemnification in the SPA is limited to a particular kind of suit which does not include indemnification enforcement and, therefore, fees may not be awarded to enforce the indemnification; and (3) the SPA indemnification is not sufficiently broad to invoke the *Pike Creek-Delle Donne* rule. As to the first two arguments, exactly the same circumstances existed in *Pike Creek* and *Delle Donne.* As to the last argument, as the trial judge concluded, the SPA indemnification is every bit as broad as those in *Pike Creek* and *Delle Donne.*

A. *No Express Provision*

UPC's argument that there must be an explicit provision for fees to enforce indemnification in order for fees to be awarded in the present case (*see UPC Reply Br.* p. 26) is self-evident nonsense.[4] The reason that the *Pike Creek-Delle Donne*

[4] UPC also suggests that the fact the SPA provided for fees in circumstances other than to enforce indemnification indicates that fees were not intended for enforcement of indemnification. (*See UPC Reply Br.* pp. 22, 28). These circumstances were also the case in *Pike* and *Delle Donne* but this Court nonetheless held fees to enforce the indemnification provision were mandated. *Pike Creek*, 637 A.2d at 422; *Delle Donne*, 840 A.2d at 1249.

doctrine exists at all is because the indemnification agreements in those cases did not expressly provide for fees to enforce the indemnification. In the *Pike Creek* and *Della Donne* cases, as in the one now before the Court, there was no contract provision mandating the indemnitor pay fees incurred by indemnitee to enforce the indemnification. *See generally Pike Creek,* 637 A.2d at 422; *Delle Donne*, 840 A.2d at 1249. Indeed, in *Della Donne,* the indemnification was limited to claims for bodily injury. *Delle Donne*, 840 A.2d at 1249. This Court, in both of those cases, held that the right to fees and costs of enforcement emanated from the "hold harmless" language and the common sense conclusion that a party put to expensive litigation to secure its rights will not be "held harmless" absent an award of fees and costs. *Pike Creek*, 637 A.2d at 422; *Delle Donne,* 840 A.2d at 1249.[5] The same hold harmless language is in the SPA. (A.98).

B. *Particular Kind Of Suit*

Della Donne also takes the air out of the sails of UPC's argument that the SPA provided for fees only in a particular type of action (third party environmental claims) and, therefore, fees incurred to enforce the indemnification are not covered. (*UPC Reply Br.* pp. 23–29). As noted in Clean Harbors' Answering

[5] UPC also points to Section 9.1 of the SPA as authority for its position. (*UPC Reply Br.* p. 28). During argument on the fee motion, counsel for UPC acknowledged that this section, which related to fees incurred *performing* the contract, was not applicable to the fee application. (BR.38–40).

Brief on Appeal, the *Delle Donne* indemnification was limited to a particular type of action as well, bodily injury claims which, because of the corporate nature of the indemnitee and indemnitor, were necessarily third party claims. (*CH Ans. Br.* pp. 62–63). Notwithstanding that limitation, this Court determined that the hold harmless language of the indemnification required an award of fees and costs for enforcement. *Delle Donne*, 840 A.2d at 1249, 1256. The limitation to a particular type of claim that is to be indemnified, one that had to be a third party claim, did not preclude the fee award in *Delle Donne*. *Id.* The similar limitation in the present case does not preclude it here.

C. *Breadth Of Indemnification*

As the trial judge noted, the SPA indemnification contains "broad 'any and all' language similar to the clauses in *Pike Creek* and *Delle Donne*…." (*See* Ex. A, p. 17; *CH Ans. Br.* pp. 61–62). The SPA indemnification language is, indeed, broad, requiring UPC to "hold harmless [Clean Harbors] from, against and in respect of 80% of all Environmental Liabilities that may be imposed upon, asserted against or incurred by [Clean Harbors]… ."[6] (A.98). Environmental Liabilities include "any and all" costs, damages, settlements, and expenses associated with liabilities arising from Environmental Laws or governmental or other demands and

[6] Subject to the limitations that the claim be a third party claim arising from pre-closing events and law and incurred within 20 years. (A.98).

extended to personal injury, property damage and damage to natural resources. (A.64).

The introductory paragraph to Section 8.10 of the SPA, relied on by UPC, (*see UPC Reply Br.* pp. 26–27), which says UPC will have no liability for Environmental Liabilities except as set forth in Section 8.10, does not make the indemnification narrow because the scope of indemnification described in the text that follows the introduction is the exceedingly broad language described above. (A.98).[7] It also included liabilities not caused by UPC's actions or inactions. *Id.* By contrast, the *Della Donne* indemnification, which this Court found to be sufficiently broad to support an award of fees, was limited to bodily injury, and to only such injury caused by the indemnitor's conduct. *Delle Donne*, 840 A.2d at 1249.

Clean Harbors submits that *Pike Creek* and *Delle Donne* require nothing more than the "hold harmless" language to establish the breadth needed to award fees of enforcement, but in any event, the environmental indemnification in the SPA is exceedingly broad.

[7] The limitation of the introductory paragraph of Section 8.10 is procedural and acts to create an exclusive remedy for Environmental Liabilities. Any claim must be brought as an indemnification claim as opposed to a claim under some environmental statute, but the nature of the claim that can be asserted and the recovery available in a claim for indemnification extends to the broadly defined "Environmental Liabilities." (A.98; A.64).

III. UPC'S RESORT TO OBSOLETE CASE LAW, SIMPLISTIC GENERALITIES, AND OFF POINT AUTHORITY CANNOT UNDERMINE THE APPLICATION OF *PIKE CREEK* AND *DELLE DONNE* TO THE PRESENT CASE.

UPC tries to wiggle out from under the controlling authority by pointing to pre-*Pike Creek* cases, resorting to generalities trumped by the *Pike Creek-Della Donne* case line, or citing cases that are inapposite. Most of the authority UPC cites is from pre-1994.[8] If the cases were on point and contrary to *Pike Creek*, they lost any vitality. The age of the cases alone renders them without significance.

Generalities about the "American Rule" and the narrow construction given to indemnification agreements are of no moment when analyzing the right of an indemnitee to recover costs and fees to enforce an indemnification because this court has held "hold harmless" means that one gets fees to enforce. The "American Rule" has as a corollary that fees may be shifted when an agreement so provides. *See e.g., ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 558 (Del. 2014). This Court's *Pike Creek* and *Della Donne* decisions have determined that "hold harmless" language effects a contract based fee shifting. Those

[8] *See e.g., Peterson v. Reynold*, 1979 WL 149980 (Del. Com. Pl. Oct. 11, 1979); *Oliver B. Cannon & Son, Inc. v. Dorr-Oliver, Inc.*, 394 A.2d 1160 (Del. 1978); *Honaker v. Farmers Mut. Ins. Co.*, 313 A.2d 900 (Del. Super. 1973); *Great Am. Indemnity Co. v. State*, 88 A.2d 426 (Del. 1952); *Maurer v. Int'l Reinsurance Corp.*, 95 A.2d 827 (Del. 1953); *Howard, Needles, Tammen & Bergendoff v. Steers, Perini & Pomeroy*, 312 A.2d 621 (Del. 1973).

decisions also mean that a hold harmless promise, narrowly construed, includes the right to an award of fees incurred to enforce indemnification rights. When interpreting a contract, the specific controls over the general. *DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005). This Court's specific determination that "hold harmless" includes the right to recover fees to enforce an indemnification agreement takes precedence over general platitudes about the "American Rule" and narrow construction.

Moreover, many of the cases cited by UPC are simply off point. *Chase Manhattan Mortg. Corp. v. Advanta Corp.*, 2005 WL 2234608, at *22 (D. Del. Sept. 8, 2005), involved a case where the indemnified party sued the indemnitor for substantive violations of the contract, then sought to use the indemnification provision as a provision granting fees to a prevailing party. *Pike Creek* and *Delle Donne* articulate a rule that applies to cases such as this one, when indemnitees are forced to sue to recover for violating the indemnification provision itself.

In *DRR, LLC v. Sears, Roebuck and Co.*, 949 F. Supp. 1132, 1142–43 (D. Del. 1996), the party seeking to be indemnified, Sears, had no pre-litigation claim for indemnification. Rather, Sears asserted a counterclaim in which its sought indemnification solely because it argued its cost of defending the plaintiff's claims fell within the indemnification provision. *Id.* Sears was not seeking to be held harmless for having to incur fees to enforce its right to recover for failure to pay

recoverable amounts under an independent, pre-litigation right to indemnification based on the parties' agreement.

Townley v Dayon, 1996 WL 769345 (Del. Super. Dec. 23, 1996), cited by UPC, particularly underscores that the above cases are inapposite. In that case, relying on an indemnification provision intended to indemnify the landlord against third party claims, the landlord sought fees to defend a claim brought by a tenant who asserted a breach of lease. The court rejected the fee claim and distinguished the case from *Short v. Walker & Labarge*, 1995 WL 656864, at *2 (Del. Super. Oct. 3, 1995), where fees to enforce an indemnification were awarded using a hold harmless reasoning. The *Townley* court recognized that a suit to enforce indemnification is a different creature than a suit between indemnitee and indemnitor on substantive disputes over the contract that contains the indemnification. *Townley*, 1996 WL 769345, at *9.

UPC also relies on *Home Ins. Co. v. Am. Ins. Group*, 2003 WL 22683008, at *2 (Del. Super. Oct. 30, 2003), an opinion relied on by the trial court, to support its contention that fees and costs should not be awarded. That decision also does not preclude the award of fees to Clean Harbors.

The *Home* case arises from starkly different facts than those present in this case and in *Pike Creek* and *Della Donne.* In that case, plaintiff, Home Insurance Company, sued American Insurance, claiming a right to be reimbursed for defense

costs incurred from a prior suit. *Home Ins. Co.*, 2003 WL 22683008, at *1. Home Insurance advanced its claim under a duty to defend provision contained in an American Insurance policy. *Id.* at *4. Home Insurance was the insurer to Dover Mall, a mall operator in Dover, Delaware. Dover Mall, and its security consultant, Abacus, were sued by an employee who worked at the mall and who was abducted from the mall parking lot. *Id.* at *1. Under the service agreement between them, Abacus agreed to indemnify Dover Mall against claims for injury to persons or property caused by Abacus. *Id.* Abacus made Dover Mall an additional insured under its policy with defendant, American Insurance. *Id.* American Insurance refused to provide a defense for Dover Mall and to pay for the mall's share of the settlement amount paid to the underlying plaintiff; Home Insurance paid the cost of defense, then sued to recover those costs from American Insurance. *Id.* The dispute between Home Insurance and American Insurance was tried before a jury, and the jury found that Home Insurance's liability to the underlying plaintiff did not arise from any breach by Abacus, but also made finding that supported the contention that claims as alleged in the complaint arose out of the security arrangements between Abacus and Dover Mall, which American Insurance acknowledged triggered the duty to defend. *Id.* at *2. Home Insurance was awarded the fees it incurred defending from the time it received notice of the claim

but the court denied fees incurred to enforce the duty to defend obligation under the American Insurance policy. *Id.* at *5.

Home Ins. Co. v. Am. Ins. Group is a determination of rights under the duty to defend concept applicable to insurance policies and on that basis, alone, could be rejected as off point. A duty to defend provision is much narrower than a broad based "hold harmless" provision.[9] Home Insurance, however, argued for fees to enforce its duty to defend rights, citing to *Pike Creek.* *Id.* at *5. The court rejected the *Pike Creek* argument, noting that the *Pike Creek* indemnification contract provided for attorney's fees and the Abacus one did not. *Id.* The only fees provided for in the *Pike Creek* indemnification agreement were fees incurred in connection with defending indemnified claims, not for suits to enforce the indemnification. *Id.* The indemnification language in the Abacus contract quoted in the decision does not explicitly state that fees in defending an indemnified claim are covered by the indemnification. *Id.* at *1. If that is the distinction the *Home* court intended to make in declining fees, the case has no application here because the UPC indemnification, like the one in *Pike Creek* and *Delle Donne*, provides for fees incurred in defending an indemnified claim. (A.64). If the *Home* court meant to suggest the *Pike Creek* indemnification included language providing fees to

[9] The jury in *Home* had determined that Home Insurance was not entitled to indemnification for the underlying liability to the employee. *Id.* at *3. All that was in issue was the right to payment of the defense costs.

enforce the indemnification, the court simply misread *Pike Creek* as the indemnification in *Pike Creek* did not provide for fees in the event of an enforcement claim. In either case, *Home* does not stand for the proposition that Clean Harbors is not entitled to an award of fees.

IV. CLEAN HARBORS' RIGHT TO RECOVER FEES IS NOT DIMINISHED BY THE FACT IT DID NOT RECOVER ALL THAT IT CLAIMED.

UPC argues that the *Pike Creek-Delle Donne* authority should not apply because if UPC did not force Clean Harbors to litigate, it would have paid for profits that the trial court determined Clean Harbors was not entitled to receive.[10] UPC is essentially saying that *Pike Creek* and *Delle Donne* do not apply if there is any dispute as to the amount to be indemnified or if plaintiff does not recover all that it claimed.

Delle Donne dispenses with this argument. There, the parties had an agreement providing for reciprocal indemnification, such that each was entitled to be indemnified for loss caused by the conduct of the other. *Delle Donne*, 840 A.2d at 1249. The indemnification related to elevators manufactured and installed by Millar in a building owned by Delle Donne. *Id.* at 1247. Both were sued by a party injured in the elevator and both settled the underlying claim, and litigated between themselves, among other things, their relative responsibility for the injury.

[10] As a matter of fact, it is not correct to say that UPC would have paid the profit component had it not embarked on its scorched earth litigation approach. Affidavits filed in connection with the application for fees showed that UPC could have settled for less than the judgment it incurred. Settlement information was properly before the court because "rule 408 does not bar a court's consideration of settlement negotiations in its analysis of what constitutes a reasonable fee award in a particular case." *Lohman v. Duryea Borough*, 574 F.3d 163, 167 (3d Cir. 2009).

A jury determined that Millar was 35% responsible and Delle Donne was 65% responsible. *Id.* at 1249. A net judgment, accounting for the relative responsibility was awarded to Millar, along with 100% of the fees to enforce the indemnification. *Id.* at 1255–56.

Like Clean Harbors in this case, Millar lost a portion of its indemnification claim to account for its own fault. The fact that indemnification award was less than the indemnification claim did not there and should not here preclude the award of fees required by controlling authority.

Clean Harbors is entitled to recover its complete attorney's fees because it was substantially successful at trial. *See Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 178, 179–80 (Del. Ch. 2003). Deductions from the full amount of attorney's fees should only be made "for work related to claims **distinct** from the claim on which the party was successful." *Dreisbach v. Walton*, 2014 WL 5426868, at *5 (Del. Super. Oct. 27, 2014) (emphasis added); *see also West Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2009 WL 458779, at *9 (Del. Ch. Feb. 23, 2009) (party entitled to full attorney's fees where it "prevailed on the litigation's chief issue"). Here, Clean Harbors substantially succeeded at trial on its overarching claim. This Court has also recognized that the results obtained by a party does not need to be the primary factor considered by the court; in particular, courts should consider other factors when one party's obstinate posturing

prolonged the proceedings and made trial necessary. *See Mahani v. Edix Media Group, Inc.*, 935 A.2d 242, 246–48 (Del. 2007).

CONCLUSION

This case demonstrates the wisdom of the warning in *Chamison v. Healthtrust, Inc.*, 735 A. 2d 912, 927 n.57 (Del. Ch. 1999) that not awarding the cost of enforcing an indemnification to the successful indemnitee litigant "will create perverse economic incentives for indemnitors, and potentially vitiate the value of indemnification agreements to indemnitees." UPC threw every roadblock imaginable in the way of Clean Harbors receiving the indemnification to which it was entitled. It employed shifting excuses, many of which it asserted long enough to impose litigation costs, and then abandoned them. The judgment against UPC should be affirmed and the case should be remanded to the trial court with direction to award the reasonable attorneys' fees and costs incurred.

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