EFiled: Jun 20 2018 07:55PM EDT
Filing ID 62159940
Case Number 35,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANT'S REPLY BRIEF ON APPEAL AND CROSS-APPELLEE'S ANSWERING BRIEF ON CROSS-APPEAL

Dated: June 20, 2018

OF COUNSEL:

Ann L. Al-Bahish
Lauren K. Valastro
KELLEY DRYE &
WARREN LLP
515 Post Oak Blvd, Suite 900
Houston, TX 77027
(713) 355-5024
aal-bahish@kelleydrye.com
lvalastro@kelleydrye.com

Norton A. Colvin, Jr.
COLVIN, SAENZ &
RODRIGUEZ, LLP
1201 East Van Buren
PO Box 2155
Brownsville, TX 78522
(956) 295-3070

BAYARD, P.A.

Stephen B. Brauerman (#4952)
Sara E. Bussiere (#5725)
600 N. King, Suite 400
Wilmington, DE 19801
(302) 655-5000

COOCH AND TAYLOR, PA.

James W. Semple (#0396)
The Brandywine Building, 10th Floor
Wilmington, DE 19801
(302) 984-3842
(302) 984-3939 (Fax)
jsemple@coochtaylor.com

Attorneys for Defendant-Below/Appellant/Cross-Appellee Union Pacific Corporation

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SUMMARY OF ARGUMENT IN RESPONSE TO CLEAN HARBORS' CROSS-APPEAL[1]

1. DENIED. The trial court correctly determined that CH was not entitled to an award of attorneys' fees incurred in litigation construing the SPA.

[1] Capitalized terms not defined herein shall have the meanings ascribed to them in UPC's Opening Brief on Appeal, cited herein as "OB []." (Trans. ID # 61960413.) Citations to Appellee's Answering Brief on Appeal and Cross-Appellant's Opening Brief on Cross-Appeal ("Answering Brief") appear as "AB []." (Trans. ID # 62053547.)

REPLY ARGUMENTS IN SUPPORT OF UNION PACIFIC CORPORATION'S APPEAL

I. THE TRIAL COURT ERRED IN FINDING AS A MATTER OF LAW THAT CH'S CLEANUP WAS "ATTRIBUTABLE TO A THIRD PARTY CLAIM."

A. A fact issue existed regarding the Third Party Claim question that precluded summary judgment in favor of CH.

UPC has conclusively demonstrated that CH's cleanup was not attributable to a Third Party Claim and, therefore, the trial court should have entered summary judgment in UPC's favor. Assuming *arguendo* that summary judgment in favor of UPC was inappropriate, the trial court committed reversible error in *sua sponte* granting summary judgment in CH's favor. The trial court erred because it misapplied the legal standard by failing to construe all fact issues in UPC's favor, and it ignored key fact issues that needed to be resolved before summary judgment could be granted in CH's favor. (Ex. A, at 7-12.)[2] *Brown v. United Water Del., Inc.*, 3 A.3d 272, 275 (Del. 2010). The key remaining fact issues that should have been construed in UPC's favor were:

- the impact of KDHE and EPA's involvement at the Site;
- the meaning of KDHE and EPA's correspondence with CH;

[2] Citations to exhibits are to the exhibits appended to UPC's Opening Brief on Appeal. "A" citations are to UPC's Appendix filed in support of its opening brief. "AR" citations are to the supplemental appendix filed in conjunction with this Reply.

- what action, if any, the EPA letter attached to Claim 1 (the "EPA Letter")[3] and KDHE letter attached to Claim 2 (the "KDHE Letter")[4] required of CH; and
- whether the Northern Industrial Corridor Corrective Action Decision ("NIC CAD") was legally binding on CH, and, if so, what, if any, effect the NIC CAD had on CH.
- what caused CH to undertake its extensive excavation.

(Ex. A, at 3-6, 8-9.) Instead of construing these fact issues in the light most favorable to UPC, the trial court erroneously construed them in CH's favor. (Ex. A, at 3-6, 8-9.) This error requires reversal.

The Answering Brief concedes some of the critical fact issues that were unanswered at the summary judgment phase until the trial court usurped the jury's province and determined them in CH's favor. For example, CH now admits that the cleanup and massive excavation it performed "was not mandated" by any regulatory agency. (AB, at 23-24; *see also* A323, A475-76, A477-79; A481.) Had CH made these concessions to the trial court, the court below could not have properly granted summary judgment for CH. The trial court neglected to construe

[3] (A260-261.)

[4] (A295-304.)

this fact issue—among others—in UPC's favor when entering summary judgment on this issue.

Although CH wrongly maintains that it had to comply with Tier 2 values, it also admits that the method of doing so was not dictated. (AB, at 23-24.) These conflicting admissions raise a fact issue concerning whether the actual cleanup CH performed, and for which CH sued UPC, was attributable to a Third Party Claim. UPC contends CH's cleanup was attributable to the expiration of the Indemnity, not a Third Party Claim, CH expected to profit from an excavation that could be performed quickly, but expensively, before the expiration of the Indemnity. (*See generally* OB.)

B. CH muddles the distinction between Claims 1 and 2 for Site investigation and the voluntary remediation.

CH admits that neither EPA nor KDHE mandated the cleanup it performed. (AB, at 23-24.) To circumvent this fact, CH asserts that the investigation stemming from the EPA and KDHE Letters, and the cleanup CH voluntarily performed as a result thereof, are "part of a unitary process" and, therefore, the cleanup was "attributable" to a Third Party Claim. (AB, at 21.) The EPA and KDHE Letters, and CH's own conduct, undermine this argument.

As CH admits, no regulatory agency required the excavation. (*See* AB, at 23-24.) Rather, the EPA and KDHE Letters required CH to *investigate potential* contamination. (A258-61; A292-304.) CH asserts that "the EPA Demand and the

PRP Demand kicked off processes that *would result* in active cleanup measures." (AB, at 21) (emphasis added). That a regulatory agency *may* require CH to remediate at some unidentified time in the future does not create a causal connection between the Claims and the voluntary cleanup. CH's predecessor's own contemporaneous statements undermine any such "unitary process." CH's predecessor informed UPC that the EPA Letter "*may*, or will require remediation. . . ." (AB, at 21) (emphasis added). "[M]ay, or will" is not a clear statement that something will actually happen. But, putting aside the plain meaning of "may," CH's predecessor did not consider the EPA or KDHE Letters to constitute requirements that cleanup work be done at that time or it would simply have so stated. And, even if it had, the concept that a regulatory agency *would* in the future require something unequivocally means that it was not requiring that action *at that point in time*.[5] (*See* A99 ("Union Pacific shall not have any liability under this Section 8.10(a) until the aggregate of all Environmental Liabilities covered under this Section 8.10(a) exceeds $2,000,000 and then only to the extent of 80% of such excess and only *with respect to amounts spent within 20 years* after the HWMA Closing Date.") (emphasis added).) Further, this admission

[5] The terms of the SPA support UPC's interpretation, because the Indemnity limits recovery to funds actually spent within the twenty-year indemnity period. (A99.) Even if EPA were to have required CH to do exactly what it did the day after the expiration of the Indemnity and then CH were to have performed that work, the work would not have been indemnifiable under the SPA. (*Id.*)

underscores the fact that at no point in time during the twenty-year indemnification period did the regulators require CH to perform the excavation. Consistent with the terms of the SPA, UPC paid for the investigation mandated by KDHE and EPA. The SPA did not require UPC to pay for voluntary work incurred by CH. (A98-99.)

Second, CH's argument that the EPA Letter led CH "to discover contamination, so it caused [CH] to ultimately clean it up" is flawed because it necessarily ignores the fact that the parties were aware of contamination at the Site in Wichita, Kansas when they entered into the SPA. (AB, at 6; A61; A11.) While the parties did not know the extent or scope of contamination at the time they entered into the SPA, they knew environmental issues existed at the Site. (*Id.*) Moreover, even if the investigation revealed unknown environmental issues, the investigation of the environmental issues was required; the excavation was, by CH's own admission, not required. As such, the investigation and the remediation cannot possibly be one "unitary" process—as the regulators' disparate treatment of investigation and remediation activities demonstrates.[6] (A110-118.)

[6] CH incorrectly asserts that "cleanup activity required by the EPA Demand and the PRP Demand are Third Party Claims" but confuses the issue (and fails to cite to any evidence in the record that letters requiring investigation also required CH's admittedly voluntary cleanup). (AB, at 20.) The so-called "cleanup activity" CH refers to was actually investigative activity because no cleanup activity was actually required by EPA or KDHE in either of the Letters.

C. Voluntary remediation is not "attributable to a Third Party Claim."

Most of the Answering Brief addresses how the voluntary cleanup did not deprive the purported Third Party Claim of its "Third Party Status." CH misses the point. UPC argues that the voluntary nature of the remediation undercuts CH's argument that the cleanup was *attributable* to a Third Party Claim. (OB, at 14-15.)

Regardless, CH argues that the excavation was attributable to a Third Party Claim because the EPA's blessing for its proposed cleanup plan—*after* CH *volunteered* to do it—transformed the cleanup plan into a mandate requiring CH's compliance. (AB, at 16-17 ("Upon approval by EPA of an IRM work plan, Clean Harbors became required to perform the work described in it."); AB, at 24 ("Moreover, responding to either the PRP Demand or the EPA Demand was hardly 'voluntary'.")[7].) CH's argument is unsupported by the terms of the SPA and Delaware law. (A97, at § 8.7 ("The Indemnified Party shall have the obligation to reasonably mitigate the losses to the Indemnifying Party from any Claim."); *Brzoska v. Olson*, 668 A.2d 1355, 1367 (Del. 1995) ("A party has a general duty to mitigate damages if it is feasible to do so."). CH fails to point to any mandate by any regulatory agency at any time requiring it to perform the cleanup work it did—

[7] This argument is telling. UPC agrees that responding to the EPA and KDHE Letters, which mandated an *investigation*, was warranted, and UPC paid for part of that investigation and pursuant to the SPA's terms. (A117.) UPC disputes, however, that the voluntary remediation was required.

a fact it now concedes. More importantly, CH did not demonstrate that it was entitled to summary judgment as a matter of law on that issue.

II. THE TRIAL COURT ERRED IN CHARGING THE JURY IN A PREJUDICIAL AND CONFUSING MANNER.

A. Verdict Form Question No. 3 is Confusing, Prejudicial, and Constitutes an Improper Comment on the Evidence.

Question 3 misstates the Indemnity's terms and constituted an unfair comment on the evidence, which confused the jury and prejudiced UPC. Under the terms of the SPA, CH is only entitled to expenses *caused by* a Third Party Claim. (A98-99.) Voluntarily-incurred expenses are not recoverable. (*Id.*) At trial, UPC challenged CH's voluntary, chosen method of the cleanup, as well as the reasonableness of the costs CH incurred. The verdict form, however, disregarded UPC's challenge to the method of the cleanup and instead simply asks:

"What was the total reasonable cost of the environmental clean-up?" (A514.) Question 3 unfairly suggests that CH's chosen method was appropriate, a fact that the jury—not the trial court—should have decided. *Wonnum v. State*, 942 A.2d 569, 575 (Del. 2007) ("[U]nder the Delaware Constitution, juries, not judges, are fact finders in Delaware jury trials."). As discussed more fully in the Opening Brief, Question 3 should have remained consistent with Question 4 and the pattern verdict question for contractual damages, and it should have asked for the amount of contractual damages CH incurred. (OB, at 22-23.)

CH argues Question 3 was not confusing or prejudicial because the jury understood that determining the reasonable cost "necessarily included assessing whether any of the work was unnecessary at all." (AB 32.) The text of Question 3

belies CH's argument, as it only asks for the "reasonable cost of the environmental clean-up." (A514.) Question 3 does not address whether, as UPC challenged, the *method* of the environmental cleanup itself was reasonable. That Question 4 clearly asks for the amount of contractual damages to which UPC is entitled (consistent with the pattern jury instructions) compounds this problem.[8] *Duphily v. Delaware Elec. Co-op., Inc.*, 662 A.2d 821, 834 (Del. 1995) ("It is fundamental that the jury have a basic understanding of the law which it is asked to apply in order to intelligently perform its duty in reaching a verdict. Our judicial system is premised upon protecting the integrity of the trial process."); *Probst v. State*, 547 A.2d 114, 119-20 (Del. 1988) ("On appeal, our task is to determine in light of the allegations made whether the potential for juror confusion existed.").

CH also argues that the jury instructions and evidence presented at trial made it clear that the jury should consider the cleanup method in awarding damages. (AB, at 32.) CH specifically argues that Instruction 8 and the trial

[8] CH addresses this inconsistency by stating that because CH was only entitled to 80% of the reasonable costs incurred as a result of a Third Party Claim, the confusion caused by Question 3 is justified to avoid the jury from having to complete arithmetic. (AB, at 35.) Delaware law does not support CH's argument. *R.T. Vanderbilt Co. v. Galliher*, 98 A.3d 122, 125 (Del. 2014) (noting that a party has "the *unqualified right* to have the jury instructed on a correct statement of the substance of the law") (emphasis added). CH should not obtain an advantage due to a contractual limitation in the Indemnity. An improper instruction that caused confusion and prejudiced UPC was not justified here, and the SPA provides no basis to find otherwise.

court's reasonableness instruction[9] clarify any confusion from Question 3. None of these instructions cure the confusion. That CH has a duty to mitigate does not inform the jury to consider whether CH's unilaterally-chosen method was reasonable. (A502.) Likewise, the reasonableness instruction defines reasonable; it does not instruct the jury to consider whether a particular course of action was reasonable. (A503.)

That UPC presented evidence that CH's chosen method was not reasonable does not cure the deficiency. *Bullock v. State*, 775 A.2d 1043, 1047 (Del. 2001) ("The primary purpose of jury instructions is to define with substantial particularity the factual issues and clearly to instruct the jury as to the principles of law [that] they are to apply in deciding the factual issues presented in the case before them."). The general instruction that nothing said by the judge should be regarded as expressing an opinion in favor of either party does not cure the problem either, as it fails to address confusion within the judge's instructions themselves. *Probst*, 547 A.2d, at 119-20 ("On appeal, our task is to determine in light of the allegations made whether the potential for juror confusion existed."). Question 3 unfairly

[9] CH cites to B686-87 in support of this argument. B686-87 is a transcript excerpt from oral argument on the parties' pending motions presented during trial. Therefore, the precise portion of the record to which CH refers is unclear. For purposes of its response, UPC assumes that CH intended to refer to the "duty to mitigate" and "reasonableness" instructions. (A502-03.)

posits a response to the reasonableness of the cost, not the method, which was confusing to the jury and prejudiced UPC. The Court should, therefore, reverse.

B. Instruction No. 4 erroneously limited expert and fact witness testimony.

As described in the Opening Brief, Instruction 4 improperly limited expert evidence and inappropriately precluded factual evidence. CH argues the trial court's rulings were correct because it precluded speculative evidence such as "alternatives [that] would have been approved by government regulators, something Uhland acknowledged she did not know." (AB, at 36.) But even if that were the case, the trial court's ruling was too broad and, as described below and in the Opening Brief, unfairly handcuffed UPC in presenting its defenses. The trial court should have permitted UPC to present evidence of cleanup alternatives accepted by the government agencies involved in the Site investigation. This Court should reverse.

C. *De novo* review applies to whether the trial court should have provided a material breach or substantial performance instruction.

Jury instructions are subject to *de novo* review. *Sammons v. Doctors for Emergency Servs., P.A.*, 913 A.2d 519, 540 (Del. 2006). CH inappropriately argues that the Court should apply an abuse of discretion standard. CH is wrong. CH relies on *Coles v. Spence*, 202 A.2d 569 (Del. 1964) in support of this proposition, but *Coles*' holding only applies to circumstances in which the trial

court refuses to provide an instruction because the requesting party failed to produce "sufficient evidence to warrant the requested instruction[s.]" *Id.*, at 570. Likewise, in *Carter v. State*, this Court applied the abuse of discretion standard because the defendant who objected to the trial court's failure to provide the instruction never requested it. 873 A.2d 1086, 1088 (Del. 2005). Here, UPC requested the material breach/substantial performance instructions, and the trial court improperly denied its request. (A634, A567; OB, at 28-31.) Accordingly the *de novo* standard applies. For the reasons explained in the Opening Brief, the Court should reverse the trial court's refusal to provide these requested instructions.

D. UPC did not waive its objections to the jury charge.

CH incorrectly claims that UPC waived its objections to the jury charge because it did not specifically object to the trial court's ability to calculate damages and by requesting that the trial court not compound its error by further confusing the verdict form when answering questions from the jury. (AB, at 46, 48.) UPC properly preserved all objections to the verdict form and cannot waive those preserved objections by asking the trial court to refrain from further improperly instructing the jury.

CH claims "UPC waived the argument that the trial court cannot calculate damages from the answer to Question 3 by failing to specifically object on that

ground at trial." (AB, at 46.) The trial record demonstrates otherwise. UPC specifically objected to the verdict form:

> I wanted to include our objection to the verdict form. Our objection to the verdict form is as follows: One, we believe there should have been a separate instruction on whether Clean Harbors substantially performed the contract. We don't—we think it is error to include one instruction on breach that subsumes that. **Second, we object to the—to having the jury state the total cost and having the Court apply math. We think that the jury should identify with some level of particularity how [it is] calculating its actual damages number.** So we object to the jury form on that basis, and I'm sorry, to the extent the Court did not include questions that we proposed on our jury form.

(A491-92) (emphasis added). Consistent with the foregoing objection, UPC's proposed verdict form included the following questions regarding damages:

> What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Clean Harbors for its damages, if any, that resulted from such breach of contract?

(A512.) These record citations are notably missing from CH's argument. (*See generally* AB, at 46-48.) CH also fails to explain *how* the foregoing objections fail to "distinctly" state UPC's position. *See* DEL. SUPER. CT. CIV. R. 51 ("No party may assign as error the giving or the failure to give an instruction unless a party objects thereto before or at the time set by the Court immediately after the jury retires to consider its verdict, stating distinctly the matter to which the party objects

and the grounds of the party's objection.");[10] *see also Lisowski v. Bayhealth Med. Cen. Inc*., 2016 WL 6995365 (Del. Super. Nov. 30, 2016) (granting plaintiff's motion for new trial over defendant's objection that plaintiff never argued instruction confusing or misleading at trial and finding that "both the Court and Bayhealth were on sufficient notice that Plaintiffs challenged the propriety of the Proximate Cause instruction to ensure that the jury was properly charged on a fundamental issue of the case"). In addition, at the hearing on UPC's motion for new trial, even the trial court acknowledged UPC's objections and position as to the verdict form were clear. (AR1.) The Court should reject CH's waiver argument as unsupported by the both the record and the law.

CH also claims UPC waived its objection to the verdict form because in response to juror questions, UPC told the trial court it should tell the jury to follow its instructions, rather than compounding the prejudice caused to UPC and providing more incorrect or new confusing instructions. (AR2.) CH ignores the exception to Rule 51:

[10] Regardless of whether UPC preserved its objections (which it did), as noted in the Opening Brief, UPC maintains the "unqualified right to have the jury instructed with a correct statement of the substance of the law." *Culver v. Bennett*, 588 A.2d 1094, 1096 (Del. 1991); *see also Riggins v. Mauriello*, 603 A.2d 827, 830 (Del. 1992) ("While some inaccuracies and inaptness in statements are to be expected in any [jury] charge, this court will reverse if the alleged deficiency in the jury instructions undermined the jury's ability to intelligently perform its duty in returning a verdict." (internal citations omitted).).

> An exception to the requirement of Rule 51 and the doctrine of invited error applies **"if the party's position previously has been made clear to the trial judge and it is plain that a further objection would be unavailing."** Wright & Miller, § 2553, at 411; *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988). DuPont's motions for summary judgment and directed verdict did not rest on evidentiary insufficiency. Rather, DuPont argued that the governing legal standard in Delaware simply did not allow a cause of action in these circumstances. Since DuPont's position with respect to the law did not prevail in the trial court, DuPont was left to craft proposed instructions which stated what it believed the trial judge thought the law to be. DuPont was presented with a new and evolving legal standard for the application of the duty of good faith and fair dealing to at-will employment. *See Praprotnik*, 485 U.S., at 119-22. Accordingly, DuPont has preserved the issue for appeal purposes.

E.I. DuPont de Nemours & Co. v. Pressman, 679 A.2d 436, 439 n.4 (Del. 1996) (some citations omitted). UPC made its position with respect to the verdict form clear, and further objection would have been futile. (A491-92; A512.)

UPC's properly preserved error is made clearer when viewed in the context of how some of those objections were reiterated in discussing with the trial court the jury's first note. The first juror note read, "If both parties breached the contract, is it all dismissed? (Null and void!!!)" (A677.) The trial court in response stated, ". . . the easiest way for me to answer this question would be to give them an example, but I don't want to suggest any numbers to them. So that's, I want to be very careful with this." (*Id.*) UPC opposed the trial court giving an example, and reiterated: "Our view, Your Honor, is that you should reinstruct them on the verdict sheet that was provided to them which sets forth the process

that the trial court's instructed. **If we deviate from that now, if there is an error in the verdict sheet it may be compounded**." (AR2) (emphasis added). That UPC advocated for less confusion—*in light of the trial court's erroneous prior rulings on the verdict form already submitted to the jury*—falls squarely within the Rule 51 exception. DEL. SUPER. CT. CIV. R. 51. CH, again, conveniently fails to provide any analysis on the record, nor does it acknowledge the exception cited in *Pressman*.[11] Therefore, UPC's arguments are not waived.

For the reasons explained in the Opening Brief, the Verdict Form failed to account for the damages owed by UPC to CH. CH itself concedes that no one knows how the jury reached its conclusion because there was no basis for the jury to show its work on the Verdict Form. (AB, at 39 n.24 ("The jury could have come to 'zero' damages for a breach in multiple ways.").) The Verdict Form serves as reversible error and the Court should reverse.

E. The instructions and Verdict Form as a whole were incorrect legal statements.

For the reasons set forth in the Opening Brief, the trial court's jury instructions and the Verdict Form submitted to the jury were incorrect legal statements warranting reversal.

[11] UPC cited this exception when CH made this argument in response to the motion for a new trial. It is telling that CH has declined to address it here. (AR3-6.)

III. THE COURT ERRED IN EXCLUDING RELEVANT EVIDENCE.

In its Opening Brief, UPC established that the trial court erred in excluding evidence establishing customary environmental practices and standards related to environmental cleanups. Specifically, UPC demonstrated that the trial court should have permitted UPC to admit evidence establishing customary practices and standards and fact and expert testimony on alternative cleanup methods relevant to reasonableness. (OB, at 37-42.)

CH opposes this argument on the grounds that such evidence is speculative and that the evidentiary rulings were within the trial court's broad discretion. (AB, at 52-56.) But CH benefited from inconsistent rulings that had a disparate impact on UPC. (*See, e.g.*, OB, at 40 (explaining how the trial court permitted vigorous cross-examination of UPC expert Uhland while limiting her response that triggered curative instruction).) CH again takes advantage of this discrepancy in its Answering Brief.

CH asserts that Christopher Carey should not have been allowed to testify at trial and that his testimony was properly restricted, but CH nevertheless relies on both purported statements by Mr. Carey and a document authored by Mr. Carey to justify CH's voluntary cleanup. CH claims "In April 2013, Clean Harbors, KDHE and EPA conducted a conference call in which Christopher Carey of KDHE stated that KDHE would require Clean Harbors to address the groundwater

contamination by satisfying the Tier 2 soil to groundwater value." (AB, at 14.) It further asserts that pursuant to the NIC CAD, a document authored by Mr. Carey, "Clean Harbors and other property owners within the NIC boundaries had to abate the source of groundwater contamination at their respective facilities so that the groundwater contamination would decline to concentrations that complied with KDHE's published Tier 2 levels for groundwater." (AB, at 12.) CH's reliance on Mr. Carey and the NIC CAD document he authored affirmed the need for Mr. Carey's unfettered testimony at trial. The trial court erred by allowing CH to speak for Mr. Carey while preventing Mr. Carey from testifying to the facts of which he had firsthand knowledge.

IV. THE TRIAL COURT PROPERLY DENIED CLEAN HARBORS' REQUEST FOR FEES AND COSTS.

A. Question Presented.

Did the court below correctly deny CH's motion for attorneys' fees and costs?

B. Scope of Review.

Questions of contract interpretation are reviewed *de novo*. *In re Viking Pump Inc.*, 148 A.3d 633, 644 (Del. 2016).

C. Merits of Argument.

Despite lacking any controlling case law or statute in support of its position, and in direct contravention of the explicit terms of the SPA, CH asserts that, because UPC exercised its right to make CH prove it was entitled to indemnification, UPC should be punitively assessed CH's attorneys' fees. (AB, at 60.) CH conveniently ignores the fact that if UPC had not made CH prove that to which it believes it is entitled, CH would have made off with a substantial *profit* from the Indemnity—which the SPA and trial court's summary judgment order expressly prohibited. (A453, A455, A724-26, A97; Ex. A, at 10-13.)

Under Delaware law, indemnity provisions are narrowly construed and are not to be read to include obligations beyond their express terms. *Seither v. Balbec Corp.*, 1995 WL 465187, at *7 (Del. Super. July 27, 1995), *aff'd sub nom. Seither v. Charles F. Beatty, Inc.*, 676 A.2d 906 (Del. 1996); *see also Howard, Needles,*

Tammen & Bergendoff v. Steers, Perini & Pomeroy, 312 A.2d 621, 624, 622 (Del. 1973) (noting the Delaware "rule of strict construction" of indemnity provisions and requiring that an indemnity obligation must be "sufficiently clear on its face"). As such, indemnities only serve to allocate liability for attorneys' fees if their language is so broad as to provide not only for recovery of fees incurred in defending third-party claims, but also for fees incurred by the indemnitee in litigation brought to construe and enforce the indemnity provision. As the trial court explained in its opinion denying CH attorneys' fees, "the award of fees in the presence of a hold harmless clause is not automatic. Rather, the contract must have a broad indemnity clause that includes attorneys' fees." (Ex. C, at 14.)

There is no Delaware precedent providing that—despite indemnity terms that do not allow for the recovery of such attorneys' fees—attorneys' fees are recoverable in actions to enforce an indemnity. As a result, CH has no legal basis to assert any entitlement to the recovery of the attorneys' fees it allegedly incurred in this litigation. The Court should affirm.

1. Attorneys' fees are not recoverable unless clearly provided by statute or contract.

Delaware follows the American rule on fees and costs. Generally, each litigant is responsible for his or her own costs and attorneys' fees. *Maurer v. Int'l Reinsurance Corp.*, 95 A.2d 827, 830 (Del. 1953). As the trial court correctly stated in its order, "Delaware courts do not award attorneys' fees unless

specifically provided for by contract or statute." (Ex. C, at 14; *see also Honaker v. Farmers Mut. Ins. Co.*, 313 A.2d 900, 904 (Del. Super. 1973); *Great Am. Indemnity Co. v. State*, 88 A.2d 426, 567 (Del. 1952).) Since neither the contract here nor applicable statues provided for attorneys' fees, the trial court properly denied CH's motion.

2. Indemnity provisions are narrowly construed and must expressly state the terms of indemnity.

Only those losses which reasonably appear to have been intended for recovery under an indemnity are compensable. *Oliver B. Cannon & Son, Inc. v. Dorr-Oliver, Inc.*, 394 A.2d 1160, 1165 (Del. 1978). When the parties to a contract have entered into a written agreement expressly setting forth one party's indemnity liability, there is no room for any enlargement of that obligation by implication. *Howard*, 312 A.2d, at 624. As such, "indemnity contracts tend to be narrowly construed." *Seither*, 1995 WL 465187, at *7.

3. Indemnity provisions for attorneys' fees generally apply to third party claims—not claims between the indemnitee and indemnitor.

As a general rule, an indemnitee is entitled to recover attorneys' fees incurred in defending *against* an indemnifiable claim. *E. Mem'l Consultants, Inc. v. Gracelawn Mem'l Park, Inc.*, 364 A.2d 821, 825 (Del. 1976). However, indemnification provisions are generally not applicable to *inter se* claims—*claims between contracting parties*; rather, they are intended to protect one contracting

party against liability from third party claims when the other contracting party is at fault. *DRR, L.L.C. v. Sears, Roebuck & Co.*, 949 F. Supp. 1132, 1142 (D. Del. 1996) (applying Delaware law).

Accordingly, where the indemnitee sues the indemnitor, or *vice versa*, indemnification for attorneys' fees falls outside the scope of the indemnification clause—despite language allowing recovery of attorneys' fees—because the fees are not incurred in the context of a third party claim. *Cannon*, 394 A.2d at 1165. For example, in *Chase Manhattan Mortg. Corp. v. Advanta Corp.*, where the indemnity provision was intended to protect against third party claims, attorneys' fees were not recoverable by the indemnitee from the indemnitor, even though the indemnity included "reasonable expenses for attorneys." 2005 WL 2234608, at *22 (D. Del. Sept. 8, 2005) (applying Delaware law). In other words, in order for a court to award fees in the context of claims between the indemnitee and indemnitor, the indemnity provision must not only provide for the recovery of attorneys' fees, it must also be broad enough to encompass the recovery of fees in a claim between the parties to the agreement.

4. This Court has only awarded attorneys' fees incurred enforcing an indemnity where the indemnity's terms are "very broad in scope."

As the trial court correctly recognized, this Court has held on two occasions that in the context of sufficiently "broad indemnification clauses explicitly

including fees," an indemnitee may recover its costs and attorneys' fees incurred in enforcing a right to indemnification. (Ex. C, at 15.) That is not the case here.

In *Pike Creek Chiropractic v. Robinson*, the indemnification clause was described as "very broad in scope" and provided that the indemnitee would be held harmless against all claims and expenses, including attorneys' fees, without limitation. 637 A.2d 418, 419-20, 422-23 (Del. 1994). The Court construed the "very broad" indemnity provision to allow recovery of attorneys' fees incurred enforcing the indemnity agreement. *Id.*, at 423.

In another case in which this Court construed the applicable indemnification provision to be "very broad in scope," attorneys' fees incurred in enforcing the indemnity were recoverable. *Delle Donne & Assocs., LLP v. Millar Elevator Service Co.*, 840 A.2d 1244, 1256 (Del. 2004) (citing *Pike Creek*). Neither *Pike Creek* nor *Delle Donne* purport to announce a bright-line rule that mandates recovery of attorneys' fees in litigation over the interpretation and enforcement of every indemnity agreement, regardless of the terms negotiated between the parties. Rather, no Delaware case whatsoever mandates an award of attorneys' fees in litigation over the terms of an indemnity that does not allow for the recovery of attorneys' fees.

As the trial court succinctly stated, "UPC agreed to hold Clean Harbors harmless only for suits arising in specific circumstances brought by third parties,

not for an enforcement action between the two contracting parties. *Pike Creek* and *Delle Donne* are inapplicable to an indemnification provision with such limiting language." (Ex. C, at 21-22.)

5. Unless the indemnity is for third party claims or is so broad as to allow recovery of fees in an action to enforce, fees are not recoverable.

No basis in Delaware law for recovery of attorneys' fees exists unless the indemnity provision applies to third party claims or the indemnity's terms are so expansive as to allow recovery of attorneys' fees incurred enforcing its terms. As the trial court indicated, "the SPA contains an agreement, like that in *Home Insurance [Co. v. American Ins. Group*], that attorneys' fees may only be recovered in a particular type of action, which does not include the one at issue here." (Ex. C, at 18.) In *Home Insurance*, the superior court found that, because the indemnity was for third party claims and there were no indemnity terms allowing recovery of fees "in the event of a suit to enforce the defense obligation," the indemnitee could not recover its fees. 2003 WL 22683008, at *5 (Del. Super. Oct. 30, 2003) (specifically distinguishing *Pike Creek*); (Ex. C, at 16.)

Likewise, in *Townley v. Dayon*, the Superior Court appropriately dismissed the indemnitee's claim for attorneys' fees because the indemnity did not clearly provide reimbursement of attorneys' fees incurred pursuing enforcement of indemnification agreement. 1996 WL 769345, at *9 (Del. Super. Dec. 23, 1996).

Finally, in *Peterson v. Reynold*, the lower court awarded fees in defense of a third party claim but found no basis to award fees incurred enforcing an indemnity agreement. 1979 WL 149980, at *2 (Del. Comm. Pl. 1979).

6. The SPA does not contemplate recovery of attorneys' fees incurred in litigation interpreting and enforcing its terms.

Unlike the indemnity provisions in *Pike Creek* and *Delle Donne*, which this Court described as "very broad in scope," the Indemnity in the SPA is narrowly tailored. Instead of providing that UPC shall indemnify and hold harmless CH, the Indemnity is constructed to limit UPC's liabilities to certain defined and finite circumstances and situations. The SPA provides:

> UPC "shall have no liability or obligation with respect to Environmental Liabilities . . . and no obligation to indemnify with respect to such Environmental Liabilities ***except as specifically set forth in this Section 8.10***."

(*See* A98-99, at § 8.10.) (emphasis added). According to the negotiated terms of Section 8.10, UPC is not obligated to indemnify CH except and unless it is "specifically set forth in Section 8.10." (*Id.*) Section 8.10 says nothing about attorneys' fees.

Under the SPA, attorneys' fees could only be recovered if the definition of "Environmental Liabilities" specifically allows the recovery of attorneys' fees incurred enforcing the terms of the Indemnity. But, Section 3.23.3(b)'s definition

of "Environmental Liabilities" only mentions attorneys' fees once, expressly dictating when they can be recovered:

> "Environmental Liabilities" means . . . "court costs and attorneys' fees incurred or imposed (i) pursuant to any agreement, order, notice of responsibility, directive (including requirements embodied in Environmental Laws), injunction, judgment or similar documents (including settlements) attributable to, connected with or arising out of or under Environmental Laws or (ii) pursuant to any claim by a governmental authority or other entity or person for personal injury, property damage, damage to natural resources, remediation or response costs arising out of, connected with or attributable to, a Hazardous Substance."

(*See* A64, at § 3.23.3(b).) The SPA's definition of "Environmental Liabilities" clearly identifies the circumstances in which attorneys' fees can be recovered, and, as correctly noted by the trial court, it simply does not include the recovery of attorneys' fees incurred in litigation over the terms of the Indemnity. (Ex. C, at 19.) ("The Section 3.23.3(b) definition of Environmental Liabilities demonstrates that UPC only agreed to indemnify Clean Harbors against claims brought by third parties—not claims between the two contracting parties.") The Indemnity imposes no liability whatsoever on UPC "***except as specifically set forth***," and the parties chose **not** to provide for the recovery of attorneys' fees incurred in litigation over the Indemnity provisions. The Superior Court's determination is consistent with the plain language of the contract: "the SPA is providing indemnification for actions brought against Clean Harbors, not actions brought by Clean Harbors." (Ex. C, at 19.)

Moreover, Section 8.10(a) further limits UPC's liabilities to "amounts spent within 20 years after the HWMA Closing Date," which clearly does not include attorneys' fees incurred in this case. (A98-99.) In addition, the trial court rightly gave weight to Section 9.1, although Section 9.1 was only one of the trial court's considerations in determining that an award of attorneys' fees was not permitted under Delaware law or the SPA. (Ex. C, at 17.) Section 9.1 of the SPA provides that each party shall pay its own costs and expenses, "including the fees and expenses of its own counsel" in the "performance" of the SPA, except as otherwise expressly provided in the Agreement. (A100, at § 9.1).

The only other reference to attorneys' fees in the SPA is found in the definition of "Claim," found in Section 11.8. "Claim" includes "reasonable attorneys' fees and other costs and expenses for investigating or defending any actions or threatened actions . . . ." (A104, at § 11.8.) The term "Claim" is not used anywhere in Section 8.10, except in the phrase "Third Party Claim."[12] Read so as to give meaning to all the SPA's provisions, this language could be interpreted to cover attorneys' fees incurred by CH "investigating or defending" claims made by third parties against CH. It does not, however, by any reading "specifically set forth" that UPC shall be liable to CH for attorneys' fees incurred

[12] Section 8.10(d) utilizes the term "Claims" in reference to the procedure by which UPC is given notice of corrective action and the right to conduct the remediation itself. It has nothing to do with attorneys' fees.

in litigation over the interpretation and enforcement of the indemnity provisions. (A98-99.) There are no terms of the SPA that provide for such recovery.

Consequently, the trial court's denial of attorneys' fees and costs to CH was proper and should be upheld.

CONCLUSION

For the foregoing reasons, and those set forth in UPC's Opening Brief on Appeal, UPC respectfully requests that this Court reverse the superior court's grant of summary judgment and enter judgment for UPC because CH's damages were voluntarily incurred, are not the result of a Third Party Claim, and fall outside the scope of the Indemnity. In the alternative, the Court should reverse and remand the case for a new trial. UPC further requests that this Court affirm the trial court's denial of attorneys' fees and costs, which are not provided for under the SPA.

Dated: June 20, 2018

OF COUNSEL:

Ann L. Al-Bahish
Lauren K. Valastro
KELLEY DRYE &
WARREN LLP
515 Post Oak Blvd, Suite 900
Houston, TX 77027
(713) 355-5024
aal-bahish@kelleydrye.com
lvalastro@kelleydrye.com

Norton A. Colvin, Jr.
COLVIN, SAENZ &
RODRIGUEZ, LLP
1201 East Van Buren
PO Box 2155
Brownsville, TX 78522
(956) 295-3070

BAYARD, P.A.

/s/ Stephen B. Brauerman

Stephen B. Brauerman (#4952)
Sara E. Bussiere (#5725)
600 N. King, Suite 400
Wilmington, DE 19801
(302) 655-5000

COOCH AND TAYLOR, PA.

James W. Semple (#0396)
The Brandywine Building, 10th Floor
Wilmington, DE 19801
(302) 984-3842
(302) 984-3939 (Fax)
jsemple@coochtaylor.com

Attorneys for Defendant-Below/Appellant Union Pacific Corporation

CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2018, a true and correct copy of the foregoing has been served upon the following parties via File & ServeXpress:

Richard L. Renck
Christopher M. Winter
Mackenzie M. Wrobel
DUANE MORRIS LLP
222 Delaware Ave., Suite 1600-1656
Wilmington, Delaware 19801

/s/ Stephen B. Brauerman
Stephen B. Brauerman (#4952)